



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MATRIMONIAL CAUSE NO 9 OF 2018

PKG.....PLAINTIFF

-VERSUS-

EWK.....DEFENDANT

JUDGMENT

1. **PKG** filed an Originating summons dated 6th April 2018 against **EWK** his former wife, the defendant seeking declarations that the properties known as Ngong/Ngong/[.....] and Kajiado/Ntashart/[.....] both acquired solely by the applicant during the subsistence of the marriage and registered the his name belong to the applicant. He also sought an order that the said properties be settled for his benefit in such manner and proportions the court deems fit and an injunction restraining the Respondent from alienating, encumbering or in any way disposing of the suit properties. he also prays for costs of the suit.

2. The Originating Summons is supported by an affidavit by the applicant sworn on 6th April 2018 filed together with the Summons. The applicant deposes that he married the Respondent on 6th June 1995 at GRC Church Dandora under African Christian Marriage and Divorce Act Cap 151 Laws of Kenya and had 2 issue of the marriage now adults. He deposes that he acquired the two parcels of land during the subsistence of the marriage but out of his own finances and the properties are registered in his name.

3. The applicant states that he used to work as a hotelier and supported the Respondent in advancing her education but later turned cruel against him and attempted to have his life cut short. They separated in July 2006 after an attempt on his life left him paralyzed and that he now lives with his aged parents. He states that he fears that his right to the two properties may be interfered with by the respondent. He attached copies of the title for the two properties to his affidavit.

4. The Respondent filed a replying affidavit sworn on 22nd October 2018 and filed in court on 26th October 2018. The Respondent deposes that they got married in 1989 under Kikuyu Customary Law and later solemnized their marriage in 1995 in church. The marriage was dissolved in CMC Divorce Cause No. 200 of 2014.

5. The Respondent deposes that they jointly purchased parcel No. Ngong/Ngong/[.....] at Kshs. 150,000/= and that she contributed Kshs. 110,000/= of the purchase price. She further states that she paid for the construction of the building and other developments including all the furniture. According to the Respondent, she contributed about 80% towards the purchase of the property and furniture. She also states that she was solely responsible for providing for the family and that despite the fact that the applicant was gainfully employed, he did not contribute much towards the purchase of the property but had them registered in him name.

6. According to respondent, the applicant even used title number Kajiado/Ntashart/[.....] to obtain a loan facility of Ksh. 20,000/= in the pretext of paying school fees though he was not paying any and that the applicant even sold a family car KAD [...] C, and other household items. She urged that these actions be taken into account in adjusting the contributions. The Respondent therefore pleads that she is entitled to a share of the property and prays for declarations of her own that Kajiado/Ntashart/[.....] was acquired and developed by funds and efforts; that she is entitled to 80% or such other higher proportion of share on Kajiado/Ntashart/[.....]; that the Ngong/Ngong/[.....] was acquired by her and all developments thereon were done by use of her funds and effort and that the property is held in trust for the family and should be transferred and registered in her name.

7. The respondent further seeks declarations that Motor Vehicle KAD [...] C and household items acquired during the marriage were acquired through her funds and effort and should be considered in any proportions. She also prays for an injunction restraining the applicant from selling, alienating, encumbering or in any way dealing with the two parcels of land.

8. To this response, the applicant filed a replying affidavit on 4th February 2019. He denies acquiring the properties jointly with the respondent. He states that he solely acquired the properties using his own funds since he was in employment; that he sold the motor vehicle and took a loan to pay school fees for the children after he had lost his job. He states that although the respondent also acquired properties in her own name during the marriage, she has not disclosed them yet she claims those he himself acquired.

Evidence

9. The applicant gave evidence during the hearing of this matter. He told the court that he and the respondent got married in 1995 after courting for 6 years. He was at the time employed at [Particulars Withheld] Hotel Nairobi. They got two children George, the first born in 1989 and James in 1992. He testified that he purchased Kajiado/Ntashart/[.....] in 1989 and later purchased Ngong/Ngong/[.....]. He constructed a house on their Ngong parcel and moved in. He told the court that at the time he purchased the properties, the respondent did not contribute towards the purchase since she was not employed.

10. He told the court that he left the matrimonial home in 2006 after he was constantly attacked by robbers which made him fear for fear of his life; that he was not aware of the respondent's claim that she constructed the house and that the documents she is relying on are not genuine and that some of them have been altered to suit her claim. In cross-examination, the applicant told the court that the respondent was a housewife and was not doing any business when he married her; that he started constructing the house in 1997 up to 1999 and that when he left the matrimonial in 2006, he left all documents in the house.

11. The respondent testified that they got married in 1989 and not in 1995 and that they had their first child the same year; that she used to work at Dagoreti market before she was married where she used to supply meat and that she even supplied meat to [Particulars Withheld] Hotel. According to the respondent, the applicant used to drink a lot and did not take care for the family; that she contributed Kshs. 110,000/- towards acquisition of Ngong/Ngong/[.....] and that the applicant only paid Ksh. 40,000/=. She told the court that she later noted that her name was missing from the Share Certificate and went to see Benson Nganga who had sold the property to them and asked that her name be included in the Share Certificate which was done.

12. It is the respondent's case that she later went to see Nganga who told her that he had given the title deed to the applicant. She testified that she solely developed the Ngong property and relied on a bundle of documents including receipts she produced in court to support her contention. Regarding parcel No. Kajiado/Ntashart/[.....], the respondent told the court that they jointly purchased that property.

13. In cross-examination, the respondent told the court that she is currently working and denied forging any documents. Shown documents at page 7 and 8 of her bundle of documents – receipt dated 12/1/2016, 9/1/2018, 9/1/2018 and 5/1/2018 as well as ETR which shows the date of 9/1/2018, the respondent confirmed that the receipts were for materials purchased in 2018. However, some receipts showed the same amount as in other receipts but she maintained that she bought the materials. Referred to page 11 of the documents, she stated that the documents from the contractor who laid the foundation for the house but admitted that they were blank.

14. The witness maintained that they jointly purchased Kajiado/Ntashart/[.....] but admitted that she did not have the sale agreement or receipts. She also admitted that she had no evidence of monthly income though she contributed money for its purchase. She also told the court that she could not remember the person who sold the property to them although she said it cost Kshs. 30,000/=. She told the court that she completed her 'O' Level education in 1987; that she used to sell meat but had no evidence of employment or that she was working. She also had no evidence of her income.

15. She told the court that she solely paid for the construction of the house and that the applicant never contributed anything. She relied on documents at page 11 of her bundle of documents receipts from Safi Terrazzo & General Contractors dated 13/1/1997 – a photocopy and said that she did not have the original. The document is for Kshs. 70,000/=. She said she had no other evidence for payment.

Applicant's Submissions

16. Parties filed written submissions which they were to highlight. Miss Fozah, learned counsel for the applicant submitted highlighting their submissions dated 4th June 2019 that the issues arising from suit are: whether there was a customary marriage; Whether the properties are matrimonial properties and whether the respondent contributed towards the purchase of the properties.

17. On the first issue, it was counsel's submission that there was no customary marriage between the applicant and the respondent because the Decree Nisi relied on by the applicant recognized only one form of marriage, Christian marriage in 1995. Well, I do not think this is an issue for this court at this stage. Parties agreed that they met in 1989 or there about and that they had a child in the same year. There after they solemnized their marriage in church. That marriage was dissolved by a court of competent jurisdiction. This court does not therefore have to delve that issue again. It is not necessary in these proceedings because whereas the parties had their first child in 1989, they got the second child in 1992 and that is not an issue for this court. The issue before this court is different and not about marriage at all.

18. On whether the properties are matrimonial properties, learned counsel submitted that they are not as envisaged by the Matrimonial Properties Act. According to counsel, parcel No. Kajiado/Ntashart/[.....] was purchased in 1989; was acquired solely by the applicant in his name and is undeveloped. With regard to Ngong/Ngong/[.....], counsel submitted that it was also purchased prior to the marriage by the applicant and was developed in 1997 during the marriage and the family moved in in 1999. She submitted that the applicant left the home in 2006 for his own safety. According counsel, the respondent can only claim partial interest on the development if at all. It is counsel's contention however, that the respondent produced forged documents including a Share Certificate which indicates a totally different parcel of land namely Ngong/Ngong/[.....].

19. Regarding contribution, the counsel argued again that the documents purported to show contribution were forged and were full of anomalies. According to counsel, the total amount in the receipts does not in any event exceed Kshs. 500,000/=. She prayed for the orders.

20. Counsel for the respondent did not attend court to highlight their written submissions dated 13th June 2019. They therefore are deemed to have relied on the written submissions. In their written submissions, the respondent maintained that she jointly purchased the properties with the applicant but they were registered in his sole name and that they constructed a matrimonial home on Ngong/Ngong/[.....] but later, the applicant deserted the matrimonial home. It was submitted that the respondent paid Kshs. 110,000/= of the purchase price out of Ksh. 150,000/= for the Ngong property and paid for the construction of the house. She submitted that she contributed 80% in the purchase of he

household items and that she made both monetary and no monetary contribution towards the purchase of matrimonial properties.

21. The applicant relied on section 6(1) of the Matrimonial Properties Act on the definition of matrimonial property; Section 2 of the Act on the definition of contribution and Section 14 of the Act on where property is acquired during marriage but registered in the name of one spouse or both spouses. Further reliance was placed on the decision in *PNN V ZWN [2017] eKLR, Waki, JA*, on share of properties and *PWK V JKG [2015] eKLR* for the submission that where the disputed property is not registered in joint names of spouses but in one spouse's name beneficial share of each spouse would depend on their Proven proportions of financial contribution either direct or indirect towards acquisition of the properties.

Determination

22. I have considered this matter; the response thereto; evidence by parties and submissions by counsel on behalf of their behalf. I have also considered the authorities relied on. The applicant and the respondent were husband and wife. Their relationship took a turn and the marriage was eventually dissolved by a decree of a court. The parties met in 1989 and had a child in the same year and got their second child in 1992. They solemnized their marriage in church in 1995.

23. The dispute before court relates to the properties which were acquired before marriage, according to the applicant, and during the marriage, according to the respondent. This suit has been brought by the applicant, the respondent's former husband, for a declaration that the properties are not matrimonial properties, while the respondent, the former wife, seeks her own declaration that they are matrimonial properties and that she has a share on those properties. This suit, therefore, relates to two properties; KajiadoNtashart[.....] acquired in 1989 and title deed issued in 1992 and Ngong/Ngong/[.....] acquired much later.

Whether Kajiado/Ntashart/1944 is Matrimonial Property

24. The applicant argues that he single handedly acquired parcel No. Kajiado/ Ntashart/[.....] in 1989 and that was why it was registered in his sole name. The property is undeveloped. According to the applicant, he was then working as hotelier with the Norfolk Hotel and was therefore able to raise the purchase price. The respondent on the other hand contends that she contributed towards its acquisition and that it cost Kshs 30,000.- In cross-examination, she admitted that she could not tell who sold the property to them and that she did not have the sale agreement. Her argument however was that she contributed financially towards its acquisition.

25. I have considered the evidence of parties on the acquisition of this particular property, whereas the applicant states that he solely purchased this property, there is no denial that he was employed and therefore had the means to raise the purchase price. On the other hand, the respondent's evidence on employment was shaky. She had no formal employment; had no evidence of where she worked except what she told the court that she used to supply meat. She had no evidence of how much she made from that business either. She was therefore unable to say how much, if any, she contributed towards the acquisition of this property. There is therefore no proof that she made any monetary contribution towards the purchase of this property.

26. That then leaves the aspect of non-monetary contribution as the only other consideration whether it would justify the basis for her claim of a share to this property. Even on this the respondent must establish on a balance of probability that she made non-monetary contribution towards the acquisition of this property. The applicant testified that he purchased the property in 1989 and the title deed issued in 1992. Parties met in 1989 but there is disagreement on the date of marriage. What is however clear is that they had a relationship out of which they had a child later in that year. They got their second child in 1992. They solemnized their marriage in church in 1995. The respondent had therefore not lived with the applicant for long to justify her claim of non-monetary contribution.

27. Where a party wants to rely on non-monetary contribution as a basis for claiming a share of property acquired during a marriage, there must be satisfactory evidence that indeed there was some form of contribution. It is not enough for one to merely state that she or he contributed in any other way other than monetary without showing that this was the case. If the applicant and the respondent met in 1989 and started a relationship what non-monetary contribution would she have given towards the purchase of this property given that they were just starting to live together?

28. On the evidence on record, the conclusion I come to is that Parcel No. Kajiado/Nashart/[.....] is not matrimonial property. It was acquired solely by the applicant and rightly registered in his name. The respondent has no claim over it.

Whether Parcel No. Ngong/Ngong/[.....] is matrimonial property

29. This property was acquired in during the subsistence of the marriage. Although the process of its acquisition started earlier, the title deed was issued in 1997. It is registered in the applicant's sole name. Parties were then living together as husband and wife. The respondent contended that she contributed Kshs. 110,000/- towards the purchase of the property while the applicant contributed only Kshs. 40,000/-. The respondent stated that she single handedly developed the property and paid for its development. She attached receipts to show that indeed she was the only one who developed it. She further stated that the applicant was only drinking and therefore played no role in the development of the property. The applicant on his part stated that he purchased and developed the property and they moved in in 1999. He however had to move out of the home in 2006 for fear of his life.

30. The respondent contends that she contributed Kshs. 110,000/= towards acquisition of the property. She has did not produce any evidence that she had this money. Granted that it would be difficult to keep receipts all this time. However, the respondent did not adduce satisfactory evidence that she was at the time able to raise that money. Secondly, the documents she relied on are not without issues. The certificate of ownership has erasures and she admitted that she caused the certificate to be changed by one Benson Nganga after she realized that her name had been omitted. This was done without involving the applicant. She did not call the said Benson to confirm that indeed she paid that money.

31. Moreover, some documents such as those from the Contractor are blank rendering them of no evidential value. One such document is a photocopy from the contractor for Kshs. 70,000/- which clearly could not be the cost of constructing a house. I also note that some of the documents are for 2016 and 2018 when the parties' relationship was already in turmoil. Nevertheless, the receipts show some form of monetary contribution towards the development of the house even though the applicant had already left the home.

32. I have carefully considered each parties position on this property and the evidence on record. I am not satisfied that the respondent has discharged the burden of proof on a balance of probability that she paid Kshs. 110,000/= towards acquisition of the property. There may have been contribution but certainly not what she said she gave. She did not categorically state the source of her income and how much it was. That notwithstanding, it cannot be denied that this is the house the family constructed during the time of their marriage. The respondent was there when the property was being developed and she must have contributed in any other way during its development. There is some evidence that the respondent later improved the property even after the applicant had left which must have raised its value.

33. Similarly, taking into account the meaning of contribution under Section 2 of the Matrimonial Properties Act, and considering the evidence herein, I find that in the circumstances of this property, there was contribution of each party towards its development though acquired by the applicant. I find and hold that parcel No Ngong/ Ngong [.....] is a matrimonial property in terms of section 6(1) of the Matrimonial Properties Act. The applicant holds the property in trust for himself and the respondent.

34. Having resolved this issue as I have, what then is the share of each of the parties in this property. The applicant acquired the property solely but the respondent contributed towards its development. None of the parties however adduced evidence on how much they contributed towards the development of the property to enable the court determine each party's level of contribution and share. The applicant has not attached any receipts while the respondent attached some receipts which were largely on some items covering the period after the applicant had left the matrimonial home. That being the case, and in the absence of evidence to the contrary, each party is deemed to have contributed equally towards its development. I therefore find and hold that each has an equal share over this property.

35. Consequently and for the above reasons, I hereby make the following orders

- a) A declaration is hereby issued that Parcel NO. KAJIADO /NTASHART/[.....] is not a matrimonial home. It belongs to the registered owner PKG absolutely.*
- b) A declaration is hereby issued that Parcel NO. NGONG/NGONG/[.....] is a matrimonial property and PKG, the applicant, holds it in trust for himself and EWK, the respondent in equal shares*
- c) Parcel NO. Ngong/Ngong/[.....] be valued and sold and the proceeds shared equally between PKG and EWK.*
- d) Either party will be at liberty to buy the share of the other.*
- e) No order as to costs.*

Dated, Signed and Delivered at Kajiado this 22nd day of November 2019.

E. C. MWITA

JUDGE