



**REPUBLIC OF KENYA**

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

**MATRIMONIAL CAUSE NO. 2 OF 2018 (OS)**

**EKM.....APPLICANT**

**VERSUS**

**HUM.....RESPONDENT**

**JUDGMENT**

1. The suit herein was initiated by way of Originating Summons, dated 31<sup>st</sup> August 2012, under section 17 of the Married Women's Property Act, 1882, of England, in 2012 before the Matrimonial Property Act, No 49 of 2013 was enacted.

2. In it, the applicant seeks a declaration that eight properties, being Butsotso/Indangalasia/xxxx to xxxx, registered in the name of the respondent, or that was in his custody or owned by him, were matrimonial property, and that she was entitled to half share of the same by virtue of contribution. The property had been subdivided from Butsotso/Indangalasia/xxxx. It is averred that the matrimonial home and shop were on Butsotso/Indangalasia/xxxx. It is averred that the applicant contributed to the acquisition of the property, and welfare of the family.

3. The applicant avers, in the supporting affidavit, she has narrated how she married the respondent, and how they bought the subject property, with her contributing financially, as she was in employment, and even took a loan. Subsequently, the respondent contracted other marriages, and subdivided the property and transferred it to the names of the sons of her co-wives, leaving her with nothing as she had no child of her own. She has attached documents to her affidavit to support her case.

4. The respondent concedes to the marriage and avers that the same is still subsisting. He concedes too that the property in question was bought at the time the applicant was the only wife, but asserts that she did not contribute to the acquisition directly financially, although she did in other ways. He also concedes to subdividing the property and transferring it to his children, with his other wives. He denies that he had an intention to deny the applicant her share in the property.

5. The matter was disposed of by way of *viva voce* evidence, and both sides testified, and produced documents in support of their respective positions. At the end of it, the parties filed written submissions, which I have read through and noted the arguments made.

6. The fundamental issue is with respect to jurisdiction. The proceedings herein were initiated under the Married Women Property Act, 1882, before the Matrimonial Property Act of 2013 was passed. Consequently, determination of the matter should be on the principles that underpin the Married Women Property Act, 1882. It is something of a surprise that the applicant, in her written submissions, appears to ground her case on the Matrimonial Property Act, 2013, yet there is no provision in the said Act that makes it of retrospective or retroactive application or effect.

7. Secondly, it is common ground that the parties are still in matrimony and coverture, there has been no dissolution of the customary law union between them. It is trite that division of matrimonial property can only happen after dissolution of marriage, that is after the parties have ceased to be married, practically when they have gone separate ways, so that it becomes necessary to split or share out or divide what they had acquired jointly or co-owned. The Court of Appeal stated so in *Peter Ndung'u Njenga vs. Sophia Watiri Ndung'u* [2000] eKLR (Kwach, Shah & O'Kubasu J), during the regime of the Married Woman's Property Act, 1882, that there was no jurisdiction to alienate suit lands between spouses during lifetime or coverture, and that a suit seeking orders on division of matrimonial property under those circumstances ought to be dismissed.

8. There are echoes of that under the Matrimonial Property Act, 2013. Section 7 of the Matrimonial Property Act provides that division of matrimonial property is to be done if the parties divorce or their marriage is otherwise dissolved. The said provision states:

*"7. Ownership of matrimonial property*

*Subject to section 6(3), 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."*

9. That provision has been interpreted by the courts to mean that there is no jurisdiction for the courts to alienate matrimonial property during coverture. In *TMW vs. FMC* [2018] eKLR (Nyakundi J), the court declined to divide matrimonial property on the basis that the parties needed to prove divorce. In *DLG vs. LVG* [2019] eKLR (Machelule J), the court declared that no court has jurisdiction to hear and determine a dispute between spouses seeking division of matrimonial property before divorce or dissolution of the marriage between them. In *MNH vs. FHM* [2018] eKLR (Nyakundi J), the court declined to divide property during coverture, and dismissed the suit.

10. I believe that from what I have said so far it is plain that there is no jurisdiction to divide matrimonial property in this case, as the marriage has not been dissolved. I will not venture to address the rest of the issues raised, for that will be an academic. As there is no jurisdiction to alienate property during coverture, such as in the present case, the suit before me is premature and incompetent. Consequently,

I do hereby dismiss the same. Each party shall bear their own costs.

**DELEIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2021**

**W MUSYOKA**

**JUDGE**