



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL SUIT NO. 66 OF 2012 (O.S)
IN THE MATTER OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT 2013

AND

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

BETWEEN

N.C.K.....APPLICANT

VERSUS

G.V.K.....RESPONDENT

RULING

1. The applicant N.C.K. and the respondent G.V.K. got married on 3rd June 1989 and have three children. They have pending divorce proceedings in Divorce Cause No. 98 of 2010. On 16th November 2012 the applicant filed this originating summons under **section 17** of the **Married Women Property Act (1882)** seeking the following orders:-

“(1) **That** the property known as LR Number [Particulars Withheld] Njumbi Road Lavington, be severed and that the same be held by the parties herein as tenants in common.

2. **That** in the alternative this Honourable court be pleased to declare that the property known as LR Number [Particulars Withheld] Njumbi Road Lavington, acquired and developed by the joint funds and efforts of the applicant and respondent herein during their period of marriage is held by the respondent in trust for the applicant in equal shares.
 3. **That** upon severance and or declaration of their respective shares, the said property be sold and the proceeds be shared equally between the parties herein.
 4. **The Deputy Registrar be empowered to sign any documents that the respondent may refuse to sign.”**
2. The application was based on the ground that the said property was acquired and developed during the subsistence of the marriage with the joint efforts and contributions of the parties, and therefore

that it is matrimonial property. The applicant claimed they were staying in the property until 14th July 2010 when the respondent forced her out by his cruel conduct. She stated that she has a beneficial interest in the property, although it is held by the respondent.

3. On 15th August 2013 the court issued a temporary injunction restraining the respondent, his servants and/or agents from wasting, damaging or alienating or otherwise interfering with the property pending the hearing and determination of the suit.
4. On 22nd April 2015 the respondent filed a notice of preliminary objection whose grounds were that:-
 - a. the court lacks jurisdiction to hear and determine this matter in view of **section 7** of the **Matrimonial Property Act No. 49 of 2013**;
 - b. under **section 19** of the **Matrimonial Property Act (2013)**, the **Married Women's Property Act (1882)** under which the proceedings were instituted ceased to extend or apply in Kenya; and
 - c. the proceedings herein are a nullity as the applicant is seeking division of matrimonial property during unbroken coverture and therefore the court lacks jurisdiction to entertain the matter.
5. The applicant filed grounds of opposition to the objection. The grounds were that the objection was raising a procedural technicality when **Article 22(3)(d)** of the Constitution of Kenya 2010 commands the court not to be unreasonably restricted by such technicalities; that under **Article 45(3)** of the Constitution parties to a marriage have equal rights before, during and after marriage, and that on the basis of that principle matrimonial property should be shared equally when the marriage ends; and the "contribution" under **section 2** of the **Matrimonial Property Act 2013** refers to monetary and non monetary contribution and evidence needs to be led to show such contribution. She asked that the objection be dismissed with costs.
6. M/s Wahome for the applicant and Mr Aduda for the respondent filed written submissions and also addressed the court on the preliminary objection.
7. Mr Aduda correctly pointed out that the **Married Women's Property Act (1882)** ceased to extend or apply in Kenya by virtue of **section 19** of the **Matrimonial Property Act 2013**. He raised this point as a basis for the argument that the summons was not properly before the court and therefore there was no jurisdiction to entertain it. M/s Wahome sought leave to amend the summons to bring it under **section 7** of the **Matrimonial Property Act 2013**. The court allowed the amendment. This is because after the 1882 English Act ceased to apply the **Matrimonial Property Act 2013** became the only law that

“provides for the rights and responsibilities of spouses in relation to matrimonial property.....”

It needs to be pointed out that there were no transitional provisions under the new **Act**. In the Court of Appeal decision in **D.E.N. v P.N.N., Civil Appeal No. 226 of 2012** at **Nairobi** it was held that after the cessation of the operation of the **Married Women's Property Act 1882**, the **Matrimonial Property Act 2013** (which came into operation on 16th January 2014) is currently the legislation that provides for the rights and responsibilities of spouses in relation to matrimonial property. In the instant application, the applicant has asked that the matter be decided on the basis of **section 7** of the **Matrimonial Property Act 2013**.

8. Now that the application has been brought under **section 7** of the **Matrimonial Property Act 2013**, the court has to appreciate what the section provides. It provides that:-

“subject to section 6(3) ownership of the matrimonial property rests 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.”

Put simply, where a spouse seeks the distribution of matrimonial property he/she has to show that there has been divorce or the dissolution of the marriage. In the instant case the parties are still married, although there is a pending divorce matter between them. Because the application was brought under **section 7** of the **Matrimonial Property Act 2013**, I agree with Mr Aduda that the court would not have jurisdiction to entertain the matter. This is because the applicant is seeking the division of matrimonial property during the unbroken coverture.

9. M/s Wahome was, however, of the view that **section 7** of the **Matrimonial Act**, in so far as it requires that there be broken coverture before a spouse can seek the distribution of matrimonial property, is inconsistent with **Articles 10, 22(3) 45(3) and 68(iii)** of the Constitution of Kenya 2010. I do not consider that such a substantial complaint about a legislation can be argued casually in submissions. A party who wishes to challenge the constitutionality of a legislation must bring a substantive petition to be able to attract the necessary attention by the Court. In any case, counsel is the one who amended her client's application and brought it under **section 7** of the **Matrimonial Property Act 2013**. Why seek to rely on what she considers to be an unconstitutional provision? Further, a party who seeks to rely on **Article 45(3)** of the Constitution of Kenya 2010 that states that:-

“(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” has to remember that before that provision there is **Article 45(1)** that provides that:

“(1) 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.”

It has been held by the Court of Appeal that the court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings (**Anthony Francis Wareham & Others v Kenya Post Office Savings Bank, Civil Appeal Nos 5 and 4 of 2002**). I reiterate that the applicant pleaded that she was relying on **section 7** of the **Matrimonial Property Act 2013** for her application. A party is bound by his pleadings.

10. I appreciate that under **Articles 22(3)(d) and 159(2)(d)** of the Constitution of Kenya 2010 there is emphasis that justice should be administered without undue regard to procedural technicalities. However, **section 7** of the **Matrimonial Property Act 2013** is not a procedural technicality. This is a substantive provision of a statute that donates rights and responsibilities to spouses in relation to matrimonial property.

11. M/s Wahome submitted that the parties have been separated for a long time and the applicant has a demonstrated intention to divorce and therefore that the matrimonial property that they acquired should be shared; that it would be unfair to keep the property without sharing it. She argued that the two cases, the divorce one and the present one, should be allowed to go on together. It is no longer an issue that where a marriage leaves matrimonial property either spouse can apply for its distribution, and this will be done in accordance with **Article 45(3)** of the Constitution of Kenya 2010 and **sections 2, 4, 6 and 7** of the **Matrimonial Property Act 2013**. But the distribution cannot be done under **section 7** while there is unbroken coverture.

12. Under **section 17** of the **Matrimonial Property Act 2013**:-

“(1) A person may apply to a court for a declaration of rights to any property that is contested between the person and a person 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 matrimonial case; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

First, the present application was not brought under **section 17** of the **Matrimonial Property Act 2013** for the Court to have jurisdiction to declare the rights of the parties to the property in question. Listening to counsel for the applicant, what is sought is not just the declaration of rights but the sharing of the property. And looking at the originating summons and the affidavit in support, what is sought is ultimately the distribution of the property. In paragraphs 14 and 15 of the affidavit the following is deponed:-

“14. That I have been living with my parents since then and I cannot continue to do so as I require my own space and indeed, I require the money to build my own house.

15. That in the circumstances, I desire that the said property be sold and the proceeds thereof shared equally.”

In England, under the **Matrimonial Causes Act 1973**, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court’s adjustive power. The **Family Law Act 1996** at **section 33(4)** provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of **Arif v Anwar [2015] EWHC 124(FAM)** the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party’s beneficial interest in the matrimonial property without severing the same. Further in **L (Children), RE[2012] EWCA CIV 721** where a married couple were having considerable differences to the point of not being able to cohabit together, the judge issued an occupation order pursuant to **section 33** of the **Family law Act 1996** requiring the husband to vacate the matrimonial home forthwith and to remain from it until a certain period, and gave a shared residence order.

13.It would appear to me that a spouse can, under **section 17** of the **Matrimonial Property Act 2013**, either where there is a divorce matter that is pending, or where, for whatever reason, he can no longer live together with the other spouse but is not seeking to divorce, come to court to resolve any questions about the beneficial entitlement to their property. He can seek declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. The court will declare each party’s beneficial interest in the matrimonial property without severing the same. Such a declaration is not, in my view, inconsistent with **Article 45(3)** of the Constitution of Kenya 2010. In other words, both **sections 7** and **17** of the **Matrimonial Property Act 2013** are consistent with, and seek to reinforce, **Article 45(3)**. One deals with the distribution of matrimonial property upon divorce and the other protects the rights of spouses in relation to matrimonial property where the marriage is still in existence. Once again, the court is not dealing with an application under **section 17** of the **Matrimonial Property Act 2013**.

14.The result is that the preliminary objection taken out by the respondent is sustained. The court does not have jurisdiction under **section 7** of the **Matrimonial Property Act 2013** to divide the matrimonial property between the applicant and the respondent during unbroken coverture. The originating summons dated 31st October 2012 is dismissed. This is a family dispute and therefore ask each party to pay own costs for the summons and the preliminary objection.

DATED at NAIROBI this 3rd November 2015.

A.O. MUCHELULE

JUDGE

DELIVERED at NAIROBI this 4th November 2015.

M. MUIGAI

JUDGE