



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC CAUSE NO. 138 OF 2019

DLG.....APPLICANT

VERSUS

LVG.....RESPONDENT

RULING

1. The applicant DLG and the respondent LVG. are a married couple, and each filed a divorce cause at the Chief Magistrate's Court at Milimani seeking to divorce the other. The causes are contested. In the application filed before the court on 16th July 2018, the applicant asked that, among other things, the funds lying in the joint bank accounts in two banks (Guaranty Trust Bank and Bank of Baroda (Kenya) Ltd) be shared equally among them. The total amount is Kshs.57,250,000/=. The respondent filed a notice of preliminary objection to the application, on the basis that there can be no division of matrimonial property between the couple until the divorce cause has been concluded and the marriage dissolved.

2. At that point the applicant filed the present motion on 31st July 2019 before this court seeking the withdrawal and transfer of the divorce cause from the subordinate court to this court. She relied on the preliminary objection filed before that court, and stated that the amount sought to be shared is in excess of Kshs.20,000,000/= which is the maximum pecuniary jurisdiction of that court.

3. The respondent, once again, filed a preliminary objection to the application. One, that this court cannot hear and determine the issue relating to the division of matrimonial property before the dissolution of the marriage and, two, that a request to withdraw the cause ought to have been made before the trial court.

4. Mr Kimathi represented the applicant and Mr. Quadros represented the respondent.

5. Under **section 2** of the **Marriage Act, 2014** a party seeking the dissolution of a marriage has to file a petition before a Resident Magistrate's court established under **section 3** of the **Magistrate's Courts Act, 2015**. The divorce cause between the applicant and the respondent is therefore properly before the magistrate's court.

6. It appears from the application before the trial court that the applicant seeks the division of matrimonial property between them; the division of the money (Kshs.57,250,000/=) lying in their joint accounts. She wants half of that money immediately. Under **section 7** of the **Matrimonial Property Act, 2013** –

“7. 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 marriage between the applicant and the respondent has not been dissolved. They have not divorced. No court, this one or the trial court, has the jurisdiction to divide or share their matrimonial property.

7. Under **section 17** of the **Act**, 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. The application may be made as part of a petition in a matrimonial cause or may be filed not withholding that a petition for divorce has not been filed.

8. It would appear that the applicant did not in the petition or application seek the declaration of rights to the money held in the joint accounts. She sought, in the application, the division of the money to be able to access half of it. That is a prayer that the court cannot grant

as the marriage still subsists.

9. Under **section 18** of the **Civil Procedure Act** the High Court may on application of the parties, or on its own motion, at any stage, transfer any suit pending before a subordinate court to it for trial and disposal. It may withdraw any suit pending before the subordinate court to it and hear and determine it.

10. Lastly, I appreciate that under **section 7(a)** of the **Magistrate's Courts Act, 2015** the maximum pecuniary jurisdiction of a Chief Magistrate's Court is Kshs.20,000,000/=. Where a matter is of value of Kshs.57,250,000/=: that is beyond the court's powers.

11. Accordingly, this court has no power to transfer or withdraw to itself the divorce cause before the trial court as that is the proper court under **section 2** of the **Marriage Act, 2014** to hear and determine it.

12. Secondly, neither the trial court nor this court has jurisdiction to hear and determine a dispute between spouses seeking the division of matrimonial property before the divorce or dissolution of the marriage between them.

13. Thirdly, the applicant is at liberty to come before this court by way of originating summons (and not by motion as she has done before the trial court) under **section 17 of the Matrimonial Property Act, 2013** to seek the declaration of her rights in relation to the Kshs.57,250,000/= in their joint accounts, or in respect of any matrimonial property that she wishes to claim.

14. In conclusion, the preliminary objection of the respondent is sustained. The motion is struck out for want of jurisdiction.

15. This is a family dispute. I make no order as to costs.

DATED and DELIVERED at NAIROBI this 21ST day of NOVEMBER 2019.

A.O. MUCHELULE

JUDGE