



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 21 OF 2012 (OS)

I M N.....PLAINTIFF

VERSUS

D M K.....DEFENDANT

RULING

The Plaintiff filed suit before the Environment and Land Division of the High Court, Nairobi seeking a declaration that certain properties listed in the plaint were matrimonial property and therefore should be divided at ratio of 50:50 between the Plaintiff and the Defendant after the dissolution of their marriage. The Plaintiff averred that she was married to the Defendant on 10th July 2004. The marriage was however dissolved by the court on 27th June 2011. During the subsistence of the marriage, it is the Plaintiff’s case that they had acquired certain properties through their joint effort although the properties were registered in the Defendant’s name. It is for that reason that the Plaintiff was seeking a declaratory order of this court that she was entitled to 50% of the said property that was jointly acquired.

Contemporaneous with filing suit, the Plaintiff filed an application pursuant to **Order 40 Rule 1(a), 4(1) and (3)** of the **Civil Procedure Rules** seeking orders of this court to restrain the Defendant, either by himself or through his servants or agents from wasting, damaging, alienating or otherwise adversely dealing with the matrimonial property pending the hearing and determination of the suit. The Plaintiff listed the properties as follows:

- I. LR. No. Nairobi/Block *[particulars withheld]* Tassia Estate
- II. LR. No.*[particulars withheld]* Athi River
- III.LR. No.*[particulars withheld]* Athi River
- IV.Maisonette Purchased from [*.particulars withheld*]
- V. Apartment No.*[particulars withheld]* Muringa Court, Kirichwa road Title No.[*.particulars withheld*]
- VI.50% shares in *[particulars withheld]* Kenya Limited
- VII.50% Shares in *[particulars withheld]* Technologies Limited
- VIII.50% Shares in *[particulars withheld]* Limited

Motor Vehicles: Registration Numbers:

- 1. *[particulars withheld]*
- 2. *[Particulars withheld]*
- 3. *[particulars withheld]*
- 4. *[particulars withheld]*
- 5. *[particulars withheld]*

6. *[particulars withheld]*
7. *[Particulars withheld].*

The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the Plaintiff.

The application is opposed. The Defendant filed grounds in opposition to the application. He also filed notice of preliminary objection to the entire suit. In the grounds of opposition, the Defendant stated that the suit was incompetent and should be dismissed. In the notice of preliminary objection, the Defendant amplified this ground by stating that the suit was filed in contravention of the provisions of **Section 17** of the **Married Women Act 1882** (now repealed) which required that such suits be filed by a way of originating summons instead of by way of plaint. The Defendant further stated that the Plaintiff had failed to establish a prima facie case to warrant this court to grant the interlocutory injunction sought. He stated that the Plaintiff had not placed any material before court to establish her claim that she had contributed towards the acquisition and management of the properties. Finally, the Defendant stated that the Plaintiff had failed to establish, or give any evidence of her association or contribution or directorship of the two companies that she has listed as matrimonial property.

Prior to the hearing of the application, counsel for the parties agreed by consent to file written submission in support of their client's respective positions. The said submission were duly filed. The same were highlighted by Ms. Kithinji for the Plaintiff and by Mr. Kimani for the Defendant. This court has carefully considered the said submission. This court will first deal with the preliminary objection raised by the Defendant. It is the Defendant's submission that the suit filed by the Plaintiff was incompetent because it was filed by way of plaint instead of originating summons. Mr. Kimani eloquently argued that a suit for division of matrimonial property which is predicated upon **Section 17** of **Married Women Property Act** should have been filed as an originating summons and not as a plaint. In that regard, the Plaintiff relied on two decisions of this court: **POM –Vs-MNK [2013] eKLR** and **Paul Thuo Ng'ang'a –Vs-Irene Wambui [2006] eKLR**. The decision of the court in the two cases was to the effect that where a party to a division of matrimonial property dispute files a case under **Section 17** of the **Married Women Property Act**, such case should be filed as an originating summons and not a plaint. To counter this argument, Ms. Kithinji for the Plaintiff submitted that the suit was competently before the court because there were other legal regimes which were applicable at the time the suit was filed. It was the Plaintiff's case that the suit was predicated on **Section 93(2)** of the **Land Registration Act 2012** which provides that:

“If land is held in the name of spouse and the other spouse contributes by their labour or other means to the productivity, upkeep and improvement of the land, that spouse shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of ownership in common with the spouse in whose name the certificate of ownership has been registered and the rights gained by the contribution of the spouse or spouses shall be recognized in all case as if they were registered.”

Learned counsel went on to cite **Section 2** of the **Matrimonial Property Act 2013** which defined contribution to mean:

“monetary and non-monetary contribution and includes –

- a. *domestic work and management of matrimonial home;*
- b. *child care;*
- c. *companionship;*
- d. *management of family business or property; and*
- e. *farm work.”*

She submitted that the Plaintiff competently filed the suit before the court by way of plaint.

In this court's evaluation, the suit filed by the Plaintiff is competently before this court. The argument

presented by the Defendant in support of the preliminary objection raised, was attractive, and may have been the position applicable before the new legal regime ushered in by **2010 Constitution** came into effect. The **2010 Constitution** was a radical document which placed upon the court the responsibility of, in as much as possible, determining cases on the basis of its merits and not be beholden by procedural technicalities. This was aptly captured by **Article 159(2)(d)** of the **Constitution**. It is this court's considered view that the time where procedural technicalities became an article of faith for some legal practitioners is long gone. The new **Constitution** dispensation requires that the court respects the people of Kenya from whom judicial authority is derived from by giving them the opportunity to ventilate their case on its merits rather than determining them on procedural technicalities.

As correctly observed by Ms. Kithinji, the present suit was filed before the Environment and Land Court because the suit was predicated upon **Section 93** of the **Land Registration Act**. While it can be argued that the suit ought to have been predicated upon **Section 17** of the **Married Women Property Act** before it was repealed, there is nothing in law that prevents a party from exercising an option availed to him or her by the law by basing his or her case on the law as it exists. Although the present suit was transferred to the Family Division for hearing and determination, the fact that the suit was filed on a basis of a section in the **Land Registration Act** cannot distract this court from the fact that the matter in dispute is essentially matrimonial dispute which ought to be determined on its merit rather than being terminated on procedural technicalities. This court finds no merit with the preliminary objection. The objection is dismissed with costs.

As regard the merits of the case, the Defendant chose to file grounds in opposition to the application. The Defendant did not answer the facts which were placed before this court in form of an affidavit in support of the application by the Plaintiff. The facts deponed therein by the Plaintiff were therefore uncontroverted. *What were those facts?* The Plaintiff deponed that the properties that she listed in the application were acquired during the subsistence of their marriage by their joint effort. Prima facie the Plaintiff was able to establish that some of the properties registered in the name of the Defendant were indeed purchased or acquired during the subsistence of the marriage. Of course, the Plaintiff will be required to adduce *viva voce* evidence to establish her claim that she either directly or indirectly contributed towards the acquisition of the said properties.

Suffice for this court to say that, so that the Plaintiff's suit is not defeated, it is imperative that the suit properties listed in paragraph 2 of the application save for the properties owned by the listed companies be preserved pending the hearing and determination of the suit. The Defendant shall not adversely deal with the suit properties as prayed by the Plaintiff in paragraph 2 and 3, of the application dated 13th February 2012 save for the properties owned by the companies pending the hearing and determination of the suit. If the Plaintiff desires to pursue a claim in respect of the ownership of the shares in the two companies, she is at liberty to file an appropriate case under the **Companies Act** in the Commercial Division of the High Court (See **Mereka –Vs- Mereka C.A. Civil Appeal No.226 of 2001**). Costs shall be in the cause.

DATED AT NAIROBI THIS 9TH DAY OF OCTOBER 2014

L. KIMARU

JUDGE