



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL CASE NO. 13 OF 2012 (OS)**

**IN THE MATTER OF THE DIVISION OF MATRIMONIAL PROPERTY**

**AND**

**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT 1882**

**IN THE MATTER OF SECTION 17 OF HE MATRIMONIAL PROPERTY ACT 2013**

**BETWEEN**

**CLW.....PETITIONER/APPLICANT**

**VERSUS**

**CWM.....RESPONDENT**

**RULING**

1. The applicant CLW and the respondent CWM met at [particulars withheld] in 1997 when they were students. On 22<sup>nd</sup> November 2003 they wedded at the Nairobi Pentecostal Church. The marriage was blessed with two children. The couple stayed together upto 11<sup>th</sup> May 2011 when the applicant left the matrimonial home. She left with the children. On 2<sup>nd</sup> June 2015 the marriage was dissolved following divorce proceedings between the two.

2. The applicant filed the present amended originating summons seeking declaratory orders over the following properties which she claimed were matrimonial property and which she wanted valued and shared equally between them:-

- a. LR No. [particulars withheld], Consummate Court, Kilimani Nairobi, Apartment No. [particulars withheld] Consummate Court and Guest Wing;
- b. Kajiado/Kitengela/[particulars withheld] measuring about 0.08Ha.;
- c. Kajiado/Kaputiei-North/[particulars withheld] measuring about 0.37Ha;
- d. Kajiado/Kisaju/[particulars withheld] measuring about 0.400 ha; and
- e. Motor vehicle registration number [particulars withheld] saloon.

It was her case that these properties were acquired by their joint funds and efforts in equal share.

3. The respondent filed a response to state that he purchased all the property in question using his funds, and that the applicant's contribution, if at all, was negligible. He asked that the summons be dismissed with costs.

4. The applicant was represented by M/s Chigiti & Chigiti Advocates and the respondent by M/s Amolo & Gacoka Advocates. It was agreed that the summons be decided on the sworn affidavits and written submissions.

5. It is common ground that the law governing the division of matrimonial property is the Matrimonial Property Act, No. 49 of 2013. In section 6 of the Act, matrimonial property means –

- “(a)the matrimonial home or homes;
- (b)household goods 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.”

6. It is common ground that the property above was acquired at the time when the applicant and respondent were married and living together. It is therefore matrimonial property.

7. Section 14 of the Act 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 a rebuttable presumption that their beneficial interests in the matrimonial property is equal.”

8. There is no dispute that the apartment at Kilimani is on mortgage in the joint names of the applicant and the respondent, the mortgage having been entered into on 16<sup>th</sup> May 2008. Similarly Kajiado/Kitengela/[particulars withheld], Kajiado/Kaputiei-North [particulars withheld] and Kajiado/Kisaju/[particulars withheld] are each in the joint names of the parties. It was the respondent’s case that, although these properties were jointly registered, he provided all the finances for the purchase; that the applicant made no financial contribution. Then, there is the motor vehicle which the respondent states he bought using his funds.

9. It is notable that under section 2 of the Act, contribution may be financial or non-financial. It may be direct or indirect. “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.”

10. It is considered that the parties met while studying at the University of Nairobi. They married, stayed together and got the children. They lived together between 2003 and 2011. A period of 8 years. They divorced in 2015, after being separate for about 4 years. The applicant has always lived with the children. While staying together, each party was working. I have looked at the application form that was completed for the mortgage over the apartment. The applicant was a marketing manager at [particulars withheld] with annual income of Kshs.2,400,000/= before tax. That meant she was earning Kshs.200,000/= per month. In 2008 that was substantial salary. The parties opened a joint account on 20<sup>th</sup> January 2007 to enable the mortgage repayments. It remained joined up to 4<sup>th</sup> January 2012. I have read the replying affidavit by the respondent. He states that he personally made the down payment of Kshs.4,801,2000/= towards the mortgage, and had since solely made the monthly repayments and other payments. He said nothing about where the applicant was taking all her salary. At least, he did not say she did not account to him on matters finance. The applicant stated that she equally contributed to the acquisition of the apartment and was the principal borrower in the mortgage. She stated that she contributed to the renovation of the apartment and she singlehandedly provided for household expenses. The claim that she singlehandedly catered for household expenses was not challenged. Each side produced many documents to show its contribution towards the mortgage and the purchase of the other parcels of land. There is no dispute, however, that after the parties separated the respondent was left to manage the mortgage repayments. It was not clear how much was owing on the mortgage. However, the apartment has a furnished wing that is on rent (said by the applicant to be getting between Kshs.90,000/= and Kshs.130,000/=monthly) that was to be used towards mortgage repayments. The respondent was silent on this.

11. There are the three plots in Kajiado County. According to the respondent, the applicant took a loan of Kshs.1,000,000/= from her Sacco to enable them buy Kajiado/Kitengela/[particulars withheld]. However, he stated:-

- “At the stage of refinancing of the mortgage the loan balance was paid off to the amount of Kshs.802,168.90 and the amount so far repaid by the petitioner was reimbursed by the respondent .....

Regarding Kajiado/Kaputiei-North/[particulars withheld], he stated that the property was purchased at Kshs.1,200,000/= of which Kshs.400,000/= was from the applicant’s Sacco loan and Kshs.800,000/= was from him. Kajiado/Kisaju/[particulars withheld] cost

KShs.2,200,000/= He stated that he got the money through a loan from his bank. From the evidence, it is clear that both the applicant and the respondent were active in matters regarding the acquisition of property.

12. It is trite that the division of matrimonial property is not a precise mathematical exercise, but a task undertaken after the weighing of the peculiar circumstances of each case (PNN –v- ZWN [2017] eKLR).

13. It is material that the parties herein consciously made a decision to register their immovable properties in their joint names. I have made reference to the presumption under section 14(b) of the Act. On the material before me, each of the parties made a substantial but unascertainable contribution towards the acquisition of each of these properties.

14. In the particular circumstances of the case, I declare that the applicant and the respondent made equal contribution towards the acquisition of each of the following properties:

- a. LR No. [particulars withheld] Consummate Court, Kilimani Nairobi, Apartment No. [particulars withheld] Consummate Court and Guest Wing;
- b. Kajiado/Kaputiei-North/[particulars withheld];
- c. Kajiado/Kitengela/[particulars withheld]; and
- d. Kajiado/Kisaju/[particulars withheld].

I direct that these properties be valued. The parties shall have 14 days to agree on a valuer, failing which the court shall appoint one. The respondent shall be at liberty within 90 days, to pay to the applicant half of the value of each property, failing which the properties shall be sold and the proceeds of each shared equally.

15. The respondent shall have the motor vehicle registration number [particulars withheld] make VW.

16. Each side shall bear own costs.

**DATED and DELIVERED at NAIROBI this 31<sup>ST</sup> day of JANUARY 2019.**

**A.O. MUCHELULE**

**JUDGE**