



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**ORIGINATING SUMMONS NO. 12 OF 2017**

**AIN.....APPLICANT**

**VERSUS**

**IMM.....RESPONDENT**

**JUDGEMENT**

1. By an Originating Summons dated 6.11.17 AIN, the Applicant seeks the following declarations and orders in respect of the properties listed therein:

- i) That the said properties are matrimonial properties and jointly acquired and owned by the Applicant and IM, the Respondent.
- ii) That the said listed properties which are registered in the name of the Respondent are held in trust for the Applicant.
- iii) That the properties sold, and/or subdivided and/or the income derived from rent/sale be shared equally between the parties as the Court may deem fit.
- iv) That the Respondent and/or his agents or in any manner disposing of the suit property without the written consent of the Applicant.
- v) That costs be provided for.
- vi)

2. The properties listed are:

- i) Plot No. xxx, Ziwa la Ngombe Squatter Settlement Scheme. Mombasa County (Plot xxx).
- ii) Tuk Tuk registration number KTWa xxxx.

3. The Applicant claims that the Respondent collects monthly rent from Alice Wanjiru Gioche to whom the parties have leased Nyandarua /Shimata /xxxx which he no longer shares with her. There's also a caretaker thereon who keeps livestock and benefits from the land in an arrangement the Respondent has not disclosed to the Applicant.

4. The undisputed facts are that parties herein got married under Kikuyu customary law on 5.12.95 at the Association of [Particulars Withheld] in Majengo. They were blessed with 4 children. The marriage was dissolved on 7.1.16.

5. In her affidavit sworn on 6.11.17, the Applicant claims that during the marriage she and the Respondent acquired Plot xxx. They constructed a Swahili house with 7 rooms and occupied some and rented the rest for Kshs. 2,400/=. She accuses the Respondent of procuring the title to Plot xxx in his name instead of both their names. He also has possession of the logbook for the Tuk Tuk. She further accuses the Respondent of filing for divorce on 13.3.15 without her knowledge and their marriage was dissolved on 7.1.16. Following the dissolution of the marriage, the Respondent kicked the Applicant and their children out of the matrimonial home. The Respondent collects rent from the rooms and does not share with the Applicant.

6. The Respondent filed a Preliminary Objection dated 22.1.18 on the ground that the suit herein is *res judicata* and offends the provisions of Section 7 and 8 of the Civil Procedure Act. The prayers sought herein were the subject of Divorce Cause No. 14 of 2015. The Respondent

also filed a Replying Affidavit sworn on 22.1.18, in which he claims that the issues herein were the subject of an application filed by the Applicant in Chief Magistrate's Court Divorce Cause No. 14 of 2015 and a ruling delivered by Hon. Ruguru on 2.12.16. He states that since the Applicant did not appeal against the ruling and did not seek leave to file the cause, the same is incurably defective and ought to be dismissed with costs. The Applicant has failed to disclose the truth about the properties acquired by each party during marriage. The Respondent claims that he was open about the properties he acquired while the Applicant was secretive about the properties she had acquired. The Applicant has only mentioned the properties in his possession but has failed to disclose the properties in her possession which she acquired during their marriage.

7. The Respondent states that with his support, the Applicant purchased the following properties:

- i) House with 12 rooms next to [Particulars Withheld] each rented for Kshs. 3,500/= per month.
- ii) House with 14 rooms next to [Particulars Withheld] Mtwapa each rented for Kshs. 2,500/= per month.
- iii) House with 12 rooms and 2 shops next to [Particulars Withheld] Restaurant and Guest House each rented for Kshs. 2,000/= and Kshs. 5,000/= respectively per month.
- iv) House with 4 rooms at [Particulars Withheld] each rented for Kshs. 1,500/= per month.
- v) 2 acres at Majengo where she does farming.
- vi) 1 tuk tuk and 1 motor bike.

8. The Respondent further avers that the Applicant never contributed to the acquisition or development of the properties she is claiming. The Applicant disposed of some of the properties and transferred some to her relatives denying him any share. According to the Respondent, there is nothing to be shared as each party had separate assets and it will be unfair to distribute only the properties own by the Respondent. He further claims that due to pressure from the Applicant, he was forced to transfer Title No. Kajuki/Kamutiria/xxx to their children. To him, the Applicant has not approached the Court with clean hands and the Application ought to be dismissed.

9. In response to the Replying Affidavit, the Applicant asserts in an affidavit sworn on 27.2.18 that she filed an application in Divorce Cause No. 14 of 2015 to complain that she was not informed of the same. The Court however declined to grant the orders saying she cannot compel the Respondent to stay with her. She claims that the Respondent obtained a letter from the Chief of Shimo la Tewa location confirming that the Applicant has the properties he listed in his replying affidavit which is not true. The Applicant reported the matter to the Deputy County Commissioner who told the chief to write a letter confirming that the Respondent gave him wrong information.

10. In his affidavit sworn on 12.3.18, the Respondent denied knowledge and ownership of Plot xxx. As for the Tuk Tuk, he sold the same 7 months before this suit was filed and as such any orders issued in respect thereof shall be in vain. He reiterated that the Applicant has come to Court with unclean hands as she failed to disclose her properties acquired during marriage namely a 12 roomed house in [Particulars Withheld] area and motor cycle registration number KMCV xxxx. The suit is based on insufficient evidence and should be dismissed. He denies chasing the Applicant and the children away without proper facilitation. He gifted the children with land and a house.

11. At the hearing, the Applicant told the Court that she got married to the Respondent when she was underage. They worked together and acquired property together. In 1995, the parties bought Plot xxx from one Mzee Abdall Kombo for Kshs. 4,000/=. It was agreed that the Plot be in her name. The letter of Allotment was issued in the name of the Applicant and one WK. The Plot is in [Particulars Withheld] which she claims to be their matrimonial home. She further stated that in 2013, the Respondent changed the plot to No. xxx and he obtained the title in his name.

12. The Applicant further stated that the Respondent sent the Applicant and the children upcountry in 2007 and married another woman. Upon their return in 2008, he chased them away from the home. It took the Court's intervention to get them back into the property. Thereafter the Respondent filed for divorce in 2016 without her knowledge. She further stated that in 2017, the Respondent sought Court orders to restrain the Applicant and the children from setting foot in the house. The Court however declined to grant the orders. In April 2017, she went to Meru and left their son M in the house but the Respondent broke into the house and took everything. She reported the matter at Nyali Police Station who advised her to file suit. The Respondent continues to collect rent from 7 rooms in the house but does not share the proceeds with her. He bought a tuk tuk with the proceeds but sold it in 2018 without involving her. According to her the Respondent wants to retain the property for himself yet they labored together to get it She prayed that the Court makes a fair decision without oppressing either party.

13. On cross examination, she stated that Plot is No. xxx Ziwa la Ngombe and tuk tuk KTWA xxxx are matrimonial property. She further stated that receipt no. xxxxx dated 26.8.02 issued by the Government of Kenya is in respect of Plot xxx. She confirmed that the letter of offer for Plot xxx is in her name and that of Wanjiku Kinyanjui. She denied that she and the Respondent agreed that he transfers the land in Meru to their children. She denied having a house in Mtwapa with 12 rooms or any other property and stated that the only property she has is the plot which the Respondent had registered in his name. The properties they acquired during marriage is the said plot, the tuk tuk and 2 plots in Meru. She however confirmed that she has a motorcycle KMCB xxxx.

14. During the course of the hearing, the Court directed a site visit to be conducted to confirm the property in Mtwapa with 12 rooms from which the Respondent claimed that the Applicant collects Kshs. 80,000/= in rent. The Deputy Registrar conducted a site visit on 12.4.18 and filed a report dated 30.4.18. In her report, the Deputy Registrar stated that none of the properties listed in the Respondent's affidavit belonged to the Applicant. The Respondent appeared unsure of which property was which and only showed the Deputy Registrar pictures of properties when asked to identify them.

15. In his testimony, the Respondent confirmed that the parties got married in 1991 and were blessed with 4 children all of whom are adults. The parties lived in rental premises. He denied knowledge of Plot xxx. The parties separated in 2002 and the Applicant went to Tharaka Nithi with the children. The Respondent thereafter filed for divorce and the marriage was dissolved and they have not resumed cohabitation. He stated that he transferred Title No. Kajuki/Kamutuiira/xxx to their children as per his agreement with the Applicant. He said he bought the tuk tuk in 2014 after separation. He sold it to cater for his sick father's hospital expenses. He stated that the Applicant has many properties and cannot understand why she wants more. He prayed that the suit be dismissed.

16. On cross examination, he stated that he has no interest in Plot xxx as it is not his. He stated that when he filed for divorce in 2015, he informed the Applicant. He denied changing Plot xxx to Plot xxx. He claimed that the plot in Mtomodoni belonged to the Applicant. He was not satisfied with the site visit and report of the Deputy Registrar. He further stated that he wants nothing from the Applicant.

17. I have considered the Originating Summons, the rival affidavits as well as the oral evidence of the parties. The Applicant's claim is for a share of 2 properties namely Plot xxx and tuk tuk registration number KTW A xxxx. The basis of the Applicant's claim is that during their marriage, the parties acquired Plot xxx and built a 7 roomed Swahili house which has always been their matrimonial home. The family occupied some rooms while others were rented for Kshs. 2,400/=. The Respondent kicked out the Applicant and the children from the matrimonial home and rented the rooms to tenants. He does not share the rent with her. As regards the tuk tuk, the Applicant claims that the same was purchased by the Respondent with proceeds of rent from the rooms in from Plot xxx.

18. Section 6 of the Matrimonial Property Act defines matrimonial property as:

**(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**

19. In order for this Court to grant the orders sought, the Applicant must demonstrate that the 2 properties are either the matrimonial home of the parties or that the same were jointly owned and acquired by the parties during the subsistence of the marriage. The parties married on 5.12.95 but separated in 2002. The Applicant however stated that she was in the matrimonial home as late as 2017. The marriage was ultimately dissolved in January 2016.

20. The Applicant alleges that in 2002, the parties purchased Plot xxx from Mzee Abdalla Kombo for Kshs. 4,000/= in the name of the Respondent. It was later agreed that the plot be in the Applicant's name. The Respondent denies this allegation and denies knowledge of Plot xxx. The Court notes that no agreement for sale was exhibited to support the claim.

21. Further, the Applicant did not produce any evidence to show when the construction of the alleged Swahili house with 7 rooms commenced and when the same was completed. No evidence of source of funds for the construction or indeed the contribution of the parties was provided. No receipts of construction material was availed nor of rates paid for the Plot. She did not give any evidence on the kind of work each of the parties were engaged in. Further, other than stating that they occupied some of the rooms and rented the rest for Kshs. 2,400/=:, the Applicant did not state how many of the rooms they occupied and how many were rented and the amount of rent collected per month. In all there is very little by way of evidence that has that has been provided by the Applicant to persuade the Court that Plot xxx was the matrimonial home or matrimonial property.

22. Additionally, the exhibited Letter of Offer dated 15.2.02 from the Director of Land Adjudication and Settlement Department in respect of Plot 476 is in the name of the Applicant and one WKG. The Applicant has not informed the Court who this WKG is and whether they owned Plot xxx jointly and what became of her. Also exhibited is a copy of a receipt dated 26.8.02 in the name of the Applicant for Kshs. 6,750/= on account of outright purchase fees for Plot xxx. She has not stated what efforts she made to obtain the title to Plot xxx. She did not inform the Court whether she went to the Provincial Land Adjudication and Settlement Officer, Mombasa as indicated in the Letter of Offer, to be shown the plot boundaries and for documentation. She has also not told the Court what transpired between August 2002 when she paid the requisite fees and 2013 when she claims the Respondent changed Plot xxx to Plot xxx and got title in his name. Too many questions linger in the mind of the Court regarding this plot.

23. The Applicant alleges that the Respondent had Plot xxx changed to Plot xxx and transferred the same to himself in unclear circumstances. According to her, the 2 plots are one and the same and this is matrimonial property and indeed the matrimonial home. I have looked at the 2 Letters of Offer from the Director of Land Adjudication and Settlement Department exhibited by the Applicant. The first one is in respect of Plot xxx in Ziwa La Ng'ombe Squatter Settlement Scheme and is addressed to the Applicant and WKG. The letter indicates that the plot measures 0.02 hectares. The other letter dated 2.1.13 is in respect of Plot No. xxx, Ziwa La Ng'ombe Squatter Settlement Scheme measuring 0.0113 hectares and is addressed to the Respondent. It is clear that the 2 plots are of different sizes and have different numbers and different allottees. The 2 plots cannot therefore be one and the same plot as the Applicant would have this Court believe. Given these circumstances, the question that arises is, on which of the 2 plots is the alleged Swahili house with 7 rooms, which the Applicant claims to be the matrimonial home, built? This is a question which from the available material, the Court is unable to answer.

24. Further the Applicant has not produced any evidence to support her claim that the Respondent irregularly had Plot xxx changed to Plot xxx and got the title in his name. The Court is also unable to see the nexus between the 2 plots save that they are both in the same [Particulars Withheld] Scheme. On the issue of irregularity or otherwise of the allotment to the Respondent of Plot xxx, this Court lacks the jurisdiction to determine the same by dint of Article 165(5)(b) of the Constitution of Kenya 2010 which provides:

**(5) The High Court shall not have jurisdiction in respect of matters—**

(a) ...

(b) *falling within the jurisdiction of the courts contemplated in Article 162 (2).*

Article 162(2) of the Constitution of Kenya provides:

**(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**

a) ...

**b) the environment and the use and occupation of, and title to, land.**

25. Parliament did in 2011 enact the Environment and Land Court Act which established the Environment and Land Court with the status of the High Court to hear and determine disputes relating to the use and occupation of, and title to, land. It is this Court that has the requisite jurisdiction to determine whether the Respondent obtained the Letter of Offer and title to Plot xxx irregularly and whether the said Plot is the same as Plot xxx as claimed by the Applicant.

26. Plot xxx is, according to the aforesaid Letter of Offer, in the name of the Respondent. In the absence of proof that Plot xxx is the parties' matrimonial home and the Plot not being in the joint names of the parties, the same is not matrimonial property within the meaning of Section 6(1) of the Act.

27. As regards the tuk tuk, the Applicant states that he purchased the same from the rent proceeds of the matrimonial home. She claimed that the Respondent gets Kshs, 2,400/= in rent. The Respondent stated that he purchased the tuk tuk in 2014 after the parties' separation. For the tuk tuk to constitute matrimonial property, it must by dint of Section 6(1)(c) of the Act, be jointly owned and acquired during the subsistence of the marriage. It is not disputed that the tuk tuk belonged to the Respondent before he sold the same. Not being jointly owned by the parties, the tuk tuk also does not constitute matrimonial property within the meaning of Section 6(1) of the Act.

28. Having so found, can the Applicant find succour in Section 9 of the Act? This section provides that a spouse can acquire an interest in a property owned by the other spouse by contribution as follows:

***Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.***

29. For the Applicant to claim an interest in both Plot 162 and the tuk tuk which are not matrimonial property, she must demonstrate that she contributed towards its acquisition or improvement of the same. The Applicant did not place before this Court any evidence of contribution directly, indirectly, financially or otherwise, in either the acquisition or improvement of the 2 properties. It follows therefore that she has not acquired a beneficial interest in the same.

30. The Court is alive to the provisions of Article 45(3) of the Constitution of Kenya, 2010 which provides:

***Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.***

31. From the time of the promulgation of the Constitution, many including the Applicant, have been under the mistaken belief that this means that matrimonial property or property acquired during marriage is to be divided between the parties on a 50:50 basis. To debunk this equality myth, Kiage, JA observed in P N N v Z W N [2017] eKLR:

***Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.***

32. This Court is a Court of evidence and any decision made by the Court must be based on evidence. It is a settled principle of law that he who alleges must prove. This principle is firmly embedded in Section 107 of the **Evidence Act** which stipulates:

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

33. The Applicant did desire this Court to make a decision in her favour regarding her legal rights in respect of the 2 properties. She was required in law to place before the Court sufficient material as proof to persuade the Court to grant to her the orders sought. She however failed to discharge the burden of proof that was squarely upon her.

34. For the foregoing reasons it is my finding that the Court is unable to make any of the declarations sought by the Applicant over the 2 properties. It follows that the Originating Summons dated 6.11.17 lacks merit and the same is dismissed. Each party shall bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 22<sup>nd</sup> day of February 2019**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**