



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL CASE NO. 11 OF 2014 (OS)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

P H SAPPLICANT

VERSUS

S M RRESPONDENT

RULING

1. The applicant P H S and the respondent S M R got married under Hindu customary law. On 29th July 2005 the marriage was registered at the Registrar of Marriage's Office in Nairobi. They divorced in **HC Divorce Cause No. 5 of 2012** at Nairobi. The marriage had no issues.

2. On 7th March 2014 the applicant filed this amended originating summons under **section 17** of the **Married Women's Property Act (1882)** seeking:-

(a) a declaration that all the shares registered in the respondent's name in the various companies as listed in the statement generated by Dyer and Blair Investment Bank were jointly owned and that the respondent held 50% of the same in trust for the applicant;

(b) a tracing order do issue against the respondent in respect of his said shares listed in the said statement which are or may be sold to a third party by the respondent;

(c) the shares in the statement be valued and sold and that the net proceeds be shared equally between the respondent and the applicant;

(d) in the alternative to prayer (c), the respondent do pay to the applicant her fifty percent (50%) share of the total value of the shares of Kshs.4,734,238.50

(e) the respondent do return or otherwise cause to be handed over the applicant her property which was gifted to her at the wedding, which said property was more particularised in "PHS 2"; and

(f) in the alternative to prayer (e), the gifts not returned to the applicant be valued and the respondent does pay the applicant Kshs.3,037,920/=.

3. The respondent filed a replying affidavit to deny that he owned the applicant any wedding gifts or gold, or its equivalent in money. He stated that any wedding gifts that they got were shared between them, and each party took away what was due to him/her. As for shares, he stated that he bought them prior to the marriage, and that to be able to buy them he had got a loan from his father. When he sold the shares, he repaid the loan, he stated. He denied that the shares were matrimonial property.

4. At the conclusion of the applicant's evidence, the respondent's counsel Mr. Nyaga asked for adjournment to call his client's evidence. Before the scheduled date on 18th May 2017, on 9th May 2017 he filed a notice of Preliminary Objection under **section 7** of the **Civil Procedure Act**, that prayer 5 and 6 of the applicant's amended originating summons of 7th March 2014 were *res judicata*. In particular, the respondent's case was that the issue of the wedding gifts was heard and determined by Justice W.M. Musyoka who heard the applicant's application for alimony *pendente lite* and delivered ruling on 15th August 2013. The Judge dismissed the application.

5. To be able to appreciate what is in dispute, I will reproduce paragraphs 5 and 6 of the applicant's originating summons as follows:-

“5. THAT at the wedding ceremony, I was given gold from my family and that of the respondent's family and other family friends as gifts.

6. THAT I mark and annex PHS 2 a copy of the list of the wedding gifts in the form of gold that were given to me at the time of the wedding. All the gifts were in 2 karat Gold and weighed a total of 933.6 grams as is set out in the said list. They were stored at a safety deposit box at CFC Bank, Nairobi which said locker was in the joint names of the respondent and myself.”

6. M/s B.M. Quadros represented the applicant. According to her, the issue of these gold gifts has not been heard and determined; that the consent that was entered into by the parties was subject to the determination of the ownership of the gifts. It was her case that the parties were to agree on that ownership, but that has not been done to date.

7. It is material that in the application before Judge Musyoka one of the prayers was the return of the wedding gifts. The respondent's case was that the gifts were meant for both of them, that the respondent had taken most of them when she left the matrimonial home, and that, in any event, the gifts were matrimonial property that could only be dealt with by a court determining the parties' respective shares in matrimonial property. The Judge made reference to what each side had stated and proceeded as follows:-

“The application was argued on 11th October 2012 before Njagi J. The parties agreed by consent to open the safe deposit box at the CFC Bank and to divide the content between them based on the ownership thereof. This disposed of the issue of the wedding gifts.”

8. It is clear from the ruling that the parties agreed to open the safe deposit box and divide the gold contents between them in accordance with ownership. The applicant pleaded that when the parties and their counsel went to the bank to open the box, they found that the respondent had been to the box, opened it and taken some of the gold which belonged to her; that she found some of her gold was missing. She managed to get only some of her gold. What she did not find is what she claimed in this summons. The respondent's case was that when the box was opened –

“it was clear that the items that were gifted to the plaintiff were all in the box.....”

He denied that he had gone to the bank the previous day, opened the box and removed a number of gold items from there.

9. In my considered view, there was no agreement on who owned which items of gold. It was expected the parties and their counsel would go to the bank and open the box at the same time. It was alleged the respondent had sneaked into the box alone the previous day and taken some of the gold items. There was also a dispute as to which items belonged to which party. In short, the ruling of Justice Musyoka did not settle all the issues regarding the gold items, and to whom they belonged.

Consequently, the plea that the matters concerning the wedding gifts were *res judicata* was without basis. The notice of Preliminary Objection by the respondent is dismissed with costs.

DATED and DELIVERED at NAIROBI this 15th day of June 2017

A.O. MUCHELULE

JUDGE