



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 57 OF 2018 (OS)

PRN.....APPLICANT

VERSUS

FNM.....RESPONDENT

RULING

1. The applicant PRN and the respondent FNM got married on 28th June 1986 at Kevote Catholic Church in Embu. They have four children. In **Milimani CM Divorce Cause No. 333 of 2012** the applicant petitioned for divorce. The petition was filed on 15th August 2012. The respondent defended it. On 14th December 2018 the court dismissed it.

2. While the petition was pending, on 19th September 2018 the applicant filed the present originating summons seeking the declaration that the movable and immovable property acquired during the marriage were matrimonial property acquired by their joint efforts and each was equally entitled to them. She asked that the properties be valued and sold, and that the proceeds be shared equally between them; and that the respondent be restrained from alienating, encumbering, or in any other manner disposing of any of the properties. The properties named were:-

- (a) LR No. Nairobi Block [xxxx];
- (b) LR No. Gaturi/Weru/[xxxx];
- (c) LR No. Gaturi/Nembure/[xxxx];
- (d) LR No. Kajiado/Kitengela/[xxxx];
- (e) Rukira Land ½ acre
- (f) Plot at Ena Market in Embu; and
- (g) motor vehicle KBS [xxxx].

3. The respondent entered appearance and filed a notice of preliminary objection to state that, under **section 7 of the Matrimonial property Act (No. 49 of 2013)**, the court lacks jurisdiction to hear and determine this summons; and that the proceedings herein are a nullity because the applicant is seeking the division of matrimonial property during unbroken coverture, and therefore the court lacks jurisdiction to entertain the cause.

4. The court asked for written submissions on the preliminary objection. Mr. Mwangi was acting for the applicant and Mrs. Ndungu was acting for the respondent. They each filed submissions.

5. The fact of the matter is that the applicant and the respondent are married and their marriage has not been dissolved. The applicant seeks two substantial prayers: the determination of rights to property which he states were acquired during the marriage; and the division of and/or sharing of that property. I hasten to add that, at this stage, there has been no challenge to the averment that the property is matrimonial property, having been acquired during the marriage, and that there was equal contribution to that acquisition.

6. **Section 7** of the **Matrimonial Property Act** provides that:-

“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.”

7. It is evident that the applicant and the respondent have not divorced, and neither has their marriage been otherwise dissolved. The court does not have jurisdiction under **section 7** of the **Act** to share or divide the matrimonial property between them before they have divorced, or their marriage has otherwise been dissolved (**N.C.K. –v- G.V.K. [2015] eKLR**); **P.W.M. –v- E.M. [2014] eKLR**).

8. **Section 17** of the **Act** provides as follows:-

“(1) A person may apply to a court for a declaration of rights to any property that is contested between the 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.”

9. It is now trite that under **section 17** of the **Act**, a spouse, either where a divorce cause is pending or even before he has filed such a cause, can come to court seeking the resolution of any question about his beneficial entitlement to the property acquired during their marriage. The spouse can seek the declaration of his rights in relation to matrimonial property. The court will declare his beneficial interest in the matrimonial property, but will not share or divide that property (**C.K. –v- A.G.M., HCCC No. 14 of 2013 (O.S.) at Nairobi; Winnie Juliet Wairimu Macharia –v- Peter George Heinrich Koenke [2018] eKLR**).

10. The result is that the preliminary objection by the respondent succeeds in part. This court has the jurisdiction to declare the rights of the applicant in the matrimonial property acquired during the marriage between her and the respondent. It has the right to determine her beneficial interest in the property. However, the court has no right to sever, share or divide the matrimonial property as long as the marriage between them is subsisting; as long as they have not divorced and/or the marriage has been otherwise dissolved.

11. This is a family dispute. Each party shall bear own costs.

DATED and DELIVERED at NAIROBI this 23RD day of JULY 2019.

A.O. MUCHELULE

JUDGE