



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

Civil Suit No. 24 Of 2013 (O.S.)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF MATRIMONIAL PROPERTY ACT 2013

PN.....APPLICANT

VERSUS

JN.....RESPONDENT

JUDGMENT

1. Through an Originating Summons dated 8th May 2013 and subsequently amended on the 13th October 2017, the applicant sought orders as stated below:

a. That it be declared that the properties listed hereunder with all buildings and developments thereon were acquired and/or developed by the joint funds and efforts of the applicant and the respondent during their marriage and all registered in the name of the respondent, is held in trust for the applicant by the respondent:

i. [particulars withheld] and [particulars withheld] map Embakasi Ranching;

ii. Motor vehicle No. [particulars withheld];

iii. Motor vehicle No [particulars withheld];

iv. Plot No. [particulars withheld] Komarock East Housing Estate;

b. That this honourable court do issue an order declaring that the applicant is entitled to 50% or such other higher proportion of the said properties as this honourable court may deem fit.

c. That a temporary injunction do issue restraining the respondent, his servants and/or agents from alienating, wasting, damaging and/or otherwise interfering with the above mentioned properties pending the hearing and determination of the Originating Summons.

d. That this honourable court be pleased to make such further orders as the interests of justice may require.

e. That the respondent be condemned to pay costs of this application and interest thereto.

2. The application which is filed pursuant to section 17 of the Matrimonial Property Act is predicated upon grounds stated on the face of it, an affidavit in support and a supplementary affidavit sworn on 16th October 2011 by the applicant. It was the applicant's claim that; **the**

applicant and respondent solemnized their marriage in 1987; the suit properties were acquired and developed during the marriage and, the said properties were acquired and developed with the joint efforts and or contribution of the parties.

3. In response, the respondent filed a replying affidavit sworn on 12th June 2013 and filed on 21st June 2013 admitting the existence of their marriage but denied acquisition of any property through their joint effort. Brief facts of this case are that, the parties herein celebrated their marriage sometime in 1987 in accordance with Kikuyu Customary Law. The marriage was blessed with three living issues namely:

a. ENN born on 14th January 1988.

b. MNN born on 23rd September 1989.

c. JNN born on 14th July 1993.

4. The family lived together happily until 2012 when they separated due to irreconcilable differences. They have since lived separately to date though not formerly divorced. As a consequence, this suit was filed with a view to sharing out the property at 50% to 50%.

The Applicant's Case

5. According to the applicant, when she got married, she was working as a sales and distributor girl at the respondent's father's business earning a salary of 500/=. She however stopped working after delivering their 1st born baby to concentrate on looking after the family and their farm as well.

6. She averred that in 1988, her husband secured a job with **[particulars withheld]** Company as an expert examiner. That in 1999, the respondent bought property known as **[particulars withheld]** and **[particulars withheld]** Map Embakasi Ranching using money jointly earned from the respondent's salary and proceeds from farm produce.

7. She further averred that in 1994, she started selling second hand clothes at **[particulars withheld]** Market after joining her husband in Nairobi. It was her claim that she used to earn about Kshs.24,000/= per month which money she used to take care of the family needs like buying food, clothing for children, paying school fees and daily general upkeep.

8. She stated that in 1995, she opened a wholesale shop in which she sold eggs and milk thus earning her Kshs.30,000/= per month. In the year 2000, she allegedly bought a sewing machine for making sweaters and table clothes besides managing the aforesaid businesses. That as business dwindled, she closed her wholesale shop and opened a shop in **[particulars withheld]** which she later closed as well and started selling beverages besides operating a photocopier business. At the same time, she continued engaging in farming activities at their **[particulars withheld]** farm.

9. She deponed that her husband bought motor vehicle **[particulars withheld]** through a loan which he repaid using proceeds from their farm. That the motor vehicle which was later involved in a road accident was compensated with motor vehicle Registration No. **[particulars withheld]** which is part of the property in issue.

10. In their quest to develop their Embakasi plots, the deponent stated that she secured a loan of Kshs.290,000/= from Equity Bank through a women's group organization. That due to financial constraints, they did develop the house half way as her brother-in-law (brother to the respondent) offered them a house at **[particulars withheld]** by City Council. She averred that, the year 2012, the respondent kicked her and children out of **[particulars withheld]** house thus forcing her to move to their **[particulars withheld]** house which she tried to complete and has been in occupation to date.

11. During the hearing, the applicant adopted the averments contained in her affidavit and supplementary affidavit in support of the Originating Summons plus a witness statement which is a replica of the said affidavits. On cross examination, she admitted that they have only separated but not divorced.

12. She called her first born daughter EWN (PW2) who adopted her witness statement filed on 30th March 2017 in which she claimed that it was her father/respondent who chased them away from their home. She corroborated her mother's evidence to the effect that she was a business lady all through. Equally, PW2 JWM (PW2) her brother adopted the contents of his witness statement filed on 30th March 2017 just to confirm the couple's differences and how the respondent had chased the applicant and his children away.

The Respondent's Case.

13. On his part, the respondent denied the applicant was ever a business lady. He stated that his marriage was blessed with two daughters and not 3 as claimed by the applicant hence disowning EWN. He claimed to have been the sole bread winner to the family. He produced his pay slips and school fees receipts for the school fees paid for the children at various levels of education (Annexure G).

14. He denied owning property known as 5543P nor having bought motor vehicle Registration No. **[particulars withheld]**. He deponed that he bought all his cars on loan and without the applicant's contribution. In response to the claim that he chased away his wife, he averred that it was the applicant who packed her things and left while he was away and that she only resurfaced after 10 months and forcefully occupied their Embakasi house which was under construction.

15. During the hearing, the respondent relied on the contents contained in his replying affidavit. He however admitted that he has three children and that he did not chase them away.

The applicant's submissions

16. The applicant filed her submissions on 25th April 2019 through the firm of Nyiha Mukerwa and Co. Advocates. It was submitted that all the properties in question were acquired during coverture and that the applicant made both monetary and non monetary contribution.

17. Counsel submitted that although the applicant was not formerly employed, she was engaged in business from which she generated income to contribute towards family responsibilities including; purchase of property. That she made indirect contribution as well by rendering domestic work services, looking after children, companionship and management of family business, property and farm work. In support of this position, the court was referred to the case of **PMN vs JNN (2019 eKLR, Federation of Women Lawyers Kenya (FIDA) vs Attorney General (2018) eKLR and HKN vs NII (2017) eKLR** in which both courts upheld performance of household chores, raising children, supervision of family business and projects as forms of non-monetary contribution.

The Respondent's Submission

18. The firm of Njuguna and Co. Advocates appearing for the respondent filed their submissions on 15th May 2019 literally adopting the respondent's averments in his replying affidavit. Counsel submitted that the applicant had not proved any contribution towards the acquisition of the properties in question. Mr. Mbugua listed 6 issues for determination as follows: were the parties married before institution of the suit; if so, has the marriage been dissolved customarily or legally; did the parties acquire any properties jointly; is there any contested property between the parties to warrant a declaratory order; is the instant suit the proper process for the prayers sought; who will bear the costs.

19. Learned counsel submitted that although the parties were married, they have never divorced hence the suit is premature. He relied on the decision in the case of **HWK vs NII (2017) eKLR** where the court held that, for property to be shared out under Section 7 of the Matrimonial Property Act parties must divorce first. He further referred the court to a decision in the case of **C.K. vs A.G.M. (2018) eKLR** in which the court declined to share matrimonial property on the ground that the marriage had not been dissolved.

20. Counsel asserted that, a party who does not prove contribution is not entitled to a share of the property. To buttress on this position, counsel invited the court to the decision in the case of **HKW vs NII (Supra)** and **Peter Njuguna Njoroge vs Zipporah Wangui Njuguna civil appeal No. 128/14 Nairobi** where J.Kiagi in a dissenting opinion held that Article 45 (3) of the Constitution did not give a blank cheque to married couples to the property entitlement at 50% to 50% at the time of dissolution of marriage.

Analysis and Determination

21. I have considered the pleadings herein plus submissions by both counsel. Issues that crystallizes for consideration are:

- 1. Whether the parties were ever married.**
- 2. Whether they acquired the property in question during the subsistence of their marriage.**
- 3. Whether the marriage is still subsisting and if yes, whether this court can share out the property in question.**
- 4. If the answer to 2 above is in the affirmative, what was each party's contribution and entitlement.**

22. It is not in dispute that the parties were married sometime 1987 under Kikuyu Customary Law. It is also admitted that they separated the year 2012 due to irreconcilable differences and that they have never divorced.

23. The suit herein is brought pursuant to Section 17 of the Matrimonial Property Act No. 13/2013 which provides that:

- 1. A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.**
- 2. An application under Section (1) -**
 - a. shall be made in accordance with such procedure as may be prescribed.**
 - b. May be made as part of a petition in a matrimonial court and**
 - c. may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.**

24. By virtue of this provision, this court has jurisdiction to declare parties' rights in relation to any property which is contested. It therefore implies that, one does not have to divorce before seeking declaratory rights over the property claimed to have been acquired during the pendency of the marriage. However, this declaration does not include division of matrimonial property in question.

25. In the case of **C.K. vs A.G.M (Supra) eKLR** the court had this to say:

“in view of the foregoing, it is my opinion that this court has jurisdiction to make declarations only as to interest in property

during the pendency of a marriage. The issues of sharing of property can only be declared upon dissolution of a marriage”.

26. It is not controverted that the applicant and respondent have not divorced to warrant division of matrimonial property as envisaged under Section 7 of the Matrimonial Property Act which defines matrimonial property as –

“subject to Section 6 (3), ownership of matrimonial property vests in the spouses according to the distribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved”.

27. The plain reading and wording of Section 7 expressly prohibits any division of matrimonial property before dissolution of a marriage. This position has been upheld by various superior courts in several cases. In the case of **PWM vs EM (2014) eKLR** the court held that:

“it would appear, therefore, regardless of which law a party looks at, whether it is the Married Women Property Act 1882 or the matrimonial property Act 2013, matrimonial property is not subject to division in the life of the marriage between spouses”.

Similar position was held in **N.C.K. vs G.V.K. (2015) eKLR** where the court held that:

“the result is that the preliminary objection taken out by the respondent is sustained. The court does not have jurisdiction under Section 7 of the Matrimonial Property Act between the applicant and the respondent during unbroken coverture”.

28. From the above cited authorities and the provision under Section 7 of the Matrimonial Property Act, a court cannot share out matrimonial property acquired during the subsistence of the marriage unless and until such marriage is dissolved. I do agree with the respondent’s counsel that a apportionment at the ratio of 50% to 50% of the property in question cannot apply.

29. Can this court make declaratory rights over the property under Section 17 of the Matrimonial Property Act? The answer is in the affirmative. However, Section 17 (2) (b) provides that an application for declaration of rights of property shall be made in accordance with such procedure as may be prescribed. To my knowledge, there are no rules nor regulations in place yet under the matrimonial property Act governing the process on how such rights if declared can be realized.

30. There is no law prescribing whether such rights can be enforced through another suit seeking automatic division after divorce or of what value is that declaration to the individual or applicant in terms of immediate benefits especially where rent is involved. Nevertheless, this court will only endeavor to determine parties’ rights to the properties in question being the subject matter before me.

31. What is matrimonial property? Section 6 of the Matrimonial Property Act defines matrimonial property as:

a. Matrimonial home;

b. household goods and effects in the matrimonial home or homes; or

c. any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.

32. According to the applicant, during the subsistence of their marriage, they acquired the property listed in the Originating Summons and that she made both monetary and non monetary contribution. For clarity purposes, I wish to address each property separately.

a. Property P5543P and P5543B

33. These two properties located in **[particulars withheld]** Ranching within Ruai have differently been described. According to the respondent the plots are P5543 and 5543B. There seems to be no big difference in description as they are all referring to the only property that they have within **[particulars withheld]** area.

34. The applicant claimed that she contributed cash 290,000/= towards the construction of a house in the two properties which were jointly acquired. She attached several receipts showing purchase of construction materials in her names (Ex. 4 in the affidavit in support of the Originating Summons). She also attached several bank account slips showing that she was engaged in business (Ex. No. 3). She further attached rent receipts in respect of the premises where she was operating a photocopier business (Ex.2).

35. On the other hand, the respondent claimed to have bought the plot at Kshs.35,000/=. He also attached some receipts to show how he bought construction materials for the house at Embakasi. Save for the receipts for construction materials which each one of them has produced, none of them has proved that he or she exclusively acquired and developed the property.

36. There is no doubt that the property was acquired in 1992 when their marriage was subsisting. The property therefore qualifies to be matrimonial property under Section 14 of the Matrimonial Property Act. It is now settled law that contribution towards matrimonial property can be direct or indirect (**See Agnes Nanjala William vs Jacob Petrus Nicholas Vander CA No. 127/2011**).

37. In assessing contribution, the court is not bound to arrive at an accurate and exact figure of contribution. If this were to happen, most parties will not prove contribution hence posing a challenge in sharing out matrimonial property amongst parties after divorce. In the case of

NWN vs KNM (2014) and PNN vs ZWN (2017) eKLR it was held that, assessment of contribution towards acquisition of matrimonial property cannot be done with mathematical precision.

38. In the instant case, the applicant claimed to have been paying school fees for the children and rendering supervision services during construction of their home. She produced receipts for payment of school fees and for purchase of construction materials. She produced rent receipts to prove premises rented out for operating photocopier business. She claimed to have taken time to take care of their children when they were young before she started business. All these were not challenged. The respondent merely made a generalized denial that the wife did not make any contribution nor was she operating any business.

39. I am convinced that there is prima facie evidence that the applicant did make both direct and indirect contribution in terms of looking after children and undertaking other family and domestic chores, supervision during construction of their house and purchase of materials for construction as well as paying school fees for their children.

40. It is my finding that the two properties were acquired during the subsistence of their marriage through their joint efforts and contribution hence the two have proprietary or beneficial interest to which each is entitled to a share. Since they have not divorced, my hands are tied as I cannot share out the property in the manner pleaded by the applicant.

b. Komarock Plot No. 69 Komarock

41. Concerning this property, the applicant claimed that it was allocated to them by the then City Council of Nairobi. I note from the pleadings and the evidence of both parties that not much has been said on how the property was acquired and developed. The respondent stated that it was allocated to him by the city council of Nairobi. He did not go further to explain how it was developed. The applicant also did not do any better. She did not explain her contribution towards its development. Nevertheless, it was acquired during the subsistence of the marriage and I will only hold that the same was acquired through their joint effort hence each is entitled to a share.

c. Motor Vehicles Reg. No. KAW 947B and KAL 847P

42. Regarding this motor vehicles, the applicant stated that KAW [particulars withheld] was bought by the respondent through a loan which was serviced through proceeds from farm produce which was her sweat. That the respondent bought motor vehicle Peugeot [particulars withheld] through a loan and that when it was involved in a road accident he was compensated with motor vehicle Registration No. [particulars withheld]. She claimed that the loan was repaid out of proceeds earned from farm produce. The respondent denied having a motor vehicle known as Registration No. [particulars withheld].

43. It is trite that he who alleges must prove. There was no log book or search attached to show that those motor vehicles do exist and that they are owned by the respondent. The applicant has merely quoted registration numbers of motor vehicles. This is not enough. It is admitted that all the motor vehicles were acquired by the applicant through loans taken by the respondent. There is no proof that those loans were cleared through proceeds from farm produce. It is my finding that the motor vehicles if any were acquired exclusively by the respondent through loans acquired while in employment. I do hold that the applicant had no role nor did she contribute towards their acquisition.

44. Accordingly, it is my finding that the applicant has proved her case on a balance of probability and do enter judgment with the following declarations:

a. That property known as Komarok Plot [particulars withheld] estate and [particulars withheld] and [particulars withheld] Embakasi were acquired during coverture through their joint efforts and contribution.

b. That the applicant has not proved to the required degree that motor vehicles [particulars withheld] and [particulars withheld] were acquired during coverture through their joint efforts and contribution.

c. That this being a family issue, each party shall bear his or her own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2019.

J.N. ONYIEGO

(JUDGE)