



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 233 OF 2013

In The Matter of Section 17 of

The Married Womens Property Act (1882)

MARTHA WAMBUI WARIA PLAINTIFF/RESPONDENT

-VERSUS-

MOSES NDUNG'U WARIA alias

MUSA WARIA KANINI DEFENDANT/APPLICANT

RULING

1. This ruling is for an application dated **2nd April, 2015** by the defendant/applicant seeking the following orders:-

(i) THAT the suit be dismissed for want of prosecution.

(ii) That the caution dated 4th August 2011 and restriction dated 11th October 2013 be lifted.

(iii) THAT the costs of this application be in the cause.

(iv) any other relief this court May deem fit to grant.

2. The application is premised on grounds on the face of the application and is supported by the affidavit of the applicant herein, sworn on **2nd April, 2015**. He depones that the existing cautions and restrictions were registered against the title pending conclusion of a divorce cause which was concluded on 16th October, 2014 as evidenced by the divorce decree absolute marked MNW1.

It is his contention that since the cautions and restrictions were registered against the suit parcels, he has been unable to utilise the said parcels effectively.

3. It is also his contention that this suit was filed in November, 2013, to which he filed a response on 16th December, 2013; that since then, no action has been taken by the respondent to prosecute the same and the court should proceed to dismiss the suit for want of prosecution and lift the cautions and restrictions to enable him properly utilise his land.

4. The application is opposed vide a replying affidavit sworn on the **16th July, 2015**. In her reply, the respondent denies that the failure to take any step to fix the matter for hearing was occasioned by her and instead avers that no action was taken because the court file went missing from the court registry which was beyond her control.

5. When the motion came for hearing on 15th February, 2016, the applicant's counsel sought to rely on the grounds on the face of the application and the affidavits on record. In addition, he submitted that the plaintiff had not provided any evidence that the court file had gone missing.

6. The respondent in reply, relied on **Section 28** of the Land Registration Act 2012. She submitted that she respondent had an overriding rights over the suit property; that she resides therein and if the restriction was removed, she would be prejudiced. She also relied on **Article 159** of the Constitution and prayed that the motion be dismissed.

7. In a rejoinder the applicants counsel submitted that the sections sought to be relied on were not applicable in this suit and hence there was no sufficient reason that had been advanced to restrain the court from granting the orders sought.

8. I have considered the pleadings on record and submissions by counsels. It is not in dispute that Land Parcels **Tetu Muthuaini/292** and **Nyeri Luso 1/619**, the suit properties herein, are registered in the names of the applicant, who was the plaintiffs husband. It is also not in dispute that their marriage was dissolved on 16th October, 2014 as evidenced by attached decree absolute marked as MNWI.

9. I have looked at the prayers sought in the originating summons filed by the applicant on 15th November, 2013. In a nut shell what the applicant seeks is a declaration that the suit properties are jointly owned by herself and the applicant which properties she describes as matrimonial property. In my view, the prayers sought are clearly outside the jurisdiction of this court and I find that this court is not the appropriate court to deal with this matter.

10. This court's jurisdiction is provided for under **Article 162 (2b)** of the constitution and **Section 13** of the Environment and Land Act, 2011 as to deal with environment and the use and occupation of title to land. The plaintiff in this case, prays for a declaration that the suit properties were acquired by joint funds and efforts of both her and the respondent during the subsistence of their marriage and although registered in the name of the respondent, the suit properties are owned jointly by both of them.

11. Whereas I am alive to the fact that I have the mandate to determine prayer 1 in the originating summons sought under **Section 17** of the Matrimonial Properties Act, 2013, I am also alive to the fact that **Section 7** of the same Act is clear that matrimonial property can only be divided between the spouses after dissolution of marriage. The issue of distribution of matrimonial property is a matter that can only be handled by the High Court and not the Environment and Land court.

12. Having found that I have no jurisdiction to deal with this matter, I associate myself with the holding in the case of ***The Owners of Motor Vessel Lilian "S" -Vs- Caltex Oil Kenya Ltd [1989] KLR 1***. At page 14, where the Court said:-

“When a court has no jurisdiction there would be no basis for a confirmation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction,” and transfer this matter to the High Court for hearing and determination of both the application and the suit.

Dated, signed and delivered at Nyeri this 4th day of October, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Martha Wambua Waria

Moses Ndingu Waria alias Musa Waria Kanini

Court assistant - Lydia