



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: WARSAME, KIAGE & GATEMBU, JJA)

CIVIL APPEAL NO. 61 OF 2019

BETWEEN

AKK..... APPELLANT

AND

PKW..... RESPONDENT

(An Appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (M. W. Muigai, J.) delivered on 3rd December, 2018

in

Civil Case No. 6 of 2018)

JUDGMENT OF THE COURT

1. The appellant and respondent commenced cohabitation as husband and wife in the year 1999 and later formalized their marriage under Kikuyu Customary law in the year 2000 wherein they were blessed with two children. The appellant states that due to the respondent's financial manipulation, breaches of trust and domestic violence, she was forced to flee their matrimonial home, file a custody and maintenance suit **Nairobi Children's Court Case Number 652 of 2010** and **Divorce Case No. 867 of 2017** both against the respondent.

2. Vide an Originating Summons under **Order 37** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act**, and **Sections 2, 9, 12(1), 12(3) and 14** of the **Matrimonial Property Act, 2013**, the appellant herein, filed a suit claiming ownership of various properties which she alleged were acquired, developed and improved during the subsistence of her marriage to the respondent. She alleged that various properties moveable and immovable, and registered both in their joint names or in the name and possession of the respondent, had been acquired, developed and improved through the joint efforts of the appellant and respondent during their marriage and sought determination as to whether the matrimonial property and those registered in the respondent's name were held in trust by the respondent for the benefit of the appellant at a ratio of 50:50. The appellant sought orders:

(a) Restraining the respondent and his agents or proxies from disposing or dealing in **LR KJD/DALALEKUTUK/[...]** and **LR NAIROBI/BLOCK/[...]** and in shares held in **Streetwise Media Services Limited, Springboard Holding Limited, Essential Mountain Links Limited, Upphill Springs Restaurant Limited, Apollo Merchants Limited, Eight Investments Limited** and **Springboard Capital Limited** as particularised in the pleadings.

(b) Declaring that the appellant had acquired interest in those shares, that the same constituted matrimonial property and that 50% of the same was held in trust by the respondent for the benefit of the appellant.

(c) Declaring that the properties **LR KJD/DALALEKUTUK/[...]** and **LR NAIROBI/BLOCK/[...]**, registered in the joint names of the respondent and appellant, were matrimonial property.

(c) That the status of the marriage between the parties depended on the court's finding as to whether there was such a marriage.

(d) That the property alleged to be under sale did not belong to the respondent; and

(e) That the suit offended Section 7 of the Matrimonial Property Act, 2013.

7. In a ruling dated 3rd December, 2018, the learned Judge upheld the preliminary objection stating, *inter alia*, that though the Family Court is clothed with the requisite jurisdiction to hear and determine matters concerning the division of matrimonial property, the court could only exercise its jurisdiction upon proof of a court order on dissolution of marriage. Noting that it is not contested that **Divorce Cause No. 867 of**

2017 exists between the parties, the Court stated that the Cause provided the appropriate forum within which the question of existence of marriage and/or the dissolution thereof should be determined. The Judge concluded that until such determination was made, it was estopped from exercising jurisdiction in hearing and determining the application related to the originating summons filed on 24th January, 2018 until the divorce case was finalized, hence upholding the preliminary objection dated 7th March, 2018.

8. In vacating the interim orders granted on 19th April, 2018 and extended on the 30th April, 2018, the High Court stated that it could not grant the same as the appellant had brought the issue of the alleged sale of matrimonial property as an oral application and had failed to file any documents regarding the impending sale, specific properties, and the interest of the respondent in the properties listed in the application. The High Court further held that the three properties owned by Upper Hill Springs Limited were owned by the company, a separate legal entity to the respondent and therefore could not be part of the proceedings. It found that the appellant had failed to establish the respondent's claim, share and/or interest in the same, in the absence of which it could not issue interim orders. Citing the decisions in *Nancy Wambui Ndichu vs. Steve Ndichu Mwaura Nairobi HCCC No. 51 of 2012 (OS)* and *Minnie Waithera Mbue vs. John Peter Mbue Nairobi HCCC No. 43 of 2009 (OS)* the court held:

“... it is crystal clear that division of matrimonial property by the Family Court does not/will not include shares/properties of a company as a company is a separate legal person from the shareholders and/or directors. To safeguard one's rights the right forum to ventilate and canvass the preservation of interest in shares and/or property in a company is the Commercial Division of the High Court.”

9. The Court thus ordered that the appellant pursue her rights in the companies listed in the applications dated 22nd January, 2018 and 24th February, 2018 in the Commercial Division of the High Court.

10. Aggrieved by that decision the appellant has now preferred this appeal against the whole ruling of the superior court seeking orders, *inter alia*, that the entire ruling of the learned Judge upholding the respondent's preliminary objection filed on 7th March, 2018 be set aside and that this Court issue an injunction restraining the respondent, his proxies or agents from selling, alienating, transferring, subdividing, encumbering or in any way disposing of any of the suit properties.

11. The appellant's grounds of appeal can be condensed into the following main issues: whether the preliminary objection qualified to be upheld as such in law; whether the High Court erred by failing to consider evidence and admissions on existence of a customary law marriage between the appellant and respondent herein; whether the shares in the listed companies form part of matrimonial property; whether the Judge erred in failing to issue an injunction to preserve the matrimonial property.

12. Prosecuting the appeal, learned counsel for the appellant, **Mrs. Mbugua**, urged this Court to allow the appeal and issue an injunction to preserve the matrimonial property until the issue of the status of marriage is determined. The learned counsel submitted that the preservatory orders were sought in recognition that under **Section 7** of the **Matrimonial Property Act**, the court cannot distribute matrimonial property without first dissolving the marriage; hence the reason why the appellant had sought orders preserving all the properties deemed matrimonial, pending the dissolution of the marriage and subsequent distribution of the same.

13. On the issue of the preliminary objection, the appellant submitted that the respondent's preliminary objection did not qualify as one and the learned Judge erred in upholding the same. Counsel urged this court to be guided by the definition given in the case of *Mukisa Biscuit Company vs. Westend Distributors Limited (1969) EA 696* which provides that a preliminary objection must be on a pure point of law that is pleaded, it must be capable of disposing the suit, it cannot raise any fact which is unascertained, and it must not seek the exercise of judicial discretion.

14. The appellant maintained that the preliminary objection raised issues of existence of the marriage which in her view would require ascertainment from the parties and further, that the contention about ownership of the properties was purely factual and evidence-based. Moreover, the appellant stated that the preliminary objection did not arise from pleadings before the court, neither did it arise in the course of pleadings.

15. As regards the issue of the existence of the marriage, the appellant faulted the learned Judge for failing to recognise the customary marriage of the parties. It was the submission of counsel that the respondent in his statement of defence and counterclaim had admitted that *“he had always been a loving husband to the plaintiff”*, amongst other admissions intimating that they were indeed married. That in light of the said admissions, the respondent went ahead and gave false testimony in his replying affidavit claiming that there was no marriage between the parties.

16. According to the learned counsel for the appellant, the respondent's false statements amount to perjury which disregards the sanctity of

this court's process and hence casts doubt on the credibility of his testimony.

17. Turning to the issue of whether the shares in the listed companies form part of matrimonial property, the appellant faulted the learned Judge for holding that the application raising issues of imminent danger of disposal of the respondent's shares was brought by way of oral application.

18. The learned counsel further submitted that the learned Judge failed to take notice of the application seeking the preservation of the shares from being disposed and /or alienation of the property. That in vacating the interim orders, the trial court erred by concluding that the details of the respondent's interest in the shares had not been provided. She asserted that the appellant provided company search forms for all the companies and thus established the interest.

19. The appellant also pointed out that the trial court erred by dwelling on the issue of the separate entity of the company and not on the ownership of the shares which was the pertinent issue at hand. That the learned Judge failed to consider the shares as a unit of ownership falling within the ambit of **Section 6 (c)** of the **Matrimonial Property Act, 2013**.

20. Relying on **Section 17 (1)** and **(2)** of the **Matrimonial Property Act, 2013**, the appellant submitted that the courts are not limited in respect to declaration of rights of a spouse's interest in matrimonial property.

Indeed, contrary to the finding of the trial Judge that jurisdiction could only be invoked upon dissolution of marriage, **Section 17 (2)** provides that a party can apply to court for declaration, whether or not a petition for a matrimonial cause has been filed.

21. On the issue of whether the learned Judge erred in failing to issue an injunction to preserve the subject properties, it was the appellant's submission that the appellant had demonstrated a prima facie case with a reasonable prospect of success through evidence and the Judge erred by setting aside the interim orders which she had previously issued and even extended without due regard of the harm and injustice that would be occasioned to her and her children. She urged that the trial court's ruling be set aside and an injunction be issued preserving the disputed property.

22. **Mrs. Thongori**, learned counsel for the respondent, in opposing the appeal, submitted that the appellant in seeking division of property offends **Section 7** of the **Matrimonial Property Act**. According to counsel, the fact that the alleged marriage had not been dissolved was a clear indication that the court is barred by law to determine the matter. She reiterated that without proving the existence of marriage, the matrimonial property could not be divided.

23. Regarding the preliminary objection, the respondent submitted that they sought to challenge the issue of the court's jurisdiction, the existence of a marriage, whether the suit offended **Section 7** of the **Matrimonial Property Act** and ownership of the property under sale. According to the respondent those were pure points of law.

24. On whether there existed a marriage between the parties, the respondent asserted that no marriage exists between the parties unless the court so declares and hence the appellant did not qualify to invoke the provisions of the **Matrimonial Property Act** until her marital status is determined.

25. The respondent also pointed out that this Court lacked jurisdiction for the reason that the appellant had to first establish whether there was a valid Kikuyu customary marriage between the parties, before she could seek remedies under the **Matrimonial Property Act** and the **Land Registration Act**. It was urged that this Court holds and declare that the court has no jurisdiction to consider or to entertain the reliefs sought.

26. Regarding the issue of the shares of the companies, the respondent contended that a company is a separate legal entity from its shareholders and directors and hence the court did not have jurisdiction to make a **finding with regard to properties and shares held in Uperhill Springs Limited**.

27. The respondent also reiterated that the appellant did not contribute towards the acquisition of the properties held in the companies, neither did she make any monetary or non-monetary contributions towards these companies.

28. The respondent refuted the appellant's claims that the shares and properties were acquired during the marriage through joint efforts and registered in the respondent's names and maintained that claims for shares held by the spouse in a company should be made to the commercial court as they cannot be construed as matrimonial property.

29. We have carefully considered the record of appeal as well as submissions by counsel and discern a number of issues for determination. This court in **Mbogo & Another vs. Shah [1968] EA 93**, stated that it would only interfere with the exercise of discretion by a lower court where it is satisfied that the decision of the lower court is clearly wrong "... **because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.**"

The well settled position was reasserted in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** where this Court stated:

"... this Court will not interfere with the exercise of discretion by the Judge in the court below unless satisfied that the decision

of the Judge is clearly wrong because of some misdirection, or because of failure to take into consideration relevant matters or because the Judge considered irrelevant matters and as a result arrived at a wrong conclusion, or where there is a clear

abuse by the Judge of his discretion. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing of clear abuse of discretion.”

30. We will deal first with the issue of jurisdiction. It is clear from the Originating Summons and Notice of Motion both dated 22nd January, 2018 and the Notice of Motion dated 24th February, 2018 that the appellant herein sought a variety of reliefs including declaratory orders, preservative orders and mandatory injunctions. The jurisdictional aspect of the preliminary objection relied heavily on two assertions: that the Court had no jurisdiction to entertain the matter as the fact of marriage had yet to be established; and that the court has no jurisdiction to distribute and/or divide shares and properties registered in the name of a limited liability company as they cannot be construed as matrimonial property.

31. Whilst the respondent argued that the suit offended **Section 7** of the **Matrimonial Property Act, 2013** on the basis that the remedy sought for division of property was not available until divorce or dissolution of marriage, the appellant, relying on **Section 17** of the same Act argued that the court is not limited in respect to the declaration of rights of a spouse’s interest in matrimonial property. Section 7 states:

“... ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

Section 17 states that:

“(1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.

(2) An application under subsection (1) –

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

32. Section 7 refers to division of matrimonial property whilst Section 17 refers to a declaration of rights in any property contested between a person and a spouse. It can be discerned from the appellant’s pleadings in the High Court that she sought not only division but also orders from the court that the listed property was matrimonial property and a further finding that she had proprietary and pecuniary interests in the same. The trial court found that it had no jurisdiction under Section 7 to make orders as to the division of property. It is also correct that the orders concerning division of matrimonial property pursuant to **Section 7** of the **Matrimonial Property Act** was unavailable to the appellant until the determination of **Divorce case 867 of 2017** between the parties hereto. However, in view of the order sought by the appellant extensively detailed above, it cannot categorically be said that the appellant’s prayers fell solely within the ambit of Section 7 of the Act. It is our opinion that the learned Judge erred in limiting the court’s jurisdiction to the provisions in Section 7 of the Act. In failing to address itself to the nature of reliefs sought by the appellant and the enabling provisions under Section 17 of the Act, the trial court did not proceed to determine whether the appellant satisfied the provisions under Section 17 of the Act in order for the court to make the declaratory orders sought.

33. In order to bring an application under Section 17, there must be a contest between a person and their spouse. Though framing the argument from the perspective of the Section 7 of the Act, the respondent argued that there was no spousal relationship between the appellant and

himself as that question has yet to be determined by the court in **Divorce Cause 867 of 2017**. The respondent submitted that the appellant’s prayer in the petition in **Divorce Cause No. 867 of 2017** “[t]hat the court find that there was a Kikuyu customary marriage...” proved that the subsistence of a marriage between the parties had yet to be determined. The learned Judge, having framed the jurisdiction of the court solely with Section 7 of the Act, was alive to the fact that Divorce Cause was yet to be determined and hence deferred the jurisdiction of the court until the subsistence of a marriage had been determined and the same then dissolved/determined.

34. A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act. In **PNN vs. ZWN [2017] eKLR**, Waki, JA stated that:

*An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in **Petit vs. Petit [1970] AC 777**:*

“One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was

whose is this? And not to whom shall it be given?”

35. The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant's prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.

36. In the persuasive case of *N.C.K. vs. G.V.K [2015] eKLR*, Muchelule, J. observed thus:

“In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court’s adjustive power. The Family Law Act 1966 at Section 33 (4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of Arif vs. Anwar [2015] EWHC 124 (FAM) the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party’s beneficial interest in the matrimonial property without severing the same ...

It would appear to me that a spouse can, under section 17 of the Matrimonial Property Act 2013, either where there is a divorce matter pending, or where, for whatever reason, he can no longer live together with the other spouse but it is not seeking to divorce, come to court to resolve any questions about beneficial interest in the matrimonial property without severing the same.”
(Emphasis).

37. In our opinion, the trial court had jurisdiction to make declarations in so far as the interest in the property during the pendency of a marriage is concerned. The issues of distribution of the property would then only be determined upon dissolution of a marriage. In the case of *Muthembwa vs. Muthembwa [2002] 1 KLR* page 92, the court found:

“In assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness. The jurisdiction of the court is to determine a question or questions between husband and wife principally as to title to or possession of property.

In the instant case, where matrimonial property is intertwined with company property the court cannot decline jurisdiction under Section 17 to deal with the whole property as this would be unjust. In application under Section 17 the court has wide and unfettered discretion to make such order or orders as justice may demand including sale distribution of property subject of the application.”

38. Having found that the trial court had the requisite jurisdiction to consider the appellant's prayers under Section 17, we hold that the learned Judge erred in upholding the preliminary objection and concluding that the court did not have jurisdiction. In the circumstance. We find as follows

1. The preliminary objection, of 7th March, 2018 is hereby set aside and dismissed.
2. The Notice of Motion dated 24th January 2018 is remitted back to the High Court for hearing and determination before any Judge other than Muigai, J.
3. We direct the matter to be placed before the Head of Division within 21 days of delivery of this Ruling for necessary directions regarding the hearing and disposal of the matter.
4. No orders as to costs.

Dated and Delivered at Nairobi this 2nd day of October, 2020

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR