



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

FAMILY DIVISION

CIVIL CASE NO 6 OF 2019 (O.S)

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013

RK.....APPLICANT

VERSUS

PK.....RESPONDENT

JUDGMENT

1. **RK**, the Plaintiff filed this Originating Summons on 21st March 2019 against **PK**, her husband, seeking a declaration that **parcel No. Ngong Township/Block [particulars withheld]** is matrimonial property; that **parcel LR No. [Particulars Withheld]** in Sabaki area Mlolongo Township is not matrimonial property and that she be registered as joint owner of **parcel No. Ngong Township/[Particulars Withheld]** with the respondent.
2. The plaintiff further sought an injunction restraining the defendant from disposing of the Ngong Township property and restraining him from evicting her from that parcel of land. She also prayed for an order evicting the defendant from that same property.
3. The plaintiff filed an affidavit in support of an application dated 7th March 2019, deposing that she is wife to the respondent through a Christian Marriage solemnized in church in 1995; that they had been blessed with issue of the marriage; that in 2002, she purchased **parcel No. Ngong Township/Block [Particulars Withheld]** but the respondent caused it to be registered in his sole name; that she constructed a home on that parcel of land and that they have been living in that house.
4. The plaintiff deposed in her supporting affidavit that the defendant had on various occasions been violent and on 15th January 2019 he assaulted and threatened to kill her which made her flee from home for fear of her life. When she returned, she found that the defendant had removed her personal effects and possessions from the premises took her file which had documents for **LR No. [Particulars Withheld]** and that she was unable to access the home.

Response

5. The defendant filed a replying affidavit sworn on 24th April 2019 to the Originating Summons. He deposed that both parcels of land are matrimonial property purchased during marriage with joint contribution. He denied that the plaintiff purchased **Ngong Township/Block [Particulars Withheld]** alone. He attached a copy of sale agreement to show that the property was jointly acquired.
6. The defendant further stated that out of the purchase price of Kshs. 300,000/= he paid Kshs. 260,000/= while the plaintiff paid only Kshs. 40,000/=. He also denied that the plaintiff solely purchased **LR No. [Particulars Withheld]** using her own resources. He however admitted that the plaintiff applied for a loan for the purchase of that property, but that he also contributed Kshs. 100,000/= towards the purchase price through sale of his motor vehicle which cost Kshs. 150,000/=.
7. According to the defendant, they agreed as a family that he be registered as proprietor of **Ngong Township/Block [Particulars Withheld]** while the plaintiff was to be registered proprietor of **LR No. [Particulars Withheld]**
8. The defendant deposed that although he had an altercation with the plaintiff, she left the matrimonial home on her own volition. He stated that he had no problem taking the **Ngong Township/Block [Particulars Withheld]** since he paid a greater portion towards its acquisition while the plaintiff takes **LR No. [Particulars Withheld]**.
9. In a supplementary affidavit sworn on 8th May 2019, the plaintiff denied that **LR No. [Particulars Withheld]** was purchased jointly. According to the plaintiff, at the time she purchased that property, the respondent had lost his job and could not therefore contribute towards

its purchase. She also stated that the respondent having lost his job in 2004, she single-handedly developed the Ngong property before the defendant returned in 2007. She deposed that the sale agreement for the Ngong property showed that she was the one who paid the purchase price and that she also purchased **LR No. [Particulars Withheld]** after taking loans from her Sacco.

10. The plaintiff further deposed that there was no agreement that the defendant would be registered as proprietor of **Ngong Township/[particulars withheld]** while she was registered the owner of **LR No. [Particulars Withheld]**.

Evidence

11. In her oral testimony. The plaintiff who testified as PW1 told the court that she works as a Nursing Officer at Kenyatta National Hospital; that she purchased **Ngong Township/Block [Particulars Withheld]** using her own funds from the Sacco and then constructed a house on that land where they had been living until 2019. She testified that the defendant did not contribute anything towards the purchase of that property and that although it was registered in his name, he had lost his job in 2004 and went away only to come back in 2007.

12. According to the plaintiff, she was also at the same time paying school fees for their children and taking care of all their needs. She told the court that she also purchased **LR No. [Particulars Withheld]** from KMTC Afya Sacco which was registered in her name. She maintained that she solely purchased the Ngong property although it was registered in the defendant's name. She urged the court to allow her Originating summons and argued that the defendant should not be given a share of any of the properties.

13. In cross-examination, the plaintiff stated that the defendant's name was included in the sale agreement for the Ngong property because he was the one who drafted that agreement and that is how he included his name.

14. She admitted that when the foundation for construction of the house started the defendant was still working and providing for the family. He however, lost his job thereafter; stayed at home and later wanted to the village and he did not do any business to earn a living.

15. The plaintiff told the court that titles documents for the properties were in a brief case in the house but the defendant took them away; that she purchased **LR No. [Particulars Withheld]** which was initially going for Kshs. 87,000/= excluding transfer fees and that the defendant's vehicle was sold at Kshs. 130,000/= to assist pay school fees for the children but not to purchase the property. Asked about annexures RK3, cash sale receipts for sale of **Ngong Township/Block [Particulars Withheld]**, attached to her supplementary affidavit, the plaintiff admitted that it was in their joint names. The receipts are dated, 26th September, 2001 for Kshs. 40,000, 27th June 2002 for Kshs. 40,000/= and 17th December 2007 for Kshs. 30,000/=. They are all in the names Mr. and Mrs. Peter Kanyasi Dembele.

16. The defendant testified and relied fully on his replying affidavit earlier referred to in this judgment. In cross-examination, he told the court that he and the plaintiff agreed that **Ngong Township/[Particulars Withheld]** be registered in his name while **LR No. [Particulars Withheld]** was to be registered in the plaintiff's name. He told the court that he paid Kshs. 260,000/= towards acquisition of the Ngong property but admitted that he had no receipt to show that he paid that money.

Plaintiff's submissions

17. The plaintiff filed written submissions on 11th June 2020. She argued that subject to a Decree Nisi, there should be no division of matrimonial property. According to the plaintiff, it is her prayer that the court declares that the two parcels of land belong to her solely. She relied on Article 45(3) of the Constitution and submitted that the defendant violated her right to acquire property. She also relied on section 7 of the Matrimonial Property Act as well as section 2 of the same Act on the definition of matrimonial property.

18. The plaintiff argued that the defendant did not contribute towards acquisition and development of the two properties either directly or indirectly. She relied on **PWK V JKM** [2015] eKLR to support her case. She submitted that she had demonstrated that she solely purchased the two properties and relied on **NWM V SMK** [2020] eKLR and **DV v PB** [2019] eKLR among other decisions in support of her position.

Defendant's submissions

19. The respondent submitted, relying on sections 6(1) (a) and 14(a) of the Matrimonial Property Act, that where property acquired during marriage is held by one spouse, there is a presumption that it is matrimonial property. He therefore argued that the two properties having been acquired during marriage they are, matrimonial property.

20. Regarding the Ngong property, the respondent argued that the property was jointly acquired as evidenced by the sale agreement and the receipt(s) in the plaintiff's list of documents filed in court, which are in their joint names. He submitted that the plaintiff paid Kshs. 125, 000/= (40%) of the purchase price While he contributed Kshs. 179,690/(60%) and therefore he is entitled to 60% while the plaintiff is entitled to 40% of the property.

21. On the development, the respondent submitted that the plaintiff did not prove that she solely developed the property. He urged the court to find that the property was developed by joint effort of both parties.

22. Regarding **LR No. [Particulars Withheld]**, he submitted that his motor vehicle KAL 774Q was sold for Kshs. 150,000/= by the plaintiff who used the proceeds towards the purchase of that property. According to the defendant, the plaintiff's receipt for Kshs. 87,000/= is inadmissible since it has no revenue stamp. It is important to point out here, that parties filed lists of documents which were produced by consent and the defendant never challenged that particular receipt as soon as it was served on him or during the hearing. He cannot challenge it through submissions.

23. According to the defendant this property is matrimonial also property. He proposed that **Ngong Township/Block [Particulars**

Withheld] be shared at 40%:60% between the plaintiff and him and **LR No. [Particulars Withheld]** be shared equally.

Determination

24. I have considered this Originating Summons, the response thereto and submissions made on behalf of respective parties. I have also considered the authorities relied on. The plaintiff and defendant are husband and wife. They were not divorced at the time of this judgment. That being the case, the court can only determine whether or not the disputed properties are matrimonial property and no more. It cannot divide the property.

25. The plaintiff has argued that she solely acquired the two properties using her own resources. Regarding **parcel No. Ngong Township/Block [Particulars Withheld]**, she stated that she solely purchased that property although it was registered in the defendant's name. She also argued that she developed the property on her own. According to her, the defendant had lost his job and was not working and therefore he did not contribute towards its development. It was also her argument that the defendant left and went to stay in the rural home and only returned in 2007. She contended that during that period, she was the only one developing the property and taking care of the family.

26. On **LR No. [Particulars Withheld]**, the plaintiff argued that she purchased that property using her own money after taking loans from the Sacco and that it was registered in her name. She told the court that the defendant did not contribute towards the purchase of this property. She relied on her list of documents to support her case. She therefore urged the court to find that the two properties are not matrimonial property.

27. The defendant on his part argued that the two parcels are matrimonial property. According to him, he contributed 60% of the purchase price towards acquisition of **Ngong Township/Block [Particulars Withheld]**. He relied on the fact that the agreement for sale for the property as well as receipts the plaintiff relied on are in their joint names.

28. It is the defendant's case therefore that **parcel No. Ngong Township/[Particulars Withheld]** is matrimonial property. He urged the court to declare that he holds a 60% share while the plaintiff holds 40%.

29. With regard to **LR No. [Particulars Withheld]**, the defendant argued that it is also matrimonial property. He contended that he contributed towards its acquisition and that the plaintiff sold his vehicle for Kshs. 150,000 which was used to finance acquisition of that property. He also stated that they had agreed as a family, that **Ngong Township/Block[Particulars Withheld]** be registered in his name while **LR No. [Particulars Withheld]** was to be registered in the plaintiff's name.

30. From the above contestations, the question that arises for determination is whether the two properties are matrimonial property. As already stated, parties are still husband and wife. There is also no doubt that the two properties were acquired during marriage. In that regard, the law applicable to this dispute is the Constitution and the Matrimonial Property Act, 2013.

31. 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 of either spouse to acquire and own property.

32. The Matrimonial property Act is also clear on the right to equality between marriage partners, such as the right to sharing matrimonial property. Section 6(1) of the Act defines matrimonial property in the following terms:

(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.

33. The dispute herein involves immovable property acquired during the subsistence of the marriage between the plaintiff and the defendant. However, one property was registered in the name of the plaintiff and the other in the name of the defendant. That; is each spouse had one property registered in his or her name.

34. Section 7 which relates to ownership of matrimonial property 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.

The import of this section is that matrimonial property is to be shared according to each spouse's level of contribution towards its acquisition.

35. Similarly, section 14 provides that where matrimonial property is acquired during marriage and is in the name of one spouse, there is a rebuttable presumption that the property is held in trust for the other spouse; and if (b) in the joint names of the spouses, there is a rebuttable presumption that their beneficial interests in the matrimonial property are equal.

36. Section 7 on ownership of matrimonial property is clear that ownership is to be determined based on each party's individual contribution towards acquisition of the property. Section 14(a) also makes it plain that where the property is acquired during marriage and is registered in the name of one spouse, there is a presumption that it belongs to both parties to the marriage. That is; in the event of a dispute over

ownership, either spouse has to prove that the property is either his/hers or is held in trust for both. It is in that spirit that section 7 states that the property should be shared according to each spouse's contribution towards its acquisition in the event of a divorce or dissolution of their union.

37. From the perspective of the constitution and the law, are the two parcels matrimonial property? To determine this question, it is appropriate to deal with each property separately.

Ngong Township/Block [Particulars Withheld]

38. The plaintiff has argued that she solely acquired that property using her own resources and developed it herself without contribution from the defendant. The defendant has on his part contended that he contributed towards the acquisition of the property and that in fact he contributed 60% of the purchase price while the plaintiff contributed only 40%. He held the view that the agreement for sale and receipts were in their joint names, confirming that the property was acquired jointly.

39. The property was indeed acquired during marriage but registered in the defendant's name. The agreement for sale is also in the names of Mr. and Mrs. Kanyasi; that is the plaintiff and the defendant. The plaintiff argued that the agreement for sale was written by the defendant to explain why it is in the joint names. If the plaintiff's contention be true that the defendant drafted the agreement for sale and that is why it is in the joint names, she did not explain why the receipts were also in their joint names.

40. In *PNN v ZWN* (supra), the Court of Appeal held that where there was both direct and indirect contribution by parties towards acquisition of the properties that makes them matrimonial property and a spouse would get a share of some of those properties even though they had been registered in the name of only one party.

41. 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 and was therefore matrimonial property.

42. 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 property.

43. 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 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.

44. The question therefore, is whether this particular property is matrimonial property. The uncontroverted evidence is that the property was acquired during marriage. The agreement for sale is in the joint names of the parties so are the acknowledgments for payments. Receipts for payment are also in their joint names. However the property was registered in the respondent's sole name. The plaintiff did not dispute the fact that the agreement for sale and payments receipts were in their joint name. If payment was made by the plaintiff alone, why did she make it in the name of Mr. and Mrs. Kanyasi?

45. Further, the negotiation agreement dated 26th September 2001 shows that the money was handed over by both the plaintiff and the defendant. There were witnesses present to that transaction but who were not called as witnesses in this matter. Subsequently, receipts were issued in the names of Mr. and Mrs. Peter Kanyasi Demebe. The plaintiff never gave a plausible explanation for this.

46. On the evidence, I have no doubt that this property was acquired with the joint effort of the parties. The plaintiff's argument that she acquired it herself or the defendant's contention that he contributed more than the plaintiff, was not proved on the balance of probability.

47. Regarding its development, the plaintiff argued that she solely developed the property and that the respondent had lost his job and therefore he did not contribute to its development. The respondent on the other hand argued that he contributed towards the development of the property.

48. It is instructive to note that the plaintiff admitted that the respondent was still working when development of the property commenced. It is also clear that parties were residing in the property until their disagreements arose. The plaintiff did not satisfy the court on the balance of probability that she developed the property on her own without the respondent's contribution. There was also no evidence that the respondent did not contribute in any way other way towards development of a property he played a role in acquiring with the plaintiff.

49. Based on the evidence on record, I am satisfied that this property was jointly acquired and developed by the spouses. Consequently, I find and hold that **Ngong Township/Block [Particulars Withheld]** is matrimonial property.

LR No. [particulars withheld]

50. This particular property is registered in the plaintiff's name. The transferred into the plaintiff's name is dated 24th February 2010. The receipts dated 11th June 2002 and 25th September, 2002 from Afya Sacco Ltd for Kshs. 1000/= and 87,500/= respectively, were issued in the plaintiff's name. there is a letter from the Sacco dated 22nd May 2013 addressed to the plaintiff asking her to see officials of the sacco to complete transfer forms.

51. There is no evidence that the defendant contributed towards acquisition of the property. He has argued that he contributed Kshs.

100,000/= through the proceeds of the sale of his motor vehicle Registration No. KAL 774Q. The plaintiff argued that the respondent was given Kshs. 50,000 while Kshs. Went towards paying fees for the children. The defendant did not deny this. The defendant as father to the children of the marriage had an obligation to provide for them.

52. The instrument of transfer for this property indicates that it cost Kshs. 100, 000. The plaintiff had already Kshs. 87, 500 and Kshs. 1000. Through Afya Sacco Ltd. This was in 2002. The vehicle was sold on 11th May 2006. Much after the plaintiff had paid for the property. If the defendant's argument that he contributed Kshs 100,000 towards acquisition of this property was to be true, it would mean that the property cost more that 187,000, which is not the case even going by the instrument of transfer.

53. Having considered the evidence on record regarding acquisition of this property, I am satisfied that it was acquired by the plaintiff using her resources from the Sacco. There is no evidence that the defendant contributed either directly or indirectly towards its acquisition. If it was developed, then it was developed by the plaintiff since there is no evidence that the defendant contributed towards this goal.

54. Flowing from what I have stated above, the conclusion I come to is that **LR No. [particulars withheld]** is not matrimonial property.

55. I have considered the originating Summons the response there to, the evidence on record and submissions by counsel for the parties. I have also considered the authorities relied on by both sides. On the basis of all this, the originating summons succeeds to the extent only as follows;

a. A declaration is hereby issued that parcel No. Ngong Township/Block2/383 is matrimonial property.

b. A declaration is hereby issued that parcel LR No. [Particulars Withheld] is not matrimonial property.

c. An injunction is hereby issued restraining the respondent , his servants, agents and or anybody acting on his behalf from evicting, threatening or harassing the plaintiff; partitioning, disposing of, selling, or in any other way dealing with parcel No. Ngong Township/[Particulars Withheld].

d. Each party do bear their own costs.

Dated, Signed and Delivered at Kajiado this 24th day of July, 2020.

E. C. MWITA

JUDGE