



REPUBLIC OF KENYA.
IN THE LAND AND ENVIRONMENT COURT
AT BUNGOMA
LAND CASE NO. 134 OF 2016

NIMO ADAN KABARE.....PLAINTIFF/APPLICANT

VERSUS.

ABDI ADAN ABDI.....DEFENDANT/RESPONDENT

RULING

[1]. Nimo Adan Kabare the plaintiff in this case is the wife of Abdi Adan Abdi the defendant herein. Their marriage is still subsisting. The plaintiff filed this suit on 31st October 2016 praying for Judgment against her husband the defendant for an order that the Commercial premises comprised of 8 shops on plot at Chwele market measuring 50 feet by 100 feet being part of land parcel number Bokoli/Chwele/263 which premises are also known as Albarkadh shopping centre be shared equally between the parties herein.

[2]. The plaintiff filed a notice of motion on the same day when she filed her suit and prayed that the defendant be restrained from selling/disposing off, wasting or in any way interfering with commercial premises comprising of 8 shops on plot at Chwele market measuring 50 feet by 100 feet being part of land parcel Bokoli/Chwele/263 which premises are known as Albarkadh shopping centre pending the hearing of this application in prayer c of that application the prayers she prayed that the rent from the said premises be deposited in court pending the hearing of the application.

[3]. The respondent her husband filed a defence admitted constructing a commercial premises on a plot of 50 x 100 feet on LR Bokokoli/Chwele/623 but denied that the income is Kshs.40,000/=. He denied that the said property forms matrimonial property and that the same is capable of being shared. He also denied having chased that plaintiff away from her matrimonial home and avers that the plaintiff left her own volation and voluntarily. He filed grounds of opposition to the application aforesaid in which he denied that this court has jurisdiction to entertain this suit sharing matrimonial property, further that the court lacked jurisdiction to deal with this matter since the marriage between the parties is still subsisting and finally that neither the plaintiff nor the defendant are registered owners of LR No. Bokoli/Chwele/263 that there was no prima facie case with any chances of success against the defendant as laid down by *Giella Vs. Cassman Brown & Co. Ltd [C.A] [1973] EA 358* and that the entire suit is incompetent, bad in law and otherwise an abuse of the process of the court.

[4]. When this case came up for hearing on 7th March 2017 the respondent raised a preliminary objection that

(a) This court has no jurisdiction to give the orders sought since the marriage of the two parties

was subsisting. That Section of the matrimonial Causes Act talks of when the parties are divorced or when the marriage is dissolved.

(b) That the defendant cannot be coerced to transfer his properties.

(c) That each party must prove contribution.

(d) That the property in question is not in the name of the parties herein and is in the name of the Manaseh Wekesa who is not a party in this suit.

[5]. The respondent argued that the matter is purely on a point of Law as stated in the case of Mukisa Bisquits. That even possession alone can prove ownership. That the respondent has been in possession for 6 years. That contribution should be determined by court under article 45(3) of the constitution and that parties to a marriage are entitled to equal rights under section 7 of the matrimonial Causes Act. The court was referred to articles 3(b) 19(2) and 45 of the Kenya Constitution as regards the protection of women and family.

[6]. There is no doubt that this Court has jurisdiction under the marriage Act. The act does not single out any Court. I hold that this court jurisdiction on as far as the issues relate to land.

[7]. However, the jurisdiction of this court is triggered in as far as distribution of matrimonial property that relate to land, when the parties are divorced or when the marriage is dissolved. This is what is stated in paragraph 7 of the matrimonial Cause Act. The court clearly will have no jurisdiction before a divorce is pronounced or the marriage is dissolved. The parties to this case are still married and that is what removes the courts jurisdiction.

[8]. Further the land subject to this suit and application herein is not in either of the parties names. The owner who is known is not a party to this case. This court cannot knowingly make orders that affect a registered owner of land, when it has been pointed out to the Court that the title belongs to him and when he has not been made a party to the suit.

It is the court's view that this suit has been brought prematurely and the court therefore lacks jurisdiction at the moment.

[9]. The application and the plaint are asking for the same thing, the distribution of properties of spouses who are still married. Both the suit and the application are with profound respect, misconceived and the defendants contention in the grounds of opposition that the court has no jurisdiction when the marriage is subsisting and that the suit is incompetent bad in law and an abuse if the process of the court are upheld.

[10]. The preliminary objection is upheld and both the application and the suit are dismissed and struck out respectively. The parties are husband and wife, I will make no order as to costs.

Ruling read in open court in the presence of Counsel and Respondent

DATED and DELIVERED at BUNGOMA this 28th day of March, 2017.

S.N. MUKUNYA

JUDGE

In the presence of:

Court Assistants - Chemtai/Joy

Madam Mumalasi for the plaintiff

Applicant - Present

Defendant represented by Mr. Makokha is present