



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MATRIMONIAL CAUSE NO. 1 OF 2015

(Originally Nakuru HC Matrimonial Cause No. 4 of 2015)

S H HPLAINTIFF

-VERSUS -

M H YDEFENDANT

R U L I N G

1. This suit was commenced by way of a plaint filed on 3rd March, 2015. Contemporaneously filed was an application expressed to be brought under Section 1A and 1B of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, which application is the subject matter of this ruling.
2. The relevant prayer in the application seeks an order that the Plaintiff be “allowed to continue collecting rent from the tenants of PLOT NO.[particulars withheld] NAROK TOWN pending hearing and determination of this suit.” The application is supported by several affidavits sworn by the Applicant. The Respondent also filed a replying affidavit.
3. There is no dispute that the elderly parties herein were married under Islamic Law and have adult children. They have established their matrimonial home at Ololunga, Narok. They apparently acquired several properties in the course of their marriage. For many years, rent from subject plot was collected and applied for the maintenance of the family by mutual agreement of the parties. The parties now blame each other for living apart in recent years after the Applicant left the family home, while the Respondent continued to live in Ololunga with a second wife.
4. At the hearing of the application, an objection was raised by counsel for the Respondent concerning this court’s jurisdiction under the Marriage Act, and on the basis that, in absence of divorce or separation proceedings, there is no jurisdiction for granting the orders sought. Finally, it was argued that the issues raised in the suit are governed by Islamic Law as both parties profess the Muslim faith, and that therefore, the Kadhi’s Court is the appropriate forum for the determination of this matter.
5. On the last issue, the Applicant responded that she has elected to seek relief in this court rather than the Kadhi’s court, and asserted she cannot be compelled to submit to the latter court. Secondly, the Applicant pointed out that the High Court is clothed with unlimited jurisdiction under the Constitution. I propose to first consider the objection as a determination thereon is prerequisite to considering the substance of the application.
6. I have considered the submissions by respective counsel on the objections raised. From a perusal

- of the plaintiff, it is beyond disputing that this is a suit brought under the purview of the Matrimonial Property Act. On the face of it, the main prayer sought is a declaration that the PLOT NO. [particulars withheld] NAROK is matrimonial property from which the plaintiff is entitled to collect rent. This is as contemplated in Section 17 of the Matrimonial Property Act.
7. Section 17 (2) (c) of the Act allows for the filing of an application for the declaration of rights to property “notwithstanding that a petition has not been filed under any law relating to a matrimonial causes.” The procedure for invoking Section 17 (2) has, so far as I know, not been prescribed by the Rules Committee as stipulated in Section 18 of the Matrimonial Property Act.
 8. Section 3 of the Matrimonial Property Act does not compel a party who professes the Islamic faith to file her/his suit at the Kadhi’s court, as the wording clearly indicates that the party has a choice. It states that:-

“A person who professes the Islamic faith may be governed by Islamic Law in all matters relating to matrimonial property.”

This is in tandem with Article 170 (5) of the Constitution which states:-

“The jurisdiction of Kadhi’s court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s court.” (emphasis added)

9. A party who professes the Muslim faith may opt not to submit to the jurisdiction of the Kadhi’s court as the plaintiff herein has done by bringing her suit before this court. And while the Matrimonial Property Act does not define the term “court”, there is no provision in the Act to oust the unlimited original jurisdiction of the High Court in adjudicating matters falling thereunder. **(See Article 165 (3) a) of the Constitution)**. Indeed under the Married Women Property Act, which has now ceased to apply in Kenya, by virtue of the coming into force of the Matrimonial Property Act, relevant applications were filed in the High Court in first instance. As far as the suit before this court is concerned therefore, none of the objections raised by counsel for the Respondent have any merit.
10. Turning to the application at hand, there can be no dispute that the same, despite its wording, is concerned with the maintenance of the Applicant. Maintenance applications (or suits) fall under the Marriage Act, in my considered view. It would appear that the Applicant has erroneously brought her application as one contemplated under Section 17 (1) of the Matrimonial Property Act, hence the invocation of the Civil Procedure Act and Rules, in light of the absence of specific Rules under the Act.
11. In my considered view, while the suit is properly before this court, the application for maintenance is not. A specific procedure is provided in respect of maintenance under Section 77 of Marriage Act. Again, under that section it is not mandatory that there be in existence a petition for a declaratory decree or annulment, separation or divorce, for such maintenance proceedings to be lodged. This is clear from Section 77 (1) a) & b) as read with the definition of matrimonial proceedings in the interpretative section of the Marriage Act. The provision states:-

“maintenance proceedings”, means proceedings instituted under Part IX and include proceedings for the payment of maintenance or for custody of children instituted independently of a petition for a declaratory decree or for annulment separation or divorce.”

12. Similarly, the provisions of Article 170 (5) of the Constitution apply where a party opts to pursue maintenance through the ordinary courts rather than submit to the Kadhi’s court. In my view, Section 49 (3) of the Marriage Act cannot be read in a manner that nullifies this provision of the Constitution, as suggested by the Respondent’s counsel.

13. In light of the orders I propose to make, I do not wish to say more on this question beyond stating that the Marriage Act cannot be read in a manner to suggest that contrary to Article 170 (5) of the Constitution, a party who professes the Muslim faith is under compulsion to apply for maintenance before the Kadhi's court. I do however accept that under the Marriage Act "court" is described as the Resident Magistrate's Court as established under Section 3 of the Magistrates' Court Act. This provision however does not take away the unlimited original jurisdiction of the High Court in criminal and civil matters as produced under Article 165 (3) a) of the Constitution.

14. Indeed one of the authorities cited by counsel for the Respondent **WBR –Vs- J. O. [2014] eKLR** involved the exercise of the High Court's original civil jurisdiction in a matter that was clearly brought under the Marriage Act. The High Court proceeded to grant maintenance pending the determination of the divorce proceedings before it.

15. For the sake of good order in the administration of justice however, it may be prudent that a party seeking maintenance should approach the lowest court in the first instance, save where circumstances otherwise dictate. The circumstances of the matter before me are not exceptional. I do therefore decline to assume jurisdiction in respect of the application for maintenance, but instead, direct that it be filed afresh before the court of first instance under the Marriage Act, as the Applicant may elect, whether the Kadhi's or Resident Magistrate's Court.

16. The main suit however will proceed before this court. As none of objections raised by the Respondents were properly grounded, I shall make no orders as to costs.

Delivered and signed at Naivasha this 4th day of May, 2015.

In the presence of:-

Mr. Wangila for Plaintiff/Applicant

Mr. Njuguna holding brief for Mr. Karanja for Defendant/Respondent

Court Assistant Japheth

C. W. MEOLI

JUDGE