



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MATRIMONIAL CAUSE NO.1 OF 2019 (OS)

IN THE MATTER OF: SECTIONS 2, 6 (1) (a) (c), 7,12,14,17 and all other enabling provisions of the MATRIMONIAL PROPERTY ACT NO 49 OF 2013

FH.....APPLICANT

VERSUS

FRK RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. Priscillah Mugambi advocate for plaintiff/applicant

Mr. Ombachi Moriasi advocate for the respondent

JUDGMENT

Background

The applicant brought this suit through an originating summons dated 6th September 2019 and filed on 9th September 2019 seeking the following;

- 1. THAT a declaration do issue that the properties in Kilifi acquired by joint funds and efforts of the Applicant and the Respondent during the subsistence of their marriage and registered in both their names/in the name of and in possession the Respondent are owned jointly by the Applicant and the Respondent.***
- 2. THAT the said properties be settled for the benefit of the applicant in such a manner and proportion that this honourable court deems fit, just and equitable.***
- 3. THAT the respondent himself, his agents and or servants be restrained from alienating, encumbering or in any other manner interfering/disposing of the said properties until final hearing and determination of this suit.***
- 4. THAT the respondent be condemned to pay the costs of this application and incidentals thereto.***

The applicant filed a supporting affidavit dated 6th September 2019, where she states that she got married to the respondent on 12th August 2002 having dated since the year 1998 and the said marriage was blessed with one child, **MF** who was born in the year 2000.

She further stated that during the subsistence of their marriage in the year 2001 she took a loan of Kshs.150,000 to build their home as she was the sole breadwinner at the time taking care of two other children from the respondent's previous marriage. Further, she helped the respondent secure a job at Kenya Wildlife Service where she works.

That she further took a loan of Kshs.700,000 for purposes of constructing a plot at Kiwandani Airstrip and that the Respondent is in possession of all the property documents. That the Respondent had later taken a loan of Kshs.400,000 to assist in construction of the said property to completion.

She further stated that she connected power supply to the 10 rooms that they have rented out to tenants and 6 of the rooms go for Kshs.5,000 and the remaining 4 go for Kshs.2,500 respectively per month.

That in 2006 she took a loan of Kshs.1,500,000 to do further investment and the respondent took a loan of Kshs.500,000 and they built a self-contained three rooms mabati house structures. That thereafter she financed the houses into a modern home, did all the finishing.

In detail, they own the following property;

- a) Matrimonial home, a nine bedroom house at Kiwandani (Plot No. xxxx with a borehole and a water pump.*
- b) A three bedroom house in Kiwandani with a borehole which makes Kshs.700 per day in sales*
- c) Water tank with a capacity of 15,000 liters at Kshs.22,000*
- d) 50 coconuts trees*
- e) 100 banana holes*
- f) A ten unit home at Kiwandani Airstrip; Plot No. KC/xxx, Plot No. KC xxx*
- g) 5 bedsitters KC/xxx fence and gated*
- h) A motorcycle with registration plate no. KMEJ xxxx*
- i) Motor vehicle Toyota Succeed registration number KCR xxxx*
- j) Plot no. xxx registered in the name of the respondent*
- k) Plot no. xxx registered in the name of the applicant*
- l) Plot no. 966 registered in the name of the respondent*

She states that the Respondent has been purchasing more property using proceeds from their investments and has sent her packing through cruelty in violence.

That the respondent is in possession of their property document and that she is destitute earning Kshs.15,000 due to the loans she took for the development of their matrimonial properties and that she is living in the camp with the children.

The respondent filed a replying affidavit on 4th November 2019 stating that it was untrue that the applicant took a loan of Kshs.150,000 in the year 2001 as they were not married at the time. That it was also untrue that the applicant helped him secure a job at Kenya wildlife service that he got the same on merit and it was in the year 2000 before their marriage was solemnized.

He further stated that it was untrue that the applicant took a loan of Kshs.700,000 for the purposes of construction of a plot at Kiwandani airstrip and that he is in possession of the property as he inherited the two properties from his late father.

He also denies that the applicant took a loan of Kshs.400,000 in completion of the houses, neither did the applicant connect electricity nor did she take a loan of Kshs.1,500,000 for the construction of the three bedroomed house.

In regard to the property, he analyzed them as follows

- a) The matrimonial home (3 bedroomed) is exclusively his as he built it using his resources.*
- b) Plot no xxx is in his name and he built it with his resources*
- c) The borehole was sunk by himself and it is not for commercial use.*
- d) The ten units consisting of 6 shops, and 4 residential room whose proceeds are shared equally amongst them.*
- e) Plot no xxx belongs to him as it was inherited from his late father.*
- f) The 5 bedsitters on plot no. KC xxxx though jointly owned the applicant collects an income of Kshs.25,000*
- g) Plot no. xxxx belong to him though plot no. xxx is registered under the applicant and it is where his late mother is buried.*
- h) Motorcycle KMEJ xxx was bought by him and given to his son for boda boda business*
- i) Motor vehicle KCR xxxToyota Probox is in his name*

The parties' submissions

The applicant raises the following issues for determination in her submission;

- 1. Whether or not the suit properties constitute matrimonial property.*
- 2. Whether or not the respondent is accountable to the applicant in respect to the income derived from the matrimonial properties*
- 3. Whether the matrimonial properties can be settled in equal portions between the parties herein*

The applicant submits that her marriage to the respondent was celebrated under Giriama Customary law in August 2000 and later solemnized at Kadhi's on 12th August 2002. Though the applicable law in light of their union is Islamic law, the parties were agreeable to distributing their matrimonial property under Matrimonial Property Act no. 49 of 2013.

She submits that she and the respondent started acquiring their matrimonial property together from the year 2000 after celebrating their customary marriage as recognized under Section 6 of the Marriage Act and further placed their reliance on Section 17 of Matrimonial Property Act.

The applicant further submits that upon the dissolution of their marriage, the respondent has been in continuous habit of using proceeds from the matrimonial properties to invest in other investments for his own benefit offending the provisions of Section 4 of the Matrimonial Property Act that grants equal status to spouses. The applicant placed their reliance on the case **MNH v FHM [2018] eKLR**.

The applicant further submits that ownership of matrimonial property vests in the spouse according to contribution of either spouse as envisaged under section 7 of the Matrimonial Property Act. She submits that the suit property is matrimonial property which she contributed both monetarily and non-monetarily and she is entitled to a share of the same as submitted above.

The respondent submissions raise the following issues for determination;

- 1. Whether the applicant made any contribution towards acquiring of the property.*
- 2. Whether the respondent is accountable to the applicant in respect to the income derived from the matrimonial properties.*
- 3. Whether material properties can be shared in equal portions.*

The respondent submits that Section 7 of the Matrimonial Property Act provides that ownership of matrimonial property vests in the spouses according to the contribution of either spouses towards the acquisition and shall be divided by the spouses upon divorce or their marriage otherwise dissolves. He submitted the suit property should not be shared equally as the property was never acquired through joint funds.

He further submits that the applicant has not supported her contribution to the matrimonial property claims but has only proved that she took part in child care which she has been sufficiently compensated.

Analysis And Determination

Issues for determination.

- 1. Whether the suit properties are matrimonial properties available for distribution*
- 2. Whether the applicant contributed towards the acquisition of the suit properties*
- 3. In what ratio should the same be distributed to the parties*

Section 6(1) of the Matrimonial Property Act defines matrimonial property as- the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. In a nutshell, for property to qualify as matrimonial property it has to be obtained during the subsistence of the marriage unless otherwise agreed by the parties that a particular property does not form part of the matrimonial property. It is not contested herein that the applicant and respondent had a traditional wedding in August 2000 under the Giriama customary law and later solemnized their wedding at the Kadhi on 12th August 2002.

From the various sworn affidavits of witnesses and the parties statement too, it is apparent that the suit properties were obtained during the existence of the marriage. Applicant details that the acquisition of the said properties started in the year 2001 which time I note was after the customary wedding.

The properties herein are said to be owned jointly or by each party separately. This then begs the question of ownership which is addressed by Section 7 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.”

Further, section 14 of the Act provides that:

“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.”

Article 45 (1) (3) of the Constitution of Kenya provides that

“parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.”

In regards to the above provision, Justice Kiage in *PNN vs ZWN (2017) eKLR*, expressed himself as follows:

“I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words “50 per cent.

In *Francis Njoroge Vs. Virginia Wanjiku Njoroge*, Nairobi Civil Appeal No. 179 of 2009; Kiage J. stated that:

“... a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in LOCK YENG FUN v CHUA HOCK CHYE [2007] SGCA 33: ‘It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – a precise mathematical exercise’.”

Controversies involving sharing of matrimonial property is not merely great pecuniary interest of the parties but liberty and character of the parties with deep seated feelings sometimes delay or undermine the scheme of distribution. For avoidance of doubt the issue on distribution of matrimonial property is one of the emotive area of litigation in our courts. It is also worth noting that contribution of each spouse’s share remains in certain cases in the realm of the unknown given the presumptive equality principle in their relationship. Thus, the idea that the family wealth should be shared on divorce no matter which party contributed what share is not the norm within the traditional African Society. Flowing from this statement spouses bound by the cultural/customs therein rarely fight over matrimonial property in the event of divorce. At the core of the difference in interpretation and enforcement of the Act is the lack of any traceable estate capable of being distributed. As for now thanks to the Kenyan Constitution which as a matter of fact has entrenched the justiciability of matrimonial property rights. That being the position, there is the principle of universal application that there is no place of discrimination between husband and wife as it relates to their respective roles in the marriage union. Closely intertwined with this issue, is the issue whether the wealthier the spouse is the more he or she scoops from the marital estate.

It will be recalled that upholding matrimonial property rights is underpinned under Section 2 as read conjunctively with Section 9 of the Matrimonial Property Act, 2013. Of those strands domestic work and management of the matrimonial home, child care companionship, management of family business or property and farm work taken together mean that where spouses go through divorce or dissolution of their marriage they can be helped to negotiate in the shadow of the Law in the distribution of the estate. At the other end of the spectrum is the difficult courts face in assessing the proper score of net worth of a spouse who has not made any financial contribution to the acquisition of the property but his or her claim leans towards the other parameters. In my view, the principles justifying the meeting of the needs supporting the approach of the factors outlined in Section 2 of the Act there often assume that spouses have made choices which involves division of labor during their marriage life cycle. A further difficulty experienced in the universal model of marriage and matrimonial property is the question of evidential material in support of the express provisions under Section 2 of the aforesaid Act. In terms of the Act what does it entail to apportion a percentage score to the compensatory approach in the merger in answer to the question of distribution placing emphasis on those statutory provisions. As a measure of protection of the rights of the spouses, I take the view that compensation is a useless yardstick unless the determinants can be properly quantified. The most contentious factor is the provision for a stay home spouse and the fruitful income earner spouse providing in general for the acquisition of the marital estate, the realms of spousal support, rent, mortgage, medicare, food, cloth wear, welfare and best interest of the children of the marriage and home upkeep etc. Going forward consideration jurisprudentially, should be given to provide guidelines at a particular fair and proportionate percentage of parameters in Section 2 be determined irrespective to the circumstances and strength of spousal income. The same guidance could also be translated together for the best interest of the children of the marriage in every matter more particularly those classified to be under eighteen (18) years old. At what level should their needs be met; is a moot question.

Ideally, I note the letter and the spirit of the principle of equality has been absorbed into the text of the Constitutional of Kenya. This can be seen from the provisions Article 45 (1) (3) of the Constitution. The wording mirrors the declaration this Court is about

to make in construing the evidence and the Law applicable in this Matrimonial Cause. The key pillar adopted would be as stated in the case of *Kagga v Kagga High Court Divorce Cause No. 11 of 2005* from Uganda jurisdiction in which the Court stated inter alia:

“Our courts have established a principle which recognizes each spouse’s contribution to acquisition of property and this contribution may be direct, where the contribution is monetary or indirect where a spouse offers domestic services.When distributing the property of a divorced couple, it is immaterial that one of the spouses was not as financially endowed as the other as this case clearly showed that while the first respondent was the financial muscle behind all the wealth they acquired, the contribution of the petitioner is no less important than that made by the respondent.”

The point of the Court is clear that no one may claim absolute right to the matrimonial property upon divorce as to a large extent the entrenched Constitutional provision should be purposively interpreted not to shield the weaker income earner spouse from accessing the share of the marital estate. In our jurisdiction, the Court of Appeal in PNN (supra) laid a further guide to be used in the litigation surrounding the right matrimonial property. In view of this, the Court’s interpretation has to require sufficient evidence in regard to appropriateness and their fairness in the distribution of the matrimonial property.

Guided by the above holding, I shall look at each of the suit properties independently to determine the ownership.

a) Plot no xxxx. The applicant claims that this is the matrimonial home and that she input monetary contribution. She did not produce any documents to show her contribution, the respondent avers that the plot is his and that he developed it using his own resource. He however states that the three bedroomed house in Kiwandani is the matrimonial home which he still avers that he developed using his own resources without the input of the applicant. I do note that the applicant did not adduce any proof to show that she had contributed towards developing it.

According to section 2 of the Matrimonial Property Act a matrimonial home means premises occupied by the spouses.

From the above, it is hard to determine which the matrimonial home was. I am aware of the fact that the applicant lives in the marine camp with the children as evidenced by her affidavit and those of the children. The question arising here then would be that of contribution. Contribution is defined by Section 2 of the MPA to include;

- a) domestic work and management of the matrimonial home;*
- b) child care;*
- c) companionship;*
- d) management of family business or property; and*
- e) farm work*

In the instant case, there is the aspect of child care and it is for this reason that I will grant the three bedroomed house in Kiwandani to the applicant.

As regards the property situate on plot no. xxx, the same is to be sold and proceeds shared equally between the parties. The parties shall have the priority of buying out the property.

b) Plot KCC xxxx where there are five bedsitters developed shall vest in the applicant. This is from the fact by both parties that it is the applicant who enjoys the proceeds.

c) Plot no KC/xxx. I do note that this is inherited by the respondent from his late father. The same shall remain the property of the respondent. In granting this I am guided by the authority of M V M, Civil Appeal No. 74 of 2002 (2008) 1 KLR, 247 where the Court of Appeal stated as follows: -

“... Property inherited and gifted to one spouse before the marriage, and the property exists in the same condition as it was gifted or inherited, no problems arise. The spouse to whom it was gifted should be allowed to retain it. Problems however arise where improvements are made using matrimonial resources and then the property ceases to be in its original form and increases in value....”

d) Plot no. xxx for lack of proof by the applicant shall remain with the respondent.

e) Plot no xxx registered under the applicant shall remain with the applicant.

f) Motor cycle KMEJ xxx. The respondent states that he bought it for boda boda business he gave to the son. The applicant has not adduced any proof to ascertain her claim on the same. The same shall remain with the respondent.

g) Motor vehicle Toyota Probox Registration no. KCR xxx. The respondent states that the same belongs to him. The applicant has not adduced any proof to the contrary. The same shall be in the respondent’s ownership. Each party shall bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI via email ON THIS 5TH DAY OF AUGUST 2021

.....

R. NYAKUNDI

JUDGE

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