



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 14 OF 2013 (O.S)**

**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**

**C K.....APPLICANT**

**VERSUS**

**A G M.....RESPONDENT**

**RULING**

1. The Applicant herein filed an application dated 16<sup>th</sup> February, 2016 under **section 7** of the **Matrimonial Property Act no. 49 of 2013** seeking the following orders; first that the current suit be dismissed with costs for want of jurisdiction as the parties are still enjoying unbroken coverture; secondly that the court do dismiss the suit since it lacks jurisdiction to subdivide co-owned property during the existence of a marriage.
2. The grounds of the application as contained on the face of the application are that the Respondent in this suit is seeking division of matrimonial property during unbroken coverture. That the parties in this suit are yet to finalize divorce proceedings in Divorce Cause no. 28 of 2013. The Respondent entered appearance for the divorce cause on 20<sup>th</sup> February 2013 but is yet to file her response to enable the commencement of the divorce case. That this suit is premature since the divorce cause is yet to be finalized, and the applicant has not furnished the court with any proof of dissolution of the marriage.
3. The Respondent herein had filed an application by way of originating summons dated 9<sup>th</sup> March, 2013 seeking the following orders; that it be declared that the property known as Dagoretti/Mutuini/[particulars withheld] with all the developments thereon was acquired jointly by the parties herein during their marriage and registered in the name of the Applicant; and that the Respondent is entitled to fifty (50) percent of the property or the proceeds of its sale or such other portion as the court may deem fit. The application dated 16<sup>th</sup> February, 2016 is premised on the Respondent's originating summons.
4. On 23<sup>rd</sup> June, 2016, the court directed that the application dated 16<sup>th</sup> February, 2016 be canvassed first and be disposed of by way of written submissions.
5. The Applicant supported his arguments by way of submissions dated 20<sup>th</sup> July, 2016 filed by learned counsel Mr. Muteithia Kibiria who contends that where a spouse seeks the distribution of matrimonial property, the spouse has to show that there has been divorce or the dissolution of the marriage as provided under **section 7** of the **Matrimonial Property Act, 2013**. He urges that in the instant case, the court lacks jurisdiction since the Respondent is seeking division of matrimonial property during the unbroken coverture.
6. To buttress his argument, Mr. Muteithia Kibiria relied on the case of **M.N.W vs W.N.M & 3 others (2013) eKLR** in which Justice Musyoka referred to the Court of Appeal decision in **Peter Njenga vs Sophia Ndungu Nairobi C.A Civil Appeal No. 2 of 2000**. In the foregoing case, the appellate court stated that the High Court has no jurisdiction to alienate lands between spouses

during their lifetime or unbroken coverture, and a judge faced with a suit where division of matrimonial property is sought in such a case ought to dismiss it.

7. Mr. Muteithia Kibiria submitted that while the Respondent seeks to rely on **Article 45(3)** of the **Constitution of Kenya 2010** that parties are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage, she has not made any attempts to move the court to have the divorce matter heard.

8. Counsel asserted that there were no transitional provisions under the new Act and the Respondent cannot therefore rely on **section 23(3)** of the **Interpretation and General Provisions Act CAP 2 Laws of Kenya** to claim that her rights and privileges operate under the repealed **Married Women's Property Act of 1882**. In support of this position, Counsel cited the Court of Appeal decision in **D.E.N vs P.N.N Civil Appeal No. 226 of 2012** where it was held that after the cessation of the operation of the Married Women's Property Act 1882, the Matrimonial Property Act 2013 is currently the legislation that provides for the rights and responsibilities of spouses in relation to matrimonial property.

9. Mr. Muteithia Kibiria contended that since the court lacks jurisdiction as argued, it cannot make any adverse orders for the property to be held in trust for the Respondent's beneficial interest. Counsel cited the case of **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1** where Nyarangi J stated that where a court lacks jurisdiction, it has no power to make one more step and should down its tools.

10. Ms. Judy Thongori learned counsel for the Respondent filed written submissions dated 14<sup>th</sup> September, 2016 in opposition to the application. Counsel submitted that at the time of filing the Applicant's originating summons dated 9<sup>th</sup> March, 2013, the **Married Women Properties Act** (repealed) was in force. In filing the originating summons, they had relied on **section 17** of the **Act** which required that an action was to be filed while the parties are still in coverture.

11. Ms. Judy Thongori asserted that in the Originating summons, the Respondent sought declaratory rights that the suit property be held by the Applicant herein in trust for her beneficial interest. Counsel admitted that at the time of filing the suit, the parties were married but denied that the Respondent sought for division of the suit property therein.

12. Counsel relied on the persuasive case of **R.W vs A.M [2015] eKLR** where Mulwa J stated that the transition from the English 1882 Act section 17, to the current Matrimonial Property Act No. 49 of 2013, is merely a matter of procedure and is declaratory, just like the 2010 Kenya Constitution which is not necessarily subject to the same principles, as it looks backwards, forward, horizontally and vertically. That the vested rights of the parties which accrued before the Matrimonial Property Act, 2013 ought to be determined under the repealed section 17 of the English 1882 Act.

13. Counsel cited **section 23(3)** of the **Interpretation and General Provisions Act** which provides that where a law repeals in whole or in part another written law, unless a contrary intention appears, the repeal shall not affect a right, privilege, obligation or liability acquired, occurred or incurred under a written law so repealed. Counsel submitted that the suit is competent and properly before this Honourable Court. Counsel further cited **section 93** of the **Land Registration Act, 2012**.

14. Counsel submitted that the suit is competent and properly before the court and urged that the Applicant's application be dismissed for lack of merit.

15. I have analyzed the pleadings and the submissions filed in support thereof. The issue arising for determination in this matter is whether this court has the jurisdiction to entertain a suit for division of property during the pendency of a marriage.

16. Under **section 3** of the **Marriage Act**, marriage is defined as the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act. The Respondent filed a Certificate of Marriage No. [Particulars withheld] which shows that the Applicant and the Respondent herein got married at the Registrar's office on 12<sup>th</sup> November, 2004. At the time of the marriage, the parties resided at Buru Buru phase V.

17. From the evidence presented by the parties, the marriage has not been dissolved or annulled in any court of law. However, the parties indicated that there are pending divorce proceedings in Divorce Cause no. 28 of 2013.

18. The question that follows then is whether this court has the jurisdiction to make a determination on matrimonial property during the existence of a marriage. Matrimonial property is defined under **section 6** of the **Matrimonial Property Act** to mean:

- a) the matrimonial home or homes;
- b) household goods and effects in the matrimonial home or homes; or
- c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

The matrimonial home is defined under **section 2** of the **Act** as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

19. Under **section 17** of the **Married Women's Property Act, 1882** which has since been repealed by **section 19** of the **Matrimonial Property Act, 2013**, which is now the law governing disputes relating to matrimonial property, a party may apply to the High Court by summons in any question between husband and wife as to the title to or possession of property. The section is not pegged on the status of marriage of the parties.

20. The **Matrimonial Property Act** also provides for declaratory orders under its **section 17** which 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 as part of a petition in a matrimonial cause; and**

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

21. By virtue of **section 17** of the **Matrimonial Property Act**, the court has jurisdiction to declare the rights of parties in relation to any property which is contested. The Respondent however sought more than a declaration of rights. She went further to seek that the court grants her fifty (50) percent of the property or the proceeds of its sale.

22. Even though the **Married Women's Property Act** is repealed, it is important to state the purpose of its **section 17** in making a determination in the present suit. I can do no better than to quote the Court of Appeal case of **P N N vs Z W N [2017] eKLR** where Waki JA, stated that:

**“An inquiry may thus be 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"”*

23. The above case demonstrates that a declaration under section 17 of the repealed Act is not pegged on the subsistence of a marriage. The effect of this section is such that the court can make a declaration with regard to the suit property in this case even though the parties are still married, it does not however provide for the sharing of such property.

24. The Applicant cited the court’s lack of jurisdiction to distribute matrimonial property under **section 7** of the **Matrimonial Property Act** during the subsistence of a marriage. The contested originating summons was however brought under the equivalent of section 17 of the Act, which is not dependent on the status of a marriage. In this case therefore, I find that this court is properly equipped with jurisdiction to resolve any questions about the parties’ beneficial entitlement to suit property without severing the property.

25. 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 is not seeking to divorce, come to court to resolve any questions about beneficial interest in the matrimonial property without severing the same.”**

26. In view of the foregoing, it is in my opinion that this court has jurisdiction to make declarations only as to interest in property during the pendency of a marriage. The issues of sharing of the property can only be determined upon dissolution of a marriage. I therefore find that the court has jurisdiction to determine the issues raised in the Originating summons dated 9<sup>th</sup> March, 2013 but only with regard to a declaration of beneficial interest in the suit property. The contested originating summons deals with among others, declaratory rights under section 17 of the Matrimonial Property Act, 2013. The present application dated 15<sup>th</sup> December, 2016 therefore fails and is dismissed accordingly with no orders as to costs.

**SIGNED DATED and DELIVERED in open court this 18<sup>th</sup> day of June 2018.**

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**L. A. ACHODE**

**JUDGE**

**In the presence of .....Advocate for the Applicant**

**In the presence of .....Advocate for the Respondent**



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