



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 12 OF 2014

MWB.....APPLICANT

VERSUS

CMG.....1ST RESPONDENT

JUDGMENT

1. By Originating Summons dated 24th February 2014 amended on 28th February 2019, the Applicant herein M.W.B. is seeking the following prayers against the Respondent

(i) THAT the service of this Application be dispensed with in the first instance.

(ii) THAT an urgent and temporary injunction do issue restraining the Respondent, his servants and/or agents from selling, transferring, charging, wasting, damaging or alienating and/or otherwise dealing with the following matrimonial properties and/or those properties herein below tabulated pending the hearing and determination of the Originating Summons:

a) DAGORETTI/[Particulars Withheld]

b) KJD/ [Particulars Withheld]

c) KJD/ [Particulars Withheld]

d) Motor Vehicle Registration Number [Particulars Withheld] – Toyota Prado

e) Motor Vehicle Registration Number [Particulars Withheld] - Nissan Caravan.

(iii) THAT a declaration do issue that the developments and improvements on all the properties known as DAGORETTI/ [Particulars Withheld],KJD//[Particulars Withheld],KJD//[Particulars Withheld],and all the above mentioned properties registered in the name of the Respondent are owned jointly by the Applicant and the Respondent.

(iv) THAT an Order do issue declaring that 50% or such other or higher proportion of the Properties aforesaid, is held by the Respondent in trust and for the beneficial interest of the Applicant.

(v) THAT an Order do issue declaring that the Respondent is accountable to the Applicant in respect of all the income derived from the said properties and applied to the Respondent's exclusive use.

(vi) THAT an Order do issue declaring that all rental income derived by the Respondent from the aforesaid matrimonial properties be distributed equally with the Applicant herein.

(vii) THAT an Order do issue declaring that the Respondent is accountable to the Applicant for the income derived from the sale, if at all, the property herein namely DAGORETTI// [Particulars Withheld],

(viii) THAT this Honorable Court be pleased to order that the properties and the income aforesaid be settled in proportions as aforesaid or as the Court may order.

(ix) THAT the costs of the Summons are provided for.

2. The Originating Summons is based on the ground that during the subsistence of the marriage between the Applicant and the Respondent, the Parties acquired the said properties but the same were registered in the name of the Respondent.
3. Further that the Respondent already irregularly and fraudulently purported to sell and transfer one of the mentioned properties namely DAGORETTI// **[Particulars Withheld]** to a 3rd party who is the Respondent's brother to defeat the interests of the Applicant and the Applicant will suffer great loss.
4. The Respondent filed a Replying Affidavit sworn on 31.3.2015 in which he deposed that he acquired the properties through his own means with zero contribution from the Applicant.
5. Further that DAGORETTI// **[Particulars Withheld]** was acquired jointly with his brother and that is why it was transferred to him.
6. The Respondent further deposed that the Applicant has not produced any evidence that he contributed to the purchase of the said properties.
7. The case proceeded by viva voce evidence. After the Applicant gave evidence, the Respondent and his Counsel failed to appear in Court and the Applicant closed her case.
8. The Applicant said she got married to the Respondent on 8.4.2000 and they were blessed with four issues namely:
 - (i) JNM
 - (ii) TGM
 - (iii) FWM
 - (iv) EJG.
9. She said during the Subsistence of their marriage, they acquired the following properties.
 - (i) DAGORETTI// **[Particulars Withheld]**,
 - (ii) KJD// **[Particulars Withheld]**,
 - (iii) KJD// **[Particulars Withheld]**,
 - (iv) M.V. REG. NO **[Particulars Withheld]** – TOYOTA PRADO
 - (v) M.V. REG. NO. **[Particulars Withheld]** – NISSAN CARAVAN
10. The Applicant said the marriage was dissolved on 7.8.2014 on the grounds of desertion and the degree absolute was issued on 12th March 2015.
11. The Applicant also said she secured a loan of one Million Shillings from her father and they started a supermarket Business called **[Particulars Withheld]** which they named after their first born daughter. At the time the Respondent was working with Kiwi.
12. A year later the Respondent resigned and joined her in the Supermarket business. She said they opened another supermarket called **[Particulars Withheld]** in 2006 named after their Second born daughter
13. In her oral evidence in Court, the Applicant said she used to go to the **[Particulars Withheld]** Supermarket at 6.30 am and would leave at 8.30pm and she used to take care of her home at the same time.
14. She said she was the cashier at **[Particulars Withheld]** Supermarket and she would go to close **[Particulars Withheld]** Supermarket. She said the Respondent used to do the procurement of the goods in the supermarkets.
15. The Applicant said ownership of DAGORETTI/**[Particulars Withheld]** has since been changed to AGG who is a brother to the Respondent. She said A used to work for them.
16. The Applicant said she got a Court Order on 6.6.2013 to stop the transfer and on 12.7.2013 the said property was transferred to AGG.
17. The Applicant also said the Dagoretti property has 40 flats. She said the Court ordered that the Property that was sold be shared 50:50 but she has never received her share.
18. I have considered the Originating Summons together with the Affidavits filed herein and the evidence adduced by the Applicant.

19. I find that the evidence of the Applicant is not controverted since the Respondent did not give his evidence.
20. There is evidence that the Applicant and the Respondent were married when they acquired the Properties herein.
21. The said Properties are Matrimonial Properties **Section 7** of the Matrimonial Properties Act says how the said properties should be shared. The said Section states as follows:

7. Ownership of matrimonial property 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.

22. As relates to marriage, **Article 45 (3)** provides as follows:

“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.”

23. In the case of **Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes, (Civil Appeal No. 127 of 2011)**, where this Court stated as follows:-

“Article 45 (3) of the Constitution provides that 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. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day.”

24. Contribution is defined by **Section 2** to mean monetary and non-monetary contribution. Non-monetary 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

“Family business” means any business which -

a. is run for the benefit of the family by both spouses or either spouse; and

b. generates income or other resources wholly or part of which are for the benefit of the family;”

25. In the case of **V W N v. F N [2014] Eklr** the Court had this to say:

“The provisions of Sections 2, 6 and 7 of the Matrimonial Property Act, 2013 breathe life into the rights provided in Article 45 (3). The Matrimonial Property Act recognizes that both monetary and non-monetary contribution should be taken into account in determining contribution. In light of Article 45 (3) and Section 2 of the Matrimonial Property Act which define contribution to mean monetary and non-monetary contribution.”

26. I find that the parties are entitled to share the properties equally. I apportion contribution at 50:50%.

27. The Originating Summons is allowed in the following terms:

(i) THAT an injunction do and is hereby issued restraining the Respondent, his servants and/or agents from selling, transferring, charging, wasting, damaging or alienating and/or otherwise dealing with the following matrimonial properties and/or those properties herein below tabulated :

a) DAGORETTI/ [Particulars Withheld]

b) KJD/ [Particulars Withheld]

c) KJD// [Particulars Withheld]

d) Motor Vehicle Registration Number [Particulars Withheld] – Toyota Prado

e) Motor Vehicle Registration Number [Particulars Withheld]- Nissan Caravan.

(ii) THAT the developments and improvements on all the properties known as DAGORETTI [Particulars Withheld], KJD/ [Particulars Withheld],KJD[Particulars Withheld] and all the above mentioned properties registered in the name of the Respondent are owned jointly by the Applicant and the Respondent.

(iii) THAT 50% of the Properties aforesaid, is held by the Respondent in trust and for the beneficial interest of the Applicant.

(iv) THAT the Respondent is accountable to the Applicant in respect of all the income derived from the said properties and applied to the Respondent's exclusive use.

(v) THAT all rental income derived by the Respondent from the aforesaid matrimonial properties be distributed equally with the Applicant herein.

(vi) THAT the Respondent is accountable to the Applicant for the income derived from the sale, if at all, of the property herein namely DAGORETTI/[Particulars Withheld] to the extent of 50%.

(vii) THAT the properties and the income aforesaid be settled and proportioned at the ratio of 50:50%.

(viii) THAT the Respondent to pay the costs of this suit.

DELIVERED,DATED AND SIGNED IN OPEN COURT THIS 22ND DAY OF NOVEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA,NAIROBI.