



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 149 OF 2016

UA.....APPELLANT

VERSUS

MM.....RESPONDENT

(An Appeal from the judgment of Hon. Kimanga, Resident Magistrate, delivered on 24th October, 2016 in Mombasa Resident Magistrate's Court Civil Case No. 2611 of 2012).

JUDGMENT

1. The suit against the respondent in the lower court was that he and the appellant were married since 1977 under Islamic Law but subsequently divorced on 10th December, 2008 vide Mombasa Kadhi's Court Case No. 331 of 2008. That during the subsistence of the said marriage, the appellant and the respondent cohabited in Chaani, jointly owning a house on plot number xx/xx which was their matrimonial house. The appellant averred that she substantially contributed to the construction of the house by undertaking its electrification and solely purchasing building materials. She seeks to be declared as a joint owner of the premises on 50:50 basis with the respondent.
2. The respondent filed his statement of defence and counter-claim dated 17th December, 2012, where he denied all the averments contained in the plaint and more particularly that he jointly owned the house on plot No. xx/xx Chaani jointly with the appellant. He further denied that the appellant contributed to the construction of the said house through electrification and purchase of building materials. The respondent averred that while working in Saudi Arabia, he acquired the property known as plot No. Chaani xx/xx Chaani and thereafter built a house thereon all at his own expense, since the appellant never made any contribution.
3. In the counter-claim, the respondent averred that he exclusively owns the house on plot No. xx/xx Chaani and the alleged that the appellant forged documents to claim joint ownership. He stated that the appellant had been collecting rent from the said house since January 2011 and that she used it exclusively for her own purposes. The respondent therefore claimed for an account of all the rent collected.
4. In the lower court, judgment was delivered on 24th October, 2016, where the appellant's claim was dismissed with costs to the respondent and the respondent's counter-claim was allowed as prayed and he was awarded costs of the counter-claim.
5. The appellant was dissatisfied by the decision of the Trial Magistrate and on 1st November, 2016, he filed a memorandum of appeal raising the following grounds of appeal-
 - (i) That the Honourable Magistrate erred in law and fact in relying on forged documents to establish ownership of the suit property, a document which was not produced by the maker.
 - (ii) That the learned trial Magistrate erred in law and fact by failing to establish the person who constructed the suit property despite acknowledging the same having been existing way back 1995.
 - (iii) That the learned Magistrate erred in law and fact by disregarding a title document of the suit property in absence of proof of fraud.
 - (iv) That the learned trial magistrate erred in law and fact in using evidence adduced selectively in order to arrive at predetermined decision.
 - (v) That the learned magistrate erred in fact and law in ignoring or giving no consideration to the case for the appellant and submission made before him and also ignoring that this was a matrimonial home of the appellant.

(vi) In view of the circumstances set out herein above, the learned magistrate totally misdirected himself in delivering the judgment against the appellant by failing to consider and appreciate the plight of the appellant.

6. The appellant's prayer is for this Court to allow the appeal with costs and, set aside the judgment of the Resident Magistrate delivered on 24th October, 2016.

7. This appeal was canvassed by way of written submissions. On 6th January, 2021, the appellant's submissions were filed by the firm of C'ombat & Ombat & Company Advocates. The respondent's submissions were filed on 27th January, 2021 by the firm of Khatib & Company Advocates.

8. Ms. Ombat, the appellant's learned Counsel submitted that the house in question was a matrimonial house having been bought during the subsistence of a marriage and the appellant fully and actively substantially contributed in supervising the construction and the developments of the subject house, funding the same, managing the rental business, taking care of the said home and taking care of their child while the respondent was at all material times out of the country. It was stated that she did not keep a record of the monies she spent in the construction of the house.

9. She argued that bearing in mind that the respondent had deserted the appellant with no means of support, the appellant utilized the proceeds of the rent collected to sustain herself and the parties' 12 year old daughter. She further argued that the appellant was actually residing in the said house together with the child who is now deceased. Ms. Ombat relied on Section 2 of the Matrimonial Property Act which defines contribution as monetary and non-monetary. She relied on the case of **CWM v JPM** [2017] eKLR, where the Court held that contribution be it by way of domestic work and management of the matrimonial home, child care or companionship falls within the definition of contribution.

10. Ms. Ombat submitted that the appellant produced the house plan which bore her names and the respondent's as joint owners, but the Trial Court held that the documents filed by the appellant were forgeries and proceeded to uphold the documents filed by the respondent since they were registered in his name. She further submitted that Section 14 of the Matrimonial Property Act provides that where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. She also relied on Article 45(3) of the Constitution of Kenya, 2010, which provides that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage.

11. It was submitted by Counsel for the appellant that all the documents relied on by the Trial Magistrate in favor of the defendant did not prove any ownership of the house but the plot which was not the subject for determination. She further submitted that to compel the appellant to render accounts was unfair and wrongful since no specified period was pleaded in the counter-claim and/or the amounts thereof. She was of the view that the orders sought by the respondent were vague, ambiguous and unenforceable. She contended that the respondent was in the process of executing the judgment for a sum of more than Kshs. 2,000,000/= which amount had been over exaggerated and drawn in the warrants of execution as special damages, which were not pleaded as required by law.

12. Ms Ombat relied on the case of **FS v EZ** [2016] eKLR in which the parties therein had been married for about 10 years with the respondent being out of the country while the applicant took care of the properties with nothing being wasted. Judge Chitembwe found that it amounted to contribution. The Judge stated that the applicant took care of the properties knowing that she had a recognizable stake over them and that the applicant indirectly contributed towards the acquisition of the property. He found that the respondent had faith in her and that is why he allowed some of the properties to be registered in her name only. The Judge held that there was non-monetary contribution made by the applicant.

13. Mr. Khatib, learned Counsel for the respondent submitted that the appellant did not prove any material contribution towards construction of the house, as the respondent undertook all the expenses towards the construction. He further stated that the appellant in her submissions asserted her interest on non-monetary contribution such as domestic work and management of matrimonial home, child care, companionship, management of family business or property and farm work. Mr. Khatib stated that from the appellant's testimony it was evident that she undertook no domestic work and/or management of the matrimonial home as she testified that they never lived in that house while they were still married.

14. He argued that the appellant did not prove any companionship during the construction of the house nor management of any business of the family as there was none at the time. He was thus of the view that there was no non-monetary contribution that the appellant made and her claim for interest in the suit property was totally misplaced. He relied on the case of **PNN v SWN** [2017] eKLR, where the Court held that it would be surreal to suppose that the Constitution somehow converts the state of coventures into some sort of *laisser-passer*, a passport to 50% wealth regardless of what one does in that marriage.

15. It was submitted by Mr. Khatib that the house in issue was a commercial house which was generating income collected and utilized by the appellant for her own benefit without knowledge of the respondent since the year 2011. He held the view that the lower Court properly allowed the counter-claim upon consideration of the evidence presented before him.

ANALYSIS AND DETERMINATION.

16. The duty of the 1st appellate Court is well settled as was espoused in the case of **Selle vs. Associated Motor Boat Co. [1968] EA 123** as hereunder-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound

necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. It is therefore necessary to re-evaluate the evidence adduced in the lower Court and reach a conclusion bearing in mind that this Court has not had the benefit of hearing or seeing the witnesses testifying, which was an advantage that the Trial court had. This Court has carefully considered the grounds of appeal raised by the appellant, the submissions by both parties, the pleadings filed before the lower Court and the evidence that was adduced before the said Court. The issue that arises for determination is whether this appeal is merited.

18. Section 6(1) of the Matrimonial Property Act states as follows in regard to matrimonial property-

"For the purposes of this Act, matrimonial property means;

a) The matrimonial home or homes;

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."

19. This Court agrees with the definition made by Judge Nyakundi on matrimonial property in **TMW v FMC** [2018] eKLR where he stated as follows-

"Basically for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property. In the instant case, the marriage between parties herein commenced 1993 and was officiated through Kikuyu Customary Law in 2001. The property in question was acquired in 2010 and the same was acquired during the subsistence of the marriage between the parties herein. There is also evidence that the suit property was acquired for purposes of building a family home. As a result, there is no doubt whatsoever that the suit property including the Juja farm forms part of matrimonial property as far as the parties herein are concerned."

20. There is no dispute that the appellant and the respondent were married in the year 1977 under Islamic Law and divorced on 10th December, 2008. It is also not in dispute that plot No. Chaani xx/xx was procured and the subsequent construction of the house on the said plot was also done during the subsistence of the marriage. The respondent stated that he bought the plot from one Michael Nyangweso Wangudi on 26th February, 1992 and that the said plot is currently registered solely in his name. He further stated that he sent the appellant to apply for power (electricity connection) on his behalf since he had travelled.

21. During cross-examination, the respondent stated that he travelled for most of his life and that even when the agreement was done, he was not in Mombasa. On the other hand, the appellant claimed the house which she constructed in the year 1992. Her evidence before the Trial Court was that when they got married, she and the respondent stayed in her father's house. She also stated that the respondent was working in Arabia until 2002 when he returned to Kenya permanently. She had indicated in her evidence that when the respondent was working in Arabia, he used to give his parents all his money thus he never helped the appellant to construct the house. In cross-examination, she stated that she never stayed in the said house with the respondent as it was a rental house and not a matrimonial home.

22. Section 14 of the Matrimonial Property Act guides the Court on how to deal with land acquired during the subsistence of marriage but registered in the name of one spouse as is the case herein. In such a situation a rebuttable presumption arises that the said property is held in trust for the other spouse. Section 14 provides as follows-

"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."

23. It is therefore this Court's finding that the suit property having been bought and developed during the subsistence of the marriage between the appellant and the respondent and despite the fact that it is solely registered in the respondent's name, forms part of their matrimonial property.

24. On the issue of distribution of matrimonial property, a spouse has to demonstrate through evidence that he/she contributed directly or indirectly towards acquisition of the property in dispute. As per Section 7 of the Matrimonial Property Act, ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and should be divided between the spouses if they divorce or their marriage is otherwise dissolved based on such contribution.

25. Article 45(3) of the Constitution of Kenya, 2010 addresses the issue of the rights of parties to a marriage. It provides that 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.

26. Section 2 of the Matrimonial Property Act defines contribution as follows; -

“contribution” means monetary and non-monetary contribution and includes—

(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”

27. In a bid to prove her financial contribution in the construction of the property in issue, the appellant stated that after the plot was bought, she constructed the house using her own money. She however failed to produce any documents for the construction of the said house. She explained that she did not have any as she lost the said documents when her house was attacked and her child killed. Ms Ombat submitted that the appellant had participated substantially in supervising the construction and the developments of the house, managing the rental business, funding the same, taking care of the said home and their child, while the respondent was at all material times out of the country.

28. The appellant’s Counsel further submitted that the proceeds of the rents collected were to sustain her and their daughter aged 12 years, bearing in mind the fact that the respondent had deserted the appellant with no means of support and that the appellant was living in the said house together with their child who is now deceased. The respondent did not tender in any evidence to contradict the appellant’s averments. He stated that he sent the appellant to apply for electricity on his behalf.

29. It is therefore evident that the appellant brought up their child and provided for her needs both physically and emotionally. It is also evident that she supervised the construction of the house on the suit property and continued to manage it even after it was complete and occupied by tenants. Prior to their divorce in the year 2008 and before the respondent deserted their marriage, the appellant provided him with companionship and emotional support when he was in the country. She also bore him a daughter whom the appellant nurtured when the respondent was out of the country for a long duration of time.

30. In the case of **F.S v E.Z** [2016] eKLR, the Court held that; -

“The parties herein have been married for about 10 years. The applicant dedicated all this period to her marriage. Although she never made any financial payments towards the purchase of the properties, she also indirectly contributed to the acquisition of the properties. The respondent maintains that the companionship was quite intermittent. That is true as the respondent is not a resident of Kenya. However, still there was companionship whenever the respondent came to Kenya. The applicant oversaw the purchase of the properties. She could have inflated the prices if she had any ill intention. She was honest enough and followed all the lawful procedures towards the acquisition of the properties. That amounts to indirect non-monetary contribution.”

31. The above decision was appealed against in the Court of Appeal and the said Court upheld the decision of the High Court. In the said decision in **EZ V FS** [2018] eKLR, the Court of Appeal stated as follows-

“ Suffice it to state that the inclusion of equal rights between parties in a marriage in the Constitution and under statute law was aimed at eliminating discrimination against women and underpinning the principle that parties are of equal worth and human dignity, whatever their station in life.”

32. In this appeal, in the absence of proof of monetary contribution having been made by the appellant this Court holds that she made significant non-monetary contribution to the acquisition and development of plot No. Chaani xx/xx. As a result of the said non-monetary contribution this Court hold that she is entitled to a share of the said property.

33. In view of the reasons explained hereinabove, I find that the appeal herein is merited and I proceed to make the following orders-

(i) The judgment by the Resident Magistrate delivered on 24th October, 2016 in Mombasa Chief Magistrate’s Court Civil Suit No. 2611 of 2012 is hereby set aside;

(ii) The respondent’s counter-claim is hereby partly allowed;

(iii) The rental income from plot No. Chaani xx/xx shall be shared between the appellant and the respondent on a 50:50 basis;

(iv) The respondent shall be paid 50% of all the rental income from the said property received by the appellant January, 2011; and

(v) Since both parties have succeeded in the appeal to a certain extent, each party shall bear his/her own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF NOVEMBER, 2021.

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

IN THE PRESENCE OF -

NO APPEARANCE FOR THE PARTIES

MR. OLIVER MUSUNDI – COURT ASSISTANT.