



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CIVIL CASE NUMBER 38 OF 2013

AWW.....APPLICANT

-VERSUS-

CNK.....RESPONDENT

JUDGMENT

PLEADINGS

By the Originating Summons herein dated 9th July, 2013 of AWW the Applicant sought the following:

- a. Declaration that the below listed properties are owned jointly by the Applicant and the Respondent and the Applicant is entitled through trust , or in the alternative;
- b. An order for the registration of the properties in joint names of the parties herein in default the Deputy Registrar to execute the documents for sale and/or transfer of the said properties.
- c. Costs of the application be provided.
- i) Plot no [particulars withheld] acquired under share certificates from [particulars withheld]Farmers Co. Ltd
- ii) Narok/Mutara South Block [particulars withheld]
- iii) Kabazi/Kabazi Block [particulars withheld]Mutathini Nyahururu
- iv) Plot No.[particulars withheld]Kabati
- v) KJD/Kitengela/[particulars withheld]
- vi) Motor vehicles Reg [particulars withheld]
- vii) Shares in Eveready East Africa Limited, Safaricom Limited, Mumias Sugar Company Limited and Kenya Commercial Bank.

FACTS

The parties herein were married on 19th December, 1987 under **The African Christian Marriage and Divorce Act (repealed)**. They were blessed with four issues of the marriage. The parties have since separated and were before this Court on the division of matrimonial property.

By an order of this Court dated 4th December, 2014; the Respondent was restrained from interfering with the Applicant's quiet possession or disposing off various properties as prayed in the Notice of Motion pending the hearing and determination of the originating summons.

APPLICANT'S CASE

The Applicant AWW testified on 16th February 2017 and relied on the Originating Summons supported by her Affidavit sworn on 9th July, 2013. The Respondent filed for divorce in **Divorce Cause 49 of 2011 Chief Magistrate's Court** Nairobi which was granted. The Applicant stated that the properties claimed were acquired during their marriage and that she contributed both directly and indirectly to the acquisition and development of the same. The Applicant also took care of and continues to take care of the physical, emotional, financial and psychological needs of the family.

The Applicant stated that she and the Respondent were classmates at the University and on completion of studies were posted by **TSC** to work/teach in various schools from 1988. The Applicant was posted to **Nyandarua High School** and the Respondent to **Magumo High School**. They struggled together through **Mwalimu Sacco Loans** and bought the instant properties. When she joined University of Nairobi as employee, she took a loan and used her duty free car benefit and bought in her husband's name motor vehicle Registration No. [particulars withheld] which he drove and later sold it and she did not share in the proceeds of sale. Applicant accused the Respondent of abusing the trust by selling motor vehicle registration No. [particulars withheld] and used the entire proceeds to his benefit.

The Applicant filed bundle of documents on 16th May 2017 produced as Exhibit 1 in Court on 27th July 2017. The contents are as follows generally;

- a) **Marriage Certificate of 19th December 1987;**
- b) **Copy of judgment CM divorce No.49 of 2014 of 26th June 2015;**
- c) **Payslips of Applicant and Respondent's employment and payment 1991; 1992; 1995; 2003; 2004 and 2005;**
- d) **Applicant's letter of employment and remuneration at Carfile University 1998;**
- e) **Applicant's Copy of letter of appointment by University of Nairobi 2007;**
- f) **Applicant's letter of Appointment from Methodist University 2008;**
- g) **Copies of title documents of the listed suit properties;**
- h) **Copies of quotation for Labour for Construction on Plot [particulars withheld].**
- i) **Copies of Loan applications from 1990 -2006 from Mwalimu Sacco;**
- j) **Copies of Registration and operation of [particulars withheld] Foundation High School run by their daughter CN from 2016;**
- k) **Copy of logbook for motor vehicle [particulars withheld];**

The Applicant stated as follows;

- a) **Narok /Mutara – [particulars withheld] acres;**
- b) **Kabazi/Kabazi Block [particulars withheld] -1acre;**
- c) **Kabati – 1 acre (document with the Respondent);**
- d) **Kitengela- 5 acres (documents are with Respondent);**
- e) **Plot in Kantafu –Pg 27 of the bundle of 30th November 2011 in the Applicant's name;**
- f) **Marurui Plots No [particulars withheld] where the matrimonial home is situated;**
- g) **Marurui Plots No [particulars withheld] where their son Joseph Kimamo Nderitu has a studio;**
- h) **Maruruti Plot [particulars withheld] where Strong Foundation School is situated and run by their daughter Caroline Nderitu;**
- i) **Kahawa Sukari Plot [particulars withheld] - ¼ Acre;**
- j) **Motor vehicles; Reg [particulars withheld] sold by Respondent; [particulars withheld] driven by Applicant and KBM 085D driven by Respondent;**
- k) **Shares in Safaricom, Eveready, Mumias Sugar Company and KCB.**

The Applicant is registered in Kantafu Plot, Kahawa Sukari and the vehicle she drives. All the other properties acquired and developed during their marriage are registered in the name of the Respondent.

The Applicant confirmed being in employment throughout her married life and she contributed to acquisition and development of the properties. After divorce, the Respondent remained with the other family, she remained with the children and the Respondent paid only school fees for the 3 boys, the school related expenses and upkeep the Applicant paid and also paid for utilities; water, electricity, security and house help expenses. The Applicant stated she contributed directly as shown by payslips attached and loans she took from 1987-2008 in bundle at Pg 58. Therefore the Applicant sought that all properties acquired during their marriage be shared equally between them.

RESPONDENT'S CASE

DW1 Charles Nderitu Kimani testified on 5th October 2017 and confirmed marriage to the Applicant and 4 children of the marriage. He relied on his Replying Affidavit and Supplementary affidavit. He opposed the Originating Summons and Application by the Applicant who filed a Replying Affidavit dated 18th September, 2013. He conceded that he married the Applicant under **African Christian Marriage and Divorce Act** (repealed). He avers that he left the matrimonial home in 2010 when the Applicant chased him away. He denied that he has all title documents of the properties mentioned herein except two of the properties. He alleges that the Applicant is being dishonest in that she has several properties registered in her name which she has not disclosed to this Court. He further avers that he has never had any intentions of selling the properties without the full knowledge of the Applicant.

He further avers that there was a separation of ownership of properties in their marriage with each party having full ownership over each property to avoid confusion. He therefore opposed the Applicant's claims over the suit properties being jointly owned.

He stated that the Applicant has title documents of what is alleged to be sold. He is not trustee to the Applicant; she did not contribute to purchase and/or development of the properties.

The Applicant has many properties in her own name that she failed to disclose to the Court. She is alleged to have a plot in Kamulu and shares in Mumias, Safaricom, Eveready and KCB.

He bought her ¼ Plot in Kahawa Sukari which has a 3 bedroomed house whose value is alleged to be 30m.

They jointly bought Motor vehicle **Reg. No. [particulars withheld]** which the Applicant drives, **[particulars withheld]** he bought after separation and divorce and **[particulars withheld]** he sold with consent of the Applicant and proceeds were banked in their joint account and used the same to fence **KJD/KITENGELA [particulars withheld]** and built a temporary structure and farmhouse.

The suit property **Kabazi/Kabazi [particulars withheld] Mutathini** is registered in his brother's name.

He bought **Narok/Mutara South /Block [particulars withheld]** from his sister and the Applicant did not contribute.

He bought **KJD/KITENGELA [particulars withheld]** using the teaching practice money and Module 2 classes at the University and the Applicant did not contribute to the same.

Kabati/[particulars withheld] he bought through a friend for Ksh 200,000/- and he took a loan and the Applicant did not contribute to the purchase.

He bought **Plots [particulars withheld]** and constructed their matrimonial home through payments of German Scholarship and the Applicant did not contribute to the purchase.

He took a loan to purchase **Plot [particulars withheld]** where he built classrooms; the school run by their daughter. To date he cannot access accounts or operations of the school due to threats from the Applicant.

The Respondent stated that the Applicant sent him out of the home, she remained in the matrimonial home and he had to rent the house he lives in and pay utilities

In their testimony, the parties vehemently articulated their respective opposing positions. The Respondent stated that he would like the Court to grant him ownership of **[particulars withheld]** where the matrimonial home is situated.

DETERMINATION

In determination of division of matrimonial property upon the dissolution of marriage, the Court considers **Article 45(3) of the Constitution** which stipulates:

“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”.

At the dissolution of marriage, both parties enjoy equal rights. In relation to division of matrimonial property, the phrase “equal rights” does not however mean a 50:50 sharing of matrimonial property. Rather it means that parties are entitled to whatever portion of the matrimonial property they deserve notwithstanding that the property is registered in the name of one spouse. As Lord Morris stated in ***Peit v Pettit [1970]***

“The question before the Court is “whose is this?” rather than “to whom shall this be given?”

With the enactment of the Matrimonial Property Act, the decision in *Peter Mburu Echaria –vs- Priscilla Njeri Echaria [2007] eKLR* that entitlement to matrimonial property must be based on monetary contribution is no longer good law.

Section 2 of the Act defines contribution as:

“contribution” means 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;”*

Section 7 of the Act 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.”

Whether the listed properties constitute matrimonial property;

The Blacks Law Dictionary defines matrimonial property as,

“...property that is acquired from the time when the marriage begins until one spouse files for divorce...”

In the case of *Essa vs Essa, Civil Appeal No. 101 of 1995*, Hon. Omolo, JA stated that;

“There is of course, no presumption and there could not have been any, that any or all property acquired during the subsistence of the marriage must be treated as being owned jointly by the parties” thus requiring proof of contribution before the court can make a declaration as to ownership. Matrimonial property therefore is all property acquired by joint contribution of the spouses, either directly or indirectly during the subsistence of the marriage.”

In *Kivuitu v Kivuitu (1982 – 1988) 2 KAR 241*, Hon. Omolo, Ag JA (as he then was), laid down the rule that;

“where property acquired during coverture is registered jointly, it shall be presumed to be held in equal shares.”

In *Karanja v Karanja, (1976) KLR 307* the court held that;

“when property is purchased jointly by both spouses and registered in the name of the husband with the wife's approval, a resulting trust can be inferred in her favour.”

In *Njoroge –vs- Ngari (1985) KLR 481* where the plaintiff sought declaration that half of the property registered in the name of her husband was held in trust beneficially for her, the court therein held, inter alia, that:

“If property is held in the name of one person but another contributes towards acquisition of the property, then both persons have proprietary interests in that property...”

If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person.”

Plot no [particulars withheld] acquired under share certificates from Mararui Farmers Co. Ltd

The Applicant contends that **Plot No. [particulars withheld]** were acquired during the marriage and that is where the matrimonial home is built. She further contends that there is a school built on **Plot No. [particulars withheld]** which she runs with her eldest daughter. Both parties contributed towards the acquisition and development of the plot. She claims that she lives in this house and has never moved out.

The Respondent on the other hand claims that he solely acquired the property using a loan and his savings and that the applicant did not contribute anything towards acquisition. He attached copies of payments made. He confirmed in cross examination that he paid Ksh 200,000/- and the Applicant gave him Ksh 80,000/-He prayed for the property to be left to him and the children as the applicant should occupy the property in Kahawa Sukari instead of renting it out.

From the evidence, this property was acquired in 2002, well into the marriage of the parties herein.

Section 2 of the Matrimonial Property Act defines matrimonial home as:

“matrimonial home” means 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;

From the material placed before me, I am satisfied that this property is where the parties lived as husband and wife. It is therefore the matrimonial home as per the definition in **Section 2** of the Act. Being the matrimonial home, this property is matrimonial property as defined in **Section 6(1)(a) of the Act** which provides:

(1) “For the purposes of this Act, matrimonial property means—

a) the matrimonial home or homes;

b) ...

The parties agree that the property is registered in the name of the Respondent, (the copy of title was however not produced to confirm this). However, there is a presumption that the same is held in trust for the Applicant as stipulated in **Section 14(a) of the Matrimonial Property Act**.

“14. Presumptions as to property acquired during marriage

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;

The above stated presumption is rebuttable. However, the Respondent has not produced any evidence to rebut the presumption that he holds the property in trust for the Applicant.

The Applicant and Respondent admit that they were in formal employment in the Education Sector from 1989 to date in various capacities and various institutions. They acquired their matrimonial home in the above properties, **Plots 85 & 86** and brought up 4 children of the marriage and started a school on **Plot [particulars withheld]**. The fact of Applicant’s working life is confirmed by letters of appointments. Loan forms and payslips in the bundle exhibit 1. This has not been controverted by evidence to the contrary. The household had/has various expenses, food, shelter, clothing, medical expenses and education of the children and utilities; water, electricity, security and house help expenses that must have been catered for. It is not possible that while both spouses were in formal employment, the Respondent shouldered these responsibilities singlehandedly and at the same time had surplus funds to invest while the Applicant did not contribute towards any of these activities at all. That is very hard to fathom, especially when it is a fact admitted that the parties were in College together, they married and joined employment at the same time and have worked in the same sector and in similar capacities over the years. The main challenge and problem is that the law recognizes titled properties to the exclusion of other equally important and crucial financial expenses and activities that are undertaken by spouses. It is difficult to prove and quantify their payments as none enters a marriage anticipating divorce and thus keeps documents for each payment. This court is satisfied that the spouses invested in properties and paid family expenses. Therefore, I find from the evidence adduced that the above properties are jointly acquired and developed and shall be jointly and equally shared between the parties. This Court notes that Plot 216 is a school that their daughter is running and Plot **[particulars withheld]** the matrimonial home and Plot **[particulars withheld]** their son’s studio. Their children shall not be removed from the said properties; each parent may forfeit their share to the said children. The matrimonial home belongs to both Applicant and Respondent jointly, they may value the home and land on which the home is situated; each party may consider buying out the other. But before that, the Applicant and Respondent shall determine where their children will reside; it shall not be feasible that the Applicant takes her 1/2share of the home and shares with the children of the marriage and the Respondent shares his share of the home with the new family. Both parties have duty and responsibility to earmark their children’s home before division of the matrimonial home. The children shall not be left homeless.

15. Narok/Mutara South Block [particulars withheld]

The applicant has claimed that both parties contributed to the purchase of the property while in employment of the Teachers Service Commission with each of them earning a salary of Kshs. 5,000/=. The Respondent denies this claim by stating that he bought this property from his sister with the applicant not contributing towards the purchase. No material has been placed before this Court to assist in making any finding regarding this property one way or the other. So since it was purchased during the marriage which both parties drew an income, in the absence of payment/contribution documents, the same is deemed to be joint property.

The property was acquired during the marriage and both parties were working and took loans. In the absence of documents of showing who paid what when; the Applicant also contributed indirectly in terms of **Section 2 of Matrimonial Property Act**, looking after children, companionship for her husband at the time etc.

The property shall be shared equally between parties.

16. Kabazi/Kabazi Block [particulars withheld] Mutathini nyahururu

The applicant's case regarding this property is that the parties herein jointly bought this property from the respondent's brother and was issued with a title upon completion of payment. The property was for the for the applicant's parents who had been displaced from Molo by the Post Election Violence in 2008. The applicant produced a copy of title deed registered to one MWK and a discharge of charge to affirm her claims. It was also stated that the Applicant constructed a house for her parents on the property.

The respondent on the other hand contends that he did not purchase this property for his parents in law after they had been displaced. He further avers that the property is registered in his brother's name who has proprietor's interest and as such he does not have any right over the property. He prayed that the property be reverted back to his brother and that the applicant was well aware of the proprietorship of the property and that his parents in law had already been resettled elsewhere by the Government. He further avers that they jointly constructed the house for the applicant's parents while the applicant was in Israel. The said property by virtue of contested ownership will not be available for division of matrimonial property at this stage. Ownership shall be determined first by parties in this Court or **ELC Court**. It is left pending at this stage awaiting confirmation of ownership and way forward.

17. Plot No. [particulars withheld] Kabati

The applicant claims that the above property was jointly bought by the parties but the respondent threatened to sell the same to pay University fees for their second child. The respondent contends that he bought the property through a friend who introduced him to the owner and he took a loan of Kshs. 200,000/= and paid a sum of Ksh. 160,000/=. That the Applicant did not contribute anything towards the purchase of this property. He did not produce documents to prove this fact and the Applicant contributed indirectly to the acquisition of the property.

The suit property was acquired during their marriage and it is not contested that both parties were employed and shared family and household expenses at the same time investing. The same shall be shared equally between the parties.

18. KJD/Kitengela/[particulars withheld]

The Applicant's claim on the property is that she took a loan from Mwalimu Sacco and used it to pay for the property. She has attached copies of payslips and loan schedule of loans obtained from 1989-2008 in the bundle Exhibit-1.

The Respondent refutes this claims and states that he purchased the property using his earnings from teaching practice and lecturing at the University of Nairobi. He contends that the applicant did not contribute anything towards the said purchase. He has copies attached bankers cheques to show payments made.

Contribution in **Section 2 of MPA** is either direct or indirect or both by parties to the acquisition of matrimonial property. It is not disputed that both parties were employed, obtained extra funds from teaching activities, engaged in further studies and were promoted and both worked in University of Nairobi. The Respondent confirmed payment by cheques and Applicant payslips and loan forms over the same period.

The Court finds indirect and direct contribution by both parties to acquisition of the property and it shall be shared equally between Applicant and Respondent.

19. Kahawa Sukari Property.

The Applicant claims sole ownership to this property. She avers that the property was acquired through an exchange with property in **Umoja II** which she bought in 1992 using a loan from Mwalimu Sacco she solely serviced. Upon exchange, they had to pay the difference of Kshs. 750,000/= to secure the property. She attached a copy of a deed of exchange to confirm the transaction and her payslips.

On the other hand the respondent denied this and states that he purchased the Umoja property and also the Kahawa sukari property without the applicant's contribution. He is not aware of any contributions made by the applicant towards the said purchase. The court cannot determine either spouses contribution in the absence of documents. The same be shared equally by the parties.

20. Plot [particulars withheld] Kantafu

The Applicant claims that she solely purchased the property at Kshs. 25,000/=as a group and it measures 50 by 80 feet. She attached a copy of the plot ownership certificate from Kenya National traders and farmers union.

The Respondent avers that he has no claim over the said property but stated that the applicant has not disclosed all the properties she owns.

The same is to be shared equally as the Respondent contributed indirectly, he shouldered some of the financial responsibilities and enabled the Applicant to invest and purchase the suit property.

21. Motor vehicles Reg [particulars withheld]

The Applicant claims that they jointly bought the motor vehicle **[particulars withheld]** in 2000 at Kshs. 350,000/= she avers that took a loan

from Mwalimu Sacco to contribute towards the purchase.

The Respondent states that he purchased the vehicle using his savings and was disposed off to fence the property in Kitengela. On sale he gave the Applicant Kshs. 200,000/= to purchase [particulars withheld] and he is not laying any claim to it. The Applicant claims that he bought [particulars withheld] with her earnings from gratuity on retirement from TSC. The vehicle is registered in her name and she considers it as matrimonial property.

Further, the Respondent states that [particulars withheld] is registered in the name of the Applicant and she is in possession to date. The same is not contested by the Applicant.

Each party shall retain the motor vehicle each one has. With regard to proceeds of [particulars withheld], the Respondent did not prove that the proceeds were used to develop Kitengela property. He who alleges must prove and/or that it was mutually agreed that the proceeds to be used in development of the suit property in Kitengela. The Respondent owes the Applicant half of proceeds of sale of motor vehicle in the absence of proof that funds were used solely for family activity.

22. Shares in Eveready East Africa Limited, safaricom Limited, Mumias Sugar Company Limited and Kenya Commercial Bank.

The applicant considers shares in the various companies acquired during the subsistence of the marriage as matrimonial property. She has attached documents to show allocated shares on Eveready East Africa Limited. The Respondent alleged the Applicant has/had acquired her own shares and failed to disclose. He did not tender evidence to confirm the same. If any evidence is provided of the Applicant's shares, then all of them shall be sold and shared equally between the parties.

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH JANUARY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

.....**FOR THE APPLICANT**

.....**FOR THE RESPONDENT**

COURT CLERK - JASMINE