



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 230 OF 2013

D. C. M.....PETITIONER/APPLICANT

VERSUS

J. W. C.....RESPONDENT

J. W. C.....INTENDED INTERESTED PARTY

RULING

The intended party filed the application on 27/2/2014 brought under Section 17(a), 17 2(b) & (c) of the Matrimonial Property ACT, 2013, Section 1, 14 and 1B of CPA. Order 1, Rules 1, 4 (a), 9, 11 and 3 of C.P.R Rules 2010.

The applicant based her application seeking the following orders;

- a. The applicant J. W. C be granted leave to be enjoined as a relevant party in the instant proceedings and upon the terms the Court may determine.
- b. The costs of the application be in the Cause.

The applicant raised several grounds to support the application through the grounds annexed to the application and sworn affidavit of the applicant filed on the same day.

During the hearing of the application on 25/9/2014 the applicant through Counsel Mr. Maina moved the Court to allow the application on the grounds that; the applicant is a former wife of the Petitioner in this case. They solemnized their marriage in 1969 and divorced in 2010 after forty one (41) years of marriage in Div. Cause 540/2010.

They have six (6) children of the marriage all adults four (4) of whom reside in US and two (2) are in the country. Their birth certificates are attached.

The Petitioner after divorce with the Applicant married the Respondent in 2010. They cohabited in Nairobi City and resided in [particulars withheld] within Nairobi.

In the present cause, the Petitioner has filed a divorce petition against the Respondent filed on 24/10/2013 and among the prayers sought in;

- a. That by a permanent injunction, the Respondent herself, her servants, agents or otherwise however be restrained from interfering with occupying, or otherwise trespassing upon the Petitioner's property known as [particulars withheld].

The import of the prayer is that it is part of the subject matter of the cause. Although the Petitioner is the proprietor of the said land and home, the Respondent herein resides there as the matrimonial home which they lived together with the Petitioner before he left the home.

The same property is also the subject matter of the application herein filed and canvassed by the applicant/intended party. The Petitioner as alluded to by Counsel Holding Brief for Petitioner's Counsel has no objection to the applicant hearing joined to this proceeding.

The Respondent J. W. C through her Counsel Ms Wambugu during the oral proceeding informed the Court that they filed Replying Affidavit on 11/4/2014 and stated that the Respondent in this cause resides in the said Highridge property from the time she got married to the Petitioner in 2010. The Respondent is of the view that the application of 26/2/2014 lacks merit and is scandalous and a buse of the Court process. Further that Counsel on her behalf would raise a preliminary objection.

The Respondent through Counsel informed the Court that the applicant is divorced from the Petitioner and therefore she cannot be part of these proceedings. Section 6(1) of Matrimonial Property Act defines matrimonial property. The Petitioner is not seeking declaration of rights over the property but a contrary order The Matrimonial Property Act allows parties to come to Court and obtain matrimonial property separately.

The Respondent filed Replying Affidavit on 14/4/2014 and indicated as pleaded in the petition filed on 23/10/2013, she sought that the property in question be conserved and to have ownership and /or possession of the property determined.

The Respondent deponed that she has resided in the said property from the time she was married to the Respondent and continue to reside there to date. The issue for determination is whether the applicant should be joined to this cause as it relates to Petitioner and Respondent.

The Matrimonial Property Act 2013 Section 17(1) states;

‘Any 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 that person.

Section 17(2) (b) and (c) states;

‘An application under subsection (1) shall be made as part of a matrimonial Cause; and

May be made notwithstanding that the petition has not been filed under any law relating to matrimonial cause’

The Petitioner in this Cause does not object to the Applicant's application to be joined in these proceedings. In relation to the property in question [particulars withheld] he claims he acquired the property and lived there with the 1st wife, the Applicant and later the 2nd wife, the Respondent.

The Respondent claims that upon her marriage to the Petitioner, she resided and they continue to reside in the Matrimonial home; i.e, the same property. The Applicant intimated that she is interested in the outcome and decision of their proceedings as they implicate her property right over the said property.

The Applicant established through her affidavit that she was married to the Petitioner for 41 years; since 1969 and they started from humble beginnings. They got six (6) children of the marriage who are now adults. With regard to the Highridge property the Applicant deponed in Paragraph 8 and 9 of her affidavit that she obtained a loan from Kenya Commercial Finance Ltd. of Ksh. 23,000. She also sold her shop then in Kariobangi at KSH.40,000/-, for the purchase of the property. The Petitioner obtained shares in Kimonyi and sold and got KSH. 150,000/=. The [particulars withheld] was transferred to the Petitioner with a charge of the bank loan of KSH. 23,000/=. In 1976 the Petitioner left to Britain for further studies and he signed a power of Attorney for the Petitioner to enable her transact on her behalf while he was

away.

The Applicant has put forth circumstances that show that this is not a scandalous and frivolous application. The application discloses sufficient information to strongly suggest that she should be enjoined to this suit/petition and she be involved only in so far as the ownership/ possession and determination of [particulars withheld] is concerned.

The Respondent in this suit deponed that the Applicant can and should pursue her interest in separate matrimonial proceedings from this action. Whereas legally it is possible and more practical and desirable; the following facts vitiate this approach.

The Applicant as the 1st wife alleges she acquired all the properties with the Petitioner her husband then. In Div. 540/2010 in Thika Law Courts the issue of matrimonial property was not canvassed and conclusively determined and would not be raised again if determined.

The cause involves a divorce petition by the Petitioner and one of the prayers is in relation to preservation of matrimonial property specifically; [particulars withheld] which was the Applicant's matrimonial home.

Thirdly, even if the Applicant was to file separate matrimonial property proceedings, the main issue will focus on [particulars withheld] which is also germane in this cause. Procedurally the Court would consolidate the two (2) causes to be heard together and determine the main issue as regards matrimonial property and specifically [particulars withheld].

Fourthly, there is no prejudice demonstrated to adversely impact on the Petitioner and /or Respondent in determining the issue of the matrimonial property together, in fact, the same should expedite matters to conclusion.

The Respondent has not raised sufficient grounds to persuade this Court that the enjoinder of the Applicant is so far as the same relates to matrimonial property and specifically Highridge property is abuse of the Court process, lacks merit and is scandalous and worst of all is in contravention of the provisions of the Constitution as deponed in the affidavit of 11/4/2014.

The upshot of the matter is that the Applicant's application of 27/2/2014 to be joined in this Cause is upheld and granted in so far as the issue of the Highridge property is concerned.

READ AND SIGNED IN OPEN COURT THIS 7TH DAY OF NOVEMBER, 2014

M. MUIGAI

JUDGE

In the presence of:

Mr. Maina and Mr. Mohamed