



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT No 30 OF 2015 (O.S.)

B E T W E E N:

E M K.....APPLICANT

Versus

J K Z.....RESPONDENT

R U L I N G

1. The Court has before it an application brought by Originating Summons filed on 27th May 2015. The Application is filed by E M K who at the time of the Application was the Wife of the Respondent. The Application is seeking specific orders relating to a single property owned by the Couple jointly. The Orders sought are:

“1. That the joint ownership in respect of L.R. No. [...] situated at Ruiru, Thika be severed and that the same be held by the parties herein as tenants in common

2. That the said property be sold and the proceeds shared equally between the parties herein.

*3. That an order do issue compelling the Respondent to sign the relevant documents to facilitate the sale and transfer of **L.R. No [...] situated at Ruiru, Thika.***

4. That in the alternative, and without prejudice to the foregoing, the Deputy Registrar be empowered to sign any documents that the Respondent may refuse to sign.

5. That this Honourable Court be pleased to grant such further or other relief as may be just in the circumstances.

6. That the Respondent be condemned to pay the costs of this application and incidental thereto.

2. In addition to the Supporting Affidavit, the Application is based on the following grounds:

(a) That the parties commenced living in cohabitation herein as man and wife on or about 5th January 1989 but separated in or around February 2003 due to matrimonial differences.

(b) That the property herein is held by the parties herein jointly, having been acquired during the subsistence of the cohabitation.

(c) That it is in the best interests of both parties that the same be severed and sold.

3. The Respondent filed a Replying Affidavit on 2nd July 2015. In it the Respondent raises various issues including the fact that the Property is the former matrimonial home and that it should be considered with the adjoining field. In addition that the needs of the Children of the Family should be taken into account. There are allegations that the work was done either by the Respondent or the Parties jointly. At paragraph 13 the Respondent states; “THAT I do suggest that the property jointly owned be valued at the market rate going for a vacant property in the area and the value to be apportioned to the two of us.” That statement seems to be in direct contradiction with the earlier statement about taking into account the needs of the Children. It is not clear how apportionment can take place without sale. The Applicant then filed a Further Affidavit where she referred the Court to properties registered in the Respondent’s name in particular the one known as L.R. No Gaturi/Gitimu/[...] located in Embu and also Plots [...] and [...] bought from Murarandia Development Company and located in Embakasi. She is seeking an alternative order for those Parties to be registered in the names of the Children.

4. The Application is brought under Section **14(b) of the Matrimonial Property Act, Section 3A of the Civil Procedure Act and Order 37 Rule 11** of the **Civil Procedure Rules 2010** and all other enabling provisions of the Law .

5. The facts as they appear from the three Affidavits and the Exhibits and/or Documents filed are relatively straightforward. The Parties were married. There were Children born to them. The Court has not been told the ages of the Children so it is assumed they are minors. The Parties separated. It is not clear whether they are still married and/or still separated or alternatively divorced. During the course of the marriage the Parties acquired various properties. The Property the subject of this Application was registered in joint names. The other(s) were not. The Applicant made all or a major part of the purchase price for the acquisition of the Property. In a further alternative to her Application, the Applicant is suggesting the Property be sub-divided and registered in the names of the Children. She omitted to tell the Court how many Children she refers to and what are their ages. In particular if they have reached majority. That particular suggestion is ignored in the Written Submissions

6. The Application is in substance, an application for the division of matrimonial property. She is seeking division of one asset in the matrimonial property. There is no evidence before the Court as to the status of the marriage, and therefore at which level and in which circumstances the jurisdiction of the Court applies. Further, the evidence before the Court is insufficient and incomplete and therefore not sufficient for the Court to make a decision.

7. Applications for the Division of matrimonial property should be accompanied with oral evidence that is subject to cross examination and the proper production of relevant documents. Further, it would be ill advised to make any distribution of matrimonial property on a piecemeal basis that could result in an injustice to one or the other party. In the circumstances, the Application is incompetent and therefore dismissed.

It is so Ordered,

FARAH S.M. AMIN

JUDGE

Signed and Delivered in Nairobi on this the 30th day of May 2017

In the Presence of:

Court Assistant: Patrick Mwangi

Applicants: Mr Gachuhi Holding Brief for Mrs Ishi Khalsi