



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

CIVIL SUIT NO. 43 OF 2013 (O.S.)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMAN'S PROPERTY ACT 1882

M A K MAPPLICANT

-versus-

G M M.....RESPONDENT

RULING

1. The originating Summons before me is dated 17th October 2012 and is brought under **Section 17** of the **Married Women Property Act 1882**. The Petitioner M A K M prays in the main for a declaration that the movable and immovable properties listed herein were acquired and developed by joint funds and efforts of the Petitioner and Respondent during the subsistence of their marriage. Further that:
 - a. All that parcel of land known as L.R. No. 209/12715/665-Syokimau be divided equally between parties who are joint proprietors.
 - b. The parcel described as Plot Number 26 Katanga Settlement Scheme be divided equally between parties but the Petitioner do retain the portion where the house is situated in view of the fact that it is the matrimonial home and the Petitioner has custody of the issues of the marriage.
 - c. The parcel number Machakos Municipal Council Block 2/672 be declared the sole property of the Petitioner as she is in any event the sole registered proprietor.
 - d. That this court do order the division of the said properties in the manner proposed by the Applicant hereinabove and grant such further reliefs as it may deem just and fitting.
2. The grounds on the face of the application are that the properties named above are jointly owned by the parties hence each party is entitled to a share thereof. Further that the parties are no longer cohabiting. The application is supported by the affidavit of the Petitioner sworn on 17th October 2012.

3. The Respondent G M M was served with the Originating Summons and with the hearing notice dated 19th September 2014. The affidavit of service of the hearing notice is on record. The Respondent entered an appearance but did not file a response. The Petitioner caused the hearing notice to be served upon the firm of Nzioka & Co. Advocates who had entered appearance for the Respondent. Nzioka & Co. Advocates did accept and acknowledge service.
4. The matter proceeded on 29th October 2015. The Petitioner appeared with her counsel Mr. Thiong'o but neither the Respondent nor his Advocate appeared for the hearing. The Petitioner testified and reiterated the grounds of application and the averments in her supporting affidavit.
5. The application is therefore uncontested and the only question for determination is what each of the two parties is entitled to from the matrimonial property.
6. The Petitioner has approached the court through **Section 17 of the Married Women's Property Act 1882** which is a procedural section and by virtue of **section 3 of the Judicature Act (cap 8)**, it was applicable in this Court as part of the procedure and practice observed in the courts of justice in England as at 12th August, 1897. This jurisdiction was to be exercised in accordance with the principle that disputes between husband and wife, as to the ownership of property which at one time they have been using in common, are disputes which may very well be dealt with under the rule that orders should be made, which appear to be fair and just in the special circumstances of the case.
7. The **Married Women's Property Act, 1882**, is by **Section 3(1)** of the **Judicature Act (Cap 8)** and by a previous ruling of the Court of Appeal a Statute of General Application and is to be applied subject to the provisions of the written laws of Kenya. – See **Ahn v Openda [1982] KLR** pg 87.
8. Parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of the marriage according to **Article 45(3)** of the **Constitution**. The **Matrimonial Property Act** (No. 49 of 2013) which is the statute that provides for the rights and responsibilities of spouses in relation to matrimonial property today carries the following interpretation on contribution:

“Contribution’ means monetary and non-monetary contribution and includes-

- a. **Domestic work and management of the matrimonial home**
- b. **Child care**
- c. **Companionship**
- d. **Management of family business or property and farm work.”**

It is therefore the duty of this court to endeavour to give effect to both monetary and none monetary contributions that both the Petitioner and the Respondent made during the currency of the marriage, to acquire and develop their matrimonial property.

9. The evidence on record is that the aforesaid matrimonial properties were acquired/bought and developed with substantial effort and contribution from both the Applicant and the Respondent. The Petitioner produced two copies of the title deeds to the property that is No. 26 Katanga Scheme which is in their joint names. The second property does not have a title deed but has an agreement signed by both the Petitioner and the Respondent. The third property is in the name of the Petitioner alone, although she admits that it was acquired by family funds.
10. I note that the Petitioner also contributed to the marriage by giving birth and raising the issues of the marriage who have all reached adulthood. The three issues of marriage are as follows:

(a) Herbert Mwalabu born in 1983

(b) Carla Wanzau Mwalabu born in 1990

(c) Emmanuel Kaleli born in 1997

The last two issues are still in college while the first has completed college education. They are however, all still depended on the Petitioner who earns a living as a business woman. It is her evidence that the Respondent does not provide for the children nor participate in their raising and education in any way, having left the burden of doing so entirely upon the Applicant.

11. From the pleadings and the Petitioner's testimony there is evidence that the Petitioner and the Respondent were husband and wife, having cohabited from 1982 and formalised their marriage on 1st October 2005. The marriage was however dissolved in 2013. The Respondent is said to have moved on and remarried. The Applicant seeks the distribution of the matrimonial property so that she too can move on with her life.
12. There is also evidence that the aforesaid properties were acquired/bought and developed during the subsistence of their marriage. The Petitioner candidly testified that both parties contributed to the acquisition of the matrimonial property. In the marriage certificate the Petitioner was described as a pharmacist while the Respondent was described as a businessman at the time of marriage.
13. On the question as to whether the Petitioner should be declared the sole proprietor of the property known as **Machakos Municipal Council Block 2/672**, I recalled the holding in **Njoroge v Ngari [1985] KLR pg. 480**, wherein the plaintiff applied to the High Court by way of originating summons under **section 17 of the Married Women's Property Act 1882**, for a declaration that half the subject property registered in the name of her husband, be declared to be held in trust beneficially for her. Butter Sloss J held *inter alia* that:-

“if property is held in the name of one person, even if that property is registered in the name of one person, but another contributed towards acquisition of the property, then both persons have proprietary interest in that property. If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person.”

The Petitioner in the case under consideration having admitted that this property was acquired by family funds, it does not therefore, lie in her mouth to state that the property belongs to her as a whole, merely because it is registered in her name solely.

14. For the foregoing reasons I find that the Originating Summons dated 17th October 2012 has merit and is allowed with the following orders:
 1. A declaration is hereby issued that the immovable properties listed herein, acquired during the subsistence of the marriage, whether registered in the names of the Petitioner and the Respondent jointly, or in any of their names solely, were acquired and developed by joint funds and efforts of the Petitioner and Respondent during the subsistence of their marriage.
 2. That the aforesaid properties shall be shared equally (50% -50%) between the Petitioner and Respondent.
 3. The Petitioner to furnish the court with the approximate values of the parcels of land known as Machakos Municipal Council Block 2/672 and L.R. No. 209/12715/665-Syokimau for purposes of aiding the court to arrive at an equitable distribution of these two parcels of land.

Each party to bear their own costs.

SIGNED DATED and DELIVERED in open court this **11th** day of **December 2015**.

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L. A. ACHODE

JUDGE