



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 18 OF 2018

(FORMER ELC. 104 OF 2017 & FORMER HCC. NO. 104 OF 2011)

LIOAPPLICANT

VERSUS

AOO..... RESPONDENT

JUDGMENT

1. The applicant filed this suit against the respondent by way of originating summons dated 5th August, 2011 seeking for determination:-
 - (1) *Whether she should be declared to have in her own capacity, acquired the whole of land parcels known as South Wanga/Ekero/***** and Butsotso/Shikoti/***** by virtue of acquisition and registration in her own name pursuant to the provisions of the Married Women's Property Act, 1882.*
 - (2) *Whether the respondent should be restrained by an order of this court from dealing in, possessing, disposing, wasting and/or in any manner transacting over the said parcels of land.*
 - (3) *Whether the respondent should be ordered removed from property No. Butsotso/Shikoti/****.*
 - (4) *Whether the respondent should be condemned in the costs of this suit.*
2. The summons were supported by the affidavit of the applicant. The same were opposed by the respondent through his replying affidavit deponed on 26th September, 2011. The hearing of the suit proceeded by way of *viva voce* evidence. The applicant was represented by the law firm of **E. K. Owinyi & Co. Advocates** while the respondent was represented by the firm of **Elungata & Company Advocates**. The applicant testified as PW1 in the case and called one witness, Aggrey Luboyi Owendo PW2. The respondent testified but did not call any witness.
3. The case for the applicant was that she got married to the respondent under Luhya Customary Law way back in 1983. The applicant was at the time working with [Particulars Withheld] at Molo while the respondent was unemployed. That at the time they entered into the marriage, the respondent had 3 children from a previous marriage. Her marriage with the respondent was not blessed with any issue. That during the subsistence of the marriage, the applicant managed to acquire the above stated properties through loans from her Sacco, [particulars withheld]. The properties were registered in her name as the absolute owner and title deeds issued to her. That on land parcel **South Wanga/Ekero/****** she had started to develop the plot but she had not completed the development by the time problems arose between her and the respondent. That on land parcel **Butsotso/Shikoti/******* she constructed a 2 bedroomed matrimonial house where she was living with the respondent and his children. Later there emerged irreconcilable differences between her and the respondent. She filed for divorce. The marriage was dissolved by the court in 2010. She then filed this suit over the stated property. She produced the sale agreements and title deeds to the property to show that she is the one who bought them and that they are registered in her name.
4. PW2 testified that he is a brother-in-law to the applicant. That he witnessed the purchase of the Shikoti Plot by the applicant. That the applicant is the one who made payment for the plot. That the respondent did not participate in the making of the agreement.
5. The respondent on his part stated that he was working with the Ministry of [particulars withheld] at Molo when he met and married the applicant in 1983. That in 1985 he was retrenched and paid a golden handshake. He moved to Kitale where he worked as a caretaker of several premises. He engaged himself in leasing agricultural land for commercial farming. That he managed to raise money to top up his proceeds from retrenchment package and bought parcel No. South Wanga/Ekero/***** without any input or contribution from the applicant. The land was initially registered in his name. That the applicant was not blessed with any issue. She felt insecure that he could abandon her. She requested him to register the property in her name to show his commitment to the marriage. He consented for the property to be registered in her name.

6. That in the year 2000 he bought Plot No. Butsotso/Shikoti/***** and put up a semi-permanent house wherein he was living with the applicant and his children. They agreed for the applicant to register the property in her name due to her nagging. That since the marriage between them is now dissolved it was his prayer that the applicant takes Plot No. South Wanga/Ekero/**** while he retains Plot No. Butsotso/Shikoti/*****.

7. The applicant insisted that she is the one who bought the property. She contends that though she acquired the property during the subsistence of her marriage with the respondent they are personal properties that are not subject to sharing with the respondent. It was her prayer that he be evicted from plot No. Butsotso/Shikoti/****.

8. The applicant admitted in cross-examination that the Ekero plot was initially in the name of the respondent before it was registered in her name. She however said that the respondent had fraudulently registered the plot in his name. She stated that the respondent used to supervise the construction of the houses. She admitted that he was at one time working as a caretaker in Kitale.

9. It emerged during the hearing that the applicant has during the pendency of the suit sold Plot No. South Wanga/Ekero/****. It is therefore Plot No. Butsotso/Shikoti/***** that is in existence.

Submissions –

10. The advocates for the applicant, **E. K. Owinyi & Co. Advocates**, submitted that the applicant produced sale agreements to show that she solely bought the parcels of land without the contribution of the respondent. That the respondent on the other hand says that he gave Plot No. ***** to the applicant as a gift. That under Section 15 of the Matrimonial Property Act 2013 gifts are not part of matrimonial property at the time of distribution of the property. That the plot therefore exclusively belonged to the applicant. That the respondent did not produce any documents to prove that he bought Plot No. ***** or that he contributed towards its construction. That the respondent admitted that he has another parcel of land given to him by his parents where he can stay. That the respondent should therefore be evicted from the plot.

11. In the alternative, the advocates submitted that since the respondent has settled on Plot No. ***** with a wife and children having the plot split between the two could be almost impossible. That they were seeking that the respondent be ordered to pay the applicant Ksh. 500,000/= as a buy off and compensation to her entitlement to the land. The advocates cited the case of **PAW – M –VS- CMA WM (2018) eKLR** where the Court of Appeal ordered the respondent to pay the appellant monetary compensation being the assessment of the respondent's contribution to the value of the suit property.

12. The advocates for the respondent on the other hand submitted that the two properties were jointly acquired with the joint effort of the two parties. That the respondent consented to the property being registered in the name of the applicant to give the applicant stability and security in their marriage. That the suit property was at one time registered in the name of the respondent and later changed to the name of the applicant. That that clearly shows that the property belonged to the respondent. The property is therefore matrimonial property. That it should be shared equally between the parties. That since the applicant has benefited from the sale of Plot No. *****, the court should award the respondent the remaining Plot No. ***** since he and his family are settled there and has developed it.

Analysis and Determination –

13. The law in respect to distribution of matrimonial property is to be found in the Constitution of Kenya, 2010, the Matrimonial Properties Act, 2013 and in case law.

Article 45 (3) of the Constitution of Kenya 2010 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.”

14. 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.”

15. Section 15 of the Matrimonial Property Act states that:-

“Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient.”

16. In **U.M.M –Vs- I.M.M (2014) eKLR** the Court stated that:-

“It is in 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.”

17. The issues for determination in this matter are -

(1) Whether the suit property is the sole property of the applicant.

- (2) Whether the suit property is the property of the respondent.
- (3) Whether the suit property is matrimonial property.
- (4) Whether the respondent contributed to the acquisition of the property.

18. Both parties are in agreement that the suit property was acquired during the subsistence of their marriage. The applicant contends that she is the one who solely bought and developed the property to the exclusion of the respondent. That the only role the respondent played is supervision of the construction during the development of the property. Therefore that the property is not matrimonial property but her exclusive property.

19. The respondent on the other hand says that he is the one who bought the property but that he consented to it being registered in the name of the applicant.

20. The applicant produced sale agreements and title deeds to the two parcels of land to show that she is the one who bought them consequent to which they were registered in her name. The applicant however admitted that plot No. 1709 was initially registered in the name of the respondent and later changed into her name. She said that the respondent had fraudulently registered the plot in her name before it changed into her name. A copy of a title deed over the plot produced in the case indicated that the registration of the plot into her name was as a result of the plot being given to her as a gift.

21. Though the applicant produced evidence to show that she is the one who bought plot **No. South Wanga/Ekero/*******, she did not come out clearly as to why the plot was initially registered in the name of the respondent. If the respondent had fraudulently registered the plot in his name, there ought to be a trail of documents to show that. The applicant did not produce such documents. The fact that the plot was registered in the name of the applicant as a gift tends to support the respondent's case that the plot initially belonged to him and that he gave it her as a gift. Be that as it may be, the effect of the respondent gifting the plot to the applicant was that the plot ceased to be matrimonial property. The plot absolutely belonged to the applicant as provided by Section 15 of the Matrimonial Properties Act 2013. The respondent has not rebutted the presumption that the gift was absolute. The property cannot therefore be the subject of distribution between the parties.

22. The applicant produced evidence to show that she is the one who bought plot **No. Butso/Shikoti/*******. The plot is registered in her name. The respondent did not produce any evidence to show that he is the one who bought the property. The conclusion is that the plot was purchased by the applicant.

23. The couple was settled on Plot No. *****. Section 2 of the Matrimonial Property Act defines a matrimonial home as:-

“any property that is owned by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property.”

It is my finding that plot No. ***** was the matrimonial home of the applicant and the respondent. It therefore fits the description of matrimonial property. Though the plot was registered in the name of the applicant the presumption is that she was holding it in trust of the respondent.

24. Section 7 of the Matrimonial Property Act, 2013 vests ownership of matrimonial property to couples in accordance with their contribution to the acquisition of the property. **“Contribution”** is defined by Section 2 to mean monetary and non-monetary contribution. Non-monetary contribution 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.

24. The applicant and the respondent are now divorced. The property should therefore be shared out between them in accordance with each party's contribution to its acquisition and development.

25. The applicant stated that the respondent supervised the construction and development of the plot No. *****. She admitted that the respondent was working as a caretaker in Kitale. It is therefore possible that the respondent put some resources towards the development of the plot. It is unreasonable to expect him to provide receipts for such expenses as usually couples do not keep receipts for such things when the boat of marriage is stable. The applicant was working away from home. The supervision of the construction by the respondent is deemed to be a contribution. The respondent at the same time offered companionship to the applicant during the subsistence of their marriage. I however do not think that the respondent's contribution was that high as to entitle him a share of 50:50. I assess his contribution at 25%.

27. The respondent is in occupation of plot No. ***** with his family. I am of the view that the best option is for him to compensate the

applicant over her contribution. It is not fair to evict him from the property without giving him an opportunity to compensate the applicant over her contribution. However the value of the property is not known. The order that commends itself to me is for land parcel **No. Butsotso/Shikoti/******* to be valued and the respondent pays the applicant 75% of the assessed market value consequent to which the property shall go to the respondent.

28. In view of what I have stated above I do hereby make the following declarations:-

1. That land parcel No. South Wanga/Ekero/***** belongs to the applicant by virtue of registration.
2. That land parcel No. Butsotso/Shikoti/***** is matrimonial property.

I thereby order that:-

1. Land parcel No. Butsotso/Shikoti/**** be shared out between the applicant and the respondent to the ratio of 75:25 in favour of the applicant against the respondent.
2. Land parcel No. Butsotso/Shikoti/**** be valued and the respondent to pay the applicant 75% of the market value of the property consequent to which the property shall change ownership to the respondent.
3. In the event that the respondent is unable to compensate the applicant as aforesaid land parcel No. Butsotso/Shikoti/***** to be sold and the proceeds thereof shared between the parties in the ratio of 75:25 in favour of the applicant against the respondent.
4. Parties to jointly meet the costs of the valuation.

Orders accordingly. Each party to bear its own costs.

Delivered, dated and signed at Kakamega this 22nd day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Applicant

No appearance for Respondent

Applicant - absent

Respondent - absent

Court Assistant - Polycap

30 days right of appeal.