



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PROBATE AND ADMINISTRATION DIVISION**

**CIVIL SUIT NO. 29 OF 2012 (O.S.)**

**FNN.....APPLICANT**

**VERSUS**

**JKM.....RESPONDENT**

**JUDGMENT**

1. By her undated Originating Summons filed on 19.4.12 and amended on 23.11.17, the Applicant FNN seeks the following orders:
  1. A declaration that L.R. No. xxxx Kasarani, Nairobi (the suit property), acquired by the Respondent, JKM and developed by the Applicant during the subsistence of their marriage belongs to both Applicant and the Respondent in equal shares.
  2. That in the alternative, the suit property be divided between the parties.
  3. That the suit property and the developments thereon be valued and sold at market value and the proceeds thereof be divided equally between the parties who shall have pre-emptive rights in the purchase.
2. In her affidavit sworn on even date, the Applicant deposed that she and the Respondent got married under Kikuyu Customary Law in 1992 and blessed with 1 child on 12.7.07. The marriage was however dissolved on 25.7.11. Prior to the marriage, the Respondent had acquired the suit property which the parties agreed to develop and build their matrimonial home. The Applicant contended that she contributed greatly to the construction of the matrimonial home by shipping in locks, doors, wall paper and household goods from London. She prayed that valuation of the development be done and the same be shared equally between the parties.
3. The Respondent swore a replying affidavit on 29.3.19, in which he denied that the Applicant contributed to the development of the suit property. He averred that on 5.10.99, the Applicant deserted their matrimonial home at [Particulars Withheld] and called him the following day to inform him that she was in London, United Kingdom. The parties however, continued in communication. The Respondent further stated that he commenced construction of the suit property in November 1999. Upon her return in April 2001, the Applicant found the house complete and she again left for London in May 2001.
4. The Respondent accused the Applicant of failing to disclose to the Court, Plot No. xxxx, Kasarani and Plot No. xxxx acquired during the subsistence of their marriage. According to the Respondent, Plot xxxx was acquired in 2002 with the Applicant contributing Kshs. 400,000/= while he contributed 200,000/=. They put up 4 units of 3 bedrooms each at the cost of Kshs. 4.5 million. He contributed Kshs. 2.5 million while the Applicant contributed Kshs. 2 million. The Respondent averred that he sourced all the construction material and supervised construction as the Applicant was away in London. Since 2004 to date, the rental income has been deposited in the Applicant's bank account. The Respondent stated that Plot xxxx was purchased for Kshs. 400,000/=. The Applicant contributed Kshs. 150,000/= while the Respondent paid the balance. The Plot is still in the name of the previous owner YMM, now deceased.
5. As regards, the parties' marriage, the Respondent confirms that the same was indeed dissolved on 25.7.11. This was following the Applicant's infidelity with a man from Nakuru and subsequent birth of a daughter with him in 2007. The Respondent stated that the Applicant married her lover in 2009 in London. He further accused the Applicant of going to the suit property on 4.1.11 with a gang of 20 men with the intention of carting away household goods from the home. After the Respondent reported the matter to the Kasarani Police Station, the Applicant was summoned and on 6.1.11 and she picked all her belongings.
6. The Respondent prayed that this Court makes a declaration that both parties made contribution to the acquisition and development of the matrimonial properties and that both have an interest therein. He further prayed that distribution of the said property be done equitably after valuation by 2 reputable valuers appointed by each party. Additionally, the Respondent prayed that the Applicant be restrained from disposing of or dealing with Plot xxxx and Plot xxxx in a manner detrimental to him. He urged that the Applicant's prayers be dismissed with

costs.

7. Directions were given that the matter proceeds by way of *viva voce* evidence. The Applicant testified and closed her case on 22.5.18. The Respondent testified on 6.12.18 but was stood down to enable him file an affidavit to correct particulars of a property. The Applicant was recalled on 13.6.19 to testify on issues raised by the Respondent, and then closed her case. On that date however, the Respondent's case did not proceed as he was said to be in hospital. The hearing did not proceed for a period of time as the Hon. Judge seized of the matter was away handling matters in the Anti-Corruption and Economic Crimes Division and thereafter transferred from the station. The matter was then fixed for hearing before me on 25.2.21. Counsel for the Respondent said he was not ready to proceed as he had misplaced his file and sought another date. The Court allowed the adjournment and directed the Respondent's counsel to locate his file or make copies from the Court file. Hearing was fixed for 3.6.21, with the rider that in the event the Respondent was not ready to proceed, his case would be marked as closed. On that date, neither the Respondent nor his advocate attended Court. The Court then proceeded to close his case and gave directions for filing of submissions.

8. I have considered the Originating Summons, the response thereto, the parties' testimony as well as the Applicant's submissions.

9. It is common ground that the suit property was acquired by the Respondent before the parties' marriage. What is in dispute is the Applicant's claim that she contributed towards the development of the suit property. The Respondent's position is that when he began to develop the suit property, the Applicant was away in the United Kingdom and made no contribution towards the development. Notably, the Applicant did not counter this assertion by the Respondent by way of a further affidavit. It is trite law that what is not denied is deemed to be admitted. It is stated in Odger's Principles of Pleadings and Practice in the High Court of Justice 25th Edition, page 124:

***1. Any allegation of fact unless traversed is admitted.***

***The pleader must either admit or deny every material allegation of fact in the pleading of his opponent and he must make it absolutely clear which facts he admits and which he denies. To ensure this, Rule 13 provides that any allegation of fact is deemed to be admitted unless traversed and that a traverse may be either by a denial or by a statement of non-admission and either expressly or by necessary implication.***

10. In her testimony, the Applicant stated that the parties began to build their matrimonial home on the suit property in 2000. Upon completion in 2001, they moved in and lived there until 2010. Although she moved to the UK in 1999, she came to Kenya often. The Applicant seeks that the suit property be divided equally between the parties. The Respondent however stated that he alone built the house in 2011 when the Applicant was away in the UK. He further denied that the Applicant lived with him in the suit property. He occupies the suit property.

11. Section 6 of the Matrimonial Property Act defines matrimonial property as follows:

***(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***

12. For a property to be declared to be matrimonial property, it must constitute the matrimonial home or homes of the parties and household goods and effects in such home or homes. Other property jointly owned and acquired during the subsistence of the marriage of the parties also constitutes matrimonial property. Matrimonial home is defined in Section 2 of the Act as ***“any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”***

13. It is not possible to tell from the available evidence whether the Applicant did in fact live in the suit property. It is her word against the Respondent's. Be that as it may, I am prepared to accept that this house was intended to be the matrimonial home of the parties. Accordingly, the same is matrimonial property by definition.

14. Section 7 of the Act makes provision relating to ownership of matrimonial property as follows:

***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.***

15. The Applicant's testimony is that when she went to the UK in 1999, she worked for [Particulars Withheld] and earned £510 a week. She sent the sum of about Kshs. 4 million to the Respondent through Biashara Forex in Kenya. She also sent furniture and fittings from the UK through Alexandria Freight. She further claimed that she installed the electric fence. She however said she did not have any evidence or documents to support her assertions. The Respondent on his part denied that the Applicant ma

16. The basis for division of matrimonial property between spouses, is contribution. A party seeking a share in matrimonial property must demonstrate that they have contributed to the acquisition or development of the said property. This is observed in the P N N v Z W N case (supra), where Waki, JA citing the case of Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR stated:

- ***Court also examined local decisions and came to the following conclusion:-***

**“In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see Essa vs. Essa (supra); Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported), Kamore vs. Kamore (supra); Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife’s contribution as equal to that of the husband.”**

17. In the present case, the Applicant is seeking that the suit property be divided equally between her and the Respondent on the basis of her contribution. The Applicant concedes that the Respondent acquired the suit property before the parties’ marriage. The Applicant did not place before the Court any evidence to demonstrate her contribution towards the development of the suit property. It would have been helpful if she had exhibited a letter of employment showing that she worked with [Particulars Withheld] and the salary that she earned, bank statements or other documents showing that she did in fact send to the Respondent a total of Kshs. 4,000,000/=, copies of shipping documents or receipts of the furniture and fittings that she claimed to have purchased for the house.

18. It is trite law that he who asserts must prove. Section 107 of The Evidence Act stipulates:

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

19. The Applicant was obligated to place before this Court, cogent evidence to support her claim. Notably, her affidavit in support of her amended Originating Summons did not even have a single annexure by way of documentary evidence. I therefore find that the Applicant failed to discharge the burden of proof placed upon her by law.

20. I now turn to the claim by the Respondent in prospect of Plot xxxx and Plot xxxx. It is the Applicant’s contention that the same cannot be sustained because the Respondent filed no counterclaim. Further, that Plot xxxx was sold and that this Court has no jurisdiction over disputes related to land that is not matrimonial property.

21. Order 7 Rule 3 of the Civil Procedure Rules provides:

**A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.**

22. The rationale behind the requirement for filing a counterclaim by a defendant is that it makes a plaintiff aware of the case is against them and enables them to respond appropriately. A counterclaim also enables the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim. In the present case, the Respondent ought to have raised his claim against the Applicant over Plot xxxx and Plot xxxx by way of a counterclaim and have the same disposed of in the suit before the Court. Rather than raising a counterclaim however, to which the Applicant would have had an opportunity to respond and in respect of which the Court would have pronounced itself, the Respondent merely included the claim in his averments in his relying affidavit. This is contrary to the provisions of Order 7 Rule 7 which provides:

**Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim.**

23. Further, Halsbury’s Laws of England, Fourth Edition, Vol. 42, states as follows regarding a counterclaim:

**When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.**

24. The Respondent had an opportunity to exercise his right of counterclaim against the Applicant, but for whatever reason, chose not to exercise the same. Without a counterclaim, there would be no basis for this Court to consider the claim by the Respondent in respect of the said 2 properties.

25. In the end, having considered the matter before me, and in view of the foregoing, I find and hold that the undated Originating Summons amended on 23.11.17 lacks merit and the same is hereby dismissed. This being a family matter, each party shall bear own costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25TH DAY OF FEBRUARY, 2022**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**