



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL SUIT NO. 52 OF 2014
IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013
AND
IN THE MATTER OF THE LAND REGISTRATION ACT

M N N.....APPLICANT

VERSUS

G N M.....RESPONDENT

AND

S N N.....INTERESTED PARTY

RULING

The Notice of Preliminary Objection was filed on 29th June 2016 which raised the point of law that the Application infringes the principles of law as regards what matrimonial property consists of and that this court has no jurisdiction to hear and determine this matter.

PLEADINGS:

The parties were married in 23rd March 1985 as evidenced by their certificate of marriage of serial number [...]. **Separation Cause no. 36 of 2010** between M N N (petitioner) and G N (respondent), decree nisi issued on 6th March, 2014 Therein the marriage between the Petitioner and the Respondent that had been solemnized on 23rd March 1985 at PCEA Embu church was dissolved and the Respondent was ordered to pay the Petitioner alimony of Kshs. 100,000 from the date of service of the order.

Thereafter the Applicant, by way of Originating Summons, filed an application to the High Court, Family Division on 14th August 2014 under **sections 2,6,7,9, and 17 of the Matrimonial Property Act, 2013 and Section 93 (3) of the Land Registration Act**. She sought orders *inter alia* that this court declare the following movable and immovable property as property acquired by the parties jointly and held by the Respondent beneficially in trust for the Applicant and that she is entitled to a 50% share of the same:

- a. LR.[...], situate at Kileleshwa Nairobi.**
- b. LR NO. [...] situate at Kileleshwa Nairobi**
- c. Motor vehicle KBU [...] Toyota Prado**
- d. Shares in [particulars withheld] Limited**
- e. Shares in [particulars withheld] Limited.**
- f. Karai/Gituamba/[...](OR ANY OF ITS SUB DIVISIONS)**
- g. Ancestral properties inherited and developed jointly at Gikambura and Tinganga.**

She also sought an order of temporary injunction to issue restraining the Respondent and his servants or agents from alienating or interfering in any way with any portion of the matrimonial home situate on LR [...] and the other properties listed above.

The Respondent sought the temporary injunction under certificate of urgency on the grounds that:

- a) The Respondent threatened to dispose of or otherwise interfere with the suit property.**
- b) The Respondent intends to sell off and dispose L.R. NO. [...], KILELESHWA, NAIROBI (where the matrimonial home is situate)**
- c) Since 5th August 2014, various strangers have been coming to view the property with an intention of purchasing the same.**
- d) The Respondent has been threatening to kick out the Applicant from the Matrimonial home.**

Thereafter S N N sought to be enjoined in this suit as an interested party as per her Application and Supporting Affidavit of 29th September 2014 where she brought to the attention of the court that she was the first wife of the Respondent married according to the Kikuyu Customary Law in the year 1954. She further stated that she contributed to the acquisition of the above mentioned properties including shares in [particulars withheld] Limited where she is also a director. She also claimed to be a director in [particulars withheld] Limited. She also brought to the attention of the court that she and the Respondent were blessed with eight children but one of them unfortunately passed on. Her last child was born in the year 1973. In 1973, her first son, R K N became director of [particulars withheld]. In 1974 she and the Respondent incorporated [particulars withheld] Limited. They acquired the matrimonial home L.R NO. [...] (now subdivided into LR. NO. [...] and L.R.NO. [...]) situate at Kileleshwa, Nairobi where she has raised all her children and resided since 1974 to date.

After the Petitioner married the Respondent, they lived within Kimathi Estate and thereafter came to live with her in the matrimonial home at Kileleshwa which was already developed. The Apartments therein however had not been built at the time. S N further averred in her Supporting Affidavit that she and the Respondent developed the inherited ancestral property Karai/Gikambura/[...]. Thereafter an order of this court issued therein ordering that the Applicant, S N N is granted leave to join as interested party.

The Respondent filed an affidavit in reply to the Applicant's application for division of matrimonial property on 9th October 2014 wherein he stated that the Applicant did not contribute to the acquisition or the development of the matrimonial home L.R NO. [...] (now subdivided into LR. NO. [...] and L.R.NO. [...]) situate at Kileleshwa. He further averred that the Applicant was unmarried when she sought the loan of 22nd December 1976, in the annexed document marked **MNN4** since she referred to herself as "miss" at that time. This was a loan she took to build a borehole at her farm. In 1987 she took another loan of

number 650 and used the money to purchase a piece of land. Thereafter she took another loan no. 1610 and used the money as deposit for Postel Housing Scheme and not for purchase or development of the matrimonial home above stated since it was already in existence. The Applicant is not a shareholder nor is she a director of [particulars withheld] Limited. This company was placed under receivership in 1987 and wound up in 1989. The principal shareholders of [particulars withheld] Limited are the Respondent and the Interested Party herein enjoined. The Respondent further stated that [particulars withheld] Company was a development vehicle for the purpose of developing houses for sale and is now about to be wound up since it has already achieved its purpose now that the properties have been sold to their respective owners. Karai/Gituamba/[...] was developed single handedly by the Respondent in 1982 for his mother who unfortunately passed away in 1984. He has since then been receiving rent from this property. The Applicant acquired motor vehicles during their marriage but willfully concealed the same from the court. Ancestral properties inherited and developed at Gikambura and Ting'ang'a were inherited by the Respondent from his late father and he gave them to his children from the first wife. The Applicant holds in trust for the Respondent properties known as; Kiambu Municipality Block [...], L.R NO. Ngong/Ngong/[...] and L.R No. [...] Eastleigh (currently the subject of a court case **Nairobi ELC HCCC NO. 1357 of 2007**) and she deliberately concealed the same from the court at the time of seeking divorce. The Interested party confirmed these averments in her replying affidavit of 21st April 2016. The Applicant denied owning the said properties stated by the Respondent.

The Applicant then filed a Replying Affidavit denying the fact that she owns properties listed in the originating summons filed on 29th June 2016 by the Respondent. She stated that this was malice on the Respondents part and so was including the interested party in this suit, whom she had never known about nor met as alleged in the Interested Party's affidavit.

DETERMINATION

The first objection raised in the Preliminary Objection is that the Application infringes the principles of law with regard to what matrimonial property is. In this regard the court refers to **Section 2** of the **Matrimonial Property Act No. 49 of 2013** which defines **matrimonial home** as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property and **matrimonial property** as provided in **Section 6** which provides the meaning of matrimonial property as follows;

“(1) for the purposes of this Act, 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.”

The Applicant rightly filed her Originating summons under this section as she is claiming LR NO. [...] situate at Kileleshwa Nairobi which she believes is her matrimonial home and was acquired during the subsistence of her marriage to the Respondent. She and the Respondent are also rightfully allowed to prove or disprove their allegations in the pleadings in order to convince this court of the same. This is because **Section 7** of this Act further states that;

“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.”

This suit was rightfully brought under **sections 2,6,7,9, and 17** of this Act. Further, precedent was set in the landmark case of:

MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969

E.A. 696.

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

Raising a Preliminary objection based on the fact that the Application infringes the principles of law as regards what is matrimonial property is improper because this is a matter to be determined in the suit in the exercise of the discretion of the court.

The Preliminary Objection is also based on the jurisdiction of this court to hear and determine this matter.

To this the court invokes section 17 of the Matrimonial Property Act No. 49 of 2013 which under subsection (1) provides;

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.

Further in **sub section (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.

Such a petition may be made in the High Court which has unlimited original jurisdiction in criminal and civil matters conferred to it by **Article 165 of the Constitution of Kenya, 2010** and jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights according to **Article 23 (1)**. If at the hearing of the matter there are properties deemed not to comprise of matrimonial property, the same shall be set aside. If some properties are registered under a Company, then the parties shall tender evidence to prove the same and that such properties do not comprise of matrimonial properties then such properties may be left out to be canvassed in the Commercial Division of the High Court. In a nutshell, the issues raised as Preliminary Objection are issues for determination by the Court during the *interpartes* hearing.

The Preliminary objection is hereby dismissed. The suit shall proceed in the normal manner. It is so ordered.

DELIVERED SIGNED & DATED IN OPEN COURT IN NAIROBI ON 22ND SEPTEMBER 2017.

M.W.MUIGAI

JUDGE