



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MURANG'A
CIVIL SUIT NO. 1 OF 2013(O.S)
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
AND
IN THE MATTER OF SECTION 17 OF MARRIED WOMEN'S PROPERTY ACT OF 1882
BETWEEN
P W M.....APPLICANT
AND
E M.....RESPONDENT

RULING

The applicant filed an originating summons dated 18th December, 2006 seeking division of property known as **Loc 19/Gacharageini/13** between herself and the respondent on the ground that it was acquired and is owned jointly between herself and the respondent.

The applicant also sought for the division of property known as **Loc 19/Gacharageini/720**, again between herself and the respondent on the ground that she contributed to the development of the property.

This court was also urged to restrain the respondent from alienating or in any other manner disposing of or dealing with the properties aforesaid in any manner that may prejudice the interests of the applicant and in the event that he has done so, he be ordered to compensate the applicant to the extent of what would be her due share.

The applicant also asked for the costs of the suit.

In the affidavit sworn by the applicant in support of the summons she deposed that she married the respondent in 1967 under Kikuyu customary law. Their marriage was blessed with five issues the last of whom was born in 1984.

It is the applicant's case that during their marriage, they resided on land parcel number **Loc 19/Gacharageini/720**. She contends that she grew tea on this farm but as at the time she filed this suit, the respondent had denied her access to proceeds of the sale of this crop.

The applicant also deposed that in the year 1986, she jointly with the respondent bought the property known as **Loc. 19/ Gacharageini/813** where they established their matrimonial home. On this farm, she planted tea whose proceeds were always shared equally between them.

The applicant contends that as at the time she filed this suit, she was separated from the respondent who she alleges has evicted her from the matrimonial home and married another woman; further still, the respondent has been solely enjoying the proceeds from the sale of tea she planted on the parcels of land they bought jointly.

In order to protect her interests, the applicant placed restrictions on these parcels of land but that they were removed by the court in **Kangema Resident Magistrates Court Civil Suit No. 138 of 2005**.

It is the applicant's case that since she is no longer living together with the respondent it is prudent that the properties they acquired jointly be divided and shared out equally between them.

In response to the originating summons, the respondent filed a replying affidavit in which he denied the applicant's claims. In particular, he denied that the applicant planted any tea on land parcel **Loc.19/Gacharageini/720** or that she has left the matrimonial home.

The respondent has also deposed that he solely purchased land parcel **Loc. 19/ Gacharageini/813** without any contribution from the applicant.

On 26th March, 2013, directions were taken on the summons to the effect that the case proceeds for hearing by way of *viva voce* evidence; however, counsel for the respondent raised a preliminary objection to the hearing of the entire suit mainly on the ground that this court lacks jurisdiction to hear it because the suit seeks division of matrimonial property during the subsistence of unbroken coverture.

In the face of the preliminary objection it was inevitable and necessary that this court deals with the objection first since its outcome may as well determine the fate of the entire suit.

In his brief submissions on the preliminary objection, Mr Warima for the respondent argued that it is clear from the applicant's originating summons and the affidavit in support thereof that the parties are husband and wife and that since their marriage is still in existence, their matrimonial property cannot be shared out. Counsel relied on **High Court Civil Case No. 46 of 2012, MNW versus WNM & 3 Others** and the Court of Appeal's **Civil Appeal No. 2 of 2000 Peter Ndungu Njenga versus Sophia Watiri Ndungu** to support his argument that matrimonial property cannot be shared out between a husband and his wife during the pendency of their marriage.

On his part, Mr Nderi for applicant opposed the preliminary objection and argued that much as the parties are not divorced there is no legal requirement that they have to be divorced before the matrimonial property can be divided between them.

In any event, Mr Nderi argued, the **Matrimonial Property Act 1882** had been repealed and now we have a new law which is the **Matrimonial Property Act 2013, (No. 49 of 2013)** which came into force on 16th January, 2014.

Counsel argued that the position adopted by the respondent that matrimonial property cannot be shared out while a marriage is in existence is contrary to **Article 45** of the **Constitution**. On the decisions cited by the learned counsel for the respondent, Mr Nderi simply dismissed them as irrelevant as the cases in which those decisions were made did not arise from matrimonial causes.

I have considered the submissions by counsel for the applicant and the respondent. I have also read the decisions cited by counsel for the respondent on this question of division of matrimonial property; they have, no doubt, provided me with a useful guide on the position of the law on this issue.

In the case of **Peter Ndungu Njenga versus Sophia Watiri Ndungu, Civil Appeal No. 2 of 2000**,

parties were married under Kikuyu customary law. After the husband married a second wife, the first wife sought to have the matrimonial shared out between her and her husband on the ground that they were acquired through their joint efforts. The cause was based on **section 17** of the **Married Women's Property Act, 1882** of England. The High Court allowed the summons and distributed the property between the husband and his wife.

While allowing the appeal against the decision of the High Court, the Court of Appeal held that the learned judge of the High Court fell into error when he divided the matrimonial property as if he was dealing with a succession cause yet the husband was still alive. The learned judges of the Court of Appeal were emphatic that:-

“...we find and hold that the learned judge had no jurisdiction to alienate suit lands between spouses during their lifetime or unbroken coverture and he ought to have dismissed the suit.”

The court proceeded to dismiss the wife's claim.

Circumstances in that case bear resemblance to this case and although the applicant in the summons herein did not cite the particular provision in the **Married Women's Property Act, 1882** she was relying upon, it must have been **section 17** of the **Act**. Going by the decision in **Peter Ndungu Njenga versus Sophia Watiri Ndungu (supra)**, it is clear that even under this section of the Act matrimonial property cannot and could not be divided during between the spouses during the subsistence of their marriage.

Counsel for the cited **Article 45** of the **Constitution** in support of the argument that an impediment to division of property between married spouses would be unconstitutional. I have considered that provision of the constitution carefully and I have not found anything in it that subscribes to sharing out of the matrimonial property between married couples while their marriage lasts. If anything, **Article 45** promotes the unity of a family as a natural and fundamental unit of society necessary for social order and therefore deserving state recognition and protection. This provision of the law recognises that married partners enjoy equal rights but nowhere does it suggest that division of matrimonial property is one of the ways of actualising these rights.

As far as the **Matrimonial Property Act No. 49 of 2013** is concerned, counsel for the applicant did not cite any provision in that Act that supports the position he has adopted. Having come into force long after the applicant had filed her suit, I could not see how this Act was going to apply to the applicant's cause since there is no express provision in that Act providing for its retrospective application. At any rate, I have not come across any provision in that Act that advances the notion that matrimonial property can be divided between spouses while their marriage is alive. The only time the Act contemplates the division of the property is at the termination of the marriage. Section 7 of the Act says:-

“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.”

It would appear, therefore, regardless of which law a party looks at, whether it is the Married Women's Property Act, 1882 or the Matrimonial Property Act 2013 matrimonial property is not subject to division in the life of the marriage between the spouses.

In the premises, the applicant's originating motion is misconceived and to that extent I am satisfied that the respondent's preliminary objection is merited; it is hereby upheld and the applicant's Originating Summons dated 18th December, 2006 is accordingly struck out. Parties shall bear their respective costs.

Signed, dated and delivered in open court this 6th day of October 2014

Ngaah Jairus

JUDGE