



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 36 OF 2017

IN THE MATTER OF MATRIMONIAL PROPERTY ACT 2013

IN THE MATTER OF AN APPLICATION BY MOA UNDER MATRIMONIAL PROPERTY ACT 2013

IN THE MATTER OF DIVORCE CAUSE NO. 196 OF 2012

BETWEEN

DR. MOA.....PLAINTIFF

VERSUS

DNO.....DEFENDANT

JUDGMENT

1.The Plaintiff herein Dr. MOA filed this suit by way of Originating Summons (O.S.) dated 15.6.2017 against DNO seeking the following Orders:

(i) **THAT the properties and investments in the schedule herein below acquired during coverture through funds and efforts of the plaintiff and the defendant during the subsistence of the marriage between the parties herein be distributed in the ratio of actual financial contribution of each one of them or such proportions as the court may deem just and fit.**

(ii) **THAT the properties and investments acquired by the parties herein during the subsistence of their marriage as listed in the schedule appended herein below be settled for the benefit of both the plaintiff and defendant in the ratios of the actual financial contribution of each one of them towards the acquisition of the said properties and investments or in such a manner and proportions as the court may deem fit and just.**

(iii) **THAT the Plaintiff be granted leave to pay the Defendant off in respect of the Defendant's actual financial contribution, right and interest in Apartment [particulars withheld] on Riara Road Milimani Nairobi so that the same be retained by the Plaintiff in his sole name.**

(iv) **THAT the Defendant upon payment to her by the Plaintiff do execute all the necessary transfer documents of ownership of the said Apartment [particulars withheld] on Riara Road Milimani Nairobi together with the transfer of the one (1) share in Rear Paddocks Management Limited (the management company) to the Plaintiff and in default of the Defendant doing so, the Deputy Registrar of this court be authorized to do so.**

(v) **THAT the Defendant do transfer title LR [particulars withheld] County to the Plaintiff and in default of the Defendant in executing the necessary transfer documents in favour of the Plaintiff the Deputy Registrar of this court to do so.**

(vi) **THAT the Defendant be immediately evicted from the matrimonial home Apartment [particulars withheld] Paddocks on Riara Road Milimani Nairobi.**

(vii) **THAT the Defendant do pay the costs of this suit.**

SCHEDULE OF PROPERTIES

(a) THAT Leasehold interest in Apartment [particulars withheld] on Riara Road Milimani Nairobi with the current value of Kshs.13,000,000/= in the joint names of the Plaintiff and the Defendant.

(b) THAT Freehold interest in an undeveloped plot measuring 50ftx100ft L.R. [particulars withheld] SyokimauMavoko Machakos County with the current value of ksh.2, 500,000/= in the sole name of the Defendant.

(c) THAT a freehold interest in a three bedroom Residential House in Mwihoko Githurai Nairobi with a current value of Kshs.7, 000,000/= in the sole name of the Defendant.

(d) THAT one (1) share in the management company [particulars withheld] Management limited.

2. The Originating Summons is supported by the Affidavit of the Plaintiff also sworn on 15.6. 2017 in which he has detailed how the properties listed in the Schedule of Properties were acquired.
3. The Defendant filed a Replying Affidavit dated 27.11.2017 in response to the Originating Summons in which she denied the averments in the Affidavit in Support of the Originating Summons.
4. The Suit proceeded by way of Viva voce evidence after the parties failed to reach a settlement.
5. The Plaintiff said in his oral evidence in Court that he wished to adopt his Supporting affidavit to the Originating Summons as his evidence in Chief and annexures thereto and also supplementary Affidavit dated 13.12.2017 filed in Response to the Defendant's Replying Affidavit.
6. In his oral highlight of this evidence, the Plaintiff said the Defendant was his wife and they got divorced in April 2014.
7. The Plaintiff also said they still stay together in the Matrimonial home in Apartment [particulars withheld] at [particulars withheld] along Riara Road Milimani in Nairobi (hereafter referred to as the Matrimonial Home).
8. The Matrimonial home is registered in both their names but he wants to be given a chance to buy off the Defendant.
9. He said since the year 2005, the Defendant has never paid a coin towards the servicing of the Mortgage and neither has she contributed to payment of Service Charges.
10. The Plaintiff said the Defendant's total contribution towards the purchase of the Matrimonial Home is 1,200,655.00 only while his total contribution as at the time of giving evidence in Court stood at Ksh.10, 917,131.95 cents. He wants to pay off the defendant her contribution.
11. The Plaintiff also said he solely purchased undeveloped property known as LR No. [particulars withheld] situated at Syokimau Mavoko in Machakos County (hereafter referred to as the Syokimau Property) and he contested the defendant's claim in her Replying Affidavit that she took a loan to buy the said property.
12. The Plaintiff said the Defendant bought a car with the loan she took and further that he paid for the Syokimau Property in three instalments. He produced counterfoils for the Payment. He said that he allowed the Defendant's name to be put in the Syokimau Property.
13. The Plaintiff said the Defendant has a house (Residential Mansionette at Mwihoko Githurai Nairobi which is registered in her name (hereafter referred to as the Mwihoko Property). He said the Defendant has taken some of their household goods to the Mwihoko Property.
14. The Plaintiff asked the Court to direct the defendant to moves to the Mwihoko Property since the atmosphere at the Matrimonial Home is toxic to the extent that their first born son is depressed. He said the boy goes for counseling and comes back to the same toxic atmosphere and that is not helping situation.
15. The Plaintiff said some of the documents which the defendant attached as evidence of her contribution to the payment of the Matrimonial Property are fake and forgeries.
16. The Plaintiff said several of the documents relied on by the Defendant were doctored including counterfoil for cheques for Ksh.150, 000 which he said the Pay-in slips showed they were only for Ksh.50,000/-.
17. The Plaintiff said the Defendant only contributed Ksh.1, 200,655 but she hyped the figure to Ksh.3, 505,735 using forged documents.
18. The Plaintiff asked to be given the Syokimau Property and his rightful share of the Matrimonial home. He asked to pay off the Defendant her share of contribution which he said was only Ksh.1, 200,655/-.
19. In Cross examination the Plaintiff said he wanted the Court to give him the Matrimonial property after he has paid off the Defendant her share towards the purchase of the same.
20. He also said the Mwihoko Property belongs to the Defendant and that he is not claiming the same. He said they were married for 19 years before they Divorced and that both took care of the children.

21. The Defendant in her Oral evidence in Court also adopted her replying Affidavit dated 27.11.2017 and her witness statement dated 16.3.2018 filed in Court on 5.4.2018 as her evidence in Chief.

22. The Defendant also said she is the one who looked for the Matrimonial home and she has always lived there with their children. She said she first contributed Ksh.691, 705/- towards the initial purchase and she always allowed the Plaintiff to do all the transactions and the house was registered in their joint name.

23. The Defendant also said she has attached several documents to show she contributed financially towards the purchase of the Matrimonial home.

24. She produced the original counterfoils of cheques which she said she wrote and gave to the Plaintiff who delivered all cheques. She also said she contributed substantially towards the Maintenance of the Matrimonial home.

25. The Defendant said her total monetary contribution was Ksh.3.5 million and she also contributed indirectly in terms of maintenance of the home.

26. The Defendant also said the Plaintiff has another home in Kindaruma and he only comes to the Matrimonial home after dinner to sleep.

27. The Defendant said she is a Clinician and she contributed 1.5 million towards the setting up of the family business which she repaid until the divorce proceedings started and the Plaintiff took over the repayments.

28. In Cross examination, the Defendant denied that she tailored the Counterfoils to hype her contributions towards the purchase of Matrimonial home. She said her total contribution was Ksh.3, 505,735/-.

29. The Defendant also said in cross examination that the Syokimau Property does not exist. She said when the divorce proceedings started the Plaintiff stopped supporting her and she wanted money to take her children to school and she sold it in the year 2011 or 2012 to pay fees.

30. The parties filed written submissions which I have duly considered. I find that it is not in dispute that the Plaintiff and the Defendant got married in 1995 and that they were blessed with two issues ROO born on 3.6.1995 and AMO born on 18.3.2001 (now both adults).

31. There is no dispute that the marriage was dissolved on 24.4.2014 in Divorce Cause No. 196 of 2012 filed by the Defendant herein.

32. The issues for determination in the Originating summons dated 15.6.2017 are as follows:

(i) What constitutes Matrimonial Properties in this case?

(ii) How should the Matrimonial Properties to be distributed between the Plaintiff and the defendants?

(iii) Who pays the costs of this suit?

33. On the issue to what constitutes Matrimonial Properties. The **section 6** of the Matrimonial Properties Act defines Matrimonial Properties as follows;

(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.

35. The Plaintiff who filed this Originating Summons said the Properties listed on the SCHEDULE OF PROPERTIES in the OS which are as follows constitute Matrimonial Properties:

(a) THAT Leasehold interest in Apartment [particulars withheld] on Riara Road Milimani Nairobi with the current value of Kshs.13,000,000/= in the joint names of the Plaintiff and the Defendant.

(b) THAT Freehold interest in an undeveloped plot measuring 50ftx100ft LR. [particulars withheld] SyokimauMavoko Machakos County with the current value of ksh.2, 500,000/= in the sole name of the Defendant.

(c) THAT a freehold interest in a three bedroom Residential House in Mwhoko Githurai Nairobi with a current value of Kshs.7, 000,000/= in the sole name of the Defendant.

(d) THAT one (1) share in the management company [particulars withheld] limited.

34. In his evidence before this Court, the Plaintiff said that he does not want any share in the Mwhoko Property but he asked the Court to direct the Defendant to move to the said Property which belongs to her.

35. The Plaintiff also asked the Court to allow him to pay off the Defendant her share towards the contributions of the purchase of the Matrimonial home situated at Riara where both parties still reside to date.

36. The Plaintiff in his prayers in the Originating Summons asked for orders that the Defendant be evicted from the Matrimonial home upon being paid her share of contribution to its purchase which the Plaintiff said is Ksh.1,200,655. The Plaintiff apportioned the Distribution as 9:1 in his favour against the Defendant.

37. The Defendant on her part asked for 60% contribution and stated that apart from making direct financial contributions of 3,505,735/- She also made indirect contributions in terms of Child Care and Maintenance of the Matrimonial Home which she identified through a friend called DO and where she has lived with the Children since it was purchased to date.

38. I find that both the Plaintiff and the Defendant contributed to the acquisition of the Matrimonial Property. I find that the said contributions are both direct and indirect. The said property therefore constitutes Matrimonial property and is liable to be distributed between the Plaintiff and the Defendant.

39. The Matrimonial Property Act defines with clarity what constitutes “**contribution**” to mean “**monetary**” and “**non-monetary**” contributions 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.”

40. Concerning the Syokimau Property, the Plaintiff told the Court that he bought it from one MM whom he refers to as the seller and he paid for it in three instalments. However, no sale agreement was produced in this court. It is trite law that all transactions involving land must be in writing.

41. **Section 3(3)** of the Law of Contract Act provides;-

“No suit shall be brought upon a contract for the disposition of an interest in land unless:-

(a) The contract upon which the suit is found-

(i) Is in writing

(ii) Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

42. In the case of Silverbird Kenya Limited –vs- Junction Ltd & 3 Others [2013] eKLR where J. Mutungi, stated inter alia:-

*“..... **Section 3(3)** of the Law of Contract Act is indeed couched in mandatory terms and does in fact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff’s suit must fail for being in contravention of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya.”*

43. See also the cases of Rainald Schumacher –vs- Aubrey Garth Monsey [2008] eKLR, LaikipiaMifugo Ranching Co. Ltd –vs- Nanyuki Ranching Ltd [2007] eKLR and John Michael Wanjao –vs- AlubalaAbonayoAndambi [2011] eKLR where the courts declined to enforce contracts which fell foul of **Section 3(3)** of the Law of Contract Act and proceeded to strike out the suits for non-compliance thereof.

44. The Plaintiff did not call the said MM as his Witness and neither did he tell the Court why he registered Syokimau Property in the name of the Defendant if indeed he is the one who solely financed its purchase.

45. I find that there is no evidence that the Plaintiff is the one who purchased the Syokimau property.

46. The Defendant on her part said she took a loan to purchase the said Property which was registered in her name and when she filed the Divorce cause, the Plaintiff stopped maintaining her and the Children and she was forced to sell the Syokimau Property to maintain herself and the children.

47. I find that the Plaintiff was aware of these facts and yet he did nothing to stop the sale and now that the Syokimau property is no longer owned by the Defendant, it is not possible for this Court to transfer the same to the Plaintiff as he is seeking in the Originating Summons.

48. My finding on the Syokimau Property is that the Plaintiff did not convince the Court that he solely bought it. The Plaintiff said the loan which the Defendant took was utilized in the purchase of a car and that he added the Defendant money to purchase the said car yet the Plaintiff did not include any car on the list of matrimonial properties.

49. The Plaintiff in his submissions told the Court to factor the Syokimau Property in distributing the Matrimonial Properties herein but he failed to tell the Court how much the Defendant fetched for its sale. It is trite law that he who alleges a fact is duty bound to prove the said fact.

50. **Section 107** of evidence Act succinctly states:

“Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

And Section 108 of Evidence Act, further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

51. I therefore find that the Syokimau Property does not exist and the same does not constitute Matrimonial Property in this Case.

52. Concerning the Mwhoko Property, the Plaintiff said he is not claiming the same and this Court removes it from the Schedule of Matrimonial Properties herein. The Plaintiff asked the Court to direct the Defendant to move into the Mwhoko Property but it is not clear on what basis this Court would do so since the Plaintiff concedes that the Mwhoko Property is not Matrimonial Property.

53. The duty of this Court is to determine Matrimonial Properties and to distribute the same in accordance with the law.

54. The Plaintiff also asked for one (1) share in the management company called Riara Paddocks management Limited. However, no evidence was tabled before this Court to establish that the said Limited Company constitutes Matrimonial Property. The Evidence adduced by the parties herein is that the Plaintiff started a clinic and that the defendant took a loan of Ksh.1,500,000/- to enable him start the said clinic.

55. The Plaintiff said he repaid the said loan in full but the Defendant said the Plaintiff took over the loan but did not repay the amount she had already paid. The particulars of the Limited Company are not before this Court and in any case the same falls within the realm of commercial law. I therefore find that one (1) share in the management company [particulars withheld] Limited does not constitute Matrimonial property.

56. The only property available for distribution which constitutes matrimonial property in this case is the Matrimonial Home. The parties reside in the said property with their two children even after they divorced in 2014. The atmosphere in the home is so acrimonious that their two children have been adversely affected to the extent that one of them is undergoing treatment for depression.

57. The Plaintiff wants the defendant to be evicted after he has paid her Ksh.1,200,655 which he says is her direct financial contribution. The Defendant on her part said she is entitled to 60% share constituting her direct contribution of 3,505,735 and indirect contribution in terms of Child care and home maintenance.

58. The law is clear that parties to a marriage are entitled to equal rights before the marriage, during the marriage and upon dissolution of the marriage. In the case of **PAWN vs CAWM [2018]eKLR**, the Court held as follows;

“..... The Constitution and the statute law, herein before referred to as the Matrimonial Properties Act of 2013, protects family property and underpins the principles of fairness and non-discrimination of a spouse who has made contribution in the manner provided in the Act. Article 45 (1) (3) of the Constitution makes provisions regarding the rights of parties during marriage and upon dissolution and anchors the principle of “equal rights” as thus:-

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.

The aforesaid Matrimonial Property Act defines with clarity what constitutes “contribution” to mean “monetary and non-monetary contributions 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.”

Ownership of matrimonial property is described under Section 7 of the Matrimonial Property Act as:-

“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.”

59. The Plaintiff did his best to discredit the Defendant and to call her a liar on the issue of her contribution towards the purchase of the Matrimonial Home. He said she forged documents to hype her direct financial contributions. I find that there is no evidence that he reported the alleged forgery to the police for investigations and it is not the mandate of the Family Court to ascertain criminal activities.

60. The defendant on her part said it never occurred to her that one day she would be called upon to produce documents to show she contributed to the purchase of her own home since marriage is a relationship based on trust. She said it was the Plaintiff who was entrusted to remit the payments and her duty was to give him the money. The Plaintiff did not deny that fact.

61. I accordingly find that the Defendant contributed both directly and indirectly towards the purchase of the Matrimonial home. Although the exact amount the Defendant contributed directly cannot be ascertained, the fact remains that she made direct financial contributions towards the purchase of the Matrimonial Property, a fact the Plaintiff does not deny.

62. The duty of this Court is to distribute the property in accordance with the Law

63. I find that the Law recognizes both direct and indirect contributions and there is evidence that the Defendant made both monetary and non-monetary contributions as envisaged in the matrimonial properties Act. The matrimonial property Act defines what constitutes “contribution” to mean monetary and non-monetary contributions and includes;

a. Domestic Work and Management of the Matrimonial home.

b. Child Care

c. Companionship

d. Management of family business or property; and Farm work.

64. In the current case the Plaintiff ignored the Defendant’s indirect contribution which constituted child care and support and companionship during the subsistence of the marriage. I find that there is evidence that the Defendant provided the Plaintiff with support to the point that she took a loan of Ksh.1, 500,000 to enable the Plaintiff to start a clinic.

65. The Plaintiff’s long stay in the Matrimonial Property which she helped to identify through her friend DO and where she resides to date with the Children should also be factored.

66. The Defendant said she is the one who purchased all the furniture in the matrimonial home and that she maintains the home to date. I find that the Plaintiff did not list any furniture as Matrimonial Property and the Defendant’s evidence that she solely bought the furniture is plausible.

67. I find that the Principles of fairness and human dignity demand that both direct and indirect contributions be factored in determining the respective contributions of the parties upon dissolution of the marriage. The distribution of Matrimonial Properties should not be a Mathematical Exercise otherwise Marriage relationships will become Commercial transactions.

68. A marriage as per Section 3 of the Marriage Act is defined as follows:

(1) Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.

(2) Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.

69. The duty of this Court is to preserve the family unity and the marriage union in part of the family which article 45 of the Constitution sets out to protect and preserve and when the marriage is dissolved, the parties still have equal rights.

70. Each case is determined on its own merits and in the current case, I find that both the direct financial contributions of the Defendant together with her indirect contribution towards the acquisition of the matrimonial property entitle her to equal distribution of the said property.

71. The maxim “equity is equality” is applicant in this case subject to the caution by Lord Pearson in **Gissing Vs Gissing 1970] 2 All ER 780] at page 788** who stated as follows in paragraph c that:

“No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions otherwise than by way

of advancement, by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix.....”

72. The Court had occasion in **Kamore Vs Kamore [2000] 1 EA 80** to clarify the law applicable in disputes of this kind. What this Court said at Page 89 paragraph (b) is worth repeating:

“We would like to add our observations, that is to say, that until such time as some law is enacted, as indeed it was enacted in England as a result of the decision of Pettit Vs Pettit and Gissing Vs Gissing to give proprietary rights to spouses as distinct from registered title rights Section 17 of the Act must be given the same interpretation as the law Lords did in the said two cases. Such law should be enacted to cater for the conditions and circumstances in Kenya. In England the Matrimonial Homes Act of 1967 was enacted which was later replaced by the Matrimonial Proceedings and Property Act 1970. The Matrimonial Causes Act of 1973 also made a difference”.

*We are of the respectful view that the principles restated by **ECHARIA VS. ECHARIA** are good law and contribution as the basis for distribution of matrimonial property remains valid”.*

73. This Court would visit injustice upon the Defendant and the Children by allowing the Plaintiff to refund her Ksh.1, 200,655 and evict them thus ignoring the Defendant’s indirect contribution in child care, maintenance of the home, acquisition of the furniture and her long stay in the said Matrimonial home which is the only place the defendant and her children call home.

74. The Plaintiff said the Defendant owns another home at Mwihoko but no documents were tabled to prove the same. I accordingly distribute the matrimonial home which is registered in both the names of the Plaintiff and the Defendant as follows;

(i) I direct that Apartment No. D4 on [particulars withheld] on Riara road Milimani be shared between the Plaintiff and the Defendant on a 50:50% basis.

(ii) I direct that survey of Kenya values the property within 45 days of this date.

(iii) The Plaintiff and the Defendant to foot the cost of the valuation on a 50:50% basis.

(iv) The Defendant is given the first option to pay off the Plaintiff his 50% share of the value of the Property within 90 days of the filing of the valuation Report.

(v) If she is unable or unwilling to pay off the Plaintiff his share, the Plaintiff will be at liberty to pay her off her share within a further 90 days.

(vi) If the Plaintiff is unable or unwilling to pay off the defendant her 50% share within the prescribed period, the property to sold within a further 90 days thereof and he proceeds shared between the parties at 50:50% basis.

(vii) This being a family dispute, each party to bear its own costs of this suit.

Orders to issue accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 31ST DAY OF JANUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.