



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL SUIT NO.3 OF 2020 (OS)

IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT, ACT NUMBER 49 OF 2013

AND

IN THE MATTER OF SECTION 45 (3) OF THE CONSTITUTION OF KENYA

BETWEEN

VI.....APPLICANT

VERSUS

JT.....RESPONDENT

JUDGMENT

[1] This suit pitting the applicant, **VI** and the respondent, **JT**, was commenced by originating summons on the 25th October 2019 and is anchored on **s.17** of the Matrimonial **Property Act No.49 of 2013** and **Article 45 (3)** of the Constitution of Kenya.

Whereas the Matrimonial Property Act provides for rights and responsibilities of spouses in relation to matrimonial property, **Article 45 (3)** of the Constitution provides for equality in a marriage to the extent that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

[2] Accordingly, the applicant seeks against the respondent an order to transfer to him a half share of the matrimonial property described as **Kajiado/Kaputiei North xxxx (Kajiado property)** measuring 0.4 hectares registered in the name of the respondent and a further order declaring that he is entitled to 13.705 acres of the matrimonial property described as **Bukhayo/Kisoko/ xxxx. (Busia property)** measuring approximately 14.705 acres with the respondent being entitled to the remaining one acre of the property.

[3] The grounds in support of the application are set out in the originating summons and in the applicant's supporting affidavit deponed on the 24th October 2019 and further affidavits deponed on 15th January 2020 and 30th July 2020 respectively.

The respondent's grounds in opposition to the application are contained in her reply to the originating summons dated 16th December 2019 and her replying affidavit deponed on 10th July 2020. The hearing of the application was by way of affidavit evidence and written submissions and not by oral or "viva-voce" evidence as earlier directed by this court.

[4] The applicant's submissions dated 17th September 2021, were accordingly filed by **Roseline Odede & Co. Advocates** while those of the respondent dated 25th October 2021, were filed by **Annet Mumalasi & Co. Advocates**.

The pleadings and averments in both the supporting and replying affidavits together with the rival submissions clearly indicate that there exists no dispute that the parties were previously a married couple for a period of about thirty four (**34**) years from the year 1985 to the year 2019, when their marriage was formally dissolved with the issuance of a decree absolute dated 5th April 2019 by the High Court at Eldoret.

[5] Also not disputed was the fact that during the period of their coverture or marriage the parties acquired the suit property which invariably became their matrimonial property within the meaning of **s.6 (1)** of the **Matrimonial Property Act, 2013**, which provides that:-

“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.”**

[6] This therefore means that each one of them is entitled to a share of the matrimonial property now that their marriage has since gone south. The form and degree of the sharing is what forms the substratum of this suit as the parties did not sign a pre-nuptial agreement on the respective share of the matrimonial property on dissolution of marriage. Neither do they appear kin on equal sharing of the property as contemplated in **Article 45 (3)** of the Constitution. They actually indicated herein that they would rather have an unequal sharing of the property than apply the principle of equality in the present circumstances since each one of them claims to have contributed none than the other in the acquisition of the respective matrimonial property during the subsistence of their marriage.

[7] Whereas the applicant desires a half share of the Kajiado property and 13.705 acres of the Busia property, the respondent desires the whole of the Kajido property and a half share of the Busia property. This means that the Kajiado property is so dear to the respondent while the Busia property is so dear to the applicant. In the circumstances, they should have easily agreed to have the Kajiado property distributed to the applicant wholly and the Busia property to the applicant wholly. Their failure to even think and arrive at that agreement or any other amicable agreement was a reflection of selfishness on each one of them and forgetting “**them good old days**” of their erstwhile marriage.

[8] All these appears to have been brought about by their divorce which it would seem was acrimonious and created the stalemate in the distribution and share of the matrimonial property. Thankfully, the Law provides the key to unlocking the stalemate. For a very long period of time the law guiding distribution of matrimonial property in this country was **s.17** of the **English Married Women Property Act 1882**, which was a statute of general application allowing a party to apply by summons or otherwise in a summary way to a judge of the High Court of Justice for determination of any question between husband and wife as to the title to or possession of property. The court would then make such orders as may be necessary with respect to the property in dispute.

[9] In **Kamore Vs. Kamore [2000] 1EA 80**, the court opined that laws should be enacted to cater for the conditions and circumstances in Kenya as in England. Later, in the celebrated case of **Echaria Vs. Echaria (2207) 2EA 139**, the court lamented that there was no sign so far that parliament had any intention of enacting the necessary Legislation on matrimonial property. That, it was a sad commentary on our own law report agenda to keep the county shackled to a 125 year old foreign legislation which the mother country found wanting more than 30 years ago.

[10] The court stated further that in enacting its **1967, 1970 and 1973 Matrimonial Property Acts**, Great Britain brought justice to the shattered matrimonial home. In this country, justice was brought to our shattered matrimonial home by the promulgation of the Constitution of Kenya, 2010, which brought in **Article 45 (3)**, to provide for equal rights between parties to a marriage during its subsistence and dissolution. Under **Article 68 (iii)**, parliament was mandated to enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and/or the termination of marriage.

[11] Accordingly, parliament enacted the **Matrimonial Property Act, 2013**, which commenced on 16th October 2014 and is the current Statutory Law for purposes of this and such related suits. In that regard, **s.7** of the Act provides for ownership of matrimonial property to the extent that ownership 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.

[12] **S.2** of the Act, defines “contribution” as follows:-

“ **“contribution”** means monetary and non-monetary contribution and includes:-

- (a) Child care
- (b) Companionship
- (c) Management of Family business or property and
- (d) Farm work

Under the same provision, “**matrimonial home**” means 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.

[13] In this case, the applicant lays a claim to a half share of the Kajiado property thereby implying that in monetary terms he contributed fifty percent towards its acquisition although it was registered in the name of the respondent. He also lays a claim to almost the whole of the Busia property on the basis that he contributed 95% or 100% of the purchase price and that it was registered in his name.

On the other hand, the respondent claims the Kajiado property wholesome and half of the Busia property on which the matrimonial home was erected. She contended that the applicant contributed “**not a penny more nor a penny less**” towards the acquisition of the Kajiado property.

[14] **S.14** of the Matrimonial Property Act provides that:-

“Where matrimonial property is acquired during marriage-

(a) In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse and

(b) In the name of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

Therefore, it matters not that the Kajiado property is registered in the name of the respondent and the Busia property in the name of the applicant. Both have beneficial interest in both property and hold either property in trust for the other. The Busia property comprises of the matrimonial home. It was not inherited by the applicant but acquired during the existence of his marriage with the respondent who would invariably be entitled to a sizeable share of the same.

[15] The evidence from both sides indicate that the contribution alluded to by the parties is at most, monetary contribution. Non-monetary contribution especially on the part of the respondent did not receive much attention from the applicant even though the parties enjoyed their “**seventh heaven**” for more than thirty (30) years and were in the process blessed with several children. In this court’s opinion, a wife’s non-monetary contribution cannot be down played especially in an African society where men cannot achieve any social or economic success without a woman behind him. The strength of a woman is not something to be underrated. This is a truism which started after the creation of the first woman (**Eve**) from the rib of the first man (**Adam**).

[16] The non-monetary contribution of a woman in the creation of matrimonial wealth and acquisition of matrimonial property cannot be measured in monetary terms as doing so, would amount to discrimination and violation of a woman’s Constitutional rights to equal rights to property ownership during the existence and dissolution of a marriage.

In any event, the documentary evidence availed by both parties in an attempt to establish their respective monetary contribution made by either party towards the acquisition of the matrimonial property was not sufficient to establish with certainty the alleged monetary contributions made by either party towards the acquisition of the matrimonial property given the fact that they were both in gainful employment during their marriage.

[17] In the circumstances, this court cannot yield or accede to the request or wish of either party to distribute their matrimonial property in accordance with either of their respective proposals.

There being no certainty as to the extent or degree of their respective monetary contribution towards the acquisition of the suit matrimonial property, this court must find and hereby finds that their contribution either monetary or non-monetary was equal. The property shall therefore be shared between them on equal basis i.e at the ratio of 50:50%.

[18] In the **Echaria case (supra)**, the court stated that in cases where each spouse has made a substantial but unascertainable contribution it may be equitable to apply the maxim “**Equality is equity**”. This maxim applies aptly to the circumstances of this case and is fortified by the constitutional principle of equality in ownership of property between married couples.

[19] In sum, prayer (1) of the Originating Summons is hereby granted in favour of the applicant as it accords with the principle of equality. Prayer (2) is granted only to the extent that both parties are entitled to equal share of the Busia property and not in the manner suggested by the applicant.

Both parties shall bear their own costs of the suit.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED & SIGNED THIS 4TH DAY OF NOVEMBER 2021]