



RND v RSA (Civil Suit E40 of 2016) [2022] KEHC 13745 (KLR) (Civ) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 13745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT E40 OF 2016

M THANDE, J

JULY 29, 2022

BETWEEN

RND APPLICANT

AND

RSA RESPONDENT

JUDGMENT

1. By an Originating Summons (the OS) dated September 30, 2016 against the Respondent RSA, the Applicant RND seeks the following orders:

1. That it be declared that the Applicant owns a substantial percentage of the value of the property known as LR No XXXX, Karen, Nairobi (original no XXXX) together with the improvements thereon, which property was acquired during the subsistence of the parties' marriage but on the sole financial contribution and effort of the Applicant.
2. That the honourable court do order a valuation of the property known as LR No XXXX, Karen, Nairobi (original no XXXX) and thereafter a sale of the said property.
3. That the honourable court do order that the Applicant be refunded back the total rental outlay that he has expended since February 2009, when he was compelled to leave the matrimonial home and take up rental accommodation.
4. That the honourable court do order that the Respondent refund the Applicant the amount of Kshs 2,110,000 being the value of the Applicant's personal possessions as part of which she (sic).



5. That the household items being the electrical items and well (sic) as the furniture be equally divided between the parties.
 6. That the honourable court do order that the net proceeds of the sale after the refund on order 3 hereinabove, and all other statutory payment, be divided between the parties in accordance to their contribution to the matrimonial home.
 7. That the respondent bears the costs of this suit.
2. It is the Applicant's case that the parties got married on June 28, 1997. The marriage was however dissolved on March 10, 2015. During the subsistence of the marriage, he purchased a property known as LR No XXXX, Karen, Nairobi (the suit property) with no financial input from the Respondent and the property was registered in their joint names. In February 2009, the Applicant was compelled to vacate the matrimonial home and has since not been able to have use or possession of the same. He has since spent the sum of Kshs 5,435,000/= on rental accommodation while the Respondent lives in the suit property rent free. The Applicant seeks that the suit be valued and sold and that he be awarded at least 80% of the value. Further, the amount of Kshs 2,110,000/= that he seeks is in respect of his personal items which include his coin, music record and art collections, stereo system, Dell laptop, cut glass and tools. His pleas to have these items were met with hostility by the Respondent who claimed that she had sold them off. The Applicant also seeks a refund of 50% of household items and furniture and furnishings which he bought in the United Kingdom for use in the matrimonial home.
3. The Respondent swore a replying affidavit on December 20, 2016 in opposition to the OS and denied the allegations by the Applicant. She asserted that she contributed to the purchase of the suit property and that is why she owns half share jointly with the Applicant. She stated that on February 3, 2009, after assaulting her and causing her grievous harm the Applicant willingly abandoned the matrimonial home and went to live with his mistress RM. Since that time, she has solely maintained and improved the matrimonial home including paying rates and other charges. The Respondent opposed the sale of the suit property and claimed that in October 2009, the Applicant in an agreement stated that his half share should go to their daughter Neve. She admitted to selling a few household items to maintain herself and their child when the Applicant abandoned them. She further stated that claimed wages from the Applicant as a wife and homemaker. The Respondent seeks that the Applicant makes disclosure of properties and businesses acquired during marriage, namely LR No XXXX, [particulars withheld] Limited, [particulars withheld] Business Solutions Limited and [particulars withheld] Properties Limited. She claimed dividends and profits from [particulars withheld] Limited of which she is director. Additionally, the Respondent claims the sum of Kshs 5,236,874/= being a refund of land rates, maintenance and repairs for damage caused by the Applicant to the suit property in 2010. She urged that the matrimonial property be retained to ensure stability for their child and for the Respondent's and child's livelihood. She also urged that the OS be dismissed with costs.
4. In a further replying affidavit sworn on March 27, 2017, the Applicant reiterated his earlier averments and denied the allegations by the Respondent in her replying affidavit. He stated that in spite of being thrown out of the matrimonial home, he continued to contribute towards its maintenance. In 2013, he paid Kshs 130,035/= being half of the accumulated land rates. He financed the repair and replacement of electronics that were damaged by a major power failure. He also paid Kshs 50,000/= for the repair of the Respondent's vehicle after an accident. The Applicant stated that the agreement referred to by the Respondent regarding leaving his share of the suit property to their daughter was made under duress after the Respondent had him arrested over trumped up charges. He also denied the allegations that he was violent towards the Applicant and their daughter. The Applicant denied that he owned



LR No 209/9859 and that the Respondent was a director or shareholder of [particulars withheld] Limited. [particulars withheld] Solutions Limited was incorporated in 2015 and [particulars withheld] Properties Limited, formed with Evans Thegeya (deceased) owns no assets. He stated that he is claiming what is lawfully his and urged that their daughter who is now an adult should not be dragged into the dispute herein.

5. I have considered the Originating Summons, the response thereto, the parties' testimony as well as the filed submissions. The issues that arise for determination are:
- i) Whether the suit property should be valued and thereafter sold.
 - ii) Whether the Applicant should recover the value of his personal possessions.
 - iii) Whether the Applicant concealed from the Court any other matrimonial property.
 - iv) Whether the Respondent is entitled to refund of rates and Kshs 5,000,000/=.
 - v) Whether the Applicant should recover the total rent outlay.
 - vi) Who should bear the costs of this suit.
6. This Court is called upon once again to determine a case of division of matrimonial property between former spouses. A great challenge that faces Courts is that division of matrimonial property is not a mathematical exercise. It is preceded by termination of marriage which more often than not is acrimonious. As such, the matter is convoluted by varied emotions such as bitterness, resentment, sense of betrayal and loss and even vengefulness which cloud rationality and sobriety making it impossible for parties to agree on an amicable division of property. In considering the issues herein, the Court must look beyond the emotions and consider the evidence adduced by the parties. The Court will also be guided by Article 45(3) of the [Constitution of Kenya, 2010](#) which provides:

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

Whether the suit property should be valued and thereafter sold

7. The Respondent submitted that she has been living in the suit property since 2001 with their only child, which is the only place that their child has ever known as home. She even exhibited a letter from their child dated 22.11.16 stating that the thought of losing the only place she has called home has been causing her stress which has affected her studies. She stated that she hoped to one day inherit the home and call it her own as her parents had promised her. The Respondent contended that if the suit property is sold, she and their daughter will be rendered homeless. The Applicant countered this by submitting that their daughter was now an adult and not a child who needs to live with her parents. After all she is a student at USIU where the Applicant pays her tuition fees and accommodation.
8. It is common ground that the suit property is matrimonial property as defined in Section 6 of the [Matrimonial Property Act](#). The parties lived together in the suit property until the Applicant left in 2009. The Respondent and the parties' child remain in occupation of the suit property. Further, the suit property is jointly owned and acquired during the subsistence of the parties' marriage.



9. 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.

10. The basis upon which matrimonial property is divided between spouses, is contribution. A party seeking a share in any matrimonial property must demonstrate the contribution made to the acquisition or development of the said property.

11. In the case of properties jointly acquired during marriage, Section 14(b) of the Act provides that there shall be a rebuttable presumption that the parties' beneficial interest in the matrimonial property is equal:

Where matrimonial property is acquired during marriage—

(a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

12. The presumption in Section 14 of the Act is not absolute but rebuttable. If the evidence before Court does not demonstrate equal contribution by the parties, then such matrimonial property shall not be divided between them equally. In the case of OKN v MPN [2017] eKLR, the Court of Appeal had this to say about this presumption:

Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See Kivuitu v Kivuitu, [1991] KLR 248. The presumption is however, rebuttable by either party showing that their contributions were not equal.

13. In the present case, the suit property was acquired during the subsistence of the parties' marriage and is jointly owned by them. Both parties claimed to have contributed to the acquisition and development of the same. Neither party however placed any evidence, documentary or otherwise, to support their claims.

14. The Applicant exhibited a bank statements showing which the sum of Kshs 2,701,136/= was paid by the Applicant to a company known as [particulars withheld] Limited on August 18, 1999. The exhibited agreement for the sale of the suit property to the Applicant and the Respondent dated April 1, 1999 however indicates the vendor is one Dr. Wahu Kareithi. No connection was demonstrated between the vendor and the payee company. Other statements are of the Applicant's sterling pound account with [particulars withheld]. Various amounts have been paid out. Again, no connection has been demonstrated between these payments and the purchase and development of the suit property. It is also not indicated to whom these payments were made.

15. Similarly, for the Respondent, other than stating that she contributed substantially towards the purchase of the suit property, she did not place any evidence to support her assertion.

16. There is nothing on record to show how much each of the parties contributed towards the purchase price of Kshs 2,800,000/=. Further neither party supplied any details of the



developments made on the property and cost thereof. Duly guided by the Court of Appeal in the *OKN v MPN* case (supra), in the absence of a rebuttal of the said presumption, the Court will presume that each party made equal contribution towards the acquisition and development of the suit property. In the premises, the presumption that the parties' beneficial interest in the matrimonial properties is equal, remains unrebutted.

17. A similar finding was made in the case of *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR where the Court of Appeal stated:

“However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “Equality is equity” while heeding the caution by Lord Pearson in *Gissing v Gissing* (supra) at page 788 paragraph c that:

No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing”.

18. Duly guided, and given that the parties' contribution is unascertainable, I find that this is a proper case where it is equitable to apply the maxim “equality is equity.” Accordingly, I find that the prayer that the suit property be valued and sold is merited.
19. On the submissions that the suit property should remain available for the parties' child, the Court notes that she is an adult. She should complete her university studies and go out there, work and acquire property of her own instead of looking to inherit her parents' property. The matter herein relates to the division of matrimonial property between the Applicant and the Respondent. Indeed, the long title of the *Matrimonial Property Act* under which the matter herein is filed, states that it is an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. Accordingly, the interests of adult children are not to be taken into account in the division of matrimonial property between their parents.

Whether the applicant should recover the value of his personal possessions

20. The Applicant seeks that the Respondent be ordered to refund the amount of Kshs 2,110,000/= being the value of his personal possessions which he was forced to leave in the matrimonial home. He contended that he has always complied with orders of maintenance of their child. As such, the Respondent had no right to sell his possessions which were of great sentimental value to him. On her part, the Respondent contended that the valuable possessions alluded to by the Applicant were imaginary. She conceded selling a few household items to cater for her maintenance and that of their child. She further stated that the laptop was still available. In response, the Applicant reiterated his claim for his valued possessions which he said the Respondent admitted to having sold.
21. The Respondent admitted to having sold a few household items. The Court however notes that the Respondent did not state what items she sold or the price for which she sold the same. In the premises, I find that the Applicant is entitled to shall recover the items not sold from



the suit property and should any of the listed items be found missing, then the Respondent shall make good.

Whether the applicant concealed from the court any other matrimonial property

22. The Respondent contended that the Applicant failed to disclose other properties, namely LR No XXXX, [particulars withheld] Limited, [particulars withheld] Solutions Limited and [particulars withheld] Properties Limited. The Respondent claimed that in spite of being a shareholder and director of [particulars withheld] Limited for many years, she never received any dividends. She therefore claimed profits from the said company.
23. The Applicant denied owning the property known as LR No XXXX. He further denied that the Applicant is a director and shareholder of [particulars withheld] limited. As regards [particulars withheld] Solutions Limited, the same was incorporated 6 years after the parties separated. The Applicant further stated that [particulars withheld] Properties Limited was incorporated together with Evans Thegeya who subsequently died. The property has no assets.
24. 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.
25. The Respondent's claims that the Respondent owned LR No XXXX and that she was a shareholder of Cherwell Limited were denied by the Applicant. The Respondent was obligated to place before this Court, cogent evidence to support her claim by way of a supplementary affidavit. She failed to discharge the burden of proof placed upon her by law. Her claim is therefore rejected.
26. I now turn to [particulars withheld] Solutions Limited and [particulars withheld] Properties Limited, the existence of which the Respondent claims was concealed by the Respondent. It must be noted that the orders sought relate to limited liability companies. The Court must give due regard to the well settled principle of company law in Salomon v Salomon [1897] AC 22, that these companies are separate legal entities apart from the Applicant. For the purposes of division of matrimonial property, this Court's interest is confined to the shares owned by the Applicant therein, upon proof. The Respondent was required to demonstrate to the Court the number of shares the Applicant has in those companies and her contribution towards the acquisition of the same. This she failed to do. Accordingly, I am unable to make any order in respect of the companies.

Whether the respondent is entitled to refund of rates and Kshs 5,000,000/=.

27. The Respondent has claimed a refund of rates paid together with Kshs 5,000,000/= for maintenance and repairs of the property and damages caused by the Applicant to the suit property. She exhibited a copy of a rates receipt for Kshs 263,874/= dated November 15, 2013.
28. The Respondent has been in exclusive occupation and enjoyment of the suit property since the Applicant left in 2009. It goes without saying that the person in occupation of a property is responsible for repairs and maintenance thereof and other costs relating thereto. This is the principle of benefit and burden where a person who takes the benefit of an arrangement will



be bound by any associated burden contained in it, despite the fact that he was not a party to the original arrangement. The Respondent is therefore liable to all the associated costs of the suit property during the period of her sole occupancy of the same. Her claim for refund therefore fails.

29. As regards the damages claimed for the alleged destruction of the suit property by the Applicant, no evidence was adduced to demonstrate show the extent of the damage and the cost of making good the same. It is also not clear how the amount of Kshs 5,000,000/= was arrived at. In any event, the Applicant denied having caused any damage to the suit property.
30. In order to deserve the orders sought, the Respondent was obligated under Section 107 of the Evidence Act to place before this Court, cogent evidence to support her claim for damages. Without discharging the burden of proof placed upon her, I am unable to find in her favour. Accordingly, her prayer for damages fails.

Whether the applicant should recover the total rent outlay

31. The Applicant seeks a refund of Kshs 7,610,000/= as at 24.10.2019, being the rent he has paid since he was unjustly evicted from the suit property in February 2009, by the Respondent. The Applicant claimed that upon eviction, he was forced to rent alternative accommodation while the Respondent lived in the suit property rent free. He exhibited the tenancy agreements he entered into. The Respondent denied evicting the Applicant. She contended that the Applicant voluntarily moved out of the suit property thereby abandoning the Respondent and their child, and chose to live with his mistress, one Rebecca Mutua.
32. The Court notes that the Applicant claims that he was evicted from the matrimonial home while the Respondent contends that he left voluntarily. The circumstances under which the Applicant left the matrimonial home remain disputed. Be that as it may, the law is clear that parties to a marriage are protected from unlawful eviction from their matrimonial home. Section 12(3) of the Act provides:

A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.
33. Rather than going to seek alternative accommodation, the Applicant ought to have sought and obtained protection from the Court from being evicted. Had he done so, he would not have incurred the rental outlay that he now claims from the Respondent. It is clear that this is a choice that he made and as we have often been told, choices do have consequences. I therefore find that the Applicant is the author of his own misfortune. Accordingly, his claim for refund of the rent he has paid since February 2009 cannot be granted.

Who should bear the costs of this suit.

34. I now turn to the issue of costs. The Applicant submitted that the Respondent should bear the costs of the suit. The Respondent on the other hand urged that the Applicant's prayer for costs be dismissed. She cited the case of *JNM v MM* [2019] eKLR where the Court directed that each party bears own costs given that the case was a family matter.



35. It is trite law that costs follow the event. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR, the Supreme Court held that this principle of law is not invariable. The Court said:

Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.

36. The award of costs is a matter of judicial discretion. The parties herein have been in bitter litigation since 2009, from the Children’s Court to the Divorce Court and now this Court. In the circumstances, awarding costs to either of them will further aggravate their relationship.

37. In the end, after taking into consideration the totality of the evidence and the applicable law as analyzed herein, I make the following orders and declarations:

- i. The Applicant and the Respondent are entitled to LR No 7583/145, Karen, Nairobi in equal shares.
- ii. The property shall be valued, sold and the proceeds of sale shared equally between the parties. Either party is at liberty to buy out the other.
- iii. All household, electrical items and furniture in the suit property shall be equally divided between the parties.
- iv. The Applicant shall recover his possessions listed in his Originating Summons from the suit property and the value of any item found to be unavailable shall be recovered from the Respondent’s share of the proceeds of sale of the property.
- v. I direct that each party bears own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29TH DAY OF JULY, 2022

.....

M. THANDE

JUDGE

In the presence of: -

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

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

.....**Court Assistant**

