



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

FAMILY DIVISION

PETITION NO. 18 OF 2018

VWW.....PETITIONER

VERSUS

JGK.....RESPONDENT

JUDGMENT

1. The petitioner and respondent were husband and wife. Their marriage was however dissolved in divorce cause No. 1192 of 2010 at Milimani, Nairobi, bringing that marriage to an end. During the marriage, one property, parcel **No. Kajiado/Kaputiei North [...]** was acquired and registered in the petitioner's name. She has now moved this court under Article 45(3) of the Constitution and the Matrimonial Property Act, 2013 seeking the following reliefs:

- i. A declaration that the Petitioner is entitled to 100% of the property known as Kajiado/Kaputiei North/[...]***
- ii. That the Honourable court do order the refund of the payment of water tank and piping to the respondent***
- iii. A permanent injunction do issue against the Respondent to vacate Plot No. Kajiado/Kaputiei North/[...]***
- iv. Cost of accrued rent expenses since 2016***
- v. Costs of the suit***

2. The petition is supported by the petitioner's affidavit sworn on 13th November, 2018 and filed together with the petition. She deposed that she is a lecturer at the [particulars withheld], while the respondent used to work as a driver and later worked with **G4S** but left employment in 2007. She deposed that the respondent initiated divorce proceedings leading to their divorce.

3. The petitioner further deposed that she solely acquired the suit property through funds borrowed from her mother and the university Sacco and Chuna Housing Co-operative Society Ltd. She then developed the property without the respondent's contribution. She averred that the respondent forced her out of the house and has prevented her from accessing the house. She further averred that she tried to have the matter sorted out through mediation without success forcing her to file this petition. She stated that the respondent never made any contributions direct or indirect to the acquisition and development of the property.

Response

4. The respondent filed an answer to petition and cross petition dated 17th December, 2018 and filed on the same day. In the answer to petition, the respondent denied that the petitioner was the sole owner of the suit property but admitted that the property is registered in the petitioner's sole name. He also denied that the property was solely acquired by the petitioner through her own finances. He stated that he substantially contributed towards the purchase and development of the property both directly and indirectly. He also denied that he had trespassed onto the property. He contended that it is matrimonial property and therefore the issue of trespass did not arise.

Cross petition

5. In the cross petition, the respondent reiterated that he substantially contributed both directly and indirectly towards the purchase, development and care of the property. He stated that the property was registered in the petitioner's name because during its purchase, the properties were only being sold to members of the university Sacco and therefore the property was purchased on terms suitable to members of the Sacco. His name could therefore not have appeared on the documents. He however contended that he was the one who choose the parcel of land on the map plan.

6. It was the respondent's further contention that the mere fact that the property was registered in the petitioner's name did not make her the sole owner. He prayed for a declaration that he is entitled to equal share of the property.

Evidence

7. The petitioner was disposed of by way of oral evidence. The petitioner who testified that she is a lecturer at the [particulars withheld] and lives at Kahawa Sukari. She relied on her affidavit sworn on 13th November, 2018 and the annexures attached to her affidavit as her evidence and exhibits. The annexures UNW 1 – 10 were produced by consent as PEX 1 – 10,

8. She told the court that her marriage with respondent was annulled on 13th February, 2018 in Divorce Cause NO. 192 of 2016. She maintained that she was the owner of the suit property and that she purchased and developed it on her own. According to the petitioner, the respondent's only contribution was in the construction of an underground tank and some piping.

9. In cross examination, she stated that she started living with the respondent in 1997 and got their child in April the same year; that she graduated in 1996 and although she did not get a job immediately, she was on contract with the university. She also stated that between 1996 and 1997 the respondent was not employed; that as an academic, she conducts research, teaching and writing. She also stated that some work required her to be away and as such she would not go with the children. The children would remain in school.

10. The petitioner further stated that at the time the divorce cause was filed, the respondent was not working. She also stated that the title deed to the property was issued on 24th April, 2008 and admitted that the property was purchased during the subsistence of the marriage; that the purchase price was Kshs.420,000 but did not have documents to show that her mother gave her some money for that purpose. She denied that the respondent contributed towards purchased the land.

11. The respondent on his part, testified that the petitioner was his spouse and relied on his affidavit sworn on 17th December, 2018 in support of the answer to the petition and cross petition. He also relied on the annexures to the affidavit as his exhibits. He told the court that he met the petitioner in 1995 at the [particulars withheld]; that she was expectant and that she got child on 3rd April, 1997.

12. He testified that at the time, he was a property agent while the petitioner was not working. He was therefore taking care of the family. According to the respondent, the petitioner later got a scholarship and went on with further studies in the same University. He relied on his exhibits to show that he was earning a living by selling land as an agent and that he also paid rent for the office space from where he was working.

13. It was the respondent's evidence that he would contribute to family expenses; upkeep and paid medical, water security and other bills. He denied the petitioner's claim that he did not participate in the acquisition of the property and its development.

14. The respondent testified that he contributed towards the purchase of the property but it was registered in the petitioner's name because she was a member of the Sacco; that they started construction on the property in 2010; that he purchased construction materials and relied on JUK 4, receipts for purchase of some materials; that he used to get payment prior to moving into the property and relied on JUK 3. This is a receipt for rent payment.

15. The respondent denied that he chased the petitioner from the matrimonial home. He contended that the petitioner moved out on her own. He also denied that construction was done through loans obtained by the petitioner. He stated that the petitioner only took a loan to purchase a car and refuted the petitioner's claim that she also got some money from her mother.

16. In cross-examination, the respondent stated that he contributed half of the purchase price (Kshs. 200.000) but admitted that he had no evidence to that effect. Regarding construction, he told the court that the cost of construction was about Kshs. 2.5 million and that he contributed Kshs. 1.5 million because he was doing business and earning money. He again admitted that he had not attached evidence of his contribution. He testified that he was aware that he was required to show monetary contribution but argued that he also made indirect contributed.

Petitioner's submissions

17. The petitioner filed written submissions dated 3rd November, 2019 and filed on 4th December, 2019. She submitted that she is the registered owner of the suit property; that there was no contribution from the respondent towards the purchase and development of the property; that the only thing that the respondent did was to construct an underground tank and some piping which she is willing to reimburse what he spent.

18. The petitioner submitted that the respondent has prevented her from accessing the property in violation of her fundamental rights and that he has violated her right to equality before, during and after the marriage. According to the petitioner, she solely purchased the property and developed it.

19. She relied on *State of Kisumu & another v N.M. Thomas & another* [1976] SCR for the submission that the rule of parity is the equal treatment of equals in equal circumstances. She also relied on *Crywas Enterprises Ltd v Kenya Revenue Authority* [2013] eKLR to argue that the respondent denied her equal protection and equal benefit of the law.

20. On whether the respondent is entitled to a share of the property, she argued in the negative, stating that the respondent did not contribute to the purchase or development of the property. She relied on sections 6(3) and 7 of the Matrimonial Property Act, to argue that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition.

21. The petitioner further relied on *PNN v ZNN* [2017] eKLR (CA No. 128 of 2014), in particular the judgment of Kiage JA, for the submission that equality does not mean the property should be divided equally. She also relied on *Federation of Women Lawyers Kenya (FIDA-K) v The Attorney General & another* [2018] eKLR(Petition NO. 164B), for the submission that by providing that a party walks out with his or her entitlement based on his or her contribution, section 7 of the Matrimonial Property Act entrenches the principle of equality in marriage.

Respondent's submissions

22. The respondent filed written submissions dated 21st January 2020 and filed on 22nd January 2020. He submitted relying on section 14 of the Matrimonial Property Act that there is a rebuttable presumption that where matrimonial property is acquired during marriage in the name of one spouse, that the property is held in trust for the other spouse. He contended that they jointly acquired the property in 2006 although it was registered in the petitioner's name. He argued that he contributed part of the money used to purchase the property.

23. Regarding his contribution, he relied on Article 45(3) of the Constitution to submit that parties to a marriage are entitled to equal right as at the time of marriage, during the marriage and at the dissolution of the marriage. He also relied on section 7 of the Act that ownership of the property vests in the spouses according to the contribution of either spouse towards its acquisition and is to be divided between the spouses if they divorce or their marriage is dissolved.

24. The respondent further relied on *Federation of Women Lawyers (FIDA-K) v Attorney General & another* (supra) on the constitutionality of section 7 of the Act. He also relied on *UMM v IMM* [2014] eKLR on the importance of the matrimonial property Act in ameliorating the harshness that was brought by *Echaria v Echaria* case

25. On direct contribution, he submitted that he had provided several receipts for the contribution he made towards construction of the house and also relied on *MBO v JOO* [2018] eKLR.

26. The respondent further submitted that the petitioner spent much of her time in the academia leaving him to take care of the family which was a form of indirect contribution. He relied on *PNN v ZNN* (supra) and *Federation of Women Lawyers Kenya (FIDA-K) v The Attorney General & another* (supra).

Determination

27. I have considered the petition, the response and cross petition. I have also considered the evidence together with the exhibits, as well as submissions by the parties. The single question that arises for determination in this petition is whether **parcel No. Kajiado/Kaputiei North/[...]** is matrimonial property.

28. The petitioner and the respondent were wife and husband respectively. They met between 1996 and 1997 and got into a marriage relationship. They later divorced in on 13th February 2018 in Divorce Cause No. 192 of 2016. During the marriage the suit property was acquired and registered in the petitioner's name. That property is at the centre of this dispute.

29. The petitioner has argued that she purchased and developed the property using her own resources. She averred, deposed and testified that she took a loan from her Savings and Credit Cooperative Society and got some additional money from her mother to purchase and develop the property.

30. The fact that the property was purchased from the Sacco and registered in the petitioner's sole name is not in dispute. What is in dispute is whether the respondent contributed to the purchase and development of the property to make it a matrimonial property.

31. The respondent on his part, averred and testified that he contributed towards the purchase and development of the property. According to the respondent, he contributed Kshs. 200,000 towards the purchase price although the property was registered in the petitioner's name. He contended that the property was purchased from the Sacco where only the petitioner was a member as the reason why it was registered in the petitioner's name.

32. During the hearing of the petition, the petitioner told the court, relying on her affidavit and annexures which she produced as exhibits that she solely purchased and developed the property. On his part, the respondent maintained that he contributed to the purchase of the property but did not produce evidence of direct contribution towards the purchase. He admitted in cross examination that he had not adduced evidence of any contribution but maintained that he contributed half the purchase price.

33. Regarding development of the property, the petitioner argued that she single handedly developed the property and produced documents exhibits 1 to 10 to show that she developed the property. In this regard, the respondent also claimed that he contributed towards the development of the property. He stated that the cost of developing the property was about Kshs. 2.5 million, and that he had contributed Kshs. 1.5 million towards its development. He again admitted in cross examination that he had not produced documents to show that he contributed that money.

34. Article 45(3) of the Constitution 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.**" These rights include the right to acquire and own property.

35. The Matrimonial property Act is also clear on the right to equality between marriage partners including the right to matrimonial property. Section 6(1) of the Act defines matrimonial property thus:

(1) 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.

36. The dispute herein involves immovable property acquired during the subsistence of the marriage but was registered in the name of one spouse. The petitioner cited section 6(3) of the Act which states that notwithstanding subsection (1), parties to an intended marriage may enter into an agreement before their marriage to determine their property rights. Under section 6 (4), a party to an agreement made under subsection (3) may apply to Court to set aside the agreement and the Court may set aside such agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

37. Even though the petitioner has made reference to section 6(3) of the Act, the section does not apply to this case given that there is no allegation or evidence that there was a pre marriage agreement between the parties to this petition.

38. The relevant provision is section 7 which relates to ownership of matrimonial property. It provides:

“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.

39. Similarly, section 14 provides that 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.

40. Section 7 is clear that ownership of matrimonial property is based on each party’s individual contribution towards its acquisition, while section 14(a) is also plain that where the property is acquired during marriage, but is registered in the name of one spouse, a presumption arises that it belongs to both parties to the marriage. That is, in the case of a dispute on ownership, as is in the present case, either spouse has to prove that the property is either his/hers or is held in trust for both. That is why section 7 states that the property will be shared according to the contribution of each spouse towards its acquisition in the event of divorce or dissolution of their marriage.

41. Both the petitioner and the respondent have relied on section 7 to advance their respective claims. Article 45(3) and section 7 of the Act are on equality of spouses and have been interpreted and applied by courts in circumstances that have called for their application.

42. In *PNN v ZWN* (supra), the Court of Appeal found that there was both direct and indirect contribution by ZNN towards acquisition of some properties to warrant her getting a share of some of those properties in dispute even though they had been registered in the PNN only.

43. Similarly, in *MBO v JOO* (supra), the same court held that the appellant was in gainful employment; that she constantly took loans and that the property had been acquired with joint efforts of the parties.

44. And in *PWK V JKG* [2015] eKLR it was held that where the disputed property is not registered in joint names of spouses but in one spouse’s name beneficial share of each spouse would depend on their Proven proportions of financial contribution either direct or indirect towards acquisition of the properties.

45. The principle running through in the above decisions is that a spouse has to demonstrate through evidence that he/she contributed directly or indirectly towards the acquisition of the property in dispute. And in line with section 7 of the 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.

46. The petitioner has adduced evidence and produced exhibits to show that she acquired the property from the Sacco although it was acquired during the marriage. She also testified that her mother gave some additional money for that purpose.

47. On the other hand, although the respondent stated that he contributed towards the purchase of the property, he did not adduce evidence to prove the fact that he made direct contribution towards the acquisition of that property. Sections 107 through 109 of the Evidence Act place the burden on the person who alleges existence of certain facts to prove existence of such facts. In other words, the respondent had the burden to prove that he contributed towards the acquisition of the property even though it was registered in the petitioner’s name. That is really what section 14 of the Matrimonial property Act means when it states that there is a rebuttable presumption that where the property is registered in the name of one spouse, but was acquired during marriage, the spouse holds it in trust for the other spouse.

48. The respondent did also admit in cross-examination that he had not produced documents to show the contribution he had made in the acquisition of the property. He merely stated without evidence, that he contributed half the cost of the purchase price, that is; Kshs. 200,000. I therefore find and hold that there was no direct or indirect contribution by the respondent in the acquisition the property.

49. I now turn to consider whether the respondent made direct contribution in the development of the property. To discharge this burden, the respondent was to establish that he made direct or indirect contribution towards the development of the property.

50. The petitioner argued that she developed the property on her own. She contended that the only contribution the respondent made was the construction of an underground tank and piping which she said she was willing to refund and in fact prayed that the court makes an order for refund of that cost. The respondent did not make any response or submission to this argument that his only contribution was in the

construction of the underground tank and piping.

51. The respondent, however contended that he contributed half of the cost of construction of the house putting his contribution at Kshs. 1.5 million. He relied of receipts in annexure JGK 4 which he said were receipts for construction materials. He also argued that since the petitioner was in the academia and she was at times away doing research and writing, he took care of the family and that when they met the petitioner she had no degree but she is now a Professor. The respondent further argued that he was paying rent and other bills and, therefore, indirectly contributed to the development of the property.

52. The petitioner disputed the respondent's claim arguing that whenever she was away, the children were in school; that the respondent did not at times have a constant job and therefore his argument that he indirectly contributed towards the development of the property was untrue.

53. There is no evidence that the petitioner's pursuit of further studies was attributable to the respondent's contribution. The petitioner testified that she got a scholarship that enabled her pursue her studies. The fact that respondent paid rent and other household bills and that he may have taken care of the children could not alone amount to indirect contribution towards development of the property.

54. The respondent did not argue that the petitioner did nothing for the family during that period to persuade this court that he played a significant role in the development of the property.

55. The respondent produced documents to show that he at times worked as an agent selling properties and therefore earned money. He however did not say how much he made to show that he was able to meet the family obligations and significantly contribute to the development of the property. Some of the receipts showed that he was paying rent for the premises he said he worked from and, therefore, had nothing to do with the family.

56. When the law states that ownership of matrimonial property will depend on the contribution of either spouse, it requires a spouse to show through evidence that he/she made direct or indirect contribution in the acquisition and or development of the property. In this regard, the respondent has produced documents to argue that he purchased materials towards construction of the house. He testified that he contributed as much as Kshs. 1.5 million towards construction.

57. The petitioner disputed the respondent's claim that he contributed to the development of the property. That denial notwithstanding, she stated that he constructed an underground tank and did piping. This is admitted direct contribution towards improvement of the property **Kajiado/Kaputiei North/[...]**.

58. I have perused receipts **JGK4 from page 75 to 107** of the respondent's answer to petition and cross petition. Only 6 receipts at pages 75 to 78 are in the respondent's name. They are for Kshs, 10, 000 for Order 85, 25,000, for Order 86, 20,000 for Order 87. It is not clear what order 85, 86 and 87 were. So are Kshs 7,000 and 9,000 for unidentifiable payments and whether they related to the property. The rest of the documents do not show to whom they were issued. Further, the documents at page 81 to 89 are not receipts and the respondent did not explain their relevance to this matter. As it is, the respondent filed documents and left it to the court to make sense out of them.

59. From the evidence on record, it would have been difficult for this court to make a conclusion that the respondent made a direct contribution towards the development of the property. The petitioner would have made a case that she purchased and developed the property using her own resources which would remove it from the definition of matrimonial property that ought to be dealt with in terms of section 7 of the Act.

60. However, the petitioner stated that the respondent constructed an underground water tank and did piping, an admission that he somewhat contributed to the development of the property. The respondent did not deny this and did not say how much he spent on the tank and piping. The petitioner did not also give the figure or estimated cost of the water tank and piping. The pleadings do not also state the amount spent to do this work to enable the court weigh this contribution in terms of percentage against that of the petitioner. That leaves it to the court to hazard an opinion on what contribution the respondent may have made.

61. I have carefully considered each party's position on this matter and the evidence on record. I am not satisfied that the respondent has discharged the burden of proof on a balance of probability, that he contributed Kshs. 1.5 million towards development of the property. There may have been some level of contribution but certainly not what he said he gave. He also did not categorically state the source of his income and how much it was.

62. That notwithstanding, it cannot be denied that this is the house the family constructed during the time of their marriage. The respondent was there when the property was developed and he must have contributed in any other way during its development. There is some evidence from none other than the petitioner herself that the respondent improved the property by constructing an underground water tank and piping thus connecting water to the house which improved its value.

63. In the circumstance, doing the best I can, the conclusion I come to is that the respondent made minimal contribution to the development of the property. In the absence of clear evidence, I find that the respondent contributed about 15% towards development of the property.

64. Flowing from my finding above, I make the following orders.

a. A declaration is hereby issued that Parcel NO. Kajiado/Kaputiei North/[...] is matrimonial property

b. A declaration is hereby issued that the Petitioner is entitled to 85% of Kajiado/Kaputiei North/[...] while the respondent is entitled to 15%

c. An order is hereby issued directing the parties to have the house, excluding the land, valued by a joint professional valuer to determine the value of the house and thereafter the petitioner do the refund to the respondent 15% of the value.

d. An order is hereby issued directing the respondent to move out of Parcel No. Kajiado/Kaputiei North/[...] within three months from the date of this judgment and hand over the property to the petitioner

e. A permanent injunction is hereby issued restraining the Respondent from interfering with the petitioner's right of access to Parcel No. Kajiado/Kaputiei North/[...]

f. This being a matrimonial dispute, I order that each party do bear own costs of the suit

Dated, signed and delivered at Kajiado this 23rd day of April, 2020.

E.C. MWITA

JUDGE