



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 50 OF 2013

L W W.....PLAINTIFF

VERSUS

C W K.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff herein L W W (hereinafter referred to as “the plaintiff ”), filed an Originating Summons dated 12th August 2013 against her husband C W K (hereinafter referred to as the “defendant’’) pursuant to Section 3A of the Civil Procedure Act and Order 37 rule 11 of the Civil Procedure Rules seeking orders directing valuation and sub-division into equal share various assets claimed to be matrimonial properties inter alia: L.R. [particulars withheld] Kasarani, Donyo Sabuk Komarock [particulars withheld], Plot No. [particulars withheld] Loc. Ten Block [particulars withheld], [particulars withheld] holding company, Plot [particulars withheld] L.R [particulars withheld], Motor vehicle registration numbers KAW [particulars withheld], KAU [particulars withheld], KAJ [particulars withheld], KBG [particulars withheld], proceeds from [particulars withheld] Academy and cash in Barclays and Equity Banks joint accounts. The plaintiff further prayed that, in the event the defendant failed to sign any documents to facilitate the process, the Deputy Registrar of the High Court to sign the same.

2. Application is supported by grounds on the face of it and an affidavit deponed by the plaintiff on the 12th August 2013 but filed on 14th August 2013 in which she claimed that sometime in 1996, she entered into a marriage relationship with the defendant under Kikuyu Customary Law which relationship gave rise to two children aged between 8 years and 14 at the time this suit was filed. However, due to irreconcilable differences, the said marriage hit a rock and broke down irretrievably leading to their separation sometime September 2012 hence the suit to equally share what they had acquired during the subsistence of their marriage.

3. In response to the summons, the defendant entered appearance on 8th October 2013 and filed a replying affidavit deponed on 7th November 2013 but filed on 8th October 2013 admitting his marriage relationship with the plaintiff but denied the averments contained in the plaintiff’s affidavit in support of summons claiming half share of the property in question on account of equal contribution.

4. On 20th March 2017, parties agreed to file witness statements and supporting documents besides the respondent filing a further affidavit sworn on the 13th March 2017. Despite parties’ agreement to proceed by way of viva voce evidence, on 11th May 2017, they changed their mind and by consent preferred to dispose of the matter by way of written submissions which they did by the plaintiff filing hers on 16th June 2017 and the defendant filed his on 21st September 2017 with a separate list of authorities filed the same day.

Plaintiff’s Case

5. According to the plaintiff’s affidavit in support of summons, she contracted her marriage relationship with the respondent under Kikuyu Customary Law sometime 1996 and cohabited as such till September 2012 when their marriage failed and irretrievably broke down thus culminating to their separation to date.

6. That during the subsistence of their marriage, they jointly acquired the aforesaid properties some of which were jointly registered in their names via their business ventures in the names of K Agriculture Products and [particulars withheld] Academy. To prove her claim, she attached a business registration certificate dated 27th December 2005 in their joint names in respect of [particulars withheld] Academy located in L.R. No. [particulars withheld]Plot Nos. [particulars withheld]Kasarani (annexure LWN1).

7. It is her contention that, the aforesaid properties were acquired by herself and the defendant to the exclusion of any other third party. That since their separation, the defendant has been enjoying the proceeds out of their joint business venture more particularly school fees from their academy to her exclusion hence wasting some of the properties and businesses.

8. She further averred that, since the defendant chased her away from their matrimonial home, she has no access to their joint bank accounts leave alone the newly opened bank accounts in the defendant's name with the intention of diverting some cash proceeds from school fees. She further claimed that, the defendant has since married the school (academy) headmistress whom he has since moved into their matrimonial home and another teacher as 3rd wife also settled in their 10 acre land.

9. To bolster her claim, the plaintiff attached a copy of title deed, a transfer form dated 20th September 2010 and a sale agreement dated 28th April 2010 in respect of Donyo Sabuk Komarock Block [particulars withheld] with the plaintiff and defendant as joint purchasers and registered owners. She further attached a partnership deed signed on 11th May 2010 between her and the defendant. The said partnership deed was in respect of a joint business in respect of [particulars withheld]Academy with effect from 27th December 2005 with the initial capital being kshs7,000,000 million in equal share.

10. With regard to Plot No. [Particulars withheld] in Bigima Holding Co. Ltd. also known as Komarock [particulars withheld], she attached a share certificate dated 19th November 2010 and a sale agreement dated 9th November 2010 between the defendant (buyer) and one Kenneth Irungu Karuga as the seller. She claimed that the property was jointly acquired using proceeds from their jointly managed business venture ([particulars withheld] academy) hence her half share beneficial interest.

11. Concerning motor vehicles KAU [particulars withheld] and KAJ [particulars withheld] registered in the name of [particulars withheld] Academy, the plaintiff contended that they were acquired in partnership as joint property out of school fees proceeds generated from the said academy which she single handedly started as a kindergarten but later joined by the husband thus expanding it to a full-fledged Nursery and primary school. She attached a joint loan application form to equity bank for a sum of Kshs.7,000,000 dated 5th July 2010(see annexure ck-1) and bank statement (ck-5) showing the amount advanced and recovered for purposes of improving and managing the school.

12. The plaintiff further contended that, besides the two aforesaid vehicles, the school had also acquired motor vehicle Registration. No KAW [particulars withheld] being a school bus and KBG [particulars withheld] (small car). The plaintiff urged the court to assess the loss incurred and the amount and benefits lost out of their school business since their separation to date plus interest thereof and then direct for a refund of her half share. Lastly, she asserted that the property in question were acquired exclusively by herself and the defendant considering that the defendant had divorced his first wife long before they met and that the claim over the existence of another wife and children is unfounded.

13. In submission, counsel for the plaintiff Mr. Gikunda reiterated the averments contained in the plaintiff's affidavit and further contended that the properties in question were acquired during the subsistence of the plaintiff and respondent's marriage hence matrimonial property. That properties acquired under a partnership deed arrangement should be shared equally after dissolving the partnership deed. Counsel further submitted that, damages for non-use or enjoyment of the partnership property since their separation should be assessed although he did not specify how much.

14. Counsel asserted that, the defendant having admitted and recognized the plaintiff as a wife, all properties jointly registered in their names or acquired during the subsistence of their marriage whether under partnership deed arrangement or not, should be shared out equally. Mr. Gikunda submitted as baseless and without proof the claim by the defendant that he had a wife by the time he married the plaintiff hence the need to take care of the first family is ill informed.

15. In support of his submissions, Mr. Gikunda listed some authorities among them the constitution of Kenya and married women's property Act although none was attached and no specific reference was made and their relevance in this case. Counsel further attached an authority in respect of **Christopher Michael Strong vs Sabina Wairimu Strong civil appeal no.221of 2000 Nakuru** in which the court awarded half share to each party in respect of property acquired during coverture despite the fact that none of them proved with exactitude the actual individual contribution.

Defendant's Case

16. In response to the plaintiff's claim, the defendant admitted in his replying affidavit that he was indeed married to the plaintiff who was his former employee at a stationery and hardware shop but denied chasing her away. He claimed that all the properties in question were acquired by himself out of his own effort with minimal contribution from the plaintiff. He averred that, the properties registered in his joint name with the plaintiff was out of trust being the closest person in the family hence meant to safeguard the interest of the other wife and children all of whom are not parties in this case and that their interest must be taken care of.

17. He claimed exclusive ownership and acquisition of properties registered in his name inter alia; motor vehicle Registration No KBG [particulars withheld], KAJ [particulars withheld], Plot No. [particulars withheld] on LR no. [particulars withheld] Bigima housing and plot no. [particulars withheld] LR .Loc Ten block [particulars withheld] Bigima housing. To buttress his argument, he attached sale agreements in respect of those properties reflecting him as the sole buyer. As regards properties acquired under [particulars withheld]Academy, the defendant claimed that the same was governed by a partnership deed a copy of which he attached providing for a special process of dissolution and dispute resolution mechanism.

18. In submission, the firm of King'ori and Co. Advocates submitted that the law governing distribution of matrimonial property is the Married Women Property Act 1882. Counsel urged the court to find that the suit herein is premature and an abuse of the court process since no divorce proceedings had been conducted and therefore the marriage has not been dissolved to give way for division of matrimonial property. Learned counsel further opined that the plaintiff had not established and or proved contribution of the property in question some of which he allegedly acquired before he contracted their polygamous marriage with the plaintiff.

19. In support of this assertion, counsel made reference to Section 7 of the Matrimonial Property Act 2013. The court was further referred to the case of **S.N.K. vs M.S.K. and 5 Others (2015) eKLR** and **P.N.N. vs Z.W.N. (2017) eKLR** where the court held that:

“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.**

It is the learned counsel’s submission that, properties acquired under a partnership arrangement cannot be divided under Matrimonial Property Act since there is an existing partnership deed which governs the process of dissolution including payment of debts to creditors.

Analysis and Determination:

20. I have considered summons herein, supporting affidavits, replying and further affidavits by the defendant, documentary evidence placed before the court, submissions by both counsels and authorities quoted thereof.

Issues for determination are:

- (a) Did the plaintiff and defendant contract any form of marriage relationship?**
- (b) If the answer to (a) is yes, was any property acquired during the subsistence of their marriage?**
- (c) Has the marriage been dissolved? If not, can the court share out any property acquired during the subsistence of their marriage before divorce or dissolution of marriage?**
- (d) Is the plaintiff entitled to half share of the alleged matrimonial property?**
- (e) Can a court distribute property acquired on a partnership arrangement under the Matrimonial Properties Act?**
- (f) Is the Married Women’s Property Act 1882 applicable in these proceedings?**

21. Before I proceed with the rest of the issues, I would like to address issue number (f) with regard to the applicable law in these proceedings. Although the plaintiff did not quote any relevant law governing division of matrimonial property in the heading of her summons, it is apparent that this suit was filed before but heard after the commencement of the Matrimonial Property Act No. 49 of 2013 which Act commenced on 16th January, 2014 thus replacing Married Women’s Property Act of 1882 which then ceased to apply in Kenya. However, both counsels in their submission agreed that the applicable law is the Married Women’s Property Act 1882 despite Mr. Kingori making some submissions referring to section 7 of Matrimonial property 2013.

22. It is trite law and ordinary rule of construction of statutes that, unless specifically stated that a provision that has been repealed or ceased to apply shall continue to apply, then, the new law shall not apply retrospectively. In this regard am guided by the supreme court finding in the case of **John Harun Mwau and 2 others vs IEBC and 2 others(2017)eKLR** in which the court held...

**“it is a conventional rule of construction that legislation
must be addressed to the future, and a statute should not be
given retrospective operation, interfering with antecedent
rights. We are inclined to the standpoint that, legislation
should bear only prospective effect, in the absence of special
legislative signal to the contrary. Where a legislative body
thus wishes to change the law regarding a past event/
action, its intent is to be clear enough.....”**

In this case, the cause of action arose and a suit thereof instituted before

the commencement of the 2013 matrimonial property Act. It then follows that, the relevant law applicable is Married Women's Property Act 1882 in particular section 17 which provides.....

“In any question between husband and wife as to the title to or possession of property, either partymay apply by summons or otherwise in a summary way to any judge of the High Court of justiceand the judge.....may make such order with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit.”

23. As to whether there was a valid or binding marriage between the plaintiff and the defendant, both parties are in agreement that there was a Kikuyu Customary Law marriage between the two. This is clear from paragraph two of the plaintiff's affidavit in support sworn on 12th August 2013 and paragraph 3 of the defendant's replying affidavit sworn on the 7th November 2013 in which he stated;

“that the contents of paragraph 2 of the affidavit are admitted save that I wish to state that the plaintiff was not my only wife but was my 2nd wife and when we got married, she knew that the 1st wife and children existed.”

24. In Paragraph 3 of the defendant's replying affidavit, he also admitted that out of their marriage, they were blessed with two children whom he acknowledged as his biological children. To that extent, I do hold that the plaintiff and defendant were validly married. Is the marriage still existing? From their respective affidavits, documentary evidence placed before court, submissions by both counsels, there is no evidence of divorce proceedings having been undertaken under statute or customarily. Effectively, the marriage is still subsisting same having not been dissolved.

25. Did the couple acquire any property during the pendency of their marriage? According to the plaintiff, all properties listed in the summons were acquired during the pendency of their marriage although most of them were registered in the defendant's name with resources earned from school fees out of their Academy.

26. On the other hand, the defendant admitted that they operated joint business with regard to [particulars withheld]Academy which property was financed with a loan from a financial institution repayment of which he has undertaken alone since 2012 after the plaintiff moved out of their matrimonial home. He stated that all properties registered in his name were acquired without the support of the plaintiff who in any event had nothing when they met. He claimed that all properties were registered in his name absolutely save for Oldonyo Sabuk Komarock [particulars withheld] which is registered in their joint names.

27. As to the school property, he stated that the same should be determined in accordance with the partnership deed which both parties admitted has been in existence since the year 2005.

28. The key question is, can a court share out matrimonial property of a couple that have not dissolved their marriage or divorced. This argument was brought on board by Mr. Kingori for the defendant who sought to have the suit dismissed on grounds that the suit herein was premature as the parties were still married. Both parties are in agreement that their marriage has not been dissolved and that they have been living separately since 2012. Prior to the enactment of the 2013 Matrimonial Property Act, parties to a marriage would under Section 17 of the Married Women Property Act 1882 petition for division of matrimonial property even before dissolution of their marriage. I must however state and acknowledge that, am alive to the fact that there are several authorities including court of appeal decisions where it had been held that a cause of action for division of matrimonial property could not stand before dissolution of marriage (see Peter Ndungu Njenga vs Sophia Watiri Ndungu(2000)eKLR) and Murang'a H.CCC no.1 of 2013(OS) Peris Wambui Mugacha vsEphraim Mugacha.

29. However, the legal position has since changed following the court of appeal decision in the case of PNN VS ZWN (2017) eKLR. In this case, the parties who were married under statute, moved the court for division of matrimonial property under section 17 of the Married Women's Property Act 1882. The court allowed division of matrimonial property despite the fact that marriage had not been dissolved. Referring to the case of Hitchens vs Hitchens (1945)1ALL ER787 where similar holding was made, the court of appeal had this to say:

“In this case, as earlier observed, marriage between P and Z

had virtually come to an end but subsisted on paper. P had already moved in with another woman and transferred part of the disputed property to her. The parties had to come to terms with the realty they were no longer going to share or enjoy joint ownership of whatever property they may have previously owned and therefore the wisdom in putting their house in order. I would answer the second question in the positive.”

30. The second question answered in the positive by the court of appeal was whether section 17 of the Married Women’s Property Act 1882 applied to division of matrimonial property where marriage had not been dissolved. Based on that decision, it is my finding that the court can distribute matrimonial property in question in the instant case in accordance with section 17 of the Married Women’s Property Act 1882 despite the subsistence of the marriage.

31. However, the story is different under the Matrimonial Property Act 2013 Section 7 which is couched in mandatory terms as follows:

“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”.

32. As to whether property acquired through a partnership deed joint venture can be shared out as matrimonial property, both parties are in agreement that the same is subject to the deed agreement which provides for a special alternative dispute resolution mechanism.

33. Paragraph 9 of the said deed provides that in case of a dispute in management or running the partnership, the same shall be determined by a sole administrator to be appointed by the Law Society of Kenya at the request of parties and whose decision shall be binding. There is no evidence that such dispute resolution has been undertaken. It is my finding that where there is a mutually agreed dispute resolution mechanism in case of a dispute, the court shall let the process take its full course in default parties can seek a civil remedy before court. In the circumstances, the dissolution of [particulars withheld] Academy and its proceeds is a subject of a partnership deed with specific dissolution guidelines hence parties are advised to follow the same.

34. Were properties in question acquired during the subsistence of the marriage? According to the plaintiff, all properties listed in the summons and affidavit in support were acquired during the pendency of their marriage with funds generated from their partnership venture. In this case [particulars withheld] Academy. The plaintiff stated in her witness statement that, when she first met the defendant, she was running a kiosk and later a mitumba business while the defendant had nothing. That they started staying at Ngumba estate where they stayed until they relocated to a house in Kasarani where the defendant had an incomplete house which they jointly contributed towards its completion hence established their matrimonial home. She further stated that the year 2005, she started [particulars withheld] Academy as a baby day care for children aged 3 years and below and later on invited the defendant as a partner. It is this business that expanded thus enabling them to do all investments giving rise to all these properties in question.

35. That after joining hands, they moved fast enough to register [particulars withheld] Academy as a business venture under Registration of Business Names Act and a certificate issued on 7th December 2005 with [particulars withheld] Academy reflected as operating on LR 57/31 Plot No. [particulars withheld] Kasarani Road (See LWW 1 plaintiff’s list of documents). They again proceeded to register jointly another business name known “K Agricultural Products in LR. No. [particulars withheld] Plot No. [particulars withheld] Kasarani Road.

36. From the evidence laid before this court by both parties, it is apparent that their main source of income during the subsistence of their marriage was proceeds in form of school fees out of their jointly managed nursery and primary school. None of them proved alternative source of income.

37. Before arriving at the final finding as to what property was acquired during their marriage and who contributed what, I wish to address the issue of acquisition of each property and when.

(a) Donyo Sabuk Komarock Block [particulars withheld].

38. The plaintiff attached a copy of title deed in their joint names, a transfer dated 20th September 2010 and Sale Agreement dated 28th April

2010. The defendant does not deny this fact. It is now settled law as reflected in various court decisions that where property is registered in joint names, there is a rebuttable presumption that the same is owned jointly in equal share by both parties unless the contrary is proven. **(See Kivuitu vs Kivuitu 1991 2 KRR 241)** where it was held:

“the fact that the property is registered in the joint names that each party owns an undivided equal share thereon because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the intention of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the entire ownership”.

39. Similar position was held in **Kamore vs Kamore (2000) IEA81** where the court held that:

“where property is acquired during the cause of coverture and is registered in the joint names of both spouses being a family asset is acquired in equal shares”.

This was also held in **Gathiya Essa vs Mohamed Alibhai Essa (CA No.141 of 1988)**, in which the court stated that:

“where the property is acquired during the subsistence of a marriage is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares”.

40. In the instant case, this property was acquired jointly during coverture and the defendant has not contradicted the plaintiff as to the source of their money to acquire the property. In the spirit of the authorities quoted, the property is presumed to have been jointly acquired and therefore each party entitled to equal share.

(b) Plot No. [particulars withheld] **in Bigma Housing Co. Ltd. also known as Komarock** [particulars withheld]

41. In respect of this plot, the plaintiff attached a share certificate dated 19th November 2010 and a sale agreement dated 9th November 2010 with the respondent as the buyer and Kenneth Irungu as the seller. She claimed that the same was acquired using funds generated from the academy. The defendant did not give any cogent explanation as to the source of the money he used to buy that property. To that extent the explanation given by the plaintiff is convincing hence the presumption that the property was jointly acquired using funds from the academy which was a joint business. The defendant was therefore registered hence holding the property in trust for the plaintiff who is entitled to equal share. **(See Christopher Michael Strong vs Sabina Wairimu Strong) (Supra).**

(c) Plot No. [particulars withheld] **Plot No.** [particulars withheld] **Kasarani in the name of K Agricultural Products and** [particulars withheld] **Academy.**

42. This is the property where the academy is located hence developed and improved using joint funds acquired through bank facility. Although plot No. [particulars withheld] was acquired on 24th October 1995 long before the two had gotten married, the same has allegedly been improved with developments thereon. The three properties are subject of a partnership deed which they signed and agreed on the mode of distribution by referring the dispute to the Law Society of Kenya for arbitration.

43. Having agreed on the mode of dispute resolution to property held jointly through partnership, the same is held jointly in equal shares subject to dissolution of their partnership deed in which debts and all other liabilities shall be taken care of first before the balance can be shared as per the partnership deed.

(d) (i) Motor vehicles KAW [particulars withheld] bus

(ii) KAU [particulars withheld] Van

(iii) KAJ [particulars withheld] Van

(iv) KBG [particulars withheld] Saloon

44. It is the plaintiff's assertion that they are properties acquired jointly during the subsistence of marriage. There is no dispute that they were all acquired during coverture with KAW [particulars withheld] and KAU [particulars withheld] registered in their school name. The defendant claimed that KAJ [particulars withheld] van and KBG [particulars withheld] Saloon car were his exclusively. However, he did not reveal the source of his income towards purchase of those motor vehicles. I will therefore hold that motor vehicles KAU [particulars withheld] and KAW [particulars withheld] school bus being school property are governed by the partnership deed agreement and the same shall be shared under that special arrangement for dispute resolution.

45. As to KAJ [particulars withheld] and KBG [particulars withheld] Saloon which the defendant is claiming exclusive ownership, I would hold that he is holding them in trust for the plaintiff and that the two shall be sold and proceeds shared out equally between the parties.

(e) Plot No. [particulars withheld] LR Loc Ten Block [particulars withheld] Bigma Housing Co.

46. This property was acquired on 12th November 2010 in the name of the defendant. (See annexure CWK 1A being share certificate). Again, the same property was acquired during the subsistence of marriage. According to the plaintiff, it was bought using money from their joint business (academy). The defendant did not controvert this assertion by adducing any other evidence to prove the alternative source. I will again hold that he was holding the same in trust for the plaintiff hence each party is entitled to equal share.

(f) Conveyance [particulars withheld]

47. From the conveyance attached, the same property was purchased the year 2010 in the joint names of the plaintiff and defendant. As held above, the property is presumed to be held in equal share as joint tenants. The defendant has not established or proven that the property was solely acquired to the exclusion of the plaintiff.

48. I must however state that there was no proof that any other wife to defendant if any, did contribute towards the acquisition of the properties

in question. If there was, then such wife or children should have sought leave to be enjoined as interested parties. The claim by the defendant that there is a first wife is a mere statement with no proof hence this

court will not make provision of non-existent wife or parties.

49. Based on the foregoing, the court will make orders as follows:

(a) That property known as Plot No. [particulars withheld] in Bigma Housing also known as Komarock [particulars withheld] and Donyo Sabuk Komarock Block [particulars withheld] will be shared equally between the plaintiff and the defendant, in default the same shall be valued by a joint valuer and sold and the proceeds shared equally. Each party shall be at liberty to buy out the beneficial interest of the other.

(b) L.R No. [particulars withheld] Plot Nos. [particulars withheld] Kasarani, in the name of K Agricultural Products and [particulars withheld] and motor vehicles KAW [particulars withheld] and KAU [particulars withheld] shall be shared in accordance with the partnership deed agreement.

(c) Motor vehicles KAJ [particulars withheld] and KBG [particulars withheld] shall be sold and proceeds shared equally.

(d) Plot No. [particulars withheld], LR Loc Ten Block [particulars withheld] Bigma Housing and

Conveyance [particulars withheld] will be shared equally in default the same

shall be valued by a joint valuer and the proceeds be shared equally.

In the alternative, any party willing shall be at liberty to buy out the beneficial interest of the other.

(e) This being a family dispute each party shall bear his or her own costs.

SIGNED, DATED AND DELVIERED AT NAIROBI THIS 15TH DAY OF JANUARY 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

Mr. Gikunda Counsel for Plaintiff

Mr. Omondi.....Counsel for Defendant

Edwin..... Court Assistant