



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL SUIT NO. 1 OF 2018 (O.S)**

**IN THE MATTER OF THE MARRIAGE ACT 2013**

**AND**

**IN THE MATTER OF SECTION 7 OF MATRIMONIAL PROPERTY ACT OF 2013**

**BETWEEN**

**DMW.....APPLICANT**

**AND**

**LMM.....RESPONDENT**

**JUDGMENT**

The applicant and the respondent are respectively husband and wife; they married in 1996 under Kikuyu customs but later, in 2003, solemnised their union under the African Christian Marriage and Divorce Act, cap. 151.

By an originating summons dated 12 January 2018, the applicant sought this honourable court's declaration that the following parcels of land are matrimonial properties and the same be shared out between him and the respondent:

- a. LR No. Nyeri Municipality Block xx
- b. LR No. Nyeri Municipality Block xx

Meanwhile, he asked the court to restrain the respondent from, inter alia, alienating, disposing of or interfering in any other way whatsoever with the properties pending the determination of his summons.

In the affidavit he swore in support of the summons, the applicant deposed that that these assets were purchased through their joint efforts in the course of their marriage although he made a larger contribution towards their acquisition.

The applicant further swore that he and his wife separated in 2007 and since then, more than ten years later, they had never cohabited or lived together. As a matter of fact, the magistrates' court at Nyeri had decreed in Divorce Cause No. 15 of 2014 that the two of them were no longer bound to live together.

The respondent replied to the summons by of way a replying affidavit which she swore on 5 February 2018 and stated that the question of division of matrimonial properties between them had already been addressed in the divorce cause which the applicant made reference to. She denied that the respondent made a greater contribution to the acquisition of these properties; instead, so she deposed, she had single-handedly built a family house on these properties and it is in this house that she lives with her two children. The applicant, on the other hand, lives on a parcel of land known as Title No. *[particulars withheld]*.

When the suit came up for hearing both parties were in agreement on what I suppose are the fundamental facts upon which the applicant's summons revolves; for instance, they agreed on the fact of their marriage; they also agreed that they had separated. As matter of fact, the respondent produced a decree in Divorce Cause No. 15 of 2014 showing that they had been judicially separated and were no longer bound to live together.

The parties were also in agreement that the properties in issue were matrimonial properties purchased with their joint efforts during their marriage. They also added that there were other properties which, apparently, were omitted from the applicant's summons; although the respondent took issue with this omission, their inclusion may not have made any difference at the end of the day when one considers the Matrimonial Property Act, 2013 which is the relevant law on this subject. This should be the ideal point to address it; section 7 of that Act states as follows:

**Section 7 of the Matrimonial Property Act 2013, Act says: -**

**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.**

The definition of 'matrimonial property' is found in the preceding section which reads as follows:

**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 movable 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 and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.**

It is common ground, as earlier noted, that the properties in issue are matrimonial properties and thus subsection (2), (3) and (4) would not apply to their dispute for the reasons that none of the properties is held in any sort of trust and neither was there any agreement prior to the parties marriage to determine their property rights.

Section 7 of the Act is clear that matrimonial property can only be divided between spouses upon divorce or dissolution of their marriage. No doubt, Mr King'ori, the learned counsel for the applicant is aware of the import of this provision of the law because he not only cited it in his submissions but went ahead to suggest that the court should ignore it and 'invoke its inherent jurisdiction' and distribute the properties as sought in the summons. To quote him, the learned counsel said:

**Your Lordship, as earlier submitted, this is a case where the parties have been separated since the year 2007. They have been under judicial separation since the year 2016. The applicant humbly prays that this honourable court invokes its inherent powers and orders for division of the two properties in the joint names of the plaintiff and defendant to sever the proprietorship in common.**

With due respect to the learned counsel, without a decree absolute of divorce or, in the absence of any other proof that the marriage between spouses has otherwise been dissolved, matrimonial property cannot be divided between them: the essence of section 7 of the Act is that it does not matter how long a duly married couple may have been separated and, irrespective of the period of separation, the court cannot purport to exercise its inherent jurisdiction and order for division of the property between them. In any event, it is trite that where either by express provision of the statute or by its necessary implication a particular issue has been addressed, a court of law cannot ignore it under the guise of exercising its inherent jurisdiction; this notion only comes into play where the law is lacking in some respect in which event the court intervenes to meet the ends of justice. Put another way, the court cannot deliberately ignore the express provisions of the Act in the name of exercising its inherent jurisdiction.

There is evidence that the applicant petitioned for divorce; the Divorce Cause No. 15 of 2014 was instigated by him. It was, however, dismissed; had the petition succeeded the applicant would have had a chance in the present suit but, unfortunately for him, as long as the magistrates' court's decision dismissing his petition is not overturned and the marriage dissolved, the applicant is bound by the knots he tied with the applicant; with the subsistence of their marriage, their matrimonial properties remain indivisible and this is the reality that both of them have to live with.

I was not invited to address article 45 of the Constitution on family and for our purposes sub-article 3 thereof on the marriage partners' equal rights to property at the time of the marriage, during the subsistence of the marriage and at the dissolution of the marriage. I feel obliged to say something about this constitutional right to married couples because it is relevant to the issue at hand. Of particular relevance is, as noted, article 45 (3) which reads as follows:

**45.(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.**

My understanding of the provision of the mother law is that there is nothing in it that subscribes to sharing out of the matrimonial property between married couples during their marriage. If anything, **Article 45** promotes the unity of a family as a natural and fundamental unit of society necessary for social order and therefore deserving state recognition and protection. (See art. 45(1) and (2)). While the constitution recognises that married partners enjoy equal rights to matrimonial property, nowhere does it suggest that division of matrimonial property between them while their marriage subsists is the only way or one of the ways through which these rights can be actualised

The short answer to the applicant's summons, therefore, is that it is misconceived; I hereby dismiss it with costs.

**Signed, dated and delivered in open court this 20<sup>th</sup> day of September, 2019.**

**Ngaah Jairus**

**JUDGE**