



REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

MATRIMONIAL PROPERTY CAUSE NO 4 OF 2017 (O.S.)

PKM.....APPLICANT

VERSUS

LMK.....RESPONDENT

J U D G M E N T

1. The Applicant herein, **PKM**, brought originating summons dated 22/08/2017 under **section 17** of the *Matrimonial Property Act, No 49 of 2013*, seeking declaration of rights to the following properties –

- (i) L.R. NANYUKI/MARURA BLOCK 8/XXX (NTURUKUMA)
- (ii) L.R. NANYUKI/MARURA BLOCK 8/XXXX (NTURUKUMA)
- (iii) L.R. NANYUKI WEST/TIMAU BLOCK 2/XXXX (MATANYA MARURA)
- (iv) L.R. ONTULILI/ONTULILI BLOCK 1 KATHERI/XXXX

2. All these four properties are registered in the sole name of the Respondent, **LMK**. It is common ground that the properties were acquired during the subsistence of the marriage between the Respondent and the Applicant. That marriage was contracted on 25/05/2009 and was dissolved by a decree of divorce on 22/11/2016.

3. The specific reliefs that the Applicant seeks in the originating summons are as follows –

- (a) A declaration that the four immovable properties were acquired by the joint efforts and funds of the Applicant and the Respondent.
- (b) A declaration that the Respondent holds the properties in trust for the Applicant.
- (c) An order that the properties be either subdivided and be shared, or be sold and the proceeds of sale be shared, equally or in accordance with each party's contribution towards acquisition.

4. The originating summons is supported by the Applicant's affidavit sworn on 22/08/2017. It is the Applicant's case that both parties contributed directly and indirectly towards the acquisition of the properties. The Applicant has described the four properties as "*Matrimonial Properties*."

5. The Respondent filed a replying affidavit sworn on 19/10/2017. He asserted that he acquired the four properties through his sole efforts, and that the Applicant never made any contribution, directly or indirectly, or otherwise, towards their acquisition. In response to the replying affidavit the Applicant filed a supplementary affidavit sworn on 06/11/2017.

6. The cause went to full hearing; the parties adopted their respective affidavits as their testimony-in-chief and were cross-examined. None of them called a witness. The documents annexed to their affidavits were by consent admitted in evidence. I have considered the evidence placed before the court and the written submissions filed on behalf of the parties.

7. As already pointed out, this suit is brought under section 17 of the Matrimonial Property Act for a declaration of rights in respect to the four properties in contention between the parties. The Act was enacted –

"...to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes."

So, for the court to have jurisdiction, the properties in contention must be *matrimonial properties*.

8. The definition of *matrimonial property*” under **section 2** of the Act is the meaning assigned to that term in **section 6** of the Act which provides –

“6. Meaning of Matrimonial Property

(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 moveable property jointly owned and acquired during the subsistence of the marriage.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the court to set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.”

Matrimonial home is defined in 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.”

9. None of the two parties has claimed or asserted that the couple’s matrimonial home or homes was/were in any of the four properties in contention. There is in fact no suggestion that any of the properties is developed in any way, and none of them appears to contain any kind of home.

10. The four suit properties are of course not jointly owned by the two parties. They are registered in the Respondent’s sole name.

11. The Applicant has pleaded in the originating summons that the Respondent holds the four properties in trust for her. That also removes the properties from the definition of matrimonial property by virtue of **subsection (2)** of section 6 aforesaid of the Act.

12. So, upon the material placed before the court, the four properties in contention are not matrimonial properties within the meaning of that term found in section 6 of the Act. There is also no plea or evidence that the properties, once acquired, were improved in any way, and the Applicant has not pleaded so, nor made any claim of contribution to such improvement, in order to bring into play section 9 of the Act, which states –

“9. Acquisition of interest in property by contribution

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

13. The upshot of the above analysis is that the four properties not being matrimonial properties as defined in law, this court has no jurisdiction to adjudicate upon the Applicant’s claim. As she has pleaded trusts, her claim probably lies in the **Environment and Land Court**.

14. That being my view of the matter, I need not consider the evidence placed before the court regarding the Applicant’s contribution, or lack thereof, towards acquisition of the four properties.

15. The upshot is that the Applicant’s claim is hereby struck out for want of jurisdiction. It is so ordered.

16. In the interests of justice I will direct that parties do bear their own costs of the suit.

DATED AND SIGNED AT NANYUKI THIS 17TH DAY OF AUGUST 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 21ST DAY OF OCTOBER 2021