



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL SUIT NO. 38 OF 2015 (OS)
MATRIMONIAL PROPERTY ACT
IN HE MATTER OF AN APPLICATION FOR DECLARATION OF PROPERTY RIGHTS

BETWEEN

N S..... APPLICANT

VERSUS

Z S H.....RESPONDENT

JUDGMENT

1. The originating summons filed on 6th July 2015 sought the following orders:-

- (a) it be ordered that the property listed herein with all buildings and developments thereon acquired and/or developed by the joint funds and efforts of the applicant and respondent during the marriage and all registered in the joint names of the applicant and respondent are jointly owned by the applicant and the respondent (the property being Apartment Number A5 on the second floor of Block A erected on LR No. [particulars withheld] Nairobi and known as Bid Apartments Ltd);
- (b) the joint ownership of the above property be severed and the same be held by the parties as tenants in common;
- (c) the said property be sold and the proceeds be shared equally between the parties;
- (d) the court be pleased to order that the property be settled and/or partitioned in proportions aforesaid or as the court may order;
- (e) the court be pleased to order the respondent to return motor vehicle Reg. No. [particulars withheld] (Toyota Caldina) registered in the respondent's name to the applicant.

2. The applicant and the respondent got married on 21st March 1985. From the pleadings, they live apart. However, they are not divorced and neither has the marriage been dissolved.

3. It is common ground that the apartment is matrimonial property that was jointly acquired. The level of contribution of each party was, however, not agreed. The applicant stated that her contribution was half, but the respondent stated that her contribution was minimal and his was substantial; that his total contribution was Kshs.20,153,650/= and hers was Kshs.1,800,000/=.

4. The parties agreed that the property be sold and there be distribution of the proceeds on basis of the determined contribution.

5. **Section 7 of the Matrimonial Property Act (No. 49 of 2013)** provides that:-

“Subject to 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.”

This is the provision under which the originating summons was made.

6. I am aware of the provisions of **section 17** of the **Act** which states that –

“(1) A person may apply to a court for declaration of rights to any property that is contested between the 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.”

However, this cause was not brought under this section. It was brought under **section 7**. The parties sought, not only the determination of the contribution of each spouse but also the division of the property between them. Quite unfortunately, as long as they have not divorced or their marriage has otherwise been dissolved, the court does not have the jurisdiction under **section 7** of the **Act** to deal with the matter and grant the orders in the summons. It is for these reasons that I strike out the summons with costs.

DATED AND DELIVERED at NAIROBI this 22ND JUNE, 2017.

A.O. MUCHELULE

JUDGE