



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL SUIT NO. 6 OF 2012 (OS)
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
AND
IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT, 1882
POM.....APPLICANT
VERSUS
MNK alias MNP.....RESPONDENT
RULING

1. The Court of Appeal in its judgment delivered on 25th January 2019 found that the appellant POM and the respondent MNK alias MNP were married under the principle of presumption of marriage, and that plot No. 29 within Riruta/Dagoretti/[particulars withheld] constituted matrimonial property whose acquisition and development they had jointly contributed to. The court declared that each of the two was equally entitled to the property and the developments thereon.
2. The applicant filed a motion dated 9th July 2019 before this court under **sections 1A, 1B, 3, 3A and 63** of the **Civil Procedure Act** and **Order 22 rule 51** of the **Civil Procedure Rules** seeking the execution of the orders of the Court of Appeal. In particular, he asked for the appointment of M/s Tysons Limited, or any other agreeable estate management company, to be collecting rent and sharing it equally between the parties; and the appointment of a surveyor to subdivide the property into two equal portions to enable each party to get his/her share.
3. The respondent opposed the application through a notice of preliminary objection and a replying affidavit. The grounds of the objection were that this court was *functus officio* and that it lacked jurisdiction to hear and determine the application. In the replying affidavit, it was stated that the Court of Appeal had not ordered the division of the property, the management of the property or the sharing of rent.
4. The respondent, being aggrieved by the decision of the Court of Appeal, had sought certification and leave to appeal to the Supreme Court.
5. Mr. Siagi for the applicant and Mr. Muthiga and Mr. Agwata for the respondent filed written submissions on the application and objection, and addressed the court on the same.
6. In my view, the Court of Appeal declared the rights of the applicant and the respondent to plot No. 29 within Dagoretti/Riruta/[particulars withheld] which was contested. It declared that each was entitled to half of the property together with its developments made and being thereon. This was in line with **section 17** of the **Matrimonial Property Act No. 49 of 2013** that provides as follows:-

“17. Action for declaration of rights to property

(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

7. If the applicant seeks that the property be distributed in accordance with that declaration he has to bring a fresh suit, but that is only after the marriage that the Court of Appeal found to exist between him and the respondent has been dissolved. Indeed **section 7** of the **Matrimonial Property Act** states that -

“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.”

8. The Court of Appeal, I think, did not order the division of the matrimonial property between the applicant and the respondent because their marriage was still subsisting. The parties were still enjoying unbroken coverture, and therefore the court lacked jurisdiction to subdivide the co-owned (matrimonial) property (**C.K. –vs- A.G.M. [2018]eKLR**).

9. I also agree with the respondents that the Court of Appeal merely declared the rights of the parties in relation to the property. The declaration had no coercive power (**Johana Nyokwoyo Buti –v- Walter Rasugu Omariba (suing through his attorney Beutah Onsomu Rasugu & 2 Others [2011]eKLR)**). The legal position and rights of the parties were declared, and there was no order which could be enforced against the respondent. It follows that the notice of motion by the applicant was misconceived.

10. I hope I have said enough to show that the notice of motion dated 9th July 2019 cannot be allowed because of want of jurisdiction, and also because it was misconceived because the Court of Appeal did not give orders capable of execution. For these reasons, the objection taken out by the respondent succeeds with costs, and the application by the applicant is dismissed with costs.

DATED and DELIVERED at NAIROBI this 28TH day of NOVEMBER, 2019.

A.O. MUCHELULE

JUDGE