



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 4 OF 2020 (OS)

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT

LNM.....PLAINTIFF/APPLICANT

VERSUS

BNI.....DEFENDANT/RESPONDENT

JUDGMENT

1. The Originating Summons under consideration herein is dated 4.03.2020 and is brought under sections 6 and 7 of the Matrimonial Property Act, section 3, 3A of the Civil Procedure Act. The applicant seeks for;- a declaration that Kajiado/ Kaputei North/xxx, Githurai-Kimbo Plot under Mwhoko Housing Company Limited, 0.60Ha Ngandori/Kirigi/xxxx, and 0.12Ha Ngandori/Kirigi/xxxx are matrimonial property; a declaration that the applicant is entitled to fifty percent (50%) share of the said properties; an order that the matrimonial properties be shared equally and if incapable of being shared, they be sold and the net proceeds be shared equally between the parties; and that the respondent do bear the costs of the application.

2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant on 4.03.2020. In a nutshell, the applicant's case is that she was married to the respondent on 7.08.2004 under the Marriage Act Cap 50 but the same was dissolved vide the orders of 15.08.2018. Further that during the subsistence of the said marriage, they together acquired all the above-mentioned properties and which are thus matrimonial properties and that the applicant was at all times during the subsistence of the marriage employed, financially sound as an accountant and contributed both materially and emotionally to the acquisition of the said properties. However, the respondent has since remarried and the plaintiff is apprehensive that the properties might be interfered with as some of the properties are registered in the names of the respondent. Further that the marriage was blessed with three minors and who are in the care and custody of the applicant and who are entitled to benefit from matrimonial properties.

3. The application is opposed by the respondent by way of a replying affidavit and wherein he admitted having been married to the applicant herein in the year 2004 but deposed that he left the matrimonial home on 30.03.2015 due to irreconcilable differences and which separation was admitted by the applicant herein in her replying affidavit dated 31.08.2016 in **Nairobi Children's Court Case No. 927 of 2016**. He further deposed that between the year 2004 and 2014, he took various loans which he used to single-handedly purchase some of the properties and which were meant for the family. Further that Ngandori/ Kirigi/xxxx is not matrimonial property but the same is leased from one Martin Mukundi after the intended purchase flopped for the reasons that the same was not owned by Martin Mukundi but by other beneficiaries too.

4. The respondent further denied that Ngandori/Kirigi/xxxx is matrimonial property and deposed that, him and the applicant initially purchased Ngandori/Kirigi/xxxx measuring 0.10Ha but the transfer of the same was not effected due to their fall out in 2015. That however, his current wife WKN approached the said seller and they entered into a sale agreement in relation to an extra 1¼ acre of the said land and the two parcels (Ngandori/Kirigi/xxxx and the 1¼ acres) were merged to form Ngandori/Kirigi/xxxx and a title deed issued. As such, the only non-financial contribution the applicant would claim is only limited to the said Ngandori/Kirigi/xxxx and not the whole Ngandori/Kirigi/xxxx. Further that he solely contributed to the purchase of Kajiado/Kaputei North/xxx through the men's fellowship in his church and as such her claim of equal share over the same is unjustified.

5. In relation to Plot Number xxx Mwhoko Housing Company, it was deposed that the same was acquired jointly and that the respondent paid the Kshs. 250,000/- solely but the applicant was given the said money to pay as she was more available than the respondent and that the applicant did not make any financial contribution towards its purchase. Further that the respondent acquired the properties herein through bank and sacco loans and as such, the only claim the applicant has over the said properties are not based on any monetary contribution but only by virtue of her being a wife when the same were being acquired and as such, her 50% claim is unjustified. He deposed further that he was not opposed to the applicant getting a share of the properties which has been registered jointly by virtue of her being the wife but the said share ought not to be over 20%.

6. The application was canvassed by way of written submissions and wherein the parties reiterated their rival positions as contained in their respective pleadings.

7. I have perused through the pleadings and taken time to appreciate the respective parties' positions as elucidated in the said pleadings and the rival submissions. It is not in dispute that the parties herein got married on 7.08.2004 and that the marriage was dissolved on 15.08.2019. The identity of the properties subject of the instant application is not disputed and neither is the fact that the marriage brought three issues. It is trite that where a marriage has been dissolved, matrimonial property (ies) ought to be shared between the parties to the dissolved marriage. It is my view that the main issues which this court is invited to determine are:-

- 1) *Whether the suit properties as pleaded constitute matrimonial properties.*
- 2) *What ratio/ percentage should the said properties (if any) be shared as between the parties herein.*
- 3) *Whether in the circumstances of the case, the applicant is entitled to the orders prayed for.*

8. As to whether the suit properties as pleaded constitute matrimonial properties, Section 6(1) of the Matrimonial Property Act No. 49 of 2013 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.*

9. Section 7 provides that *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. It therefore means that the property acquired during the subsistence of the marriage and jointly owned is matrimonial property. However, there are situations where the property is acquired during the subsistence of the marriage and registered in the names of one of the spouses. The law provides that in such a case, the property will be presumed to be held in trust for the other spouse.

11. Section 2 defines matrimonial home 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.* From the pleadings before me, the applicant does not lay claims on any of the properties herein by the virtue of being matrimonial home. What is clear is that her claim is premised on the fact that she is entitled to a share of the properties by virtue of being a wife to the respondent at the time of acquisition of the said properties. The respondent on the other hand refuted the said depositions and further deposed that the properties do not form part of matrimonial properties and/ or the applicant is not entitled to 50% of the properties jointly registered in their joint names. I will therefore start by determining as to whether all the properties in dispute are matrimonial property (ies).

12. In relation to Kajiado/Kaputei North/69843 the respondent deposed that he purchased the same single-handedly through his church's men's association and that the applicant did not contribute to the purchase of the same but that he decided to register the same in their joint names as she was his wife then. The property having been acquired during the subsistence of the marriage and in fact having been registered jointly, it therefore means that the same is matrimonial property within the provisions of section 6 of the Matrimonial Property Act of 2013.

13. In relation to (Githurai-Kimbo) Plot xxx under Mwhoko Housing Company the applicant deposed that she solely bought the same but however both names appear on the certificate of registration. The respondent deposed that they jointly purchased the same and that the agreement indicates that payments were made by the applicant on behalf of the couple. From the agreements and the plot certificate for the said plot, it is clear that the same was acquired during the subsistence of marriage. Further, the same is indicated as being jointly registered in their two names. The same can only be said to be matrimonial property.

14. As for Ngandori/Kirigi/xxx the respondent in opposing the same deposed that the same was not matrimonial property but that he approached one Martin Mukundi with the view of purchasing the same in 2012 but that he later realized that the sale would not go through as the land did not belong to the intended seller but jointly with other beneficiaries of the estate of one Njiru Gacirati. He annexed a copy of a certificate of confirmation of grant issued by this court in **Embu High Court Succession cause No. 410 of 2011 In the matter of estate of Njiru Gacirati (deceased).**

15. It is trite that he who alleges must prove (See section 107 of the Evidence Act). In the instant case, the applicant did not place before this court any evidence of ownership of Ngandori/ Kirigi/xxx and or proof that the same is registered either in the names of the applicant (so as for the presumption of trust to arise) or in their joint names. There was no evidence which was produced by the applicant as to the ownership of the same and neither did the applicant rebut the claims by the respondent that the said land does not belong to him and that it was a leased property. She was obligated to place before this court, cogent evidence that the respondent owned the said land or it was matrimonial property. She therefore failed to discharge the burden of proof placed upon her by law. As such, it cannot be said that Ngandori/Kirigi/xxx is matrimonial property. I therefore make a finding that it is not.

16. As for Ngandori/Kirigi/xxx, the applicant laid claim on the same as a matrimonial property. However, the respondent denied the same and deposed that he paid Kshs. 150,000/- to one Margaret Gitiri in installments for the purchase of Ngandori/Kirigi/xxx measuring 0.10Ha and that after paying the entire purchase price, the surveyor prepared an application for consent to transfer the land in their joint names.

17. However, due to their fall out in 2015 the transfer was not effected. That he was able to acquire an extra 1¼ acre of the said land with the help of his current wife WKN and the two parcels (Ngandori/Kirigi/xxx and the extra 1¼ acres) were merged to form Ngandori/Kirigi/xxx and a title deed issued but which land was sold in February 2020 so that the respondent together with the new wife can plan their family. As such, the only non-financial contribution the applicant would claim is only limited to the said Ngandori/Kirigi/xxx and not the whole Ngandori/Kirigi/xxx. He annexed a title deed registered in his name and that of WKN dated 6.09.2019. The applicant did not dispute these averments as she did not seek leave to file a further affidavit.

18. In her written submissions, she submitted that she was entitled to 50% of the said land as at the time of acquisition of the same (2017), their marriage had not been dissolved (the same was dissolved on 5.08.2019). However, from the evidence on record, it is clear that the same was registered in the names of the respondent and one WKN on 28.08.2019 and a title deed issued on 6.09.2019. As such, at the time of acquisition of the said Ngandori/Kirigi/xxx, the marriage had already been dissolved.

19. As I have already stated, he who alleges must prove. The applicant in my view did not tender sufficient evidence to prove that the said land is matrimonial property. The same is not registered in the names of the respondent so as to be said that it is matrimonial property. The applicant did not prove any contribution to the acquisition of the whole land parcel. However, the respondent conceded that one acre of the same (formerly Ngandori/ Kirigi/xxx) was acquired during the subsistence of their marriage with the applicant and that they paid a total of Kshs. 150,000/-. It is my considered view as such that the said one acre is matrimonial property.

20. In my view, in absence of monetary contribution, the applicant is entitled to the part of the undisputed one acre due to non-monetary contribution which is defined under the law to include domestic work and management of the matrimonial home, child care, management of family business or property and farm work. The respondent did not refute the depositions that the applicant has been taking care of the children. As such, the same can be said to be non-monetary contribution.

21. However, I find that the averments by the applicant that she was entitled to the 50% of the whole land parcel as the time of alleged acquisition of the same their marriage had not been dissolved cannot hold. The evidence on record and which is not disputed is that the parties herein separated sometimes in April 2015. This can be seen from the replying affidavit in Nairobi Children's Court Case No. 927 of 2016 annexed to the replying affidavit herein and which was sworn by the applicant herein. In paragraph 6 of the said affidavit, she deposed that their marriage broke down resulting in the applicant leaving the matrimonial home on 30.03.2015 hence they are presently separated. This issue was brought up by the respondent in his submissions and the applicant did not refute the same.

22. It is my considered view that at the time of acquiring the said land (more so the extra acres), and despite the marriage having not been annulled, the applicant nonetheless cannot be said to have made non-monetary contribution towards the acquisition of the same. In my view, the respondent did not offer companion to the respondent at the time of acquiring the extra land. Neither can she be said to have taken care of the family business or farm. She did not prove contribution in relation to the extra land. The joint contribution towards the initial 150,000/- towards purchase of the initial one acre having been admitted, it therefore means that the same is matrimonial property and the same ought to be available to be shared between them.

23. It is my considered view, as such, that the only properties which are matrimonial properties are Kajiado/Kaputei North/69843, (Githurai-Kimbo) Plot xxx under Mwhoko Housing Company and one acre out of LR Ngandori/Kirigi/xxx, LR Ngandori/ Kirigi/xxx is not matrimonial property as no evidence was tendered to prove registration of the same in the name of the respondent or in the parties' joint names.

24. The said properties (Kajiado/Kaputei North/xxx, (Githurai-Kimbo) Plot xxx under Mwhoko Housing Company and one acre out of LR Ngandori/Kirigi/xxx) being matrimonial properties it therefore means that since the marriage between the parties herein was dissolved, they are entitled to a share of the same. The question therefore is as to what ratio/ percentage should the said properties be shared as between the parties herein.

25. The applicant deposed that she is entitled to 50% of the said properties and the same should be shared equally. The respondent on the other hand deposed that the applicant ought to get not more than 20% share of the said properties. To justify the 50% share, the applicant deposed that she contributed to the acquisition of the said properties whereas the respondent refuted the same and deposed that the applicant did not make any monetary contributions thereto.

26. To begin with, it is not in dispute that LR Kajiado/Kaputei North/xxx, (Githurai-Kimbo) Plot xxx under Mwhoko Housing Company are registered in the names of both parties herein. The plot certificate for Plot xxx Githurai Kimbo and paragraph 11 of the respondent's replying affidavit are sufficient in this regard. Under Section 14(b) of the Matrimonial Property Act, *where matrimonial property is acquired during marriage in the names of the spouses jointly, the law creates a rebuttable presumption that their beneficial interests in the matrimonial property are equal.*

27. This section presumes that the interests in the matrimonial property are equal where the same is registered jointly as between the parties. In the case of **Kivuitu –vs- Kivuitu (1991) 2 KAR 241** the Court of Appeal held that;-

“The law presumes equal ownership of the matrimonial property from the fact of registration in joint names; recognized the wife’s indirect financial contribution towards the purchase of the matrimonial home and the fact that both parties held the property as a joint venture.”

(See also **OKN –vs- MPN [2017] eKLR**, **INN –vs- MSC [2018] eKLR** which were quoted with approval in **MNNN –vs- ENK [2019] eKLR** and where A. Onger J found that the properties in that case were jointly owned by the parties herein and thus each party is entitled to 50% share of the property).

28. It is my considered view therefore that LR Kajiado/ Kaputei North/xxx, (Githurai-Kimbo) Plot xxx under Mwhoko Housing Company should be shared in the ratio of 50:50 between the parties herein.

29. As for the one acre in LR Ngandori/Kirigi/xxx, now that the respondent admitted as to the process of acquiring the same having been initiated at the time of the subsistence of the marriage (intentions being to purchase Ngandori/Kirigi/xxx measuring 0.10Ha) it is my considered view that in the circumstances, the applicant is entitled to 50% of the same. I note that the respondent deposed as to having disposed the LR Ngandori/ Kirigi/xxx (the resultant land after consolidation). However, he did not tender any evidence in that respect. It is my view therefore that the applicant is entitled to half of 0.10Ha (being 0.05 Ha and the same being her 50% contribution to the acquisition

of the original Ngandori/Kirigi/xxx).

30. As such, the court makes the following orders:-

- 1) *That a declaration is hereby issued that LR Kajiado/ Kaputei North/xxx and (Githurai-Kimbo) Plot xxx under Mwihoko Housing Company are matrimonial properties and the same should be shared on a 50:50 basis between the parties hereto.*
- 2) *That in the alternative, either party shall be at liberty to buy out the beneficial interest of the other in the said property in monetary terms.*
- 3) *That a declaration be and is hereby issued that LR Ngandori/ Kirigi/xxx is not matrimonial property.*
- 4) *That a declaration is hereby issued that the applicant is entitled to 0.05 Ha of LR Ngandori/Kirigi/xxx (being half of 0.10Ha in LR Ngandori/Kirigi/xxx) and the same being her 50% contribution towards the acquisition of the original Ngandori/Kirigi/xxx).*
- 5) *That an order be and is hereby issued that the LR Ngandori/ Kirigi/xxxx shall be sub-divided so as to excise the said 0.05Ha and subsequent transfer to the applicant herein.*
- 6) *That the applicant shall cater for the costs of sub-division and transfer of the said 0.05Ha of LR Ngandori/Kirigi/xxx.*
- 7) *That in alternative to order number 5 and 6 above and upon agreement between the parties herein, the respondent shall be at liberty to buy the said 0.05Ha from the applicant herein at the prevailing market rates upon valuation of the said 0.05Ha of LR Ngandori/Kirigi/xxx by a valuer agreed upon by the parties herein.*
- 8) *That the costs of the valuation shall be borne by both parties.*
- 9) *That each party to bear his or her own costs of the instant application.*

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF OCTOBER, 2021.

L. NJUGUNA

JUDGE

.....FOR THE APPLICANT

.....FOR THE RESPONDENT