



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCC NO. 6 OF 2012 (OS)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

M L M.....PLAINTIFF

VERSUS

C M S.....DEFENDANT

JUDGMENT

1. Through an originating summons of even date filed on 24th January 2012 pursuant to Section 17 of the Married Women's Property Act 1882, the plaintiff herein MLM former wife to the defendant CMS sought orders as hereunder:

(1) That it be declared that immovable property known as house no [particulars withheld]Kileleshwa acquired by joint funds and efforts of the applicant and respondent is owned jointly by the applicant and the respondent.

(2) That this honourable court be pleased to order the division of the said property proportionate to each party's contribution to the purchase thereof.

(3) That the respondent be restrained from alienating, encumbering, interfering and or in any manner disposing of the said property pending the hearing and determination of this application.

(4) That this honourable court be pleased to grant such further or other relief as may be just in the circumstances.

(5) That costs of this application be in the cause.

2. Application is predicated upon the grounds set out on the face of it to the effect that the said property was acquired during coverture with the plaintiff making greater contribution towards its purchase. In support of the summons, the plaintiff filed an affidavit sworn on the 24th January 2012 deposing in detail how the property in question was acquired.

3. She deponed that upon celebrating their marriage on 7th July 1983 at the Civil Status Registration office, Ivanavo Town Council, Ivanavo Region within the Russian Federation, they settled and continued cohabiting as husband and wife in the said region until 1996 when they relocated to Kenya. While in Kenya, they settled and cohabited in various places interalia Zimmerman Nairobi, Eldoret, Madaraka Nairobi and Kileleshwa. They were however blessed with two living issues namely: MCM born 1984 and KM born 1986.

4. That sometime in the year 2000, while working with the Ministry of Trade and Industry, she applied for allocation of a government house located within Kileleshwa Estate. Consequently, she was allocated house No. [particulars withheld] Kileleshwa Githunguri road but due to some error, she was re-allocated house No. [particulars withheld] Kileleshwa which is the subject of these proceedings. She attached a copy of the application letter dated 17th July 2000 (Annexure MLM-2) as proof of the said request.

5. That owing to her insufficient house allowance at the time, she and the defendant agreed to have the house allocated in the defendant's name whose house allowance as an employee of Teachers Service Commission then was slightly higher for purposes of monthly rental payment to the relevant ministry. She asserted that they later mutually agreed for the defendant to apply for allocation of the house which the government was then disposing to civil servants in his name which he could then later include her name.

6. Upon allocation of the house to the couple but through the defendant's name, the couple was required to make initial payment which the defendant was unable to raise. Determined to acquire the house, the plaintiff applied for a loan of Kshs.180,000 from Barclays Bank. She attached a letter of offer for a loan of Kshs.180,000 and subsequently a banker's cheque dated 11th September 2002 for a sum of 200,000

payable to the Commissioner of Lands (see annexure MLM-3). She further attached her bank statement reflecting loan recovery vide standing order of Kshs.7,218 per month.

7. That besides the bank loan, she also secured a Sacco loan from [particulars withheld] Co-operative Savings and Credit Society Ltd for a sum of Kshs.371,000/= (See Sacco application form and bankers cheque for the same amount marked MLM-5). She further attached an internal memo (annexure MLM-6) from the principal accounts Controller addressed to PS Ministry of Housing confirming that they had received a sum of 550,000/= in respect of House No. [particulars withheld] vide cheque No. 400 893 and 001044 all referring to the banker's cheques the plaintiff had been given by Barclays bank and [particulars withheld] Sacco through co-operative bank for that purpose.

8. Following a demand letter dated February 2003 (Annexure MLM7) by the Ministry of Lands seeking payment of ground rent and annual rates to the tune of Kshs.61,122/= for the year 1999 – 2003, she again made arrangements and paid by a bankers cheque dated 22nd July 2003 (see annexure MLM8).

9. Unfortunately, sometime May 2004, the plaintiff discovered that the respondent had craftily organized with some staff at the ministry and his office not to be deducted monthly rent thus accumulating rent arrears to the tune of 730,000/=. She attached a demand letter marked annexure MLM-9 to confirm that the defendant had defaulted in rent payment to that extent. Soon thereafter, they received another letter from the Ministry of Housing and Lands adjusting the value of the house upwards thus increasing the purchase price to 2,720,000 on grounds that the original allotment (allocation) at Kshs.570,000 was irregular. The said letter dated 9/9/2004 was attached as annexure MLM-10.

10. To avoid eviction embarrassment, the plaintiff made arrangements and paid the outstanding monthly rent arrears totaling to Kshs.628,733. Once again she applied for a loan through Barclays Bank for a sum of Kshs.700,000 which was approved vide a letter dated 6th October 2004 by the Barclays Bank Manager (annexure MLM-11). She attached her bank statement reflecting standing order for loan recovery and a bankers cheque drawn in favour of the PS Lands and Housing dated 28th October 2004 for a sum of 628,733 (Annexure MLM12).

11. Following her effort to make all this payment, the couple agreed to execute an agreement that upon completion of the payment of the purchase price, the house was to be registered in their joint names for the benefit of the children. She annexed the draft agreement as proof (MLM15). Contrary to the said agreement, the defendant refused to sign on his part. That from the year 2005, the defendant turned wild and violent thereby threatening her with cruelty thus chasing her away from the house together with their two children. She asserted that the house which is currently rented out by the defendant is fetching monthly rent while the defendant stays in a servant quarter.

12. On 23rd February 2012, orders restraining the defendant from disposing and or alienating the property were made and the suit stayed pending finalization of Divorce Cause No. 184/2011 then pending but which was later dissolved on 21st February 2017. The applicant who had not filed any response or entered appearance was given 30 days to do so.

13. Unfortunately, the respondent did not comply as he did not file any response. By an order of the court dated 26th April 2014, the respondent was again given 3 months to file his replying affidavit but he failed to comply. On 8th February 2018 Hon. Judge Muchelule in the presence of both parties directed for the matter to proceed before me on 15th March 2018. Once again the respondent was given an opportunity to file and serve his response. Again the respondent did not file any response.

14. On 15th March 2018, the respondent/defendant did not appear and the matter proceeded ex parte. During the hearing, the plaintiff adopted her affidavit in support of the summons as her testimony. She however added that when the ministry hiked the purchase price to 3,372,733, the defendant filed a suit being Nairobi HCC No. 966/05 against the ministry accusing the ministry of breach of contract. The suit was heard and determined with the ministry's new value set aside and then directed to transfer the house in the defendant's name based on the original price. She produced a copy of the judgment as exhibit (Ex.18). She prayed for orders that the house be allocated to her or it be sold and that she be given 90% share.

15. At the close of the hearing, the court reserved judgment for 14th April 2018 and counsel for the plaintiff to file submissions. However, on 12th April 2018, the applicant appeared in open court when various matters were going on. He actually caused a scene demanding to know why his case proceeded in his absence. The court advised him to file an application to raise up the issue. He subsequently filed an application dated 6th May 2018 seeking to re-open the case. The plaintiff did not oppose the application and the same was allowed by consent and the defendant was given a chance to cross examine the plaintiff. He later gave his evidence in which he claimed that the house was his and that he had paid for Kshs.280,000/= and his wife Kshs.371,000/= making a total of Kshs.570,000/= being the total purchase price. That the plaintiff later on went to the ministry and claimed her money back which was refunded although no proof was tendered.

16. Upon close of the hearing, judgment was reserved for 12th July 2018. Again before delivery of judgment, the defendant filed an application dated 11th June 2018 seeking to stop delivery of the same. The court fixed the application for further directions on 19th July 2018. It was on 19th July 2018 that the court realized that the respondent/defendant had never filed any response to the originating summons or entered appearance despite being given several chances to do so. Based on this revelation, the court expunged from the court record his pleadings and proceedings held on 23rd May 2018 and any subsequent proceedings conducted without the respondent's response or leave to file response or enter appearance out of time. His application dated 11th July 2018 was therefore rejected as it was improperly on record. Based on the above finding, I will consider the originating summons as undefended.

17. In her submissions filed on 9th April 2018, Mrs. Namisi counsel for the plaintiff reiterated the plaintiff's testimony and affidavit in support of the originating summons. She urged the court to find that the plaintiff had exclusively paid for the house in full from her pocket. Counsel made reference to the case of **Burns vs Burns (1984) 1 ALL ER 244** where the court held:

“if there is a substantial contribution by a woman of the family expenses, and the house was purchased on a mortgage, her

contribution is indirectly referable to the acquisition of the house since in one way or the other, it enables the family to pay the mortgage”.

To strengthen her submissions counsel quoted the case of NWK vs JKM & Another (2013) eKLR in which the court held that:

“where a property is registered in one party’s name but both parties contribute to the purchase price, the other party acquires an interest under the resulting trust proportionate to his or her contribution to the purchase price..”.

Further reference was made to the case of Echaria vs Echaria Civil Appeal No. 75/2001 to bolster the above arguments.

18. I have considered the summons herein, supporting affidavit and annexures thereof, testimony by the plaintiff and submissions by her counsel M/S Namisi. Issues that render for determination are; whether the property in question was acquired during coverture and whether the acquisition was with the joint effort of both parties and to what extent.

19. The suit herein was filed under Section 17 of the Married Women’s Property Act 1882. Section 17 of the said Act provides that:

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

20. In Kivuitu vs Kivuitu (1991) KLR 241, the court placed the issue of indirect contribution as an integral aspect which means contribution does not have to be direct. In the instant case, the applicant claimed that the house was allocated to her by the Ministry of Housing but due to her lower house allowance she requested the same to be allocated in her husband’s name. She adduced documentary proof by way of bankers cheques for a sum of Kshs371,000 and Kshs 200,000 as cost of purchase of the house, Kshs 628,733 as rent arrears, and Kshs.61,122 being payment of rent and land rates. This evidence has not been controverted or at all. There is enough proof that payments were made to the PS Ministry of Lands and Housing by the plaintiff.

21. Although each party is claiming exclusive contribution without each other’s help, they both played a role directly or indirectly. In fact, it is the defendant who saved the ministry house by going to court to challenge the ministry’s increased value from Kshs.570,000 to Kshs.3,372,000 shillings. This was an indirect contribution which cannot be ignored. It cannot be said that the defendant had no role to play in the family while the plaintiff was repaying the loans.

22. Contribution is not measured in monetary contributory alone. There are many ways a spouse in a home can make indirect contribution towards acquisition of property by discharging other family roles like paying school fees for children, buying food and other related domestic expenses thus creating an enabling environment for the other spouse to repay a mortgage or a loan. **(See WN vs NK (2008) IKLR 218)** where the court allowed the wife who applied to court for a share in a number of properties acquired by their joint efforts and funds of both parties during their marriage and registered in the sole name of the husband to be divided equally between them.

23. The fact that the defendant is the allottee and directed by the court to be the registered owner does not give him exclusive beneficial interest and oust the plaintiff’s proprietary right over the same. He is holding and or to be registered as a trustee for his benefit and that of the plaintiff. The defendant cannot rubbish the plaintiff’s contribution towards acquisition of the house simply because he is the allottee.

24. It is my finding therefore, that the property herein was acquired during the subsistence of their marriage with joint effort hence entitled to equal share. Accordingly, property known as house No. [particulars withheld] Kileleshwa Nairobi be and is hereby declared to be joint property of the plaintiff and defendant in equal share and that the same should be sold upon conducting joint valuation and the proceeds be shared equally. Secondly, each party shall be at liberty to buy the beneficial interest of the other on the property before offering the sale to a 3rd party. As regards costs, this is a family matter to which each party shall bear his or her own costs.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of

Mr. Kangata H/B for M/S Namisi.....Counsel for the plaintiff

Respondent In person

Edwin..... Court Assistant