



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF EKNYA

AT MALINDI

HCC NO. 8 OF 2017

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT

BETWEEN

PB.....APPLICANT

VERSUS

AWB.....RESPONDENT

Coram: R. Nyakundi, Judge

Mr Gicharu Kimani for the Applicant

JUDGMENT

The parties to this cause were married on the 9.12.1986 and they later divorced on 26.3.2014. Prior to the marriage the parties cohabited and were blessed with two issues of the marriage who have all attained the age of majority.

The applicant filed an Originating Summons in which he sought the following orders from the court.

- (i) That the scheduled properties Title No. Kiambaa Kihara/xxxx, plots at Mtwapa Section iii being plot xxxx (Original Number xxx xxx) Plot No R xxxx (Original Number xxxx/xx and plot No. 3774 Original Number xxxx/xx including a 4 Bedroom Maisonette built therein with a swimming pool.**
- (ii) That the Honorable Court be pleased to order that that the said property be valued and sold and the net proceeds be divided equally between the parties.**
- (iii) That in the alternative the Honorable court does allow the respondent and grant Title Number Kiambaa/Kihara/xxxx and the applicant the three plots at Mtwapa**
- (iv) That the Honorable Court do order that the respondent do provide and discloses comprehensive list of properties, shares and Bank account she may hold and own both locally and outside the jurisdiction of this court. That the same accounts to be shared equally between the parties.**

In support of the (O.S) the applicant filed an affidavit and also gave oral testimony in court. The respondent apparently is domiciled in Switzerland. Despite the efforts made to serve the respondent through the Ministry of Foreign Affairs, there was no proper affidavit of service. It also emerged that the applicant was not seized of the respondent last known email address to facilitate effective service.

In a presumption made in this proceedings, vide a letter dated May 23, 2019, there has been no affidavit service of the O.S upon the respondent. The court is not sure whether the reference letter **MFA/ LEG/xx/xxx/Vol TYA** is still lying in the Offices of the Permanent Representative Mission in Geneva. Nevertheless, the court show it prudent to determine the matter on the issues raised in the O. S

Determination

Having considered the O. S and the unchallenged evidence by the applicant the following issue arises for determination.

Whether the schedule of inventory of the properties pleaded in the originating summons are matrimonial property capable of being distributed to the applicant

whether the applicant is entitled to a beneficial interest in each of the properties under the matrimonial property Act.

In determining these questions one has to look at the provisions of the Act and the trending jurisprudence on such matters.

The Operative Act is the matrimonial property Act No. 49 of 2013 which provides as follows;

“Under Section 6 (i) of the Act, matrimonial property is defined a the matrimonial home or homes, household goods and offices in the matrimonial home or homes, or any other immovable and movable property jointly owned and acquired during the marriage. Whereas Section 7 of the same Act provides that ownership of Matrimonial Property depends on each spouse’s contribution to it Subject to Section 6 (b) 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 on that marriage is otherwise dissolved”.

In the same Act under Section 9, it provides and recognizes contribution through improvements of property acquired before or during the marriage in the following terms that:

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but one 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”

Further under Section 14 of the Act it provides that

“Where matrimonial property is acquired during marriage:

(a) In the name of the spouse, there shall be a rebut presumption that the property is held in trust for the other spouse and

(b) In the names of the spouses jointly there shall be rebut presumption that the beneficial interest in the matrimonial property are equal”

From the facts of this case, this is a matter destined for the division of matrimonial property between the applicant and the respondent. Therefore, under Article 45 (3) of the Constitution it states:

“the parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at dissolution of the marriage”.

What the construction of the constitution reminds the courts is to take an approach in determining the proprietary interests in matrimonial division that there is an equal entitlement of the interest. The court in its assessment will treat matrimonial properties individually and in accordance with the provisions of Section 17 of the Act taking into account the form of Contribution of each spouse.

The factors referred to the Act include, the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservations or improvement of any property, whether or not such property has, cease the making of the financial contribution, ceased to be property of the spouse or earlier of them to be taken into account. The payment of money to maintain or increase the value of the property or any part thereof, the provisions of money, including the earning of income for the purposes of the marriage or cohabitation. Finally, any such factors in circumstances which in the opinion of the court. The justice of the case requires to be taken into account.

In the present case it seems like from the evidence by the applicant, three of the properties listed namely **LR xxxx/x xxxx/xx** and **xxxx/xx** are still registered in the name of **AE and FAH** both of P. O. Box xxxxx-Mombasa.

The applicant never exhibited any indenture or iota of evidence that there was a conveyance which transferred the interest in those parcels of land either to himself, the respondent or both to specifically bring them within the **Matrimonial Property Act of 2013**.

The difficulty with such evidence is however that it challenges the applicant’s claim on the property for the court to consider both monetary and non-monetary contribution, so that the division of the properties can be undertaken within the legal framework of the Act.

In any event **Section 7** vests ownership of matrimonial property in the spouses according to the contribution of each spouse towards its acquisition. That means that the applicant was under a duty to show that he made significant financial or non-financial contribution towards the purchase of these properties. This court notes that the properties in the aforementioned schedule cannot be listed as free property that both spouses jointly own or are in the individual names presumably one to hold in trust for the other.

It is this court's finding that in the circumstances and upon careful consideration of the evidence presented in this case, the applicant has not proved that, on a balance of probabilities, that at the time of their marriage any acquired or purchased the properties from the registered owners. As a result, this court cannot go further to consider the applicants financial or non-financial contribution to these properties. That in and of itself, belies the applicant's evidence which constrains this court to make any definitive findings in respect of the three parcels of land.

What that boils to is for the applicant failure to proof on a balance of probabilities that he is entitled to equal share or any other proprietary interest in the properties not registered in their own names. Indeed, no explanation was given on whose custody are the certificate of titles.

As regards the property **LR Kiambaa/Kihara/xxxx** contained in the indenture and certificate of search it bears details of an absolute interest of title registered in the name of the respondent with effect from 24.8.1999. The applicant is of the view that he is the owner of 50% of this property. He admitted that the title for the land reflects the respondents name as the sole owner. He therefore sought to explain that all of those properties are assets of the family that the respondent held it in trust and for the benefit of the family. This court notes however, to observe that having regard to the nature of this matter, and the intertwined issues involved, the applicant would have to adduced further evidence, to prove that on a balance of probabilities, he acquired the land jointly with the respondent during the marriage.

On the Bank accounts the applicant averred that the respondent is in exclusive possession of accounts held both locally and abroad with substantial interest to constitute matrimonial property. He stated that the court should order full disclosure of those accounts from the respondent.

In my concluded view there is no cogent evidence pressured to this court regarding the names of the accounts and in which banks they are domiciled. Furthermore, there were no copies of print outs from the presumed Banks holding the couples monetary reserve capable of being shared under the provisions of the matrimonial property Act, Finally, it is inconceivable that the parties solemnized their marriage on **9.12.1986**.

Thereafter they both cohabited and lived in Kenya until the dissolution of the marriage on 26.3.2014. Its apparent from the evidence that they established their matrimonial home at Mtwapa, in Kilifi County. The presumption is that the applicant pooled their resources together to acquire that property with an express or implied intention that the property should become their joint property.

Based on the unchallenged evidence of the applicant their marriage was dissolved by a court of Law. The applicant shall therefore be entitled to a share in the matrimonial property located at Mtwapa despite the absence of certificate of title.

In my view on dissolution of marriage the applicant would therefore be entitles to 50 % of the value of the matrimonial property bearing in mind the factors set out in Section 9 of the matrimonial property Act.

Finally, this court wishes to make it clear that an application for the valuation of the property herein is to be made upon the applicant availing the instruments and indenture on ownership in which the matrimonial home has been constructed.

This is informed on the applicants prima facie evidence that sufficiently demonstrates that during the subsistence of their marriage he had cohabited with the respondent at Mtwapa property. In keeping with the principles on the standard of proof and taking all the issues into considerations this court has concluded that the applicant has a legal interest in the matrimonial property in particular where the home with all its improvements was established by the parties. From this brief exposition it is understandable that the form of title may be either in the custody of the respondent or its tenure had not been transferred the ultimate owners herein being the applicant. In the instant case it is irrebuttable presumption of law that matrimonial property exists as a fact. This drives me to conclude that the property ought to be subjected to distribution in equal shares. For the foregoing reasons, it connotes in the context of the initial burden of the applicant to make the following orders.

a) That the applicant is entitled to 50% interest in the matrimonial property at Mtwapa.

(b) The applicant would have been entitled to 50% interest in the scheduled property, duly registered in the name of a third party once proven that the legal interest was transferred during the subsistence of the marriage but before the divorce decree was issued on 26.3.2014

(c) The applicant is not entitled to any share of undisclosed particulars of Bank accounts supposedly held in the name and style of the respondent

(d) That valuation of the real property to which the applicant is entitled is to be done by a valuer agreed by both parties. The other registered properties in the names of A and F remain in the realm of the third parties unless proven that a conveyance or a subdivision took place to transfer the parcels of land in their joint names or either of them in the course of their marriage.

In light of the above in spite of the scanty evidence the Originating summons partially succeeds with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF DECEMBER, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Gicharu Kimani for the Applicant

2. The Applicant PB

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