



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL CASE NO. 6 OF 2017**

**JAO.....PLAINTIFF**

**VERSUS**

**JMA.....DEFENDANT**

**JUDGMENT**

[1] The applicant/plaintiff vide the originating summons filed herein on 24<sup>th</sup> November 2017, seeks a determination of several questions mostly in relation to parcels of land described as No. Kanyamwa/K/Kwandiku/[...] (plot NO.[...]) and No. Kanyada/K/Kalanya/[...] (plot NO.[...]) registered in the name of the respondent/defendant.

[2] In that regard, the applicant seeks a declaration on whether the said parcels of land are the property of both herself and the respondent in equal shares so that the records at the land registry should be amended and/or altered to include her as an equal owner or that there be a declaration that she is entitled to an equal share of the proceeds of the two parcels of land.

[3] The applicant also seeks a declaration that the two parcels of land are jointly owned by herself and the respondent for the purposes of the **Matrimonial Property Act, 2013** and that her intended eviction from the said parcels be declared null and void.

[4] The application is based on the grounds contained in the applicant's supporting affidavit dated 24<sup>th</sup> November 2017, as fortified by her statement filed herein on the same day.

The respondent opposed the application on the basis of the averments in his replying affidavit dated 5<sup>th</sup> February 2018, and filed herein on 6<sup>th</sup> February 2018 as well as his statement filed herein on the same 6<sup>th</sup> February 2018.

[5] At the hearing of the application by way of viva voce evidence both the applicant and the respondent fully relied on the contents of their respective affidavits and statements. None of them called witnesses.

[6] From the pleadings and the evidence, it was apparent that the basic issue arising for determination was whether the disputed parcels of land (i.e. plots No.[...] and No.[...]) form part of the property acquired by the applicant and respondent during the existence of their matrimony.

[7] It is not disputed that the applicant and the respondent entered into a marriage relationship in or about the month of December 1992 under the Luo customary law and that the relationship developed a crack and eventually broke down with a formal dissolution order made on the 9<sup>th</sup> May 2016 by the magistrate's court at Homa Bay at the instance of the respondent.

The applicant was aggrieved by the order and filed an appeal at this High Court which by its order of the 6<sup>th</sup> November 2017, upheld the dissolution of marriage but varied the restraining order issued against the applicant and ordered her to commence proceedings for distribution of matrimonial property within thirty days from the date of the order.

[8] Apparently, this suit was filed on the 24<sup>th</sup> November 2017, in compliance with this court's order of the 6<sup>th</sup> November 2017. Its essence is for a declaratory order that plots No.[...] and No.[...] are matrimonial property available for distribution as such between the applicant and the respondents.

[9] In her oral evidence, the applicant, **JAO (PW1)**, indicated without dispute from the respondent that their matrimonial home was at Got-Rabuor-Homa bay town on plot No.[...] which belonged to them but registered in the name of the respondent. She contended that the property was purchased in 1996 jointly by herself and the respondent.

[10] With regard to plot No.[...], the applicant indicated without dispute that it is situated in Ndhiwa. She contended that it was acquired during the existence of the marriage between her and the respondent and that it was jointly purchased by them but registered in the name of the respondent.

[11] The applicant also mentioned another property described as plot No.[...] Kabar West/Kamagaga and implied that it was part of the matrimonial property but registered in the name of the respondent.

The respondent, acknowledged the existence of the third plot in his cross examination of the applicant but vehemently denied that plots No. [...] and No.[...] were jointly purchased by the applicant and himself.

He contended that these two plots were purchased solely by himself prior to his marriage with the applicant and do not therefore form part of the matrimonial property.

[12] It was however, indicated by the respondent that the development on plot No.[...] occurred during the existence of the marriage and that the purchase of plot No.[...] was completed in the year 2000, after which he obtained the title in his name.

[13] The **Married Women's Property Act [1882]** was the guiding law with regard to Matrimonial Property in Kenya until recently when it was replaced by the **Matrimonial Property Act, 2013**.

Indeed, the applicant filed the subject originating summons under the **Matrimonial Property Act, 2013**.

The Married Women's Property Act, 1882, was of course an Act of general application in Kenya as was held in **I –VS- I [1971] EA 278** and **KARANJA –VS- KARANJA [1976] KLR 307**.

Under **Section 17** of the **Act**, it was provided that in any question between husband and wife as to the title to or possession of property, either party could apply by summons or otherwise in a summary way to any judge of the High Court of justice and that the High Court may make such orders with respect to the property in disputes, and to the costs of and consequent on the application as the court thinks fit.

[14] The jurisdiction of the court over family assets under the provision was, as stated by Lord Denning in **HINE –VS- HINE (1962) 1 KLR 1124**, entirely discretionary such that the court's discretion transcended all rights, legal or equitable, and enabled the court to make such order as it thinks fit, meaning that the court was entitled to make such order as appears to be fair and just in all the circumstances of the case.

[15] However, the house of Lords, in **PETTIT –VS- PETTIT [1969] 2 KLR 966**, recognized that the Married women's Property Act, 1882, gave married women full proprietary rights to the properties that they may have acquired but held that **Section 17** of the **Act** was purely a procedural provision which did not entitle the court to vary the existing proprietary rights of the parties. That, the status of the marriage did not result in any common ownership or co-ownership of the property, and the term "**family assets**" was devoid of any legal meaning unless it referred to assets separately owned by one spouse.

[16] Disputes between husband and wife as to title or possession of property brought under **Section 17** of the said Married women's Property act 1882, were to be decided by applying settled law to the facts as may be established just as courts do in ordinary suits between other parties, who are not so married (see, **PETER MBURU ECHARIA –VS- PRISCILLA NJERI ECHARIA NAIROBI COURT OF APPEAL NO.75 OF 2001**).

[17] In the **PETTIT CASE** (supra), Lord Upjohn observed that where both spouses contributed to the acquisition of property, then their intention was to be joint beneficial owners, whether the purchase was to be in the joint names or in the name of one. That, this was as a result of an application of resultant Trust and that whether the spouses contributing to the purchase should be considered to be equal owners or in some other proportions must depend on the circumstances of each case. (See also, **RIMMER –VS-RIMMER [1953] 1QB 63**).

[18] In **KIVUITU –VS- KIVUITU [1991] 2 KAR 241**, the matrimonial property in dispute was purchased and registered in the joint names of the husband and wife but without specifying the share of each. After the dissolution of the marriage the wife took out an originating summons under **Section 17** of the **Married women's Property Act** seeking the main order that the matrimonial property be sold and the proceeds be shared equally.

[19] The High Court gave the wife  $\frac{1}{4}$  share of the property and the husband  $\frac{3}{4}$  share of the property. The wife appealed and so did the husband by cross appeal. The Court of Appeal held that the parties were entitled to the property in equal shares on the basis of the presumption that registration of the property in joint names connoted equal ownership of the same and the fact that the wife had made substantial indirect financial contributions towards the purchase of the matrimonial home and also the fact that the parties had bought the property as a family venture and had intended to hold it in equal shares as a family asset.

[20] In **ESSA –VS- ESSA NAIROBI COURT APPEAL NO.101 OF 1995**, the Court of Appeal stated the law with regard to the disposal of matrimonial property upon the dissolution of a marriage was well settled since the decision in **KIVIUTU-VS- KIVUITU**. That, where property acquired during the subsistence of the marriage is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares. That, there is no presumption that any or all property acquired during subsistence of the marriage must be treated as being jointly owned by the parties.

[21] In **ECHARIA –VS- ECHARIA** (supra), the Court of Appeal stated that where the disputed property is not registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of Financial contribution either direct or indirect towards the acquisition of the property.

The court went further to indicate that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. However, the peculiar circumstances of each case must be considered for an independent assessment of the wife's contribution as equal to that of the husband [see also, **NDERITU –VS- NDERITU COURT OF APPEAL NO.203 OF 1997, MEREKA –VS- MEREKA COURT OF APPEAL NO.236 OF 2001**].

[22] All the decisions hereinabove cited were grounded on the English Married women's Property act of 1882. It was the law applicable in this country in disputes relating to Matrimonial Property such as this case.

It's demise or inapplication in this country was foretold or prayed for by the Court of Appeal in **KAMORE –VS- KAMORE [2000] 1 EA 80** and **ECHARIA –VS- ECHARIA** (supra) mostly with reference to **Section 17** of the Act.

[23] In **KAMORE –VS- KAMORE**, the court stated as follows:-

**“We would like to add our observations, that is to say, that until such time as some law is enacted, as indeed it was enacted in England as a result of the decision in Pettit –vs- Pettit and Gissing –vs- Gissing to give proprietary rights to spouses as distinct from registered title rights Section 17 of the Act must be given the same interpretation as the law lords did in the said two cases. Such laws should be enacted to cater for the conditions and circumstances in Kenya. In England the matrimonial Women's Act of 1967 was enacted which was later replaced by the matrimonial proceedings and property Act of 1970. The matrimonial causes Act of 1973 also made a difference.”**

[24] In **ECHARIA –VS- ECHARIA**, the court observed that:-

**It is now about seven years since this court expressed itself in**

**Kamore –vs- Kamore, but there is no sign, so far, that parliament has any intention of enacting the necessary legislation on Matrimonial Property. It is indeed a sad commentary on our law Reform agenda to keep the country shackled to a 125 year old foreign legislation which the mother country found wanting more than 30 years ago. In enacting the 1967, 1970 and 1973 Acts, Britain brought justice to the shattered matrimonial home. Surely our Kenyan spouses are not the product of a lesser go and so should have their fate decided on precedents set by the house of Lords which are at best of persuasive value. Those precedents, as shown above, are of little value in Britain itself and we think the British Parliament was simply moving in tandem with the times. Human rights issues and in particular women's rights issues took centre stage on the global theatre from the 1960's. There were, for example “International Conventions on Civil and Political Rights” and “Economic, Social and Cultural Rights” which were adopted in 1966 and came into force in 1976, the “convention on the**

**Elimination of All Forms of Discrimination against women” (CEDAW) which came into force in 1981 and the “African Charter on Woman and Peoples Rights” which was adopted in 1981, Kenya has ratified all these international instruments and they therefore provide a source of law which, in appropriate cases, the courts in this country may tap from.”**

[25] Indeed, the prayers of the Court of Appeal were somehow answered by coming into effect of our own statute regarding Matrimonial Property. This is the **Matrimonial Property act, 2013**, which commenced on the 16<sup>th</sup> January 2014 and is the applicable law for the purposes of this suit.

**Section 6 (1)** of the Act provides that 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.

[26] In relation to this case and based on the evidence led herein by the parties, plot No.3966 is where the couples' matrimonial home was situated.

The title to the land as per the search certificate exhibited by the applicant/plaintiff dated 27<sup>th</sup> November 2017, indicates that it is vested on the defendant/respondent and was so vested w.e.f. 15<sup>th</sup> December 2003, during the existence of their marriage.

[27] The defendant alleged that the property is registered in the name of its original owner but this fact was disproved by the aforementioned search certificate which is essentially not disputed nor shown to be a false document.

Indeed, the defendant contended that he purchased the plot on his own prior to his marriage to the plaintiff but conceded that the development on the property was undertaken during the existence of the marriage.

[28] The plaintiff alleged that the property was jointly purchased by herself and the defendant as matrimonial property but did not provide any evidence of her contribution in the purchase. Nonetheless, it was not disputed by the defendant that the property was indeed the matrimonial property. This therefore, places the property as having been the matrimonial home and indeed, matrimonial property within the meaning of **Section 6(1) (a)** of the **Matrimonial Property Act, 2013**.

[29] With regard to plot No.2361, the plaintiff contended that it was acquired during the subsistence of the marriage. She exhibited a search

certificate to confirm the fact and it shows that the property was registered in the name of the defendant on 2<sup>nd</sup> June 2000. The defendant did not dispute the fact but contended that the property was purchased by himself prior to the marriage but was registered in the year 2000. He did not however, provide tangible evidence to sustain the contention.

[30] The fact that the property was registered for the first time in the year 2000 and a title document was issued in the name of the defendant in the same year is a confirmation that it was acquired during the subsistence of the marriage and was therefore part of the couples' matrimonial property even though the title was issued in the name of the defendant only thereby suggesting that he may have solely or substantially footed the cost of the acquisition.

A third property known as plot No.[...] -Kabar West was mentioned by the plaintiff in evidence but is not indicated in the originating summons as a disputed property whether or not its existence may not be in doubt. It does not therefore fall for distribution in this cause.

[31] It is only plots No.[...] and No.[...] which fall for distribution.

Before their marriage, the parties did not enter into any agreement to determine their property rights. Now that they are divorced, the ownership of their matrimonial property would be governed by **Section 7** of the **Matrimonial Property act** which provides that:-

**“Subject to section 6 (3), ownership of matrimonial property restrain 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.”**

[32] Under **section 9** of the **Act**:-

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

It has already been found hereinabove that plots No.[...] and No.[...] formed part of the matrimonial property of the couple and if this was not so, the provision of **Section 9** of the **Act** would apply herein.

[33] **Section 2** of the **Act**, defines **“Contribution”** to mean monetary and non-monetary contribution including domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.

It was herein established that the couple was childless due to a **“biological accident”** on the part of the plaintiff thereby making her unable to bear children.

However, it was not disputed that as a wife to the defendant she was obliged to undertake domestic work and management of the matrimonial home, provide companionship to the defendant and manage either alone or with the defendant family business. She was a tailor by occupation and provided tailoring services to generate income for the family.

[34] For all the foregoing reasons, this application succeeds to the extent that there shall issue a declaration that plots No.3966 and No.2361 are joint matrimonial property of the plaintiff and the defendant such that the plaintiff be and is hereby entitled to a share of the property at 30% in terms of ownership and any form of proceeds arising from the property. Both parties shall meet their own costs of the application.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**25.10.2018**

**[Delivered, signed this 25<sup>th</sup> day of October, 2018].**