



**REPUBLIC OF KENYA**

**IN HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**PETITION NO. 126 OF 2017**

**IN THE MATTER OF ARTICLE 2(1), 3(1), 19, 20, 22(1),**

**23(3) & 24 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS**

**UNDER ARTICLES 25(a), 26(1), 27, 28, 29, 40(1), 43(1) (c) & (e) & 57 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 7, 12 & 17 OF THE MATRIMONIAL PROPERTY ACT, 2013**

**AND**

**IN THE MATTER OF SECTIONS 23(3) OF THE INTERPRETATION AND**

**GENERAL PROVISIONS ACT (CHAPTER 2 OF THE LAWS OF KENYA)**

**BETWEEN**

**MKG.....PETITIONER**

**AND**

**EG.....RESPONDENT**

**RULING**

1. The petitioner MKG. and the respondent EG got married on 8<sup>th</sup> July 1978 and have three children. They have several properties, but the one that is the subject of this petition is LR. No. Nairobi/ Block xx/xxx situate in Loresho in Nairobi. The couple lives on the property as their matrimonial home. The petitioner says he bought it without the respondent's contribution. Basically, the petitioner has been asking the respondent that they sell the home whose value he estimates to be Kshs.70,000,000/=. He is a retired man, and now 76 and with limited resources. In August 2017 he informed the respondent and their children that he wanted to sell this house and divide the proceeds so that each (the petitioner, respondent and the three children) gets 20%. He suggested to the respondent that he use their total of 40% to obtain a house, and live off the balance. Alternatively, she could use her 20% to obtain alternative accommodation for herself. The respondent refused to have the home sold as suggested, or at all. This refusal, he stated, had consigned him to a life of physical, emotional and economic frustration, and thereby making it impossible in law for him to advance his life and enjoy his fundamental rights and freedoms. The refusal by the respondent has reduced his life to that of dependency, as he has to depend on the children for stipends and the stipend he gets from the government of Kenya.

2. The petitioner stated that whenever he raises the issue of sale of the house, the respondent waves the **Matrimonial Property Act, 2013**. The particular provisions that are waved are **sections 7 and 12** of the **Act** which provide as follows:-

**“7. 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.**

8. ....

9. ....

10. ....

11. ....

12.

**(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.**

**(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man’s wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.**

**(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.**

**(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—**

**(a) on the sale of any estate or interest in the matrimonial home in execution of a decree;**

**(b) by a trustee in bankruptcy; or**

**(c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.**

**(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.”**

3. The petitioner’s argument is that the provisions have violated and fettered his constitutional rights and freedoms. In particular, he stated that the actions of the respondent and her reliance on the provisions have violated his right to life under **Article 26(1)**, to dignity under **Article 28**, to property under **Article 40(1)**, to social security under **Article 43** and social security as an elderly person under **Article 57** of the Constitution.

4. The petitioner’s further case was that **sections 7 and 12** of the **Act** are under **Article 2(4)** of the Constitution inconsistent with the Constitution, and that the two provisions should be interpreted and construed with the necessary adaptation to bring them in conformity with the Constitution and in such a way that they ensure the enforcement of his fundamental rights and freedoms.

5. At the end of the day, the following are the reliefs that the petitioner sought:-

**“(a) A declaration of rights of ownership between the Petitioner and the Respondent over L.R No. Nairobi/Block xx/xxx in the ratio of 99.36% to the Petitioner and 0.64% to the Respondent;**

**(b) A declaration that to extent that the Petitioner has made provision to the Respondent of 20% of the proceeds of L.R No. Nairobi/Block xx/xxx for her alternative accommodation, the Petitioner has the right even during currency of marriage to appropriate the balance of the share proceeds in his ascertained share as he pleases including selling, renting and or in any other manner whichever to provide for himself;**

**(c) A declaration that Sections 7 and 12 of the Matrimonial Property Act, 2013 affects fundamental rights and must on case by case merits of each case be construed to give effect to fundamental rights of spouses guaranteed under the Constitution;**

**(d) A declaration that for the facts and circumstances of the present literally interpreting Sections 7 and 12 of the Matrimonial Property Act, 2013 to deny the Petitioner capacity to deal in his share of the matrimonial property to provide for his life, dignity, social security and advancement as an elderly citizen, egregiously violates the Petitioner’s fundamental rights and freedoms enshrined under Articles 26(1), 28, 29, 40(1), 43(1) (c) & (e) and 57 of the Constitution of Kenya, 2010;**

**(e) A declaration that the Petitioner is at liberty to sell and or deal in the property L.R No. Nairobi/Block xx/xxx provided before vacation by the Respondent from the said property the Respondent be paid 20% of the proceeds of sale to find alternative accommodation;**

**(f) An order that upon receipt of 20% of the value of the sale proceeds of property L.R No. Nairobi/Block xx/xxx, the Respondent to vacate the property in any event within 30 days of such payment;**

**(g) An order that the Respondent does concur and does all acts necessary to withdraw the caution registered by herself over L.R No. Nairobi/Block xx/xxx, within seven (7) days of this Order, failing which the Deputy Registrar of the High Court to execute all documents necessary for removal of the Caution;**

**(h) A declaration that the Deputy Registrar of the High Court to execute any consents or deeds necessary for sale of the property L.R No. Nairobi/Block xx/xxx at the instance of the Petitioner, that would otherwise be issued and or signed by the Respondent;**

**(i) Any other appropriate relief that the Honourable Court shall deem fit to grant.”**

6. The respondent swore a replying affidavit to oppose the petition. She stated that she was the one who had identified the house for purchase, and that she subsequently substantially contributed towards its acquisition. She later on renovated the house to create a guest wing which they rent for Kshs.52,500/= per month. She uses the money on herself and on the petitioner. She narrated a history of the petitioner's mismanagement of family financial resources, and stated that they have, over and above the home, 4 acres in Nyeri on which is their rural matrimonial home; a commercial building at Giakanja; and a commercial plot in Kajiado. She has no problem if the petitioner wants to sell any of these properties, and she has indicated to him as much. But to sell their Loresho home, she says, will fundamentally affect not just them but also their children and their grandchildren. They have a sentimental attachment to the house. This is home for them for the last 40 years, and anything else would affect their quality of life, and would not make financial or economic sense, she pleaded.

7. Regarding the claim by the petitioner that since retirement he has been reduced to a life of dependency, she responded that, over and above the monthly rent from the guest wing, he receives substantial compensation from his last employer, he has a stipend monthly from the Government, he receives money from sale of coffee grown on their rural matrimonial land, he gets Kshs.40,000/= per month in rental income from their Giakanja property, she has monthly salary from her employment which she shares with him and all their three children give him a stipend each month. Lastly, she asked the petitioner to indicate the specific financial needs that cannot be met through the available resources. As for medical needs, she stated that he is on medical cover.

8. The petitioner swore a further affidavit to reiterate that he alone bought the matrimonial home in question. He denied that he had mismanaged any family resources. He denied that he receives any monthly stipend from the Government. As for the children, he stated that they each had a young family and he did not want to put pressure on them to support him. He received Kshs.2,000,000/= compensation from Mastermind Tobacco Limited out of which he gave Kshs.1,000,000/= to one of his children to begin a business. Regarding the matrimonial home in Nyeri, he stated that this was inherited property although he put the respondent and his (petitioner's) disabled sister as joint owners, and that the coffee proceeds from there go to support his sister. He stated that the Kajiado property has a dispute which is in court. The rental property at Giakanja fetches only Kshs.30,000/= per month, he said. Lastly, he stated that the respondent is no longer employed and therefore there is no salary that she brings home monthly.

9. On 21<sup>st</sup> March 2018 the respondent filed a notice of preliminary objection whose grounds were that:-

- a) the Court has no jurisdiction to grant the orders sought during subsistence of marriage between the petitioner and the respondent;
- b) the orders cannot be sought through a constitutional petition; and
- c) that a constitutional petition cannot be raised between two private persons.

10. This ruling relates to the preliminary objection. The parties' counsel, Mr Bwire for the petitioner and Mr Ojiambo for the respondent, addressed the objection through their written submissions.

11. It is clear from the foregoing that the petitioner wants to sell the couple's matrimonial home but the respondent has refused. It is common ground that the property was acquired during the subsistence of the marriage of the parties. **Section 6(1)** of the Act provides that:

**“6(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.”**

**Section 7** of the Act provides that 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.

12. Contribution, under **section 2** of the Act, 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**

**(e) farm work.”**

13. Then **section 12** of the **Act** provides that, an estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

14. Under **Article 45** of the Constitution, the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state. Under **Article 45(3)** –

**“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.”**

15. The courts have interpreted **section 7** of the **Act** to mean that, where the parties are still married, the court can be asked to declare the rights and interest of either spouse in a matrimonial property. However, where any of the parties to the marriage seeks the division or alienation of the matrimonial property they have to divorce first, or seek the dissolution of the marriage first. The power to grant declaratory orders over the matrimonial property is granted by **section 17** of the **Act** as follows:-

**“(1) 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.**

**(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.”**

16. In short, the petitioner and the respondent are still married. The Constitution values their marriage. The Constitution protects the rights of either spouse to the matrimonial home which was acquired during the marriage. The respondent has a claim to the home, either because she financially contributed to its acquisition or indirectly contributed to the same. Whether she was employed or not, her contribution became secure when she took care of the home, she brought onto this earth three children and helped to bring them up and took care of the petitioner as he went out to seek employment and make money. She, consequently, has a say on whether the property can be sold or not. In other words, as long as the marriage still subsists the matrimonial home cannot be alienated or sold without reference to her. In reaching this decision, I have considered that in **Federation of Women Lawyers Kenya (FIDA) –v- Attorney General & Others [2018]eKLR**, the petitioner challenged the constitutionality of **section 7** of the **Matrimonial Property Act** arguing that it offended **Article 45(3)** of the Constitution and that it infringed on the rights of women to own property after the dissolution of a marriage, because the section required women to prove their contribution towards its acquisition, yet the definition of contribution had been expanded to include non-monetary contribution. The court came to the conclusion that **section 7** did not offend any of the provisions of the Constitution.

17. As to whether the orders cannot be sought through a constitutional petition, it is now trite that a mere allegation by a petitioner that his right or freedom under the Bill of Rights has been denied or infringed or violated or is threatened is in itself not sufficient to entitle him to invoke the jurisdiction of the Constitution Court under **Article 165(3)** of the Constitution, if it appears that his claim involves an alleged breach of a particular statute, and therefore can find a remedy if he filed an ordinary suit in a civil court (**Godfrey Paul Okutoyi –v- Babil Olaka & Aother, NBI HC Petition No. 457 of 2015**).

18. In **Francis Gathungu Waithaka –v- Kenyatta University [2012] eKLR**, the petitioner and his employer (the respondent) were in a labour dispute. The petitioner was suspended from employment for alleged theft. He sought to be paid his salary and benefits during the period of suspension. He claimed that he had not been afforded a fair hearing during the labour proceedings; that he had been held in servitude for the period he was under suspension; that he had been subjected to inhuman and degrading treatment; that he had been denied the right to disciplinary proceedings being heard and determined within a reasonable time; that he had been subjected to arbitrary and capricious exercise of public power; and that he had not been paid his salary and other benefits for the period of his suspension. He argued that all these actions had been undertaken in contravention of **sections 73, 74, 75, 77(a) and 82** of the Repealed Constitution, and was entitled to stated reliefs. The court went over various decided cases and held that the dispute was a mere industrial dispute that ought to have been filed in the ordinary civil court to determine whether the petitioner was entitled to be paid his salary and benefits during the period of suspension. The court concluded that: -

**“Parties should not use the sacrosanct Bill of Rights in our Constitution to pursue ends that do not meet its expectations. This Court will grant orders to deserving litigants but will in equal measure turn away those that abuse its processes and the limits set by the law.”**

19. I determine that the petition before me does not carry the hallmarks of a constitutional petition for the violation or infringement or

threatened violation or infringement of rights and fundamental freedoms under the Bill of Rights. The question whether or not the petitioner should sell a matrimonial home in which he lives with his wife (the respondent) is a matter that can find redress under the **Matrimonial Property Act**.

20. Lastly, there was the ground whether a constitutional petition can be raised between two private persons. In the instant case, the specific question was whether a private person was entitled to sustain a claim of a breach or threatened breach of his constitutional right or fundamental freedom against another private person. This is not a difficult question to answer. This is because **Article 22(1)** gives every person a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. **Article 258** further gives every person the right to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention. **Article 3(1)** states that every person has an obligation to respect, uphold and defend the Constitution, and **Article 19(1)** states that the Bill of Rights applies to all law and binds all state organs and persons. Lastly, under **section 2(1)** the Constitution binds all persons and all state organs.

21. In **Satrose Ayuma & 11 Others –v- Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others [2013]eKLR**, it was observed as follows:-

**Looking at the provisions of Articles 2(1), 19(3) and 20(1), I am certain that the Bill of Rights can be enforced as against a private citizen, a public or a government entity such as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. I say so deliberately and with firmness because previous decisions of this Court on the subject have been completely misunderstood and misread by more persons ..... The Bill of Rights is therefore not necessarily limited to a State Organ as argued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.”**

I am persuaded that the Bill of rights can be enforced against a private person.

22. However, the petitioner sought to have **sections 7 and 12** of the **Matrimonial Property Act** declared unconstitutional. He did this without minding to join the Attorney General as a party. The respondent on her own may not be able to defend the constitutionality of these provisions. It is only the Attorney General who can defend the public interest contained in the provisions, and defend the interests of the National Assembly that passed the **Act** and its provisions. One has to recall the presumption that all laws passed by parliament are constitutional. Unless it is otherwise proved (**Edward Mwaniki Gaturu & Another –v- A.G. & 3 Others [2013]eKLR**).

23. In dealing with the preliminary objection raised by the respondent, I have been conscious of the principles in **Mukisa Biscuit Manufacturing Company Limited –v- Westend Distributors Limited [1969]EA 696** where it was held that –

**“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 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.”**

24. I have ascertained that the three grounds in the objection raise pure points of law, and that if they are disposed of in the respondent’s favour that will be the end of this petition. Lastly, there is no dispute that the facts on which the petitioner has relied on are not in dispute. They are that, the two are married and live together in the matrimonial home; that the petitioner wants to sell the house; and the respondent has refused and is relying on **sections 7 and 12** of the **Matrimonial Property Act**.

25. In conclusion, therefore, I find the preliminary objection taken by the respondent is sustainable. I strike out the petition with costs.

**DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 9TH DECEMBER 2021.**

**A.O.  
JUDGE**

**MUCHELULE**