



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 10 OF 2016 (OS)**

**D K B.....PLAINTIFF**

**VERSUS**

**K S B.....DEFENDANT**

**JUDGMENT**

1. The Originating Summons herein dated 11<sup>th</sup> December 2015 was filed at this registry on 17<sup>th</sup> December 2015 by the plaintiff who seeks various declarations relating to the assets set out in the affidavit sworn on 11<sup>th</sup> December 2015 in support of the suit to the effect that they were all acquired during matrimony with the joint efforts of the parties, the defendant has been holding them in trust and there is a resulting trust and that the court should order that the same be shared out equally between them. She also prays for return of jewelry and gifts that she says were received at the time of the celebration of their marriage.

2. In the affidavit in support, the plaintiff states that the parties married in 1998, had two children between them, and were going through a divorce process with two suits at the lower court being Divorce Case No. 602 of 2014 and Children's case No. 1641 of 2014. She says that they jointly acquired three landed assets during matrimony, being LR Nos. [Particulars Withheld] Nairobi South C, [Particulars Withheld] and [Particulars Withheld] Parklands. She says the assets were registered in the defendant's name, but she had an interest therein. She is also claiming half-share of the defendant's shareholding in [Particulars Withheld] Limited which has a business in Nairobi and assets in Nairobi, Mombasa and Narok. She states that she contributed to the acquisition of these assets by her provision of welfare to the defendant and the rest of the family by buying food and clothing, and catering for the children's school fees, medical bills, and trips, among others. She avers that the defendant has refused to provide for her and the children after she got employed. To support her case, she has attached to the affidavit two documents, a copy of their certificate of marriage and a note allegedly in the hand of the defendant where he pledges to have the name of the plaintiff added as joint owner in all properties.

3. The defendant replied to the suit papers through her affidavit sworn on 13<sup>th</sup> June 2016. He concedes the marriage. He states that the plaintiff started working on her own volition, and not because the defendant was not providing. He asserts that all three landed assets were acquired by him single-handedly, without any support from the plaintiff. He has attached several documents to his affidavit to support those assertions, being charge documents from various financial institutions which bear his sole name, bank cheques made out to advocates presumably acting in the sale transactions, receipts issued by some of the said advocates, bank statements from his bank account as evidence that he was repaying the loans through monthly installments. He avers that he holds no shareholding in [Particulars Withheld] Limited, and has attached a letter dated 7<sup>th</sup> April 2016 from the Registrar of Companies which shows the shareholding in the company to be in the hands of others. He has denied that the plaintiff was solely responsible for the household expenses of the family as well as expenses relating to the children's education and general welfare. He asserts that it was him who met all those expenses. On the handwritten note exhibited to the plaintiff's affidavit, he concedes that he wrote the same before the suits were instituted in an effort to reach reconciliation with her and salvage the marriage. He asserts that the plaintiff has not provided proof of contribution to the acquisition of the assets in question.

4. The case was heard orally on 8<sup>th</sup> February 2018. Both parties were in attendance. They testified and were cross-examined. Their respective testimonies gave vent to the averments made in their respective pleadings and affidavits. I need not recite the testimonies as they are on record. At the end of the oral hearing I directed the parties to file and exchange written submissions. There has been compliance. I note from the record that the parties have filed written submissions and authorities to support their respective cases. I have carefully perused through them and noted the arguments made therein.

5. The legal base for division of matrimonial property is set by the Constitution and the Matrimonial Property Act, 2013. Article 45(3) of the Constitution states the principle of the equality of the parties to a marriage at the time of its celebration, during coverture and upon divorce. Section 7 of the Matrimonial Property Act, 2013 requires that ownership of matrimonial property be determined on the evidence of contribution of either spouse to the property.

6. The Constitution gives parties to a marriage equal rights, so that when property is acquired during marriage for the benefit of the family, then, at dissolution of the marriage, its distribution should be subjected to the equality test. The provision in the Matrimonial Property Act, 2013 requires proof of contribution, which, in my very humble view, appears to chip away at the constructional standard. Ultimately, the supremacy of the Constitution over statute ought to hold sway.

7. Looking at the material before me, it is common ground that the three landed assets were acquired during coverture. The loans to raise money for the purchases appear to have been procured by the defendant, hence the charge documents are in his name, and ultimately the assets were registered in his name. There is dispute as to who was responsible for the domestic budget and who catered for the children's welfare. The plaintiff appears to say that as the defendant acquired these assets she was busy taking care of him and the children. She asserts that she took employment after the defendant began to fail to provide. It would appear that the decision by the plaintiff to take up employment is at the core of the marital breakdown. My interpretation of it is that the defendant committed to acquiring assets for the family, his finances went low, he was not able to provide sufficiently for the family and his wife was forced into employment to fill the gap.

8. A document was placed before me written in the hand of the defendant where he proposed to have the name of the plaintiff in all the assets

as joint owner. He admits writing the note and says that he was working towards reconciling his marriage, hence the proposals which the plaintiff rebuffed. There is also evidence that the plaintiff had possession of a document of title to one of the landed assets, the same having been given to her by the defendant to facilitate her adding her name to the document as co-owner. It is not clear how she was to do that, but there was clear understanding between the two parties on that. What I deduce from these two pieces of evidence is that the defendant always considered these assets as matrimonial, and that the plaintiff was entitled to a portion thereof and what he had in mind was joint ownership. The proposals were made before the total collapse of their marital relationship. It would appear now that the proposed joint ownership cannot be tenable any more.

9. On the shareholding in [Particulars Withheld] Limited, the defendant has placed material on record to show that he held no shares in that company as at 7<sup>th</sup> April 2016. The plaintiff has not provided any evidence to counter that. On the jewelry and gifts I am not satisfied that the plaintiff has led evidence that would support grant of that prayer. I shall accordingly not make any orders in relation to it.

10. In the end am persuaded to make orders as follows: -

(a) That I allow the Originating Summons dated the 11<sup>th</sup> December, 2015 in the terms proposed at prayers 1, 2 and 3 thereof, but limited to the assets listed in paragraph 6(a)(b) and (c) of the affidavit of the D K B of 11<sup>th</sup> December 2015;

(b) That each party shall bear their own costs; and

(c) That any party who shall be aggrieved by the decision and the orders made herein shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>TH</sup> DAY OF JULY, 2018.**

**W. MUSYOKA**

**JUDGE**