



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 6 OF 2018 (O.S)

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013

AKK.....APPLICANT

VERSUS

PKWRESPONDENT

RULING OF PRELIMINARY OBJECTION

On 8th March 2018 the Respondent filed a Notice of Preliminary Objection. He raised a Preliminary Objection on points of law on the following grounds:-

- i) This Honourable Court lacks jurisdiction to hear this matter.
- ii) The suit is filed within the Matrimonial Property Act where the existence of a marriage relationship is fundamental.
- iii) That the status of the marriage between the parties depends on the court's finding as to whether there was such a marriage.
- iv) That the property alleged to be under sale does not belong to the Respondent.
- v) That in any event and without prejudice to the foregoing the suit offends Section 7 of the Matrimonial Property Act, 2013.
- vi) The suit is defective, bad in law and does not lie.

On 27th April 2018 the Respondent filed a Replying Affidavit and stated as follows:-

- i) That the said company is not a party to this case and in any event cannot be sued in a matrimonial proceeding between the Applicant and I.
- ii) That in any event the status of the relationship between the Applicant and I depends on the court's finding as to whether there was such a marriage and until such a finding, this honourable court has no jurisdiction to entertain this matter.
- iii) That I have been informed by advocates on record and which information I verily believe to be true that this court's jurisdiction cannot be invoked as it is sought to do unless there is a dissolution of marriage.
- iv) That without prejudice to the foregoing, I wish to state that Upper Hill Springs Limited a Limited Company is not at an advanced stage of selling three (3) plots valued at more than 1.7 billion.
- v) That the Applicant did not contribute anything towards the acquisition and/or development of the properties as alleged and indeed, she has not demonstrated any such contribution.

The Applicant through her Counsel filed her Replying Affidavit on 30th April 2018 and stated as follows:-

- a) That in response to paragraphs 8 and 9 of the Respondent's Affidavit, I was shocked by the Respondent's assertion that our customary marriage did not meet the required threshold for a valid marriage as the same has never been in question as shown by his previous Affidavit and Statement of Defence & Counterclaim.

b) That this fact is fully acknowledged by our respective families as shown in the attached documents marked “AKK-2”.

c) That I am informed by my advocates on record, which information I verily believe to be true, that the Respondent’s false testimony in his Replying Affidavit sworn on 27th April, 2018 amounts to perjury under the Penal Code and the Oaths and Statutory Declaration Act.

APPLICANT’S SUBMISSIONS

Summary of Issues for Determination at this point

- a) From the Respondent’s Preliminary Objection;
 - i) Existence of Marriage between the Applicant and the Respondent;
 - ii) Jurisdiction of Court;
 - iii) Shares held by the Respondent in Limited Liability Companies;
- b) From affidavits sworn by the Applicant;
 - i) Perjury by the Respondent.

A Preliminary Objection was defined in the case of *MUKISA BISCUIT COMPANY –VS- WESTEND DISTRIBUTORS LIMITED (1969) EA 696* at page 701 thus;

“A point of law which has been pleaded, or which arises in the course of the pleadings and which, if argued as a preliminary point, may dispose off the suit. Further, a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop.”

They contended that the Preliminary Objection raised matter of evidence which require the court to ascertain certain facts. These matters are for example whether there existed a marriage between the Applicant and the Defendant and the acquisition and holding of the properties cited by the Applicant in her Originating Summons and Notice of Motion.

- a) The Respondent’s Preliminary Objection does not relate to any point of law.
- b) Assuming the Respondent’s Objection was valid, which is not the case, arguing of this alleged Preliminary Objection will not have the effect of disposing this suit as there are many prayers that relate to other aspects.

The definition of Admission under **Section 17 of the Evidence Act of Kenya** as thus;

“An admission is a statement, oral or documentary, which suggest any inference as to a fact and which is made by any of the persons and in the circumstances hereinafter mentioned ...

Section 18(1) of the Evidence Act of Kenya – Statements made by a party to the proceeding ... are admissions.”

The Respondent acknowledged and admitted the existence of marriage in his pleadings and affidavits **Children Case No. 652 of 2010** as follows;

In his Statement of Defence and Counter-Claim filed on 18th October 2010:-

- a) He states through his advocate that he has always been a loving husband to the Plaintiff, now Applicant.
- b) He denies evicting the Applicant and their children from the Matrimonial home and states that the Applicant allegedly deserted their matrimonial home with the children without his knowledge.
- c) He accuses the Applicant, then Plaintiff of traumatizing their children by informing them that their marriage had irretrievably broken down which would lead to divorce.
- d) He accuses the Applicant of denying him his conjugal rights, leaving the matrimonial home, denying him meals in the matrimonial home, seeking to throw him out of the matrimonial home and telling the children misleading information about their marriage.

In his Replying Affidavit filed on 18th October 2010:-

i) He states that he has been a loving husband to the Plaintiff and further that their marriage like all others had occasional disagreements but that he had never abused her physically or emotionally.

On the issue of Jurisdiction the Applicant through her counsel submitted that this Honourable Court has jurisdiction to hear this matter under the provisions of the Matrimonial Property Act as prayed in the Notice of Motion filed on 22nd January 2018 as there is a marriage that is subject to divorce proceedings between the Applicant and the Respondent. She submitted that the marriage is in the process of dissolution and therefore this suit is filed in good faith and prudence and with the aim to preserve our client's proprietary and marital rights as per the Provisions of **Article 45(3) of the Constitution of Kenya** that,

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

Most of the properties acquired during the subsistence of the marriage are under the Respondent's name and especially property in the form of Company Shares which the Applicant contends the Respondent holds in her trust and he would have been able to dispose the same as was his intention (Kindly see our letters as Annexures 2 and 3 in our Certificate of Urgency filed on 28th February 2018) without further reference to the Applicant and her rights to the matrimonial property.

Perjury has been defined by **Section 108 of the Penal Code** as thus:-

“Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanor termed as perjury.”

Further ...

“It is immaterial whether the testimony is given on oath or under any other sanction authorized by law.”

RESPONDENT'S SUBMISSIONS

The Respondent through his counsel filed Submissions on the Preliminary Objection where he stated that Matrimonial Property Act restricts its application to situations where a marriage relationship exists or in which the same has ceased to exist through a divorce. The preamble to the Act provides as follows:-

“An Act of Parliament to provide for the rights and responsibilities of Spouses in relation to Matrimonial Property and for connected purposes.”

The Petition seeks at prayer 1 that ***“the Court do find that there was a Kikuyu Customary Marriage between the Petitioner and the Respondent.”*** Prayer 2 seeks that the said marriage be dissolved. The Applicant has filed a Divorce Petition in **Divorce Cause No. 867 of 2017**, where she seeks the Court to first declare a marriage between her and the Respondent under Kikuyu Customs and if it is found to exist then it should be dissolved.

The Respondent submitted that the fact that the Applicant seeks to have the Court declare that there was a Kikuyu Customary marriage is evidence that even by the admission of the Applicant the marriage does not exist until it is declared by the court. The Applicant claims to be entitled to the shares held by the Respondent in **Streetwise Media Services Limited, Springboard Holdings Limited, Essential Mountain Links Limited, Upper Hill Springs Restaurant Limited, Apollo Merchants Limited and Spring Board Capital Limited.**

In **NAIROBI HIGH COURT CIVIL SUIT NO. 43 OF 2009 (OS) MINNIE WAITHERA MBUE –VS- JOHN PETER MBUE** Justice L. Kimaru held as follows:-

“In the present case, it is clear that this court cannot distribute or divide the properties registered in the names of Limited Liability Companies between the Applicant and the Respondent. This is because the respective shares held by the Applicant and Respondent is provided under the Memorandum and Articles of Association of the respective Companies.”

“The correct forum where she can litigate this issue however, is the Companies Court established in Companies Act. This Court therefore lacks jurisdiction in this case to apportion or divide their respective shares in the Companies as between the Applicant and the Respondent. The Applicant's claim in respect of the said properties is therefore disallowed.”

In **NAIROBI HIGH COURT CIVIL SUIT NO. 51 OF 2012 (OS) NANCY WAMBUI NDICHU –VS- STEVE NDICHU MWAURA**, Justice L.A. Achode held as follows:-

“Shares owned by the Respondent in the Company cannot be construed as matrimonial property and be distributed under the principles set out in the Matrimonial Properties Act. The Court therefore lacks jurisdiction to grant the reliefs sought.”

“It is trite law that a Company is a separate legal person/entity from its shareholders and directors as was espoused in the English case of Salmon v Salmon (1887)AC 22. From the foregoing I find that the said property in LR No. 12904 managed by Scientific Instruments Company Limited belongs to the Company and therefore the Applicant can only make a claim to the company shares under the provisions of the Company Act.”

He further submitted that even if the court were to find that a marriage existed between the parties, the remedy sought in division of properties is not available until divorce or dissolution of the marriage as is provided by the very clear provisions of Section 7.

On the issue of jurisdiction he reiterated that a question of jurisdiction can be raised at any time in the course of proceedings and as was stated in ***OWNERS OF MOTOR VESSEL “LILIAN S” VS CALTEX OIL (KENYA) LTD (1989)KLR 1;***

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law does its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

DETERMINATION

The genesis of the Preliminary Objection is that on 19th April 2014, the Applicant through Counsel informed Court that there was information of imminent sale of 3 properties by Knight Frank on instruction of Streetwise Company Limited where the Respondent owns shares.

The Applicant and Respondent have in Courts **Divorce Cause No. 867 of 2017 & Children Case No. 652 of 2010** the outcome of which will have direct impact on the instant matter in Court.

The instant matter is Originating Summons filed 24th January 2018 on division of matrimonial property. Whilst pending, the Applicant filed certificate of urgency to stop, withhold and/or preserve the Respondent interest /share in Streetwise Company Limited. This Court granted interim orders preserving the share interest of the Respondent in the sale of properties about to be disposed by sale until hearing and determination of the Application. The parties were pursuing mediation and marital Counselling pending the hearing of the matter. The efforts to amicably reach settlement were not successful; hence the Preliminary Objection.

This Court has considered the able submissions by Counsel on record for parties on the issues raised as Preliminary Objection. The matter regarding division of matrimonial property ought/shall have the following facets proved by either party as follows;

- a) The fact of a valid ,legal, regular marriage in law;
- b) Dissolution of such marriage by/through of the Court;
- c) That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage;
- d) Contribution by each party to the acquisition/development.

The Court concedes that jurisdiction is everything and the Family Court is clothed with relevant/requisite jurisdiction to hear and determine matters regarding division of matrimonial property and hence has jurisdiction to hear and determine the instant matter. However, the hearing shall commence upon proof of Court order on dissolution of marriage. It is not contested by either party that **Divorce Cause No. 867 of 2017** exists and it is the proper forum to resolve the question of existence of marriage and/or dissolution thereof. As the Court cannot dissolve a marriage that did not exist in the 1st Place. Therefore until such determination, this Court is estopped from exercising jurisdiction of hearing and determining the application related to substantive O.S filed on 24th January 2018. The proceedings shall be *void abinitio*.

Secondly, the issue of the alleged sale was brought out as an oral application; no documents were filed regarding the impending sale, specific properties and the interest of the Respondent in the said suit properties. It would be difficult to enforce the interim orders issued by this Court without such details presented to Court to confirm the Respondent’s interest which is the only part of the Company that relates to the instant matrimonial matter.

Thirdly, the 3 properties owned by Upper Hill Springs Restaurant Limited, are owned by a separate legal entity; the Company which is a separate legal person and therefore cannot be part of these proceedings. The Respondent’s claim/share/interest is not established in the absence of which this Court acted in vain in issuing the interim orders.

From the cases cited above by the Applicant of the Preliminary Objection ***NAIROBI HIGH COURT CIVIL SUIT NO. 51 OF 2012 (OS) NANCY WAMBUI NDICHU –VS- STEVE NDICHU MWAURA NAIROBI HIGH COURT CIVIL SUIT NO. 43 OF 2009 (OS) MINNIE WAITHERA MBUE –VS- JOHN PETER MBUE;*** it is crystal clear that division of matrimonial property by the Family Court does not/will not include shares /properties of a Company as the Company is a separate legal person from the shareholders and/or directors. To safeguard one’s rights the right forum to ventilate and canvass the preservation of interest in shares and/or property in a Company is the Commercial Division of the High Court.

DISPOSITION:

- a) **For these reasons, the Preliminary Objection is upheld; this Court has jurisdiction to be exercised upon confirmation of**

marriage and dissolution thereof;

b) The interim orders issued by this Court on 19th April 2018 and extended on 30th April 2018 are vacated;

c) The Application of the Originating Summons filed on 24th January 2018 to pursue rights in Companies; Streetwise Media Services Limited, Springboard Holdings Limited, Essential Mountain Links Limited, Upper Hill Springs Restaurant Limited, Apollo Merchants Limited and Spring Board Capital Limited in Commercial Division of the High Court;

d) Any aggrieved party may lodge appeal.

READ, DELIVERED AND SIGNED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2018.

M.W.MUIGAI

JUDGE FAMILY DIVISION –HIGH COURT