



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 33 OF 2013 (OS)

E W M.....APPLICANT

VERSUS

E M K ALIAS J N.....RESPONDENT

JUDGEMENT

1. The application for determination is an Originating Summons dated 12th June, 2013, and taken out under Section 17 of the Married Women Property Act, Section 28 of the Registered Land Act (Cap. 300) and Section 38 of the Limitation of Actions Act (Cap 22). The Applicant seeks orders that the Respondent's title to all that parcel of land situated within Kiambu known as Kiambaa/Ruaka/ **[particulars withheld]** be deemed and declared to be matrimonial property, that the Applicant be declared and registered as the owner of all the parcel situated in Kiambu known as Kiambaa/Ruaka/ **[particulars withheld]** to hold in trust for the Applicant and the Respondent's son known as P K, that the said property be settled for the benefit of the Applicant in such manner and proportions as this Honourable Court deems fit and just, that the Respondent himself, his agents and or servants be restrained from alienating or encumbering or in any other manner disposing of the said properties and that the costs of the application be borne by the Respondent.

2. The application is supported by the annexed affidavit of the applicant, Emily Wanjiru Mote, sworn on the even date. In that affidavit, the deponent avers that she got married to the Respondent in 1997 and lived together with him ever since in the matrimonial home in **[particulars withheld]** in Kiambu. During the course of the said union, the couple had a child – P K - who is now 11 years old. It is averred that the Respondent left the country and now lives and works in London, United Kingdom, and has since refused and or failed to maintain the child born of the same union. Further, it is that the Respondent purchased the parcel of land known as Kiambaa/Ruaka/ **[particulars withheld]** during the course of the marriage and was issued with a title deed on 26th January, 2006 under his name. It is the applicant's averment that she contributed to the purchase of that property as while she was taking care of the child and bringing him up, the Respondent was working and saving money for the purchase of the parcel of land. It is also contended that the parties had agreed that the applicant would stay at home and take care of the family and bring up the child as the Respondent worked to enable them have a better life. The Applicant contends that she continued to live in the matrimonial home until the year 2001 when the Respondent's family turned against her after the Respondent left the country. She deposes that the Respondent has failed and neglected to pay for the maintenance and upkeep of his family; and that she has no other source of income or employment to assist in the maintenance and upkeep of their child making it difficult for her to provide for the child. It is averred that the Respondent is attempting to sell the matrimonial property or family property that was obtained during the said marriage.

3. A perusal of the records reveals that the application was served on the respondent. There is an affidavit of service sworn by Jimmy T. Ndirangu on 25th February 2014 and filed on even date indicating that service was effected through the DHL Courier Service.

4. There is no reply on record and therefore the application is unopposed. The Applicant's allegations, as made in the application, thus remain uncontroverted.

5. The applicant gave oral evidence on 29th May 2014. She asserted that the respondent was her husband. They allegedly got married in 1997, and thereafter cohabited together from 1997 to 2001 when the respondent left for Britain. She stated that they had one child between them. Since the respondent left for Europe, he never came back to the applicant and the child. When he last visited Kenya, he did not come to the matrimonial home, instead he went to stay with his sister, and the applicant was forced to meet him at a social place.

6. Regarding the property in question, the applicant testified that the same was acquired by the respondent in 2006, after he left for Britain, and is registered in his name. She produced a certificate of official search, following a search she had conducted on the title, and the certificate dated 2nd September 2013 was marked as P. Exhibit No. 1. She stated that her contribution to the acquisition of the asset was that she took care of the child of the marriage.

7. In cases of this nature, the applicant is obliged to establish several facts. One, that there was a marriage between the applicant and the respondent. Two, that the said marriage is no longer tenable as may be evidenced by pending proceedings for the dissolution of the marriage. Three, that the property the subject of the suit was matrimonial property, in the sense of it having been acquired during marriage or if acquired before marriage the applicant had contributed to its improvement. Finally, that the applicant contributed one way or the other in the acquisition of the property.

8. A case for division of matrimonial property brought under the old Married Women's Property Act 1882, which has since been repealed, and the new Matrimonial Property Act 2013 is civil in nature. The burden of proof in such case would be on the party who has brought the matter to court. Indeed, section 107 of the Evidence Act (Cap 80) places the burden of proof on the person who asserts existence of certain facts to prove that those facts exist.

9. In this case, the applicant asserts that she was married to the respondent. She neither in her court papers nor in oral evidence discloses the system of law under which the alleged marriage was contracted. There is, to my mind, no evidence that the applicant was married to the respondent. If they had contracted a statutory marriage, a certificate of marriage ought to have been produced to prove existence of the statutory marriage. If it was alleged that the parties had contracted a customary law marriage, then, by virtue of Section 51 of the Evidence Act, evidence should have been adduced to prove existence of the alleged customary marriage. If the applicant was asserting a marriage out of prolonged cohabitation, and wanted the court to presume marriage out of such cohabitation, then evidence geared to establishing cohabitation from which marriage could be presumed ought to have been presented. The applicant merely asserted that she was married to the respondent and left it that. With respect, that was not sufficient, even without any counter-pleading by the respondent. It is my view that the applicant has not established that she is or was married to the applicant at any one time. She alleges that they had a child between them. That by itself is neither here nor there. The fact that two people are parents of a particular child is not proof of marriage. In any event, the applicant did not lead any evidence which established that the alleged child was sired by the respondent or that he had assumed responsibility over him.

10. The applicant's case appears to be hinged on the respondent's alleged failure or neglect to pay for the maintenance and upkeep of the applicant and her child. This complaint forms the basis of the application now before me. Maintenance of a spouse and children is really a non-issue so far as division of matrimonial property is concerned, unless it is tied up with contribution. Lack of maintenance cannot be the reason for which the court should intervene and split the property as between the parties. It is noteworthy that the Applicant has not told this court whether in view of the alleged neglect and failure to provide for the family the said marriage has broken down. This court has not been told whether the

Applicant, assuming that there was a valid marriage, has sued for dissolution of the marriage and for maintenance. As a matter of fact there is no evidence brought before this court that is the case.

11. This court is of the view that in the absence of a cause for divorce, it has no jurisdiction to entertain the instant application. The application has been brought under **Section 17** of the Married Women's Property Act, 1882, now repealed by the new Matrimonial Property Act. It has been held that the said section 17 of the Married Women's Property Act, would only apply to cases where the marriage has broken down, and that an Applicant must demonstrate that there are separation or divorce proceedings. Nothing of that kind has been established in the instant application. The Court of Appeal in **Peter Njenga vs. Sophia Ndungu** Nairobi **CA Civil Appeal No. 2 of 2000** held that the High Court has no jurisdiction under **Section 17** of the Married Women's Property Act 1882, to alienate lands between spouses during their lifetime or unbroken coverture, and that a judge faced with a suit where division of matrimonial property is sought in such a case ought to dismiss it.

12. The new law has the same spirit. Section 7 of the Matrimonial Property Act 2013 envisages division of matrimonial property as between spouses at the point of divorce or dissolution of marriage. The said provision states as follows-

'... 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 dissolved.'

13. In view of the foregoing, this Court holds that the Originating Summons dated 12th June, 2013 lacks merit and is therefore hereby dismissed.

DATED, SIGNED and DELIVERED at NAIROBI this 28th DAY OF August 2014.

W. MUSYOKA

JUDGE

In the presence of Miss. Mote *the* applicant.