



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 8 OF 2014 (OS)**

**IN THE MATTER OF: MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF RIGHTS TO MATRIMONIAL**

**HOME AND MATRIMONIAL PROPERTY**

**REGINE BUTT ..... PLAINTIFF/ APPLICANT**

**VERSUS**

**HAROON BUTT ..... 1<sup>ST</sup> DEFENDANT/ RESPONDENT**

**AKHTAR BUTT ..... 2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**RULING**

**BACKGROUND**

0. By an Originating Summons dated the 8<sup>th</sup> September 2014, the plaintiff present for the determination of the following questions:
  1. *Whether all that property known as HOUSE NO. 1 situate on MOMBASA MN 1371, NKOMANI ROAD, hereinafter called “the subject property” was the matrimonial home of SHAHID PERVEZ BHUTT (Deceased) and REGINE BHUTT for purposes of the Act;*
  2. *Whether all that property known as HOUSE NO. 1 situate on MOMBASA MN 1371, NKOMANI ROAD, MOMBASA, household goods and effects therein are matrimonial property for purposes of the Act;*
  3. *Whether the Plaintiff can be lawfully evicted from HOUSE NO. 1 situate on MOMBASA MN 1371, NKOMANI ROAD, MOMBASA by the defendants as they have purported to do absent court order or decree.*
0. Consequently, the plaintiff prays for specific Orders that –
  1. *A DECLARATION that all that property known as HOUSE NO. 1 situate on MOMBASA MN 1371, NKOMANI ROAD, MOMBASA is the matrimonial home of REGINE BHUTT AND SHAHI PERVEZ BHUTT (Deceased) within the meaning of the Matrimonial Property Act, 2013.*
  2. *A DECLARATION that HOUSE NO. 1 situate on MOMBASA MN 1371, NKOMANI*

**ROAD, MOMBASA, household goods and effects therein are the matrimonial property of REGINE BHUTT and SHAHID PERVEZ BHUTT (Deceased) within the meaning of the Matrimonial Property Act, 2013.**

3. **A DECLARATION that the threatened eviction or eviction of REGINE BHUTT by the defendants from HOUSE NO. 1 situate on MOMBASA MN 1371, NKOMANI ROAD, MOMBASA is unlawful, null and void.**
  4. **AN Order of injunction restraining the defendants by themselves, their servants, employees, agents, assigns or otherwise howsoever from removing household goods and effect of the plaintiff and the plaintiff's children from, evicting or in any way interfering with or undermining quiet and peaceful enjoyment by the plaintiff of all that property known as HOUSE NO. 1 situate on MOMBASA MN 1371, NKOMANI ROAD, MOMBASA.**
0. Simultaneously with the Originating Summons, the plaintiff filed an interlocutory application of 8<sup>th</sup> September 2014 seeking two principal orders for –
1. *An order of injunction restraining the defendants by themselves, their servants, employees, agents, assigns or otherwise howsoever from dealing in, entering, occupying, remaining upon, removing household goods and personal effects of the plaintiff and the plaintiff's children therefrom, evicting or in any way interfering with or undermining the plaintiff's rights and interests in all that property known as House No. 1 situate on Mombasa MN 1371, Nkomani Road, Mombasa pending hearing and determination of the suit.*
  2. *In the event the defendants evict the plaintiff pending hearing and determination hereof, the Honorable Court be pleased to order the Defendants to deliver to the plaintiff vacant possession of all that property known as House No. 1 situate on Mombasa MN 1371, Nkomani Road, Mombasa.*
0. Both the application and the Originating summons are expressed to be brought substantively under section 12 (3) and (4) of the Matrimonial Property Act No. 49 of 2013. Section 12 of the Matrimonial Property Act is in the following terms:

*“12. (1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.*

*(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution / or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.*

*(3) A spouse shall not, **during the subsistence of the marriage**, be evicted from the matrimonial home **by or at the instance of the other spouse except by order of a court.***

*(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except —*

*(a) on the sale of any estate or interest in the matrimonial home in execution of a decree;*

*(b) by a trustee in bankruptcy; or*

*(c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.*

*(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.”*

## **THE PRELIMINARY OBJECTION**

0. The Defendants filed a Notice of Preliminary Objection dated 10<sup>th</sup> September 2014 seeking that the plaintiff's "*Application [dated 8<sup>th</sup> September 2014] together with the Originating Summons herein be struck out and dismissed with costs to the defendants/respondents on the grounds that:*
  1. *This Honourable Court lacks jurisdiction to entertain, hear and /or determine this matter.*
  2. *The Application together with the originating summons herein does not lie in law and the same as filed herein under section 12 (3) and (4) of the Matrimonial Property Act, are fatally defective and incompetent.*"

### **SUBMISSIONS**

0. Simply put, the defendants' objection to the suit and the application filed therein is grounded on a contention that the Matrimonial Property Act is a special vehicle legislation for determination of property disputes between **spouses** only and that therefore the present proceedings are incompetent because they have been filed by the petitioner wife of a deceased person against the deceased's other wife and her son. On enquiry by the Court, the counsel for the defendants, Mr. Agwara, appeared to agree that the suit might have been competent had it been brought against the personal representatives of the deceased husband of the plaintiff. Counsel submitted that the plaintiff may pursue the determination of her interest in the matrimonial property through the succession proceedings to the estate of her deceased husband which she had already filed.
0. The plaintiff responded to the preliminary objection contending that the plaintiff seeks to protect her right as a spouse to occupy the matrimonial property and that her action is authorized by the provisions of sections 12 (4) of the Matrimonial Property Act as read with section 12 (3) thereof to which the former is made subject. Mr. Kaluma for the plaintiff sought to distinguish the suit before the court from an application under section 17 of the Matrimonial Property Act, 2013 which deals with property disputes between spouses or former spouses.

### **DETERMINATION**

0. In determining the jurisdictional issue raised in the Preliminary Objection, the court must consider the provisions of the Matrimonial Property Act, 2013 under which the suit is brought. The object of the Matrimonial Property Act No. 49 of 2013 is given in the long title of the Act as follows:

***“AN ACT of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.”***

0. The Jurisdiction under section of 17 of the Act is cast in the following terms:

***“17. (1) A person may apply to a court for a declaration of rights to any property that is contested **between that person and a spouse or a former spouse of the person.**”***

The phrase '*former spouse*' in section 17 of the Act is not defined in the definitions section of the Act. Only the word 'spouse' is defined as 'a husband or a wife' and this corresponds to the meaning of the word '*spouse*' given in the 9<sup>th</sup> Edition of ***Black's Law Dictionary*** as "One's husband or wife by lawful marriage". The reference to '*former spouse*' in section 17 of the Act would, in my view, include divorced or deceased spouses, and it would therefore appear that a suit against the personal representatives of a deceased spouse by the surviving spouse is competent. The present suit is, however, not a contest between the plaintiff and the deceased spouse.

0. Section 12 (3) of the Act, under which the suit and application are expressly brought, appear to authorize a suit **between spouses** and against their agents or their representatives in words that "*a spouse shall not, **during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse***".
0. Section 12 (4) of the Act, however, injuncts removal from matrimonial home of a spouse by any person by providing as follows:

***“4. Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by***

**any person** except —

(a) on the sale of any estate or interest in the matrimonial home in execution of a decree;

(b) by a trustee in bankruptcy; or

(c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.”

0. While section 12 (3) appears to limit the parties to spouses and their authorized representatives, section 12 (4) appears to found action on the principle in the Latin legal maxim ***ubi jus ibi remedium*** (where there is a right there must be a remedy). As there is a statutory right that “**a spouse shall not be evicted from the matrimonial home by any person**”, she or he must be entitled to come to court to restrain or remedy such eviction.
0. According to the *locus classicus* on Preliminary Objections, ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.*** (1969) EA 696, 701 -

**“A Preliminary Objection is 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 if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

In the Chamber Summons dated 8<sup>th</sup> September 2014, the Plaintiff sets out the principal grounds of the application as follows:

1. *The Plaintiff is the wife of Shahid Pervez Bhut (Deceased).*
2. *Following their marriage, the plaintiff lived with her family in their family home on all that property known as HOUSE No. 1 situate on MOMBASA MN 1371, NKOMANI ROAD, MOMBASA, hereinafter called “the subject property” where the plaintiff’s husband Shahid Pervez Bhutt (Deceased) lived alone before marriage.*
3. *The subject property is a matrimonial home and a matrimonial property of the Plaintiff and her late husband under the Matrimonial Property Act, 2013.*
4. *The marriage of the Plaintiff to Shahid Pervez Bhutt (Deceased) is blessed with two children: Taseen Shaid Bhutt, born on 21<sup>st</sup> May 2010 and Aleena Shahid Bhutt, born on 18<sup>th</sup> April 2012.*
5. *The plaintiff’s husband died on 11<sup>th</sup> July 2014 following a widely reported shooting incident in Changamwe, Mombasa, while driving to his office along Lumumba Road from Moi International Airport, Mombasa.*
6. *Following the death of the Plaintiff’s husband, the 1<sup>st</sup> Defendant has demanded that the Plaintiff vacates her family home herein stating that he wants to live therein with his wife and biological mother, the 2<sup>nd</sup> Defendant. The demands have been followed by threats all of which have been reported to the Police.*
7. *The 2<sup>nd</sup> defendant who was the first wife of the plaintiff’s late husband had long separated from him and was living in a separate residence provided to her by Shahid Pervez Bhutt (Deceased) following protracted court actions.*
8. *The defendants have locked the plaintiff family home herein and have purported to deny the plaintiff and her young school going children access to clothing, education materials, all their belongings, household goods and personal effects all of which are in the home, contrary to law....”*

Without expressing concluded view to avoid embarrassing the trial court, the facts of the case as pleaded by the Plaintiff and set out above, which the defendants by raising a Preliminary Objection are deemed to accept, appear to demonstrate a reasonable cause of action.

0. The dictum of Madan, JA in ***D. T. Dobie & Co. (K) Ltd. v. Muchina*** [1982] KLR 1, 9 is significant in this case. The learned Judge counseled that:

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it.”***

No application has been made to amend the suit and this court cannot, therefore, speculate on such intentions and will leave it to the plaintiff to prosecute her suit as she may be advised by counsel.

0. I am at this stage of the suit not able to make a finding that the Plaintiff’s suit is one that is *“plainly and obviously discloses no reasonable cause.”* I would only observe that even where a Plaintiff, Originating Summons or a Petition discloses no reasonable cause of action, Order 2 rule 15 of the Civil Procedure Rules empowers the court to direct amendment to pleadings instead of striking out. Order 2 rule of the Civil Procedure Rules provides as follows:

***15. (1) At any stage of the proceedings the court may order to be***

***struck out or amended any pleading on the ground that—***

*(a) it discloses no reasonable cause of action or defence in law;*

*or*

*(b) it is scandalous, frivolous or vexatious; or*

*(c) it may prejudice, embarrass or delay the fair trial of the action; or*

*(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

*(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.*

*(3) So far as applicable this rule shall apply to an originating summons and a petition”*

0. In view of my finding on the effect of section 12 (4) of the Matrimonial Property Act, I am not able to hold that the Originating Summons discloses no reasonable cause of action. The filing of a suit to enforce a spouse’s right to occupy the matrimonial property as against her spouse and former spouse, representatives (s. 12 (3) of the Act) and third parties (s.12 (4)) must be deemed to be the connected purposes of the Act referred to in the long title of the Act.
0. To hold otherwise would be to assert that a spouse’s statutory right to protection, as a spouse, to occupy the matrimonial home is extinguished by the death of her spouse and that such a surviving spouse loses her protection under the Act and is then constrained to pursue such right through litigation in succession proceedings over the deceased spouse’s estate. I have not seen anything in the Matrimonial Property Act, 2013 that points to such eventuality.
0. Accordingly, for the reasons set out above, the Defendants’ Preliminary Objection dated 10<sup>th</sup> September 2014 is declined with costs to the Plaintiffs.

**DATED SIGNED AND DELIVERED THIS 12<sup>TH</sup> DAY OF MARCH 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

Mr. Miyare for the Plaintiff

Mr. Agwara for the Defendants

Ms. Linda - Court Assistant.