



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
CIVIL CASE NO. 28 OF 2018 (O.S.)
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

RMA.....PLAINTIFF

AND

JOA.....DEFENDANT

JUDGMENT

1. The parties herein **RMA** and **JOA** got married under the **African Christian Marriage Act Chapter 151** (since repealed) of the **Laws of Kenya**.
2. Subsequently, the parties had their marriage dissolved in the Chief Magistrate's Court and the divorce made absolute on the 13th of December, 2016.
3. Three properties were acquired during the substance of marriage between the two. Through agreement the parties disposed of two of the assets and proceeds thereof shared on a 50/50 basis after settling liabilities jointly incurred. The disposed properties were jointly owned.
4. In the centre of the controversy now before court is the third property acquired during the subsistence of the marriage between the parties and registered in the name of the Respondent being Apartment No. D3 Block D on property Land Reference 330/134 a prime property in [particulars withheld] road, Lavington.
5. The said property is described by the Applicant as her matrimonial home, as she lived there during coverture, after separation and divorce, and continues to do so to-date together with their two issues RAA (18 years) and NA (15 years). The Respondent is said to have moved out of the matrimonial home on the 21st of December, 2011.
6. The Applicant's case is that she contributed to the acquisition of all the three properties they acquired during the subsistence of their marriage. Her position is that she contributed to the purchases through her own funds and from borrowing. Further she paid for house bills, bought clothes for the children and generally maintained the home.
7. The Respondent vehemently denies any contribution on the part of the Applicant in the acquisition of any of the three properties and more specifically the property in question. It is his contention that the property in question was purchased through a loan from his former employer and upon quitting employment, through a second loan borrowed from a commercial bank and which loan he cleared in 2013 upon sale of the other two properties.
8. In her evidence the Applicant informed the court that she is a Relationship Manager in one of the Multinational banks in the country. She also stated that both of them made monetary and non-monetary contributions towards the acquisition of properties while married. On her part this included monetary contribution, taking care of the family expenses, managing the matrimonial home and nurturing and caring for their children. It is her case also, that out of her contribution, properties Land Reference [particulars withheld] were purchased and jointly registered. As for Apart No. [particulars withheld] the same was registered in the Respondent's name despite her contribution as he had obtained a mortgage from his employer on non-commercial rate and needed to be the registered owner in order to enjoy the facility. She further informed the court that as they acquired the apartment, she paid a down payment of Kshs.660,000/- which she obtained from the Kenya Bankers Sacco. She produced a statement as proof of the same. Further, when the Respondent had to transfer the loan from his previous employer to another bank on 3rd of December, 2010 the said bank required a down payment of Kshs.1.5 million which sum she borrowed from her employer and paid. She produced evidence of a bank slip and her bank statement as proof.

9. The Applicant stated further that when [particulars withheld] were sold at Kshs.16,625,000/= part of the proceed paid off the outstanding loan for the apartment and other individual loans they took for purpose of the said apartment. Further despite an agreement between her and the Respondent that the property would be registered in her name in trust for their children the Respondent reneged on the understanding. That the Respondent having moved out of the matrimonial home she continued to pay the service charge and all outgoings. She seeks to have the property in her sole name.

10. On his part the Respondent informed the court that he was previously a banker and is now self-employed. In 2007 he obtained a mortgage over the property subject matter from his employer, which mortgage he fully serviced until June 2009 when his employment came to an end. That due to unemployment the loan went into arrears, and he then obtained a second loan. He stated further that he met all the financial pre-conditions of the second loan and admits that the Applicant raised and paid 1 year's mortgage repayment as required. He otherwise denies receiving any other assistance from the Applicant. He also admitted that the amount due to the 2nd bank was paid off from the proceeds of the two Kajiado properties.

The Respondent objects to the Applicant's suggestion that the property be registered in her name. He However has no issue with her getting a portion equivalent to her contribution.

11. In his evidence the Respondent painted a picture of a frustrated father of two teenage girls, whom has left to his ex-wife so as to cater for their well fare including university education of the bigger girl who is in a University abroad. He does not see them much. Their upbringing has since separation in 2011 been in the hands of the Applicant.

12. The counsel for the Plaintiff filed submissions where she raised 2 issues for the court's determination as follows:

i. Whether or not it can be declared and decreed that Apartment D3 Block D erected on [particulars withheld] is matrimonial home purchased and developed by joint funds and efforts of the parties and the same is being held by the Respondent in trust for the Applicant.

ii. Whether the said property may be registered in the name of the Applicant solely.

13. In the absence of any submission from the Respondent's counsel and considering the evidence herein I find the issues crafted to be on point and adopt the same.

14. Matrimonial Property Act 2013 ("the Act") has settled the meaning of the following terms as follows;

Section (2) defines 'matrimonial home'– 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.

Section 6 matrimonial property;

- a. The matrimonial home or homes
- b. Household goods and effects in the matrimonial home or homes;
- c. Any other immovable and movable property jointly owned and acquired during the subsistence of marriage.

Section 7 attributes ownership 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.

Section 2 describes contribution to mean monetary and non-monetary contribution and 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. Gainful work and
- f. family business.

15. Based on the evidence on record and the Law the disputed property squarely fits the definition of matrimonial home no doubt. It is also clear that in acquiring the same both parties contributed to its acquisition. The Respondent met the monthly mortgage for two years; i.e.

2007-2009 and as he did so the applicant paid for food, clothing and other household bills, meaning that the household expenses of the family were shared between them. Further evidence on record is that upon sale of joint properties they paid off the outstanding mortgage for the apartment.

16. Section 14 of the 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 and where owned jointly there is a rebuttable presumption that their beneficial interest is equal.

17. Therefore, with the evidence before court, I am of the considered view that the Applicant has placed enough evidence to prove that she substantially contributed to the acquisition and maintenance of the property subject of these proceedings despite the same having been registered in the name of the Respondent and the Respondent holds the said property in trust for her.

18. What is left is for the court is to apportion the contribution by each party and in doing so I will consider both monetary and non-monetary form of contribution.

19. In terms of monetary contribution, the Applicant paid the initial deposit, and as the Respondent was paying the monthly mortgage for two years, the applicant met other house expenses, as found above; they shared family expenses. The Applicant further paid 1 year's mortgage with the 2nd bank as the husband paid the loan processing expenses which are normally not substantial and from joint funds from sale of Kajiado land, they paid off the mortgage. In my view the Applicant's contribution in monetary sense surpassed that of the Respondent who does not seem to have made any significant payment towards the 2nd loan.

Further, since the Respondent left home in December, 2011, the applicant continues to pay service charge and other expenses for the home. She has the children of the marriage, has continued to take care them, pays university for the bigger child and meets their everyday needs. The Respondent moved out of the home and out of his children's life.

20. The sacrifice and contribution to this family by the Applicant, who remained in the matrimonial home before the divorce and her contribution to the family brought forth by the two cannot be ignored, and ought to fall within the meaning attributed to contribution by Section 2 of the Act.

21. Based on the findings above I will apportion a bigger share of contribution towards the Applicant. And find that the Applicant contributed 75% share of the family asset and the Respondent 25%.

22. In order to realise the apportioned shares, the property may be sold and same shared accordingly. First priority should go to the parties so that either of the two may pay off the other according to the ratio above and upon valuation of the said property.

23. Each party to pay his/her own costs.

SIGNED DATED and DELIVERED in open court this **30TH** day of **JANUARY, 2020**.

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ALI-ARONI

JUDGE