



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 59 OF 2015 (O.S.)

MC.....APPLICANT

VERSUS

FK.....1ST RESPONDENT

TENANT/OCCUPANT APT NO. Bxx ON L.R.

NO. xxxx/x.....2ND RESPONDENT

JUDGEMENT

1. The applicant **MC** and the 1st respondent **FK** got married on the 10th of November 2012. At the time the applicant worked as an Air Hostess in Kenya while the 1st respondent worked in Australia as an Immigration Officer.
2. Arrangements were put in place for the applicant to relocate and join the 1st respondent which did not materialize as the relationship deteriorated leading to a murky separation around the 19th of July 2015 culminating to a divorce Cause No.729 of 2015. The two have no issues of the marriage.
3. In 2013 before the relationship deteriorated the two had agreed to purchase a property. It is not in dispute that this was to be their matrimonial home. They chose to purchase an apartment known as No. Bxx Block B in Golden Mile Park a property erected on L.R. No. xxxx/x.
4. It is not in dispute either that though jointly purchased the property out of convenience due to the 1st respondent's absence from the country, was registered in the name of the applicant though the 1st respondent alleges that he sent funds to the applicant to have the property in joint names which was not effected.
5. It is also not in dispute that the applicant resided in the matrimonial property for a while.
6. The property in question was purchased for the sum of Ksh.6,120,000/=.
7. It is the applicant's case that after agreeing that they purchase a property together, she scouted for the same and both of them put in funds for its acquisition. On her part she took a loan from her Sacco, she alleges to have contributed 2.1m and the respondent sent the balance. After the purchase she furnished the property and moved in. She paid service fee of Kshs.5,000/- every month.
8. It is her assertion that she was forced to leave the house after an argument with the 1st respondent in 2015; and that after she left the 1st respondent rented the house out.
9. The applicant seeks to have the rent divided into two since 2015, cost of the furniture and half share of the property at current value. According to her the current rent is Ksh.45,000/-.
10. On his part the 1st respondent contents that he paid Ksh.6,274,309 towards the property save for Ksh.410,000/- contributed to by the applicant as he paid off Ksh.590,000/- to the applicant's Sacco loan.
11. The 1st respondent further informed the court that the rent since 2016 is Kshs 45,000 of which Kshs.5,000/- goes to service charge. Further he pays a 10% management fee a month. Due to the altercation between the two, the property was vacant for almost a year after the

applicant left. His claim is that the applicant abandoned the property. He urges that the property be distributed according to monetary contribution, as the marriage lasted for only 2 years, there were no issues and the applicant was adulterous, having failed to join him as planned, having acquired for her a permanent residency in Australia.

SUBMISSIONS

12. It was submitted on behalf of the applicant that the subject property is matrimonial property. The applicant contributed to the acquisition of the property by monetary and non-monetary contribution. Reliance was made on PWK vs JKG [2015] eKLR, White vs White [2000] UKHL 521, Miller vs Miller & MC farlane [2006] UKHL 24, Francis Njoroge vs Wanjiku Njoroge, Civil Application No. 179 of 2009 and Pawn v Cawm [2015] eKLR.

13. Further it was argued that the property ought to be divided equally between the two and in this regard the court was referred to NWM vs KNM [2014] eKLR, PWK vs JKG [2015] eKLR, Peter Mburu Echaria vs Priscilla Njeru Echaria [2007] eKLR.

14. Further it was submitted that the rental income at a monthly rent of Kshs.40,000/- from July 2015 be shared equally and the value of household items totaling Kshs. 831,000 be paid to the applicant together with costs.

15. On the part of the 1st respondent, it was submitted that he contributed 93% of the purchase price, he has continued to maintain the house since July 2015; pays service charge even when the house was vacant.

16. It was further urged that this is a case where only monetary contribution should be considered as the marriage was short lived; only two years, the applicant was adulterous, caused stress in the 1st respondent, there were no issues and he did not reside with the applicant safe for the days he visited and therefore other factors that would otherwise be considered ought not to be factored in. The court was referred to the following authorities; PNN vs ZWN [2017] eKLR

DIS vs JM [2019] eKLR , ANM vs CMAWM [2018] eKLR

Bonnie Sue Dunbar v Wayne Michael Elark [2004] eKLR

17. In her originating summons filed on the 17th of September 2015 the applicant sought for the following orders:

a) **A declaration that the apartment known as Apartment No. Bxx on the 4th floor of Block B in the development known as Golden Mile Park in her sole name is matrimonial property, acquired by the joint effort and contribution by the applicant and the 1st respondent in equal shares.**

b) **A declaration that any lease agreement and or any memorandum leasing the said property by the 1st respondent is void and illegal.**

c) **An order of mandatory injunction against the tenant occupants of the said premises.**

d) **An order that the said property be valued.**

e) **The said property be sold and the value be shared equally within 30 days of the valuation.**

Alternative to the 3 above

f) **An order to issue so that the party interested to keep the property shall pay to the other equivalent to half the value within 30 days of valuation.**

g) **Should the 1st respondent fail to give detinue to the personal possessions of the applicant, an amount equivalent be recovered from the proceeds on sale.**

h) **Costs.**

18. The originating summons was objected to by way of a replying affidavit dated 2nd May 2019 reiterating the oral evidence given in court and based on documents contained therein.

19. The matter was dispensed with by way of *viva voce* evidence with the applicant and the respondent being the sole witness.

Having considered the pleadings, evidence before court and submissions the court forms the opinion that the issues as crafted by the applicant's counsel in their submissions capture the outstand issues to be determined namely;

i. Whether the suit property constitutes matrimonial property.

ii. Whether the parties each contributed to the purchase of the said property. If so to what extent?

iii. How should the property be distributed?

iv. Who pays the cost of the suit?

20. The Constitution in safeguarding the rights of parties in a marriage provides in Article 45(1) (3) that **“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of marriage.”**

The meaning of the above is that each of the parties to the marriage enjoy the protection of the law equally at all times so that depending on the facts of each case none is treated in a manner so as to be discriminated or less protected, none is more superior than the other before the eyes of the law.

21. Indeed, the above principle is underpinned in the case of **PAWN vs CAWN [2015] eKLR** where the court held:

“The Constitution and the statute law, herein before referred to as the Matrimonial Property Act 2013, protects the family property and underpins the principle of fairness and non-discrimination of a spouse who has made contribution in the manner provided in the Act.”

22. Where both spouses have made substantial contribution both monetary wise and otherwise, fairness would connote the sharing of property at 50:50, but again each case must be determined based on its peculiar circumstances. Fairness where contribution by one spouse was meagre cannot amount to 50:50.

23. In **PNN vs ZNW [2017] eKLR Justice Kiage JA** agreeing with his colleagues in principle expressed himself thus on Article 45 of the Constitution.

“..... To my mind, all that the Constitution declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words all forms of gender superiority – whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They state essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant....”

“..... Does this marital equality recognized in the Constitution mean the matrimonial property should be divided equally? I do not think so. I take the view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or there about. That is to say, however, that as a matter of doctrine or principle, equality of parties translates to equal propriety entitlement.

Kiage JA goes further to state

“...I think that it would be surreal to suppose that the Constitution some how converts the state of coverture into some sort of Laissez – passer, a passport to justify percent wealth regardless of what one does in a marriage....”

24. Section 6(1) of the Matrimonial Property Act defines matrimonial property. The parties herein do not dispute nor challenge the fact the property in question is matrimonial property which though registered in the name of the applicant was bought during coverture and they both contributed to the purchase of the same.

25. The issue is whether the property should be share equally?

The applicant maintains that she contributed Kshs.2.1m, scouted for the property, lived in it and maintained it while the 1st respondent was away.

It is her case therefore that she deserves to get 50% share of the property. In her evidence the applicant states that she took a loan of Kshs.2.1m from her Sacco and paid the entire service charge while in the property. No documents to support this assertion of payment of Kshs.2.1m were produced as part of evidence. The respondent admits that the applicant borrowed from her Sacco 1m shillings which together with his contribution formed the deposit and which amount he partially refunded to the applicant.

26. The 1st respondent gave an account of his contribution backed by bank statements as follows:

-	19 th	July	2013	-	AUD\$	11,407	from	his	ANZ	Bank	to
		vendors		account		Dreyan		Investment		(Approx.	
										Kshs.853,125/-)	
-	26 th	May	2013	-	AUD\$	11,582	from	his	ANZ	Account	to
										(Approx. Kshs.868,650/-).	
-	23 rd	October	2013	-	AUD\$	10,000	from	Common		Wealth	
		Bank	to	applicants		personal		account		(Approx.	
										Kshs.750,000/-)	

- 25th October 2013 – AUD\$ 9,799.74 to Dreyan Investment
(Approx. Kshs.744,925/-).

- 25th October 2013 – AUD\$ 6,552.36 to applicant's personal
account (Approx. Kshs.550,427/-).

- 14th December 2014 – Kshs.35,000/- to the applicant being
legal fees.

- 24th March 2015 – AUD\$ 8032 to applicant's personal
account (Approx. Kshs.619,256/-) payment towards lontels
living a balance of Kshs.400,000/-.

He made several deposits to the applicant totally
6,600,000/- to cover price and costs.

27. All things being equal the court would not have hesitated to consider other forms of contribution as defined by section 2 of the Matrimonial Property Act as to include:

- a) Domestic work and management of the matrimonial home.
- b) Childcare.
- c) Companionship.
- d) Management of family business or property; and
- e) Farm work.

Consideration of the above regarded as non-monetary cannot apply in this matter, for the reasons that the two barely lived together, there were no issues of the marriage, and in fact not much can be said of companionship. The 1st respondent cited adultery as a reason for their divorce, he alleged further that the applicant left the matrimonial home to her husband's (now) house. This was not negated.

28. In a case almost similar to the one before court **DIS v JM [2019] eKLR** the court was of the following view:

“19. There is no evidence that the respondent made any non-monetary contribution as envisaged in the Matrimonial Property Act. The Matrimonial Property Act defines what constitutes contribution to mean monetary and non-monetary contribution.....

24. In the current case, other than the four months contribution made towards the payment of the mortgage amounting to Kshs.120,000/- there is no evidence that the respondent made any other monetary or non-monetary contributions towards purchase of the matrimonial property.....”

29. In the case of **Bonnie Sue Dunbar vs Wayne Michael Erlank [2004] eKLR** – the court had this to say;

“If the defendant did not make a contribution to the acquisition or improvement of the properties, on what basis would he be entitled to a 50% of the property..... Indirect contribution is usually recognised if a spouse has dedicated his/her life to offering indirect services that enables the other spouse put more efforts in acquisition of property. Such indirect services are child bearing, home making, looking after elderly parents, or relatives and generally supporting the working spouse to in turn be able to acquire property within the marriage. This marriage was short lived, there were no children and it was dogged by stress and misunderstanding due to the defendant's unfaithfulness and underhand activities with the company accounts!.

30. Based on the authorities of PNN vs ZWN, DIS vs JM & BONNIE SUE DUMBAR vs WAYNE MICHAEL ERLARK, it would be totally unreasonable to consider non-monetary contribution as there is none to talk about.

31. This is a clear case where the court should look at what the parties brought to the table. Although there is claim of a refund of the Sacco money the evidence in this regard was not too clear. Needless to say, that despite notice to produce evidence of the Equity Account & Sacco Account sent to the Applicant's counsel none were produced.

As the contribution of 1m was admitted by the 1st respondent I will take that to be the applicant's contribution.

The 1st respondent demonstrated by way of evidence that he substantially contributed to the acquisition of the said property.

32. Based on the above evidence and in being as fair as the facts and the circumstances permit, I am of the view that the apartment should be shared at the ratio of 20:80 so that the applicant gets 20% and the 1st respondent 80% of the current value of the property.

33. The applicant halfheartedly sought to be paid for the sums she used to purchase furniture. Apart from her averments no receipts were produced to substantiate the claim. I will therefore make no order on the same.

34. In 2015 the parties were in court and it is said the tenant left. A new tenant was found in 2016 at the rent of Kshs.35,000/-, with kshs 5,000/- service charge. The rent less service charge, service charge arrears and less agency fees be shared at the ratio of 20:80.

35. The parties do agree to a valuer who will undertake valuation of the property within the next 30 days of the date hereof. Costs of valuation be shared.

36. The property be sold within 90 days from the date the valuation is complete and the proceeds shared taking into account paragraph 32 & 34 above.

37. In the alternative either party to buy of the interest of the other within the 90 days of the date the valuation report is received taking into account paragraph 32 and 34 hereof.

38. Each party to bear his/her own costs.

DELIVERED AND SIGNED AT NAIROBI THIS 30th DAY OF SEPTEMBER, 2021.

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ALI ARONI

JUDGE