



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 8 OF 2018**

**(FORMER ELC. 168 OF 2017 (OS))**

**EMS..... APPLICANT**

**VERSUS**

**VMB ..... RESPONDENT**

**JUDGMENT**

1. The applicant is the former wife of the respondent. The two were married in church in 2004 and cohabited in Kakamega town until when their marriage was dissolved by the court in the year 2016. It was the contention of the appellant that during the subsistence of the marriage they acquired land parcel No. Butso/ Shikoti/ [...] (herein referred to as the suitland/property) measuring 0.44 Ha that was however registered in the name of the respondent. The applicant filed this suit by way of originating summons dated 26<sup>th</sup> May, 2017 seeking for a determination whether -

*(1) LR. No. Butso/ Shikoti/ [...] was acquired jointly by the applicant and the respondent during the subsistence of their marriage.*

*(2) The applicant is entitled to a share of the said plot.*

2. The respondent made a reply to the summons through a replying affidavit dated 3/7/2017 contesting the claims by the applicant. The matter proceeded by way of *viva voce* evidence whereby both parties testified in support of their respective positions. They eventually made submissions.

3. The case for the applicant was that she had cohabited with the respondent since the year 1997. They got married in church wedding in the year 2004. They were blessed with a daughter who is currently at university. In the year 2009 they jointly purchased the subject parcel of land. The land was registered in the name of the respondent in trust for both of them. They proceeded to establish a matrimonial home on the property. Later on there developed some irreconcilable differences between them. She filed for divorce. They parted ways in 2015. The marriage was dissolved by the court on 1<sup>st</sup> November, 2016.

4. The applicant contends that she made contribution towards the acquisition of the property. That she is entitled to a share of the property. She urged the court to grant her half share of the plot.

5. The respondent opposed the application. He contends that he purchased the plot singlehandedly in 2009 when the applicant was jobless and a housewife. That between that year and 2011 he enrolled the applicant into a secretarial course in Kakamega town and sponsored her for a computer course. That he eventually secured her a job with a law firm in Kakamega town wherein she works to date. That he started building a house on the suit property in the year 2014 without the support of the applicant. He completed it in October, 2015. He moved into the house in the absence of the applicant as she had already deserted him in September, 2015. Before then they were staying in rental houses. He produced a receipt for rent for the month of September, 2015. Therefore that the applicant did not contribute anything towards the acquisition of the land nor in its development.

6. In her evidence in court the applicant admitted that she did not make a direct contribution to the acquisition of the property nor its development. She based her claim on contribution in the form of companionship that she offered to the respondent during the subsistence of their marriage and taking care of their daughter.

7. In her submissions the applicant relied on the provisions of the Matrimonial Property Act 2013 that define the meaning of “matrimonial property” and “contribution”. She submitted that the property was acquired during the subsistence of their marriage. It was therefore matrimonial property. That it was registered in the name of the respondent in trust for both of them. That her act of running the family home, taking care of their daughter and providing companionship to the respondent was sufficient contribution on her part.

8. The respondent on the other hand submitted that the subject land is registered under the repealed Registered Land Act (Cap 300). That the Matrimonial Property Act 2013 came into force after he had acquired the property. That the Matrimonial Property Act 2013 is not applicable to the property. That notwithstanding, the property is solely registered in his name. That he solely owns it and is not jointly owned with the applicant. That the applicant admitted that she did not contribute anything towards the purchase of the property. That the property was not their matrimonial home. That the receipt for rent that he produced indicated that they were still in a rental house in the month of September, 2015 when the applicant deserted him. That the house does not qualify as a matrimonial home.

9. Further that the applicant was working and was not a domestic worker in care of their daughter. That they separated in 2015. That if there was any companionship offered to him by the applicant, it never lasted. That since both of them were working, it is difficult to ascertain the non-monetary contribution of the applicant. That in case the court is persuaded that the applicant is entitled to a share of the suitland he suggested a ratio of 90:10 in favour of the respondent. That he is willing to pay a monetary value of the ratio apportioned to the applicant.

#### **Analysis and Determination –**

10. The questions for determination are:-

- (1) What is the applicable law?
- (2) Whether the suitland is matrimonial property.
- (3) If so, whether the applicant is entitled to a share of the property.

11. The Matrimonial Property Act 2013 came into force on the 16<sup>th</sup> January, 2014. The summons application was filed on 13<sup>th</sup> June, 2017. The applicable law is therefore the Matrimonial Property Act 2013. It matters not that the property in issue was registered under the repealed Registered Land Act.

12. Article 45 (3) of the Constitution of Kenya 2010 grants equality of parties to a marriage at the time of the marriage, during the marriage and at the dissolution of the marriage.

13. Section 6 of the Matrimonial Property Act, 2013 defines matrimonial property to mean –

- (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.

14. A matrimonial home is defined in Section 2 of the Act as follows:-

***“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.”***

15. Section 14 of the Matrimonial Property Act provides that;-

***“Whenever matrimonial property is acquired during marriage –***

- (a) in the name of one spouse, there shall be a reputable presumption that the property is held in trust for the other spouse.***
- (b) ....”***

16. Section 7 of the Matrimonial Property Act states 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.”***

17. Contribution is defined in Section 2 of the Act to mean 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.

18. The subject property was acquired during the subsistence of the marriage between the applicant and the respondent. It was registered in the name of the respondent. The presumption was therefore that the property was held in trust for the applicant unless the respondent could show otherwise.

19. The principle that emerges in our law is that whenever parties in a marriage part ways they should share whatever belongs to them according to each party's contribution to the acquisition of the property. In **UMM –Vs- IMM (2014) eKLR**, Tuiyot J. held that:-

***“It is my view that at the dissolution of marriage each partner must walk away with what he/she deserves. What one deserves must be arrived at by considering his/her respective contribution whether it be monetary or non-monetary. The bigger the contribution the bigger the entitlement.”***

20. The question then is whether the applicant contributed to the acquisition and development of the property. The court has to consider both direct and indirect contribution.

21. The parties herein were married in the year 2004 and divorced in the year 2016. The plot was bought in the year 2009. The applicant was not working when the property was bought. It is then clear that the applicant did not, as admitted by her, make any direct financial contribution towards the acquisition of the property. Her contribution can only have been non-monetary contribution.

22. The applicant was a wife to the respondent when the suitland was bought. They had a daughter by the time when the suit land was bought. Since the said daughter is currently at university, it would mean that she was born several years back before the suit property was bought. The respondent may not have been working when the property was bought. It is evident that she had been providing companionship to the respondent for several years before the property was bought. She was also at the time taking care of their daughter. The coverture did not stop by the mere fact that the appellant later on joined the working class. The two roles of providing companionship and child care were sufficient contribution on the part of the applicant. I therefore hold that the suitland was matrimonial property and that the respondent held the land in trust for the applicant. The respondent has not rebutted the presumption contained in Section 14 of the Matrimonial Property Act. The applicant is in the premises entitled to a share of the suit property.

23. The applicant requested for half share of the property while the respondent was offering 10% share of the property. The principle that has developed in our courts is that the court should distribute matrimonial property between the parties on the basis of fairness and the peculiar circumstances of each case. The Court of Appeal in the case of **P A W-M v C M A W M [2018] eKLR**, while considering the issue of contribution in some previous cases held that:-

***“...a woman's direct and indirect contribution was taken into consideration and every case was determined in its own merit while bearing in mind the principles of fairness and human dignity. See the case of;- Muthembwa Vs. Muthembwa (supra)***

***“In assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.***

***The jurisdiction of the court is to determine a question or questions between husband and wife principally as to title to or possession of property.***

***In the instant case, where matrimonial property is intertwined with company property the court cannot decline jurisdiction under Section 17 to deal with the whole property as this would be unjust. In application under section 17 the court has wide and unfettered discretion to make such order or orders as justice may demand including sale and distribution of property subject of the application.”***

***..... we appreciate no case is like another and each must be considered on its own merit while bearing in mind the peculiarities, circumstances and the principles of fairness and human worth in each case. Just like the old saying goes, ‘no one should reap where they did not plant and none should reap more than they planted’. That is a basic tenet of equity which follows the law.”***

24. In **PNN –Vs- ZWN (2017) eKLR** Kiage JA. held that:-

***“.....The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in FRANCIS NJOROGE vs. VIRGINIA WANJIKU NJOROGE, Nairobi Civil Appeal No. 179 of 2009;***

***“ ... a division of the property must be decided after weighing the peculiar circumstances of each case”. As was stated by the Court of Appeal of Singapore in LOCK YENG FUN v CHUA HOCK CHYE [2007] SGCA 33;***

***‘It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – e precise mathematical exercise’.***

25. It is clear from the evidence that the applicant's contribution to the acquisition of the property was lower than that of the respondent. There is no reason for the property to be shared on 50:50 basis. It is the respondent who met all the financial obligations towards the acquisition and development of the property. I assess the applicant's contribution at 30%.

26. In the foregoing the questions put forth by the applicant for determination are answered in the affirmative. The court therefore holds that:-

(1) LR. No. Butso/ Shikoti/ [...] and all the developments thereon was acquired jointly by the applicant and the respondent during the subsistence of their marriage.

(2) LR Butso/ Shikoti/ [...] is matrimonial property.

(3) The applicant is entitled to the share of the suit property.

27. In the premises it is hereby ordered:-

(1) That LR Butso/ Shikoti/ [...] be shared by the applicant and the respondent to the ratio of 70 for the respondent to 30 for the applicant.

(2) That the property be valued by a qualified valuer at the cost of both parties and sold and the proceeds be shared between the parties in the aforesaid ratio.

(3) That in the alternative to order (2) of the property being sold the respondent do pay the applicant 30% of the market value of the property within 6 months of the delivery of this judgment upon which the applicant shall forfeit the property to the respondent.

(4) Further in the alternative to order (2) of the property being sold the applicant's share of 30% be excised from the property at a portion other than where the residential house is situate and registered in her name at the cost of both parties.

Orders accordingly. Each party to bear its costs.

**Delivered, dated and signed in open court at Kakamega this 5<sup>th</sup> day of March, 2020.**

**J. NJAGI**

**JUDGE**

In the presence of:

Applicant

Respondent - absent

Court Assistant - Polycap

30 days right of appeal.