



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
MATRIMONIAL CAUSE NO. 3 OF 2019
MAAPPLICANT
-vs-
SAK.....RESPONDENT

RULING

The Applicant herein commenced the present proceedings vide an originating summons dated **6/3/2019** inviting the Court to address the following questions;

1. Whether the applicant and the respondent, being husband and wife acquired the MATRIMONIAL HOME IN KAPSENGERE in the course of their marriage.
2. Whether the applicant made material and/or non- material contribution towards the acquisition of the property whose particulars are set out hereinabove.
3. Whether the respondent has deserted his wife.
4. Whether the applicant, being a married woman has a right to retain the matrimonial home either under common law, principles of equity or customary law.
5. Whether the relationship between the applicant and the respondent was one based on trust so that at equity the court can infer constructive trust in respect of the properties acquired in the course of the matrimonial relationship.
6. Who shall bear the costs of this summons?

The summons is supported by the affidavit of **MA** the applicant herein.

Upon service of summons the Respondent never entered appearance nor did he file any response to the originating summons. On **29/7/2019**, the applicant's counsel sought for leave of the court to serve summons by way of substituted service. The respondent though served via substituted service as per the return of service, has since not entered appearance.

EVIDENCE

The applicant testified in court and stated that she works as an accountant and resides in Nakuru.

She adopted her affidavit as her evidence in-chief.

The respondent herein is her former husband and they got married in February 2013 though it was not in a formal wedding.

That she contributed in putting up the matrimonial home and they have been separated with the respondent since the year 2017 to date.

Since the matter proceeded ex-parte, the applicant closed their case and counsel sought for time to file submissions.

APPLICANT'S WRITTEN SUBMISSIONS

In his submissions, counsel for the applicant submitted that the Applicant and Respondent contracted a customary union in the year 2013 and were blessed with two issues together with another whom the respondent had assumed parental responsibility despite not being the biological father.

That they lived as wife and husband until the year 2018 when the respondent deserted their home and has never returned.

During the subsistence of the union the applicant and respondent constructed a house at the Respondent's ancestral land in Nandi County and that the applicant made both monetary and non-monetary contributions during the union and in the construction of the said House.

Counsel further submitted that the court should determine as to Whether the Applicant and the Respondent, being husband and wife acquired the matrimonial property, home/house in Kapsengere in the course of their marriage

Counsel relied on **Section 6 of the Matrimonial Property Act** which defines Matrimonial Property as follows;

(1) For the purposes of this Act, matrimonial property means—

- 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.**

He also relied on Section 7 of the Matrimonial Property Act which stipulates that 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.*

Further that **Article 45 (3) of the Constitution of Kenya** provides;

3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

That the Applicant and Respondent, on the basis of trust put up a matrimonial home at the respondent's ancestral land in Kapsengere.

That the Applicant applied for a loan of **Kshs.785,000/=** in the year 2017 which monies she alleges were all spent in the construction of the matrimonial home in Kapsengere.

Counsel further submitted that as soon as the home had been put up, the respondent deserted the applicant.

He further submitted that courts hold the view that contribution need not necessarily be material or monetary by a spouse for that spouse to be entitled to a share of the matrimonial property.

He submitted that the Matrimonial Property Act defines what constitutes "**contribution**" to mean monetary **and non-monetary contributions and includes-**

- a. Domestic work and management of the matrimonial home;**
- b. Child care;**
- c. Companionship**
- d. Management of family business or property; and**
- e. Farm work.**

He cited the case of *NWM v KNM [2014] eKLR* where it was held that;

"The Court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the occurrence of the marriage to acquire the matrimonial property."

That for monetary contribution, the applicant made a contribution of **Kshs. 785,000/=** which was put in the construction of the house.

That in terms of non-monetary contribution, the applicant's contribution is evident in child care, domestic work and management of the home.

He also submitted that the court has a wide discretion to determine the extent and amount of non-monetary contribution.

He concluded by submitting that after 5 years in a marital union, the respondent's and Applicant's 'marriage' broke down, ostensibly due to the respondent's desertion and that since the matrimonial home is built on the respondent's ancestral land, the applicant cannot then retain the property as essentially; she is an unwanted guest.

He finally submitted that the Respondent ought to pay off the applicant's contribution as the court may determine and, in the alternative, the property should be sold and the applicant's mammoth share recovered there from.

ANALYSIS AND DETERMINATION.

I have weighed the Applicant's originating summons, the supporting affidavit thereto, the applicant's oral evidence in court and the written submission in support of their case. In my considered view, the only issue for determination in this matter is:-

Whether the Court has jurisdiction to grant the orders sought by the Applicant.

Admittedly, the applicant in her affidavit as well as in her oral evidence in court stated that they were married in **the year 2013** under a customary law of a community of which particulars have not been disclosed. That in the **year 2018**, the respondent deserted the matrimonial home.

In her submissions the applicant has submitted that during the subsistence of their union with the respondent, they constructed a house at the Respondent's ancestral land in **Nandi County** and that the applicant made both monetary and non-monetary contributions towards construction of the said House.

At **paragraph 18 of the supporting affidavit**, the applicant deposes that the court ought to restrain the Respondent from disposing off the suit property as the same shall be the subject matter of settlement by way of possession or reversion under **Section 27 of the Matrimonial Causes Act**. **The Section provides: -**

27. Power of court to order settlement of wife's property

(1) If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them.

(2) An instrument made under any order of the court made under this section shall be valid and effectual, notwithstanding the existence of coverture at the time of the execution thereof.

(3)

Upon keenly interrogating the provisions of **S.27 of the Matrimonial Causes Act**, it is vivid that it is effective after dissolution of marriage.

The basis for the distribution of matrimonial property is **Section 7 of the Matrimonial Property Act** which provide;

" Ownership of 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."

Based on the above provisions I am of considered view that matrimonial property can only be divided upon the dissolution of marriage.

In the instant case, no iota of evidence has been provided before Court to prove that the parties herein have divorced. All the applicant is saying is that the respondent deserted the matrimonial home since the year 2018. However, she has not produced a decree of annulment, divorce or a separation order, and nor has she produced any decree nisi or decree absolute to prove that there is separation and/ or divorce.

This was the position in the case of; -

KAJIADO HIGH COURT CIVIL CASE NO. 11 OF 2018 (O.S); MNH VS FHM, [2018] e KLR where the Court pronounced itself as follows;

"So, while the Plaintiff and the Respondent might currently be at loggerheads, I find the request for a declaration on the distribution of the matrimonial property to be rather rash and injudicious. In the absence of concrete proof of dissolution; a decree nisi or a decree absolute, this court is hesitant to make such orders as to distribution of the impugned properties. I can do no better than reiterate the comments made in the decision of this Honorable Court in T M W v F M C, Matrimonial Cause 3 of 2018 [2018] eKLR to wit:

“I have not seen proof of divorce in form of a decree declaring the marriage between the parties dissolved. As to the document to prove divorce the law recognizes decree Nisi or decree absolute. So far as the language of the matrimonial property Act is concerned it must be obvious that the parties have terminated their cohabitation and there is no likelihood of reconciliation. The court is not a vehicle that encourages the breaking up marriages or setting them asunder. I cannot find better words rather than stating that the family is one of nature’s masterpieces. That is the spirit of the constitution of Kenya under Article 45 of the constitution which provides that:

“45. (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

This entails that the state has an obligation to protect the sanctity of marriages. In that regard, no court in its right mind may encourage destruction of families. Thus, if families are not protected or if courts are to give a blind eye on the mischief divorce, the spirit of section 45(1) of the constitution aforementioned will be defeated. I agree with the assertions of my brother W.M. Musyoka. J in MNW v WNM & 3 Others where he stated that “it is against public notice to entertain matrimonial disputes as it would accelerate the break-up of the family involved and that public policy favour family unity and should foster peace and reconciliation.” Alienation of lands between spouses during unbroken coverture does not augur well for the well-being of the family as a unit.

In the premises, I’m of the view that the Petitioner herein is entitled to a share which may not be equal to that of the Respondent if at all the matrimonial property is to be distributed. The suit property herein cannot be subject to distribution without proof of divorce.....”

It is also worth noting that jurisdiction is everything, without which the court downs its tools. This court in the foregoing circumstances has no jurisdiction to entertain the division of a matrimonial property in a case where there is no proof of dissolution of marriage.

On the issue of jurisdiction, the Court had the following to say in the case of;

Alfaraj Limited –vs- Raytheon Aircraft Credit Corporation & Another (2000) KLR C.A. 29 of 1999.

“Any issue regarding jurisdiction ought to be considered first so that in the event of the court coming to the conclusion that it has no jurisdiction, the intellectual exercise of going into the merits of the application would be futile.”

I do consider that even if the applicant had obtained divorce before coming to Court, the suit property herein would not form part of matrimonial property and be subject to distribution since the same is an ancestral land, a fact which has been admitted by the applicant in her affidavit evidence, oral evidence and in her submissions, that the subject matrimonial home is built on an ancestral land at the respondent’s home in Nandi county. As such the title may not be in the name and hands of the Respondent.

This position was adopted by the Court in the case of; - **CHUKA HIGH COURT, HCCC. NO. 2 OF 2015, AKM VS NNN [2019] eKLR where R.K Limo J.** had the following to say; -

“.....There is no dispute as the Plaintiff herself conceded during examination that the following properties were ancestral or are held under customary law namely: -

- i. Kagaari/K/ [particulars withheld]**
- ii. Kagaari/W/ [particulars withheld] and some extent**
- iii. Kagaari/K/ [particulars withheld]**

“.....I have already found that the land on which the matrimonial house stands is not part of the matrimonial property as it was inherited by the Defendant from his parents therefore by dint of Section 6(2) Matrimonial Property the same cannot be considered part of the matrimonial property subject to be shared. What can only be shared in my considered view is the value of the matrimonial home and the parties in this cause and particularly the Plaintiff made things difficult by not tendering evidence about the value.”

Given the foregoing considerations, the bottom line is that the application is void of merit and is dismissed. Since the Respondent did not participate in it, he is not entitled to any costs.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF APRIL, 2021

In the presence of:-

Mr. Keter M K holding brief for Mr. Ooga for the Applicant

The Respondent is in person

Gladys - Court Assistant

Mr. Keter -I pray for a copy of the ruling and original documents produced in the matter.

Court: Application is granted.

S. M GITHINJI -JUDGE

20TH APRIL, 2021