



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NUMBER 10 OF 2016

(Formerly HC Civil Suit Number 348 of 2012)

A W N.....PLAINTIFF

VERSUS

F M N.....DEFENDANT

JUDGMENT

1. By way of an originating summons dated 11/9/2012 A W N (hereinafter the plaintiff) sued F M N (hereinafter the defendant) for orders.

1. **THAT** it be declared that the property known as

a. NJORO NGATA BLOCK [particulars withheld]

Registered in the sole name of the defendant is owned jointly and in equal shares by the defendant and the plaintiff herein and the defendant is required (sic) and holds the same as proprietor thereof as trustee for himself and the Plaintiff.

2. **THAT** this Honourable Court do take into account other matrimonial properties wasted and/or disposed off by the defendant including sale of Parcel no. NJORO NGATA BLOCK [particulars withheld] (sic) and family motor vehicles Registration No. KAJ [particulars withheld] Toyota Corolla and KBA [particulars withheld] Suzuki.

3. **THAT** the Honourable court be pleased to restrain the Defendant from occasioning further waste to the foresaid property, same being held in trust for the benefit of the family.

4. **THAT** the costs be borne by the Defendant.

2. The summary of the Plaintiff's case as gleaned from her supporting affidavit sworn on 11/9/2012 is that she is a wife to the Defendant. She annexes an affidavit attesting to the same. She adds that the requisite dowry (ruracio) payable under the Agikuyu Custom was paid. A total of Kshs. 30,000/= was paid. An affidavit sworn by R N N the mother to the Applicant attesting to this is filed.

3. The couple has lived together as husband and wife for 14 years (as at the time of filing suit). On or about February 2006 the couple acquired property known as Njoro Ngata Block [particulars withheld] and set up a matrimonial home.

4. The property Njoro Ngata Block [particulars withheld] is registered in the sole name of the Defendant though acquired jointly.

5. It is the Plaintiff's case that the Defendant sold family property namely Njoro Ngata Block [particulars withheld] and motor vehicle registration numbers KAJ [particulars withheld] and KBA [particulars withheld] and squandered the proceeds. The Defendant has threatened to sell the matrimonial home.

6. The Plaintiff avers that she took a loan and gave part of her business profit in the acquisition and development of the property. She thus asserts and lays claim in the said property under the **Married Women Property Act of 1882**.

7. The claim is wholly denied by the Defendant. In a replying affidavit sworn on the 27/11/2012, the Defendant avers that he built the subject house from his own efforts without any help from the Plaintiff. He also opened a business for the Applicant which is now running and valued at over Kshs. 3 million. The Plaintiff is said to have left the house with furniture worth over Kshs. 700,000/=.

8. It is urged that the union was not blessed with any child and the Plaintiff cannot claim any indirect/emotional contribution to the property.
9. In a further affidavit, the Plaintiff avers that the business alluded to by the Defendant is a small stall/stand where she sells children apparels and the entire stock has never been more than Kshs.10,000/=. She annexes a financial statement for the past 3 years. Of note is that the financial statement is a self generated one by the Plaintiff herself.
10. The Plaintiff states that their furniture in the house did not exceed a value of Kshs. 30,000/= and she only left with not more than 1/3 of the furniture.
11. On the 11/3/2015, directions were taken that the matter be disposed off by way of written submissions. Both parties complied and filed.
12. I have had occasion to consider the originating summons, the supporting and further affidavit, the replying affidavit and learned submissions by counsel.
13. Throughout the averments, it is crystal clear that the status of the Plaintiff and the Defendant as husband and wife is not in dispute. It is also an admitted fact from both divide that property known as Njoro Ngata Block [particulars withheld] is registered in the Defendant's name.
14. It is noteworthy that the claim is based on the then applicable **Section 17** of the **Married Women Properties Act, 1882** the precursor to our homegrown **Matrimonial Property Act (2013)**. Counsel for the Applicant has submitted extensively on the provisions of the **Matrimonial Property Act** in support of the case.
15. The Court is also invited to factor in alleged sale of land Reference Njoro/Ngata Block [particulars withheld] and motor vehicle registration numbers KAJ [particulars withheld] Toyota Corolla and KBA [particulars withheld] Suzuki by the defendant in deciding what share to give to each of the parties.
16. Ultimately, the issues for determination crystalize into;
- i) Whether the property Njoro Ngata Block [particulars withheld] is owned jointly in equal shares by the Defendant and the Plaintiff and that the Defendant holds the same as proprietor for himself and as a trustee for the Plaintiff.
 - ii) Whether Njoro/Ngata Block [particulars withheld], motor vehicle KAJ [particulars withheld] and KBA [particulars withheld] were matrimonial properties and if in the affirmative whether the Defendant sold the same for his own benefit and should the Court factor this in sharing out the property.
17. I will address issue No. (ii) above which on the material before Court is straightforward and has ready answers from the record.
18. My painstaking reading of the originating summons, the affidavits and the learned submissions reveals one startling fact; there is no iota of evidence to show;
- a) That land reference number Njoro/Ngata Block [particulars withheld] exists and/or that it was matrimonial property and was sold by the defendant. No evidence of title is availed. Other than what I consider a typographical error at prayer 2 of the originating summons where parcel of land is referred to as Njoro Ngata Block [particulars withheld] (instead of, I think, [particulars withheld]), the only mention of parcel number [particulars withheld] is found at paragraph 9 of the supporting affidavit to the originating summons where a mere statement is made that the Defendant sold the same. No attempt whatsoever is made to prove by way of evidence the existence of such a property and/or its sale by the defendant.
 - b) No evidence is offered in support that the named motor vehicle registration numbers KAJ [particulars withheld] and KBA [particulars withheld] existed, were owned jointly by the parties herein and were sold by the defendant for his benefit.
19. In view of paragraph 18 above, I come to the conclusion that the Plaintiff has failed to prove the existence of the said properties, their ownership and any misappropriation by the defendant.
20. Is property known as Njoro Ngata Block [particulars withheld] owned jointly in equal shares and held in trust by the Defendant for himself and for the Plaintiff?
21. The question of division of matrimonial property in Kenya has been a difficult one and which our Courts have grappled with for a considerable time as available case law demonstrates. **Waki JA** in **PNN Vs. ZWN [2017] eKLR** had this to say;

“The matter before us relates to the perennial war between husband and wife over matrimonial property after the collapse of their marriage. It has always been a murky waterway for the courts in this country to navigate since the applicable procedural law was a piece of archaic legislation enacted in England in 1882 and inherited as a statute of general application in this country.”

22. Even before the promulgation of the **Constitution of Kenya 2010** and the subsequent enactment of the **Matrimonial Property Act 2013**, the decisions of the Courts in **ECHARIA Vs. ECHARIA, NAIROBI CIVIL APPEAL NO. 75 OF 2001, NDERITU Vs. NDERITU CIVIL APPEAL NO. 203 OF 1997, KAMORE Vs. KAMORE, MUTHEMBWA Vs. MUTHEMBWA, CIVIL APPEAL NO. 74 OF 2001**, appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards acquisition of the property. The Court has a duty to assess the wife's contribution in the circumstances of each

case.

23. **Article 45(3)** of the **Constitution** provides that;

“45. (3) 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.”

24. On the application of this Article the **Court of Appeal** in **AGNES NANJALA WILLIAM Vs. JACOB PETRUS NICOLAS VANDER GOES (CIVIL APPEAL NO. 127 OF 2011)**, stated;

“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 recognise 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.”

25. The **Court of Appeal** while appreciating the equal rights of parties in a marriage which arguably extend to matrimonial property was alive to the fact that parliament was obligated by **Article 68** of the Constitution to pass laws to recognize and protect matrimonial property particularly the matrimonial home.

26. Parliament did indeed rise to the occasion and enacted the **Matrimonial Property Act 2013. Section 7** of the Act provides;

“Subject to Section 6(3), ownership of matrimonial property vests in 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 dissolved.”

27. **Section 2** of the **Matrimonial Property Act 2013** defines contribution 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.
- e) Farm work.

28. It follows from the foregoing that the onus is on the party who alleges contribution to prove such contribution in the acquisition of the subject property, be it monetary or non-monetary contribution.

29. The burden of proof lies on the Plaintiff to establish the contribution. **Section 107** of the **Evidence Act** Provides;

“107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. ”

Section 108 of the **Evidence Act** provides;

“108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

30. The evidence available is found in the affidavit in support filed by the Plaintiff and in the replying affidavit by the Defendant. At **paragraph 12** of her **supporting affidavit** sworn on the 11th September 2012, the Plaintiff deposes thus;

“Paragraph 12. That I took a loan, gave part of my business profit in acquisition and development of the said parcel of land and it is only fair that the defendant be restrained from further wastage and disposition of the family property.”

31. This blanket statement is not backed by any evidence of the loan allegedly taken neither is there evidence annexed of the business profits injected into the acquisition and development of the said parcel of land.

32. To the contrary, and in what is a material contradiction, the Plaintiff in her **further affidavit** sworn on 7/6/2013 depones at **paragraph 6** that;

“Paragraph 6. That in response to paragraph 32 of the Defendant's Replying Affidavit I wish to state that the business referred to by the Defendant is a small stall/ stand within a small exhibition room measuring 4ft x 4ft where I sell children apparels and whose the entire stock at any one given time has never been more than Kshs. 10,000/= and further that the business has been running at a loss since its inception and it is unconscionable and absurd and mischievous for the Defendant to state that he started for me a business venture worth Kenya Shillings Three Million (Kshs. 3,000,000/- (Annexed and marked 'AWN2' is a copy of th financial statement for the past 3 years).”

33. She exhibits “Notes of Financial Statements” showing a net loss in the period 31st December 2010, 31st December 2011, 31st August 2012. If she was not making money in this business, it is incumbent upon the Plaintiff to lay evidence of the source of her monetary contribution if at all.

34. The Plaintiff could still succeed in her claim if she established non-monetary contribution. Her entire supporting affidavit and the further affidavit are defeaningly silent on any non-monetary contribution she made. She does not show her involvement in domestic work and management of the matrimonial home. Neither has she given evidence of the companionship she gave to the defendant. There is no evidence of her involvement in management of family business or property. There is no evidence that she participated in farm work. The defendant asserts that they were not blessed with any child and this fact is not controverted. Hence there is no contribution through child care.

35. We again fall back to the principle of law on burden of proof. The Court cannot infer what is not tendered in evidence. As a general rule, a Court of Law will not rely on conjecture or assumptions. Neither can it be left to the Court to speculate on what contribution the Plaintiff could have made. Direct evidence must be tendered in support of such contribution. It is the duty of a claimant to lay cogent evidence before Court.

36. Which leads me to a necessary finding. The decision to prosecute this case through written submissions appears ultimately to have been ill considered and detrimental to the Plaintiff. It denied her the chance to fully ventilate the case. The veracity of the evidence on both sides remained untested. We have averments on oath which are denied by averments on oath. It is the word of the Plaintiff as against the word of the defendant, a situation that reminds me of **Section 3(4)** of the **Evidence Act** which provides;

“Section 3(4). A fact is not proved when it is neither proved or disproved”

37. Finally, I must acknowledge that **Article 45(3)** of the **Constitution** does recognise that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at dissolution of the marriage. That, however, in my understanding, does not mean that the mere fact of being married entitles a spouse to a share of property acquired solely by the other spouse.

38. I am guided in this holding by the dictum of *Kiage JA* in PNN Vs. ZWN [2017] eKLR where he stated;

“First, while I take cognizance of the marital equality ethos captured in Article 45(3) of the Constitution, I am un persuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough;

“45(3) Parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of the marriage.”

To my mind, all that the Constitution declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words all forms of gender superiority – whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage covered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law.

Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally. I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in *FRANCIS NJOROGÉ Vs. VIRGINIA WANJIKU NJOROGÉ*, Nairobi Civil Appeal No. 179 of 2009;

“..... a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in *LOCK YENG FUN Vs. CHUA HOCK CHYE* [207] SGCA 33;

“It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and by its very nature cannot be – a precise mathematical exercise.”

I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of *laissez-passer*, a passport of fifty percent wealth regardless of what one does in that marriage. I cannot think of more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor seeking, pleasure-loving and divorce-hoping brides and alas, grooms.

Industry, economy, effort frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words “50 per cent.”

Thus it is that the Constitution, thankfully, does not say equal rights “including half of the property.” And it is not accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better than to simply declare that property shall be shared on a 50:50 basis. Rather, it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.

Section 7 of the Act states:

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

Our new constitutional dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty. What the Matrimonial Property Act has done is recognize at Section 2 that contribution towards acquisition of property takes both monetary and non-monetary forms which essentially opens the field of contribution to both spouses without distinction on the basis of remunerative employment, especially so in an urban setting. Non-monetary contribution is defined as including

- (a) Domestic work and management of matrimonial home.
- (b) Child care.
- (c) Companionship.
- (d) Management of family business or property, and
- (e) Farm work.

I have gone into all this detail to demonstrate my firm conviction that both from a practical stand-point and from the statute law now ruling, (though admittedly was not in force when the learned Judge rendered the impugned judgment) neither the Constitution nor general law imposes, compels or lionizes the doctrine of 50:50 sharing or division of matrimonial property.”

39. And very finally, I associate myself with the sentiments of *Mativo J* in Petition Number 164B of 2016 when he upheld the constitutionality of **Section 7** of the **Matrimonial Property Act** and his conclusion that the essence of the provision is that Courts will evaluate the interest of the parties and the property and make a just and equitable distribution of the property or properties. I will add however, that such evaluation of the interest shall be predicated on the evidence of contribution both monetary and non-monetary availed in the respective trial.

40. For the above stated reasons, I make a finding that the Plaintiff has failed to prove the case to the required degree. The suit is dismissed. Due to the relationship of the parties, I direct that each party to bear its own costs.

Dated and Signed at Nakuru this 14th day of June, 2018.

A. K. NDUNG'U

JUDGE