



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 25 OF 2017

SNN.....APPLICANT

VERSUS

CAO.....RESPONDENT

AND

DCMO.....1ST INTERESTED PARTY

IIOO.....2ND INTERESTED PARTY

RPMO.....3RD INTERESTED PARTY

JUDGMENT

1. The applicant SNN. and the respondent CAO solemnized their marriage on 19th July 1996 under the **Marriage Act (Cap 150** – now repealed). The applicant had her own child JSO who was born on 1st October 1993. With the respondent, they got two children, SNO born on 17th July 1994 and POO born on 31st January 1998. The marriage was dissolved on 17th March 2017 following proceedings in **C.M. (Milimani) Divorce Cause No. 440 of 2015**.

2. There is no dispute that at the time when the respondent married the applicant he was already married to DCMO (1st interested party). The marriage was on 10th August 1980. The two were blessed with three children: IIOO. (2nd interested party) born on 11th December 1981, RPMO (3rd interested party) born on 15th December 1983, and the late KO born on 15th November 1985. About 1997 the 1st interested party relocated to the United Kingdom where she lives and works.

3. On 18th April 2017 the applicant filed the present originating summons for the declaration that the properties she named were matrimonial property between her and the respondent whose acquisition, maintenance, and preservation she had contributed to, and therefore was entitled to. She wanted it shared between them to the level of that contribution. She also pleaded that the respondent had alienated, sold and/or transferred some of the matrimonial property. She sought that the respondent be made to account for the property and be made to share in the proceeds of such transactions. She swore an affidavit to support the summons.

4. The respondent's response was two-pronged. First, that the property alleged had been acquired between him and the 1st interested party and therefore the applicant was not entitled to the same. Secondly, that whatever other property that was acquired subsequently was not with the contribution of the applicant. It was also alleged that some of the property belonged to a limited liability company ([Particulars Withheld] Holdings Limited) and was therefore not available to be shared between the two.

5. The applicant and the respondent each testified, and also adopted their respective affidavits. The applicant was represented by Mr. Kago and Ms. Mbura. The respondent was represented by Ms. Guserwa, and the interested parties were represented by Mr. Madowo. The interested parties did not attend hearing, but relied on their sworn affidavits. Written submissions were filed by the counsel for the applicant and the respondent.

6. Before the consideration of the competing evidential versions by the respective parties, it is important to outline the basic law relating to the division of matrimonial property.

7. **Section 6(1)** of the **Matrimonial Property Act, 2013** defines matrimonial property to mean the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and moveable property jointly owned and acquired during the subsistence of the marriage.

8. The respondent was married to the 1st interested party when he married the applicant. It was therefore a polygamous relationship. **Section 8** of the **Act** provides as follows:-

“8 (1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the –

(a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and

(b) matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives.”

9. Under **Section 2** of the **Act** **“contribution”** may be monetary or non-monetary. It includes domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work.

10. Matrimonial property may be registered in the name of one spouse, or may be registered in the joint names of the spouses. **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 are equal.”

11. The division of matrimonial property is not, by its very nature, a precise mathematical exercise. The division is decided after measuring the peculiar circumstances of each case (**Francis Njoroge –v- Virginia Wanjiku Njoroge, Nairobi Civil Appeal No. 179 of 2009**). The contribution will be in actual quantifiable terms, based on numerical statistical information, but also on unquantifiable terms that are not easy to measure. It is not easy to measure contribution that involves, for instance, child care, companionship, and so on. Where the court is dealing with, for instance, a piece of land, a building or a business, the financial contribution, either direct or indirect, may not be difficult to determine. A monetary value can be allocated to any of these properties by valuation, or otherwise.

12. When the originating summons was filed the alleged matrimonial property named in “SNN-1” annexed to the supporting affidavit by the applicant had various items. They were land and buildings; vehicles; furniture; appliances and equipment; investments and cash. The land and buildings were –

(a) LR No. [...] Kumbe Road one acre with workers’ house;

(b) LR No. [...] Kumbe Road one acre with main house;

(c) LR No. [...] Kumbe Road one acre undeveloped;

(d) LR No. [...] / [...] at Kumbe Road one acre undeveloped;

(e) LR No. [...] Muiroi Road Langata half acre undeveloped;

(f) LR No. [...] Ridgeways 0.5 acres undeveloped (sold);

(g) Webuye plot;

(h) 4 acres at Lukenya;

(i) House No. [...] at Siwaka;

(j) LR No. [...] 5 acres at Limuru (sold);

(k) LR No. Ngong/Ngong/[...] at Nkoroi;

(l) 21 acres at Tonganen;

(m) 5 acres at Mavoko Block [...];

- (n) 20 acres in Kitale;
- (o) 10 acres in Kitale;
- (p) [Particulars Withheld] Ring Road plot;
- (q) [Particulars Withheld] Downs plot;
- (r) [Particulars Withheld] Mombasa flat;
- (s) [Particulars Withheld] Beach plot;
- (t) [Particulars Withheld] Park land; and
- (u) [Particulars Withheld] Nairobi flat.

13. It was the evidence of the applicant that the respondent incorporated [particulars withheld] Investments Limited and [particulars withheld] Limited in which the two were co-directors and which they used as vehicles to acquire and develop some of the matrimonial properties.

14. The respondent's evidence was that he and the 1st interested party jointly bought LR No. [...] and [...] in 1990, and showed titles issued on 6th December 1990. They put up a matrimonial home on LR No. [...] in 1992. They settled therein. The applicant, he said, was not married by the time. In 1991, he stated, through [particulars withheld] Holdings Limited, whose shareholding comprised him and the 1st interested party, he bought LR No. [...] and LR No [...]. LR No. [...] was sold in 2012. In the course of this case he sold LR No. [...]. In 1992 he bought LR No. [...] in Ndenderu in Limuru and sold it in 2009. In 1996, having incorporated [Particulars Withheld] Investments Limited, wherein him and the applicant were co-directors, he bought the house at Siwaka in Nairobi. This is where he lived with the applicant, as the 1st interested party lived on LR No. [...]. When the 1st interested party relocated to the United Kingdom, he stated, they left the Siwaka house to settle in the Karen home on LR No. [...]. The Siwaka house was put on rent. It earns Kshs.90,000/= monthly which the applicant uses. In 2011 he bought the [Particulars Withheld] house in Mombasa and put in his name and that of the applicant. It is on rent of Kshs.60,000/= monthly which goes to the applicant. He had in 1980 bought a house in Buruburu where he lived with the 1st interested party. He sold it in 2011. With the 1st interested party, they bought a farm in Tongaren in Trans Nzoia. The farm was invaded by squatters. While staying with the applicant, he stated, he bought 30 acres of land in Kitale which he put in their joint names. He has no problem if this land can be equally shared between them. It is on the 10 acres of the 30 acres that the respondent put up a three bedroomed matrimonial home between him and the applicant.

15. In oral testimony, the respondent stated that he has a flat in Bombolulu and the one acre Ngong piece of land. Both were bought when he was married to the applicant. They were each registered in joint names. There is the land at Webuye that was bought during the marriage between the two. In 2011 he bought five acres at Mavoko, and in 2013 he bought one acre of land in Kitale town.

16. The applicant sought 50% share in all the property in the case, saying that she contributed towards its acquisition and development. The respondent's evidence was that the applicant made no contribution at all. He stated that after he married her she worked briefly as an [particulars withheld] at a company at Wilson Airport. She resigned. He set up a video business through a company called [Particulars Withheld] Limited in which he put Kshs.7,000,000/=. She put in nothing, but both became directors. The business collapsed under her watch. He had earlier incorporated [Particulars Withheld] Investments Limited in which she was director, but again she made no contribution. When she was cross-examined by M/s Guserwa to produce any evidence of financial contribution to the purchase or development of the property she had none. She did not have any bank statements or accounts to show.

17. There was evidence that the 1st interested party was a Kenya registered [Particulars Withheld] in gainful employment and was now a senior [Particulars Withheld] at a medical institution in the United Kingdom.

18. The respondent stated that he is an [particulars withheld] by profession. He was a partner with [particulars withheld] which became [Particulars Withheld]. He educated all his children in good schools in Kenya, and each went to universities in the United Kingdom, all of which he paid.

19. The applicant did not say how much he put in either [particulars withheld] Investments Limited or [Particulars Withheld] Limited. She had no evidence of financial contribution to the companies.

20. I find that, in terms of direct or indirect financial contribution to the acquisition and development of the matrimonial property, the applicant did not prove her case. The contribution, I find, was substantially in terms of domestic work and management of the matrimonial home, child care, companionship and the management of the family business and property. She did this between 1996 and 2017, about 21 years. Between 1999 and 2017 the applicant and the respondent lived in the house on LR No. [...] which is in the respondent's name. They went into the house from that at Siwaka. However, they moved into the home because the occupant, the 1st interested party, had relocated to the United Kingdom. The parcel was bought, and the house thereon developed, before the applicant was married. I determine that this property belongs to the respondent and the 1st interested party. The other property in LR [...] which is registered in the name of [particulars withheld] Holdings Limited which was incorporated between the respondent and the 1st interested party. It was bought before the marriage to the applicant. It is not developed. I determine that the applicant has no claim to it.

21. The Siwaka property (House No. [...]) was bought when the applicant and the respondent were married. They set up their matrimonial

home here before they moved to LR No. [...]. It is in the name of [particulars withheld] Investments Limited whose directors are the applicant and the respondent. After they moved to LR [...] it begun earning rent of Kshs.90,000/= which has always gone to the applicant. This was, infact, the couple's matrimonial home. The respondent bought the 30 acres in Kitale while married to the applicant and they put up a rural home thereon. It is in their joint names. The [Particulars Withheld] flat in Mombasa was bought when the two were married. It earns Kshs.60,000/= a month which goes to the applicant. It is in joint names.

22. The respondent stated that he has no problem if the 30 acres in Kitale is shared equally between him and the applicant so that their children can live on it. Given that concession in respect of this property, I order that 15 acres of the land (specifically the portion on which the house rests) shall go to the applicant. In respect of each of the following property, and given all the facts of the case, I estimate that the applicant's contribution was 30% and that of the respondent 70%:-

- (a) Siwaka house No. [...] in Nairobi;
- (b) [Particulars Withheld] flat in Mombasa;
- (c) [Particulars Withheld] flat in Nairobi;
- (d) Webuye plot;
- (e) Nkoroi land LR Ngong/Ngong/[...]; and
- (f) Mavoko Block Block [...].

I find that where the properties were registered in joint names or in the name of [Particulars Withheld] Investments Limited the respondent has sufficiently rebutted the presumption that the beneficial interests of the parties were equal.

23. There was no proof of which vehicles are in functional state. There was no proof of the investments and the cash that the applicant made reference to in the originating summons.

24. L.R. No. [...] was in the respondent's name, having bene bought before the applicant got married to him. Having found that the applicant made no financial contribution to it, and it not having been developed, it is determined that she has no stake in the proceeds of its sale. It follows that the money (Kshs.12.5 million) deposited into the court should be released to the respondent. The 1st interested party has a claim to that money.

25. 30% of the acreage of each of the parcels at Webuye, LR Nong/Ngong/[...], Tongaren, Kitale Amagoro and Mavoko parcels shall be excised and transferred to the applicant.

26. Property (a), (b) and (c) (Siwaka house, [Particulars Withheld] flat in Nairobi and [particulars withheld] flat in Mombasa) in paragraph 22 of this judgment shall each be valued by a valuer the parties shall agree on within 30 days. They will then each be sold and the proceeds shared on a 30:70% basis as stated above. Each party is at liberty within six months to buy out the other.

27. This was a family dispute. Each party shall pay own costs.

DATED and DELIVERED at NAIROBI this 26TH day of SEPTEMBER, 2019.

A.O. MUCHELULE

JUDGE