



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 84 OF 2018 (OS)**

**JJC.....APPLICANT**

**-VERSUS-**

**SC.....RESPONDENT**

**JUDGMENT**

[1] The Applicant, JJC, moved the Court vide her Originating Summons dated **19 December 2018** pursuant to **Section 17** of the **Married Women Property Act, 1882** and **Section 3** of the **Judicature Act, Chapter 8** of the **Laws of Kenya**, seeking the determination of the following questions:

[a] Whether the land known as SERGOIT/KARUNA BLOCK xxxx measuring 11.36 acres and land known as SERGOIT/KARUNA BLOCK xxxxx measuring 19.59 acres are matrimonial properties acquired with the contribution of the Applicant during the subsistence of the matrimonial relationship between the Applicant and the Respondent;

[b] Whether in view of the fact that the Respondent has partially disposed of portions comprised in the parcels of land known as SERGOIT/KARUNA BLOCK xxxxxx measuring 11.36 acres and SERGOIT/KARUNA BLOCK xxxxxxxx measuring 19.59 acres without her consent, the Applicant is entitled to her due share of the remaining portion;

[c] Whether the Applicant is entitled to vacant possession of her share of the parcels of land known as SERGOIT/KARUNA BLOCK xxxxx measuring 11.36 acres and land known as SERGOIT/KARUNA BLOCK xxxxxx measuring 19.59 acres;

[d] Whether the Respondent should execute transfer instruments in favour of the Applicant; and in default whether the Deputy Registrar should execute the same;

[e] Whether costs should be ordered in favour of the Applicant.

[2] In the Supporting Affidavit filed along with the Originating Summons, the Applicant averred that the Respondent is her husband, and that their marriage, which was solemnized on **23 April 1993**, was blessed with 4 issues, namely:

[a] DJ

[b] DJS

[c] SKS, and

[d] SJS.

[3] The Applicant further averred that, during the subsistence of their marriage, they acquired and retained some properties from her father-in-law who is now deceased; and that the Respondent, has begun to arbitrarily dispose of part of the said properties without any due regard to her welfare or the welfare of their children. She added that her attempts to seek the intervention of local authorities, the church and relatives to have the Respondent restrained have been defied by the Respondent; hence this suit.

[4] In his Replying Affidavit sworn on **25 February 2019**, the Respondent conceded that the Applicant is his wife and that they solemnized their marriage on **23 April 1993**. He further conceded that indeed they have been blessed with four issues as averred by the Applicant. He

however denied that the properties that form the subject matter of this suit are matrimonial property. According to him, they acquired no property during the subsistence of their marriage; and that they have always lived in rental premises due to financial constraints. It was further the contention of the Respondent that the two pieces of land, namely SERGOIT/KARUNA BLOCK xxxxx measuring 11.36 acres and SERGOIT/KARUNA BLOCK xxxxxx measuring 19.59 acres (hereinafter “the Suit Properties”), are ancestral land belonging to his deceased father, **SSC**, who died in the year **2012**. Accordingly, he asserted that the Suit Properties would by law devolve to all the beneficiaries of the deceased, some of whom are residing on the properties; including his mother who has a life interest over the same.

[5] The Respondent denied having sold any part of the Suit Properties, contending that he could not sell what was not his. He further asserted that he has always been a responsible father to his children and that he has supported them in every way possible, including paying for their education, as any normal father would. He further pointed out that it was the Applicant who chose to abandon their marriage and is to blame for their inability to jointly acquire properties for themselves. He urged the Court to dismiss the application contending that it is an abuse of the process of the Court as it has been brought under an inapplicable law, namely the **Married Women Property Act of 1882**.

[6] The Applicant filed a Further Affidavit on **1 March 2019** to respond to some of the matters deposed to by the Respondent in his Replying Affidavit. She reiterated her assertion that the Suit Properties were indeed acquired by them during the subsistence of their marriage, but through transmission or inheritance from her father in law, even though the succession process is yet to be initiated to legally vest ownership in their joint names. She maintained that they have always resided on and cultivated the Suit Properties, pointing out that she is not claiming the entire parcels, but a share of what is duly hers by virtue of having been given to them jointly with the Respondent by the deceased. She exhibited photographs and other annexures in support of her assertions.

[7] Pursuant to the directions dated **28 May 2019**, the application was canvassed by way of written submissions; and hence the written Submissions were filed herein on **19 June 2019**. Learned Counsel for the Applicant, **Mr. Omusundi**, referred the Court to the Constitution and international conventions such as **Article 6(1)(h) of the International Convention on the Elimination of All Forms of Discrimination Against Women; Article 16(1) of the Universal Declaration of Human Rights and Article 7(d) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa** to buttress his argument that the Applicant is entitled to an equitable share of the property acquired during their marriage with the Respondent. He also relied on **Peter Mburu Echaria vs. Priscillah Njeri Echaria [2007] eKLR** and **E.N.K vs. J.N.K [2015] eKLR** in urging the Court to find in favour of the Applicant.

[8] Counsel for the Respondent, **Ms. Kibichiy**, on her part stressed the point that the Suit Properties form part of the estate of the late **SSC** over which his widow enjoys a life interest by virtue of **Section 35 of the Law of Succession Act**. She submitted that the same cannot be apportioned until a confirmed grant is issued distributing the estate to the deceased’s rightful dependants/beneficiaries. She also took the stance that, under **Section 29 of the Law of Succession Act**, a daughter-in-law is not recognized as a dependant; and therefore, that the Applicant’s prayers in her Originating Summons are untenable. She relied on **M.A.A vs. A.R [2018] eKLR** in support of her submissions.

[9] Having carefully considered the evidence placed before the Court in this matter in the light of the written submissions filed herein, the issues for determination can be safely summarized thus:

[a] Whether the Suit Property is indeed the parties’ matrimonial property;

[b] Whether the said property is available for distribution as sought by the Applicant.

[10] Before engaging in a discussion of the two issues, it is imperative for me to address an aspect of the case that touches on the competence of the suit. This aspect has to do with the applicability of the **Married Women’s Property Act, 1882** to this suit. It is noteworthy that the Originating Summons is expressed to have been brought under **Section 17 of the Married Women’s Property Act, 1882** as well as **Section 3 of the Judicature Act**; and, naturally, Counsel for the Respondent took issue with that, urging the Court to find that the suit is entirely misconceived and therefore an abuse of the process of the Court.

[11] Needless to say that, for a long time, the **Married Women’s Property Act** was applicable in this jurisdiction as one of the English statutes of general application, imported by dint of **Section 3 of the Judicature Act**. The situation has however changed with the enactment of the **Matrimonial Causes Act, 2013** and, in this respect, I can do no better than to adopt the posturing taken by the Court of Appeal in **P B W vs. J W C [2017] eKLR** thus:

“The summons leading to this appeal was filed on 21<sup>st</sup> October 2011 under the **Married Women’s Property Act, 1882**, which was a statute of general application in Kenya (see I v. I [1971] EA 278 and **Karanja v. Karanja [1976-80] 1 KLR 389**) During the pendency of the summons, Parliament enacted the **Matrimonial Property Act, 2013** which came into effect on 16<sup>th</sup> January 2014. By **Section 19 of that Act**, the **Married Women’s Property Act** ceased to apply in Kenya. When the summons was heard and determined on 9<sup>th</sup> July 2015 therefore, the **Matrimonial Property Act** was in force...”

[12] Thus, it was misguided for the Applicant to rely on the **Married Women’s Property Act, 1882**. I however do not share the view that that fact alone renders the suit incompetent. The Court must always have its eyes fixed on the justice of the case as opposed to technicalities, this being a dictate of **Article 159(2)(d) of the Constitution**. In this instance, I do not consider the error fatal to the suit; and I so find.

**On whether the Suit Property is matrimonial property:**

[13] Whether or not a piece of property is matrimonial property is to be determined from the prism of the definition provided in **Section 6 of the Matrimonial Property Act, 2013**. It states thus:

“(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.”**

[14] The parties herein are in agreement that the two pieces of land that form the subject of this suit belong to a deceased person, namely **SSC**, who was the father of the Respondent and therefore the father-in-law of the Applicant. The Respondent exhibited as annexures to his Repling Affidavit copies of Certificates of Official Search to that effect. Accordingly, it cannot be said that the Suit Property was acquired by the couple during the subsistence of their marriage; not even by way of inheritance, granted that the process of succession and the **Law of Succession Act** is yet to commence. It matters not that there is in existence a document to prove that the properties were given to the Applicant by her husband, the Respondent, as a gift *inter vivos*. The fact is that the two pieces of land did not belong to the Respondent as at **25 February 2016** when the document marked Annexure JJC 6 was made. Such a gift could only have been validly given by the deceased, the registered owner of the property. Then there is the life interest of the widow to consider, as well as the competing rights of the other beneficiaries of the estate of the deceased. I would thus agree with the holding in **M A A vs. A R [2018] eKLR** that in such circumstances, the subject property cannot be said to have been validly given as a gift to the Applicant by the Respondent. The Court in that matter observed that:

**“...Succession has not been done. Although the parties have lived in the premises for over 37 years, the property is yet to be acquired by the Defendant. It forms part of the estate of the late A. The Defendant cannot be held to have acquired that property.”**

**Whether the Suit Property is available for distribution:**

[15] In the circumstances aforementioned, the inevitable conclusion that I come to is that the Suit Property is not matrimonial property for purposes of **Section 6** of the **Matrimonial Property Act**; and therefore, not available for distribution between the Applicant and the Respondent herein.

[16] There is another reason why the application is premature; namely that the marriage between the parties is yet to be dissolved. **Hon. Nyakundi, J.** expressed the following viewpoint in **T M W vs. F M C [2018] eKLR** which I find apt:

**“In the foregoing and in view of the circumstances of the case at hand, the evidence on record shows that the marriage between the parties herein is still alive and subsisting. The fact that the petitioner seems to have taken a gap period or what I can refer to as sabbatical leave out of the matrimonial home by itself cannot be equated with divorce or dissolution of the marriage. It is very clear from the provisions of the matrimonial property [Act] that matrimonial property can only be distributed where the parties to a marriage have officially divorced.”**

[17] In the result, I find the Originating Summons dated **19 December 2018** premature and would accordingly strike it out with an order that each party shall bear own costs of the litigation.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 24<sup>TH</sup> DAY OF OCTOBER 2019.**

**OLGA SEWE**

**JUDGE**