



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MATRIMONIAL CAUSE NO. 19 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 (CHAPTER 4 ARTICLE 45(3))

IN THE MATTER OF SECTION OF THE MARRIED WOMEN'S PROPERTY ACT, 2013

AND

IN THE MATTER OF SECTION 3 (1) OF THE JUDICATURE ACT CAP 8 LAWS OF KENYA

BETWEEN

VS.N.....APPLICANT

VERSUS

R.N.K.....RESPONDENT

JUDGEMENT

1. The Applicant herein filed an originating summons dated 21/05/2018 seeking for the following reliefs:

(1) That a declaration do issue that all property situate at MUKALWA 72 measuring ½ acre, two plots on MUKALWA plot 120x13 together with all buildings and developments thereon, all the stock amounting to Kshs.245, 754/-and other materials amounting to Kshs.157,250/- and all the motor cycles identified as KMDB xxxx and KMCL xxxx as well as machinery chef cutter which were acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and all registered in the name of or in possession of the Respondent.

(2) That a declaration be made that the Applicant was bequeathed plot No.xxx Nduva Munyao by the mother for sole ownership.

(3) That a declaration be made that the respondent holds the said properties in trust for the applicant.

(4) That properties be distributed for the benefit of the Applicant in such manner and proportion as this honourable court deems fit and just.

(5) That the Respondent himself, his agents and/or servants, employees be restrained from alienating, encumbering on in any manner whatsoever disposing and or dealing with the said properties in whatever manner to the detriment of the Applicant.

(6) That the Respondent be condemned to pay the costs of the summons and other incidentals thereto.

2. The application is supported by grounds set out on the face thereof as well as the affidavit of the Applicant sworn on even date. The Applicants gravamen inter alia is that she got married to the Respondent in 2000 under Kamba customary law and since then they have acquired several properties which should now be declared as jointly owned and that the same be shared out jointly with the Respondent who is currently busy wasting and disposing them.

3. The Respondent filed a replying affidavit sworn on 22/11/2018 wherein he deponed *inter alia*: that the Applicant is his wife having married her under Kamba customary law in 2005; that at the time of the marriage the Applicant had two other children born in 1991 and 1995; that they lived happily until April, 2018 when the Applicant voluntarily and on her own volition left the matrimonial home leaving behind the children; that the marriage has never been dissolved and is still intact; that no properties were acquired during the subsistence of

the marriage and that the Applicant should furnish the court with particulars thereof; that he operates a bar and shop at Matungulu Town which was solely started by the Respondent and that the Applicant has never contributed towards its success; that the Applicant during her departure took shop items and cash as well as a logbook to one of the motor cycles which actions have frustrated his business that is now on the verge of collapse; that the Applicant was never bequeathed any property by her mother as alleged. The Respondent sought for the dismissal of the summons with costs.

4. The summons was canvassed by way of viva voce evidence. The parties herein presented their evidence and did not call witnesses.

5. **VSN (PW.1)** testified that the Defendant herein is her husband with whom she got married in 2000 under Kamba customary law and that they are blessed with two children and one grandchild. She averred that they no longer cohabit together as the Respondent herein married another woman in 2018 and installed her in the matrimonial home. She stated that she decided to move out on her own volition and went to live in her parent's home. She sought to have the new woman vacate from the matrimonial home and leave her property. She added that she has no problem with her husband despite suing him. On cross –examination, she admitted that she has no problem with her husband whom she still loves. She also confirmed that her husband has not returned dowry to her parents. She also confirmed that she came into the marriage with two children out of wedlock and that she did not bear children for the Respondent. She also confirmed that she lived peacefully with her husband and that on the matter at hand she had informed her husband that she was going to the hospital only to decide not to return back home. She also confirmed that the co-wife used to reside on her mother in law's house. She also confirmed that she did not have the documentary evidence over the properties she is pursuing. She also confirmed that she had no evidence that the properties had been disposed of and further had no proof of their existence.

6. **RNK (DW.1)** testified that the Applicant is his wife. He sought to rely on the contents of his replying affidavit. He averred that they did not acquire properties together as she found him already established. He stated that his younger brother had given him two motor cycles to assist him as he has a deformed hand. He denied chasing the Applicant as she only requested to be allowed to visit Kangundo hospital for treatment but did not come back. He denied having problems with the Applicant. He denied knowledge of the owners of the properties claimed by the Applicant. He finally claimed that the Applicant took away shop goods and cash thereby making his business to go down. On cross – examination, he stated he did not know how the new woman can be removed as the Applicant is free to occupy any of the rooms. On re-examination, he confirmed that the house he and his wife currently occupy is rented from a landlord. He also confirmed that the Applicants matrimonial home is still available within his parent's compound.

7. Parties were directed to file and exchange submissions. It is only the Respondent who filed submissions dated 30/06/2021.

8. Mrs Nyaata submitted that the Applicant has failed to prove her case on a balance of probabilities. It was submitted that the Applicant's evidence was not in support of her pleadings and allegations. Reliance was placed in the case of **Sammy Kikunyi Adiema –vs- Charles Shamwati Shisikani [2014] eKLR**. It was submitted that the Applicant sought a declaration of what constituted matrimonial property, protection and division of such property but she changed her case altogether during the hearing hereof. It was further submitted that the Applicant failed to prove existence of any matrimonial property or any contribution made towards acquisition of the said properties. It was urged that the suit be dismissed with costs.

9. I have considered the evidence of both the Applicant and Respondent as well as the submissions presented. It is not in dispute that the Applicant and Respondent got married under Kamba customary law sometimes in 2000 and that they had been cohabiting together until the month of April, 2018 when the Applicant left the matrimonial home on her own volition. It is also not in dispute that the marriage between the Applicant and Respondent is still in existence as it has not been dissolved. The issue for determination is whether the Applicant has proved her case on the requisite threshold of proof namely balance of probabilities.

10. The originating summons herein has been brought pursuant to the provisions of section 17 of the Married Women Property Act, section 7 of the Matrimonial Property Act 2013 as well as section 3(1) of the Judicature Act. For the purposes of this suit, section 7 of the Matrimonial Property Act 2013 is relevant and which provides as follows:-

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the distribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

The Applicant has sought for a declaration that certain specified properties be deemed to have been acquired during the subsistence of the marriage and that the same be distributed in such manner and proportion as the court deems fit. That seems to be a sum up of the Applicant's case. As the Applicant has made the allegations against the Respondent, the burden of proof lay squarely upon her shoulders to discharge as provided for under section 107 of the Evidence Act. The Respondent vehemently denies the Applicant's allegations and puts her to strict proof thereof. The Applicant in her evidence appeared rather lackadaisical and did not put a lot of seriousness in her case. Some of her evidence seriously impaired and weakened her attempts at discharging the burden of proof placed upon her. For instance, she confirmed that her marriage with the Respondent is still intact and has not been dissolved and that the reasons for leaving her matrimonial home voluntarily was due to anger brought about by the Respondent who married a second wife. She confirmed that she has no problem at all with the Respondent and would happily go back to her matrimonial home once the other woman is removed. She also confirmed that the Respondent is entitled to marry more than one wife under Kamba customary law. The Respondent gave uncontroverted evidence that the Applicant's matrimonial home located within his mother's compound is still there and that the Applicant should just proceed and occupy it while he should be left to remain with the second wife in a rented premise belonging to a certain landlord. It would therefore seem that the Applicant's conduct in moving out of her matrimonial home was as a result of the Respondent bringing in a second woman and that she has filed this case simply to force the Respondent to chase away the new woman so that the Applicant can return back to him. The Respondent on his part has taken up the challenge but has stuck to his guns and maintains that his second wife is there to stay and that the applicant is at liberty to go back to her matrimonial home as he did not chase her away. As the marriage between the Applicant and Respondent is still in existence, then the Applicant's claim under section 7 of the Matrimonial Property Act, 2013 is premature.

11. On the issue of sharing of property acquired during the subsistence of the marriage, it is noted that the Applicant identified certain assets which she listed in the originating summons but failed to avail evidence regarding ownership thereof by way of search certificates of

ownership. Indeed, the Respondent requested the Applicant to present the ownership documents of these properties but which the Applicant failed to do. The Respondent pointed out that the two motorcycles belonged to his brother who had given him to use to obtain some income as he had a deformed hand. The Applicant failed to avail contrary evidence that the said motorcycles belonged to the Respondent and not his brother and hence available for distribution. It was the Applicant's responsibility to not only present evidence that the assets were in the name of the Respondent but also prove that the same had been acquired during the subsistence of the marriage. Even though the Applicant had pleaded the issues in controversy, the evidence she adduced in court was not in consonance with those pleadings. She was thus bound by her pleadings and the evidence tendered ought to be in tandem with the said pleadings. She was not expected to depart from them. I am guided by the Court of Appeal decision on Sammy **Kikuyi Adiema –vs- Charles Shamwati Shisikani [2014] eKLR** where it cited with approval a Malawi Supreme Court decision in **Malawi Railways limited –vs- Nyasulu [1989] MWSC 3** in which the court quoted, with approval from an article by Sir Jack Jacob entitled "The present importance of pleadings current legal problems at page 174:

“As the parties are adversaries it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings and cannot be allowed to raise a different or fresh case without the amendment properly made. Each party knows the case he is to meet and cannot be taken by surprise at the trial..... in adversarial system of litigation therefore, it is the parties themselves, who set the agenda for the trial by their pleadings and neither can complain if the agenda is strictly adhered to. In such an agenda there is no room for an item called “Any other business” in the sense that points other than those specific that may be raised without notice.”

As no evidence has been tendered by the Applicant regarding the ownership, existence or otherwise of the pleaded properties, this court cannot issue orders in vain. The Applicant has failed to prove her claim beyond the requisite threshold of proof. She cannot just thrust the claims at the court's feet and expect the court to grant the reliefs claimed without establishing the proof of those claims. It seems to me that the Applicant has filed the present case as a way of getting at the Respondent for bringing in a second wife. It is a protest note by the Applicant to her husband but in a wrong forum. If the Applicant is fed up with her marriage with her husband, then she should do the needful by seeking for dissolution of the marriage before embarking on the process of seeking for a share of the properties acquired in the course of the marriage. At best the application herein is an abuse of the court process.

12. In the upshot, the originating summons dated 21/05/2018 lacks merit. The same is dismissed. As there is still room for reconciliation by the parties, I order each party to bear their own costs.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.

D. K. Kemei

Judge

DELIVERED AT MACHAKOS THIS 13TH DAY OF OCTOBER, 2021.

G. V. Odunga

Judge