



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL CASE NO. 67 OF 2012 (O.S)

IN THE MATTER OF MARRIED WOMEN PROPERTY ACT

BETWEEN

BN.....PLAINTIFF/APPLICANT

VERSUS

PK.....DEFENDANT/RESPONDENT

RULING

(1) Before Court is the Originating Summons dated 12th November 2012 by which BN the Petitioner/Applicant sought the following orders:-

(a) That a declaration be and is hereby made that the Plaintiff/Applicant herein is the absolute proprietor of half share of that land known as Nairobi/Block xxx/xxx together with any development thereon.

(b) That the joint ownership and the joint registration of that land known as Nairobi/Block xxx/xxx be and is hereby dissolved and the said land be subdivided and shared by the Plaintiff and the Defendant herein each per his or her contribution to its acquisition and development and registration thereof be effected accordingly.

(c) That a valuation report of that land known as Nairobi/Block xxx/xxx together with the development thereon be compiled by a valuer to be appointed by this Court.

(d) In the alternative and without prejudice to prayer two herein above the Defendant be at liberty to pay to the Plaintiff the value of her share of that land known as Nairobi/Block xxx/xxx and the value of the development thereon.

(e) That costs of this case be awarded to the Plaintiff/Applicant.

(2) The Summons was supported by the grounds on the face of the same and by the Affidavit of even date sworn by the Petitioner.

(3) The Respondent PKK did not enter appearance in the matter nor did he file any Reply to the Summons. The Summons was canvassed by way of viva voce evidence before **Hon. Lady Justice Rose Ougo** who heard the Petitioners evidence on 1st September 2016. Thereafter the Honourable Judge was transferred to the **Kisii High Court** and I took over the conduct of the matter.

BACKGROUND

(4) The Petitioner told the Court that sometime in the year 1992 she entered into a marriage with the Respondent. However in the year 2012 the couple separated. The Petitioner filed a Petition for Divorce being **Divorce Cause No. 255 of 2013** at the **Milimani Chief Magistrates Court**. That the Petition was allowed and her marriage to the Respondent was dissolved. A Decree Nisi was issued on 9th May 2014.

(5) The Petitioners evidence is that during the subsistence of her marriage to the Respondent the couple acquired the property known as **Nairobi/Block xxx/xxx** located in the **Thome** area of **Nairobi County** (hereinafter the '**suit property**'). The Petitioner claims that since the Respondent had not been in gainful employment since the year 1998 and that even at the time of their divorce he was still unemployed, it was she who single-handedly undertook the construction of the matrimonial home on the said parcel of land. That she was at the time employed by **Diamond Bank**. That in order to finance the said construction the Petitioner sold her shares and obtained various loan

facilities, which facilities she continues to repay to date as well as single-handedly paying school fees for their daughters and catering for other domestic bills.

(6) Based on her evidence the Petitioner now seeks a declaration that she is entitled to a **50 per cent** share of the matrimonial home. As stated earlier the Respondent did not enter appearance in the matter nor did he file any Reply to the Summons. The matter therefore proceeded as an undefended cause.

ANALYSIS AND DETERMINATION

(7) The fact that the Petitioner and the Respondent got married to each other on **2nd May 1992** at **St. Teresa's Catholic Church** is not in any doubt. Annexed to the Petitioners Affidavit dated **12th November 2012**, is a copy of their Marriage Certificate Serial No. **xxxxxx** (Annexure '**B-1**').

The Petitioner averred that the marriage later broke down and the couple separated. Following a Divorce Petition filed at the **Milimani Commercial Court** vide **Divorce Cause No. 255 of 2013** the marriage was dissolved with a Decree Nisi being issued on **9th May 2014**.

(8) The Petitioner moved out of the matrimonial home and is currently living in a rented accommodation in **Buru Buru Estate**. She states that despite not deriving any benefit from the matrimonial home she is continuing to service the loans that she took for purposes of construction of the same.

(9) The Petitioner stated that during the subsistence of her marriage to the Respondent the couple purchased a parcel of land being **Nairobi/Block xxx/xxx**. The said land was registered in their joint names. Annexed to the Petitioners Supporting Affidavit is a copy of the Title Deed for the said parcel of land (Annexure '**B-2**'). The Registered proprietors of the land are named on the Title Deed as-

(1) **PKK**(the Respondent herein) and;

(2) **BNM** (the Petitioner herein).

(10) The Title Deed was issued on **2nd August 1993**. From the date of Registration of said Title it is clear that the land was acquired during the subsistence of the Petitioners marriage to the Respondent. From this evidence it is manifest that the Petitioner is a joint owner of the parcel of land in question.

(11) The Petitioner stated that during the subsistence of the marriage the Respondent was not in any gainful employment. That on the other hand the Petitioner was at the material time an employee of **Diamond Bank** where she has worked for the past **33 years**. The Petitioner told the Court that she alone financed the construction of the matrimonial home on the land in question without any input from the Respondent. She states that she took two loans of **Kshs. 239,000/-** and **Kshs. 300,000/-**. That in the year **2006** the Petitioner sold her shares and took out a further loan of **Kshs. 250,000/-**.

(12) The Petitioner has annexed to her Summons a Bundle of Documents which include the following:-

(i) **A letter dated 4th March 1996 from her employer Diamond Trust of Kenya Limited approving a staff loan on the amount of Kshs. 60,000/- (at page 21 of the Bundle of Documents).**

(ii) **Cheque dated 18th May 2004 issued to BN(the Petitioner) for Kshs. 1,403,982.80 from Nyaga Stockbrokers – being the proceeds for sale of her shares (page 10 of the Bundle).**

(iii) **Letter dated 26th October 2006 written to the Petitioner from Standard Bank Limited confirming approval of a loan of Kshs. 250,000/- and confirming that the loan amount had been paid into the Petitioners Account. The letter further states that the Petitioner was required to repay the loan by way of monthly instalments of Kshs. 9,038.00 (page 15 of Petitioners Bundle).**

(iv) **Bank Statement indicating a credit of Kshs. 1,008,355/- as loan amount (page 18 of Bundle).**

(v) **A schedule of dispatch of loans indicating dispatch on 28th June 1995 of a cheque for Kshs. 150,000/- issued by Diamond Bank (page 22 of the Bundle).**

(vi) **Copy of the Petitioners loan account with Kenya Bankers Sacco Ltd (page 23 of the Bundle). This loan Account indicates deductions made for both the Principal and interest on the loan of Kshs. 150,000/- taken by the Petitioner. The corresponding deposit of this loan cheque for Kshs. 150,000/- dated 5th July 1995 appears at page 25 of the Bundle.**

(vii) **A Members Loan Application Form filled and signed by the Petitioner seeking a loan of Kshs. 350,000/- from Kenya Bankers Sacco (page 24 of the Bundle). The corresponding credit of this sum of Kshs. 350,000/- paid into the Petitioners loan account as well as the deductions made for the repayments, principal and interest. (Page 26 of the Bundle).**

(viii) **Letter dated 30th October 2006 written to the Petitioner from Kenya Power & Lighting Company regarding the connection of electricity supply to Plot No. xxx/xxx Roysambu. (Page 28 of the Bundle).**

(13) From the mountain of documentation availed to this Court I am satisfied that the Petitioner has proved that she took a series of loans towards the construction of the matrimonial home.

(14) The Petitioner has sought a declaration that both herself and the Respondent are entitled to equal shares in the matrimonial home. In the alternative the Petitioner prays that matrimonial home be sold and the proceeds shared equally between herself and the Respondent.

(15) This suit was filed in the year 2012 before the commencement of the **Matrimonial Property Act 2013**. However the suit was heard **after 16th January 2014** being the date of commencement of that **Act**. It is trite law that the ordinary principle in construction of Statutes is that unless specifically otherwise stated no **Act** shall apply retrospectively.

(16) In the case of **JOHN HARUN MWAU & 2 OTHERS –VS- IEBC & 2 OTHERS [2017]eKLR** it was held as follows:-

“It is a conventional rule of construction that legislation must be addressed to the future, and a statute should not be given retrospective operation, interfering with antecedent rights. We are inclined to the standpoint that, legislation should bear only prospective effect, in the absence of special legislative signal to the contrary. Where a legislative body thus wishes to change the law regarding a past event / action, its intent is to be clear enough” [own emphasis]

(17) In this matter the cause of action arose **prior** to the commencement of the new **Matrimonial Property Act 2013**. In the circumstances the applicable law would be the **Married Womens Property Act 1882** (now repealed). **Section 17** of that **Act** provides that:-

“In any question between husband and wife as to the title to or possession of property, either party ... may apply by Summons or otherwise in a summary way to any Judge of the High Court of Justice ... and the Judge ... may make such order with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit.”

(18) As this Court has already found the Petitioner and Respondent were in a legally valid marital union at the material time. The property in question was acquired during the subsistence of said marriage and the land in question was registered in the name of **both** parties as proprietors. As pointed out earlier the hearing of this suit commenced after the repeal of the **1882 Act**. The question of Division of Matrimonial Property will thus be guided by the **Matrimonial Property Act 2013** of which **Section 17 Act** provides:-

“Sub-section (1) – “For purposes of this Act, matrimonial property means-

(a) The matrimonial home

(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.” [own emphasis]

(19) It is settled law that where property is registered in joint names of the parties to the marriage, there exists a rebuttable presumption that said property is owned by the parties in equal shares. In **KIVUITU –VS- KIVUITU [1991]2 KLR** it was held:-

“The fact that the property is registered in the joint names means that each party owns an undivided equal share thereon because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the intention of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the entire ownership.” [own emphasis]

(20) Similarly in **KAMORE V. KAMORE (2000) 1 EA 81** the Court held that:

“Where property is acquired during the course of coverture and is registered in the joint names of both spouses being a family asset is acquired in equal shares.”

(21) Finally on this point in **GATHIYA ESSA VS. MOHAMED ALIBHAI ESSA (CA No 141 OF 1998)** the Court stated that:-

“Where the property is acquired during the subsistence of a marriage is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares.”

(22) The Petitioner has demonstrated to the Court that she contributed in a substantial way to the construction of the matrimonial home. In the premises I do find and hold that the Petitioner herein is entitled to a half (50%) share of the matrimonial home. Accordingly I find merit in this Summons and I hereby make the following orders:-

(1) A declaration be and is hereby issued that all that piece of land known as Nairobi/Block xxx/xxx together with any developments thereon is owned jointly in equal shares by the Applicant and the Respondent.

(2) The said property is to be sold and the proceeds shared equally between the Applicant and the Respondent.

(3) The property be valued by a Registered Valuer to be agreed upon by both parties in order to establish its current value. If parties are unable to agree on a Valuer then the Deputy Registrar will appoint a Valuer to carry out the valuation.

(4) The cost of the valuation to be met by both parties equally.

(5) In the alternative if the Respondent wishes he may buy out the Applicant by paying her a half share of the value of the property.

(6) Since this is a family matter I make no orders on costs.

DATED IN NAIROBI THIS 21ST DAY OF MAY, 2021.

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MAUREEN A. ODERO

JUDGE

Ms. Mudaye holding brief for Ms Oseko for Applicants.