



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCC NO. 39 OF 2004 (OS)

IN THE MATTER OF SECTION 17 OF MARRIED WOMEN'S PROPERTY ACT 1882

B N M.....APPLICANT

VERSUS

G M K.....RESPONDENT

JUDGMENT

1. By originating summons dated 14th December 2004 brought pursuant to Section 17 of the Married Women's Property Act of 1882, B N M (herein referred to as the applicant) filed this suit on 16th December 2004 against G M K her former husband (hereinafter referred to as the respondent) seeking determination and orders in relation to the following issues:

(1) Whether the immovable and movable property listed in the schedule hereto annexed was acquired by the joint efforts of the Applicant and the Respondent during the subsistence of the marriage.

(2) Whether the immovable and movable property listed in the schedule hereto annexed and currently in the possession and registered in the names of the Respondent is matrimonial property.

(3) Whether in particular properties known as Shares in Brite Print (K) Ltd., Shares in Binary Commercial Systems, L.R. No. 36/914/1 (Maisonette No. [particulars withheld]), Shares in Peers Pub, Plot number [particulars withheld] situate in Umoja 2 Estate, Nairobi, House number [particulars withheld] in Siwaka Estate, Shares in Bright International, Motor Vehicle registration number KAE . [particulars withheld] – Mercedes Benz, Motor Vehicle registration number KAG [particulars withheld] BMW, Motor Vehicle registration KAL [particulars withheld] Range Rover registered in the names and possession of the Respondent be disposed of and the proceeds equitably divided between the Applicant, the Respondent and the issues of their marriage or as the court may deem just to order.

(4) In the alternative and without prejudice to the foregoing, whether the respondent should be ordered to transfer a half of the value of the properties listed in the schedule hereto annexed to the Applicant for her benefit and that of the issues of the marriage.

(5) Whether any acts, transactions or dealings by the respondent regarding the matrimonial property aforesaid during the subsistence of the marriage and subsequent thereto should be declared and rendered null and void and of no legal effect as against the applicant herein.

(6) Whether this court may, before the determination of the above questions issue a temporary injunction restraining the respondent from disposing off the matrimonial property pending the hearing and determination of this suit or further orders of the court.

(7) Whether the honourable court be pleased to grant such further or other reliefs as may be just in the circumstances.

(8) Whether the respondent is to be condemned to pay the costs of this application and incidentals thereto.

Apparently the properties referred to as being listed in the schedule annexed thereto are the same ones listed in prayer 3 herein above.

2. Application is premised on grounds on the face of it and affidavit in support deposed on 14th December 2004 by the applicant in person. According to the applicant's averment, she celebrated her marriage with the respondent under Kikuyu Customary Law sometime 1978 and thereafter solemnized the same in church on 10th December 1988. (See marriage certificate marked ("BWB")). The couple was blessed with five children namely; P W, J K , J M , W C and A T born 1978, 1979, 1982, 1983 and 1985 respectively. Due to irreconcilable differences,

the couple's marriage broke down irretrievably leading to the respondent petitioning for divorce vide Divorce Cause No. 68/1998 CM's Milimani Commercial Court culminating to their divorce vide a court order dated 6th July 1999 in which the respondent was ordered to maintain the applicant and children.

3. It is the applicant's case that during the subsistence of their marriage, they acquired several movable and immovable properties through their joint effort. She claimed that she made both direct and indirect monetary contribution towards the acquisition of the property in question through playing her role as a wife, emotional and physical support to the respondent and the children of their marriage thus creating an enabling environment for the respondent to peacefully discharge his family contribution and or duties including investment.

4. In response, the respondent filed a replying affidavit on 12th April 2006 denying that the properties in question does constitute joint matrimonial property. He stated that the applicant did not make any contribution towards their acquisition save for perfecting in quarrelling and making noise all the time.

Plaintiff's Case

5. On 7th February 2007, the applicant gave her testimony thereby adopting her affidavit in support of the originating summons deponed on 14th December 2004 together with a list of documents filed on 26th October 2006 interalia; marriage certificate, application for divorce dated 18th July 1994, schedule of immovable and movable property among them copy of records for motor vehicle registration No. KAE [particulars withheld] dated 20th March 2000, Business card for Binary Commercial Systems and Brite Print, title No. [particulars withheld] for lease of LR [particulars withheld] and certificate of registration of business name for peers pub No. [particulars withheld].

6. In a nut shell, the applicant stated that during the subsistence of their marriage, she was engaged in tailoring business at Uhuru Market which her husband did boost by buying several sewing machines which she used to enhance her business thus generating enough income part of which was used to acquire family property and offset loans taken by her husband.

7. Besides her business, she claimed that she assisted in taking care of their children's needs like paying bus fare to school, paying school fees and meeting other family related expenses like buying food. It was her contention that she used to bank cash in a bank account managed by the respondent alone hence part of the income used to purchase some of those properties. Her contribution towards acquisition of each property is enumerated as hereunder:

(a) Brite Print Ltd

8. This is a company incorporated the year 1986 with joint directorship of the applicant, respondent and one Charles Mwangi. The company whose core business was a printing press was located at Gill house and later moved to Hurlingham Nairobi. However, the applicant is not aware of its current status but nevertheless claimed her shares. She claimed that the company was acquired through her joint effort and the husband through a loan acquired from the bank. She contended that she gave the husband emotional and financial support out of her tailoring business.

(b) Binary Commercial

This was a furniture oriented business started by the respondent in the year 1989 but collapsed after two years. She however stated that in case there is anything remaining out of the said business she is entitled to a share.

(c) LR No. 36/914/1 Maisonette No. [particulars withheld] Eastleigh house

This is a house that currently serves as matrimonial home. Originally, the applicant and respondent had rented it as tenants but later in 1990 bought it at 300,000/= after the landlord put it on sale. That the property was acquired out of money generated from Brite Print K Ltd and also money earned from her business. She however revealed that the house was indebted to Barclays Bank for a loan of Kshs.600,000/= unilaterally taken by the respondent which he later defaulted in repaying hence attracting a huge but undisclosed loan arrears thus endangering the house for auction. She pleaded with the court to allocate her the house absolutely so as to continue serving as matrimonial property for the family.

(d) Shares in Peers Pub

With regard to this business, the applicant stated that it was started by the respondent in 1999 long after their separation and in partnership with somebody else. She was however unable to lay claim over the same.

(e) Plot [particulars withheld] Umoja 2 Estate

According to the applicant, this was a city council 2 bedroomed house allotted to the respondent in 1987 but which the respondent sold for an unknown amount after their separation. Although she did not know how much it was paid for, she allegedly stood by him at the time it was bought hence her support was sufficient contribution.

(f) House [particulars withheld] Siwaka

To the applicant's knowledge, this house was bought in 1994 while she was operating her business at Uhuru Market. That they occupied the house briefly and moved out after the husband filed for divorce. She also claimed that she had made financial contribution out of her tailoring business.

(g) Motor vehicle KAE [particulars withheld] Mercedes

The applicant stated that the motor vehicle was bought in December 1995 for family use but it was sold by the respondent hence demanded half of the sale proceeds.

(h) Motor vehicle KAR [particulars withheld] Range Rover

It is the applicant's case that this property was bought by the respondent after

separation and pendency of divorce proceedings and therefore required a share as it was acquired before the marriage was dissolved.

(i) Motor Vehicle KAG [particulars withheld] BMW

It was the applicant's position that this motor vehicle was bought by the respondent after their separation. She also claimed half share after selling the same.

Defendant's Case

9. In response to the originating summons' prayers and testimony of the applicant, the respondent stated that sometime in 1978, he started cohabiting with the applicant on an intermittent relationship (on and off affair) till 10th December 1988 when they formally got married at [particulars withheld] Church. That during the subsistence of their marriage, he was engaged in printing press business out of which he managed to get funds which he used to expand the applicant's tailoring business by buying her 19 sewing machines. That he also used to pay school fees for the children out of funds generated from that business.

10. He further stated that despite supporting his wife (applicant) in enlarging her business, the applicant did not make any financial contribution towards any family investment or even meet any family obligations like paying school fees. Concerning Brite Print Kenya Ltd., he admitted that the company was incorporated in 1986 with him, the applicant and Mwangi as joint directors with a shareholding of 5000 to 5000 to 8,000 respectively.

11. The respondent averred that he started and managed the company single handedly without any contribution from the applicant. He also admitted that property known as Binary Commercial Systems was registered in 1987 as a business name but collapsed hence not a going concern anymore. That between 1986 and 1987, he bought house No. L.R. 36/914/1 maisonette No. [particulars withheld] Eastleigh at Kshs.300,000/=. He attached a bundle of payment receipts made in installments towards the realization of the purchase price (See bundle of receipts in document No. 14 of the list of documents). It was his contention that the property was acquired through his sole effort without any contribution from the applicant. He acknowledged that it is the applicant who is occupying the house to date even after their divorce.

12. However, the respondent claimed that, sometime in 1997, he took a loan with Barclays Bank to pay school fees for their children who were studying abroad and in private schools. That due to poor business, he was unable to repay the loan which accumulated to Kshs.5.8 million inclusive of interest as at January 2017. He therefore proposed to have the house sold to offset the loan first before distribution is done in equal share.

13. Regarding Peers Pub which was jointly owned with his wife Lucy now deceased and his brother-in-law, the same was repossessed by the owner of the premises who had rented it out to them hence it is no longer operational. Concerning plot No. [particulars withheld]- Umjua 2, the respondent claimed that the property was advertised and sold to him by City Council of Nairobi. That he bought the property at Kshs.10,000/= which he paid at Kshs.1,000/= installment per month. He asserted that the property was repossessed after he defaulted in monthly repayment. He attached allotment letter dated 29th April 1988 and repossession and or eviction notice dated 5th June 1989 (See bundle of documents No.1). Basically, he claimed that the property was repossessed and it is no longer his property.

14. As regards house No. [particulars withheld] Siwaka Estate, the respondent stated that he bought it via a mortgage savings and a loan of Kshs.1.4 million KCB in the year 1996 much after their separation. He went further to state that, he used the same house to service a loan from the bank of Barodha to clear the mortgage. That the loan arrears now stands at Kshs.6,000,000/=.

15. As pertains motor vehicle Regn. No.KAE [particulars withheld] Mercedes, he claimed that the motor vehicle bought in 1995 after their separation was for purposes of business and taking children to school. That he sold the motor vehicle in the year 2004. Touching on motor vehicle Registration No.KAL [particulars withheld], he alleged that he bought it between 1994 and 1995 and gave it to his wife Lucy who sold it later. That in 1999, much after their divorce, he bought motor vehicle Regn. No.KAL [particulars withheld] Range Rover which he later sold. After the close of the hearing, counsels agreed to file written submissions. Mr. Enonda for the applicant filed his on 14th March 2018 while the firm of Njenga Mbugua for the respondent filed theirs on 19th March 2018.

Applicant's Submissions

16. In submission, Mr. Enonda submitted that the applicant had proved that she was a wife to the deceased and that the properties in question were acquired during the subsistence of the marriage. He further stated that there was enough proof that the applicant had made both direct and indirect contribution. Counsel referred the court to the case of **Njoroge vs Daudi alias Ngari (1985) eKLR** where the court declared that the property acquired during the subsistence of the couple's marriage was joint property available for equal distribution despite being registered in the husband's name. Further reference was made to the case of **MWG vs TKG (2016) eKLR** where the court recognized non monetary contribution of a wife to entitle her to half share of the matrimonial property. Similar position was replicated in the case of **M vs M (2008) IKLR 2017 (G and F), and JW Vs CWM (2017) eKLR Civil Case (OS) 4 of 2016.**

Respondent's Submissions

17. In their submission, the firm of Njenga Mbugua appearing for the respondent reiterated the testimony of the respondent. They submitted that property No. 36/914/1, Eastleigh was solely acquired by the respondent as proved from payment receipts. He further asserted that a loan taken using the same house as security to pay school fees for children then studying abroad and private schools is attributable to and recoverable from both parties. Counsel submitted that the property should be sold and the proceeds to pay the outstanding loan arrears due to Barclays bank and the balance shared out equally. To support their proposition, counsel relied on Article 45 of the Constitution which 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”.

18. With regard to Brite International, counsel submitted that the company was incorporated the year 2000 with Lucy the respondent's wife now deceased as co-director. He contended that that company was incorporated after divorce of the parties hence not available for distribution

Analysis and Determination

19. I have carefully considered the originating summons herein, supporting affidavit, replying affidavit, materials filed before the court, testimony by both parties and rival submissions by their counsels. Issues that crystallized out for determination are:

(a) Whether the property in question was acquired during the subsistence of their marriage? If so;

(b) Whether the property was acquired through the applicant's and respondent's joint effort;

(c) Whether each party is entitled to half share and if not, to what extent.

20. Both parties have made great effort in trying to convince the court on how each property was acquired and through whose effort. I will direct my mind to each property separately to assess when it was acquired and through whose effort. The suit herein was filed sometime on 14th December 2004 much earlier before the Matrimonial Property Act 2013 was enacted. It then follows that the law applicable is Section 17 of the Married Women's Property Act 1882 which 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 Judgemay make such order with respect to the property in dispute and the costs ofconsequent on the application as he thinks fit”.

21. Was the property in question acquired during the subsistence of the marriage? Both parties are in agreement that they started cohabiting sometime in 1978 and thereafter formalized their marriage through a church wedding in 1988. Although the respondent claimed that he got married to the applicant in 1988 terming the relationship preceding their formal marriage as mere cohabitation, the applicant said that she got married to the respondent under Kikuyu Customary Law in 1978 which was formalized in 1988. It is not in dispute that the couple was blessed with five children all born between 1978 and 1985. For all purposes and intents, this relationship cannot be said to be an ordinary come we stay affair. Even without the execution of the primary Kikuyu Customary Law traditional rituals and rites, there was definitely a marriage between the two under common law by virtue of long cohabitation. Accordingly, I am satisfied that from 1978 to 1985 when the marriage was formalized the couple was properly married.

22. I will now direct my mind to individual property to ascertain the effort of each party in terms of contribution and when it was acquired.

(a) Brite Print Ltd

Although none of the parties listed the incorporation certificate of this company as an exhibit, they were nevertheless in agreement that the same was incorporated between 1986 – 1987 and it is no longer a going concern. It was not in dispute that this company was engaged in printing press business managed and conducted by the respondent and that they were all directors together with one Mwangi. The respondent asserted that the applicant should claim for her shares from the said company and not through this suit.

23. A company is a legal entity with the power to sue and be sued. It is also governed in accordance with the companies' Act and by its Articles and Memorandum of Association. Affairs of a company are regulated by the said instruments and anybody claiming shareholding should be able to follow the requisite law in this case company law to claim any beneficial interest. To that extent, this court cannot share out property of a company which is a legal entity. Parties should approach commercial court division to lodge any claim in relation to their shareholding.

(b) Binary Commercial Systems

According to the applicant, this business was registered under the business names Act in 1987 for purposes of transacting business in furniture production and supplies. The same operated for 2 years and it collapsed. There is nothing to share in this particular property.

(c) L.R. No. 36/914/1 Maisonette Eastleigh House

This is the elephant in the house. The respondent is claiming that he bought it solely using funds generated from Brite Print Ltd. The house

which cost Kshs.300,000/= was bought in 1990 when the marriage was in existence. The key question is who contributed what. The respondent produced payment receipts to prove how he purchased the house. The applicant said she used to give the respondent cash generated from her tailoring business which was booming then. She also claimed that she used to take care of family responsibilities like buying food, paying bus fare for the children to school and even paying school fees.

24. It is not in dispute that the applicant was doing tailoring business which the respondent confirmed boosting by buying 19 more sewing machines for the applicant. By all means, this must have been a large business generating reasonable turn over in terms of income. We cannot say that the applicant had no role to play from all this income. I do not believe that the applicant's contribution was making noise and quarrelling in the house. The fact that property acquired during coverture was registered in the name of one spouse does not automatically disentitle the other spouse his or her beneficial interest (**See NN vs NK (2008) IKLR 2018**). I am convinced that the applicant did make contribution directly out of income generated from her business and also indirectly by providing for the family. Obviously, we do not expect production of receipts for buying vegetables, unga, tomatoes and onions as proof of contribution made in domestic expenses. Equally, the applicant did not anticipate a divorce to be able to keep evidence whenever she gave the respondent money to pay for the house. I am convinced that the property was acquired by the joint effort of the two hence entitled to equal share.

25. It does not matter that the property was registered in the name of the respondent. The property is deemed to have been held in trust for the benefit of both the applicant and respondent. In arriving at this decision, I am guided by the decision in the case of **Burns vs Burns (1984) I ALL ER 244** where the court held that:

“If there is a substantial contribution by a woman of the family expenses, her contribution is honestly referable to the acquisition of the house since in one way or the other, it enables the family to pay the mortgage”.

Similar position was held in the case of **NWK vs JKM and another (2013) eKLR**.

26. Having held that the property was acquired jointly out of joint effort, who is responsible for the loan now outstanding? The loan in issue was acquired in 1997 by the respondent in the name of Brite Print K Ltd with the house as security. The respondent alleged that he took the loan in 1997 after separating in 1994 and lodging his divorce proceedings in 1996. Obviously, it was taken without the knowledge of the applicant as a co-director of the company. To argue that a company director of a company that took the loan without her knowledge is bound to repay the loan is not correct.

27. The respondent did not produce any company resolution or minutes to confirm that the loan was taken with the approval of the company directors or share holders for a particular purpose. The applicant cannot be made responsible or liable over a loan she did not participate in its acquisition. The respondent must be held responsible. The allegation that the loan was for payment of school fees for the children is neither here nor there. How would a company take a loan to educate one of the director's children without the knowledge of the other directors? It is inconceivable.

28. Since the bank is not a party in this case, they cannot be condemned unheard. It is my finding that the house be valued with a jointly agreed valuer, sold and then shared out equally with the respondent's share going towards repayment of the loan first and then retain whatever balance available out of his share.

(d) Shares in Peers Pub

29. This business was started in 1999 after the couple had divorced. The business has since ceased operating. This property is not available for division as it was acquired outside marriage. Same fate shall befall Bright international which business was registered the year 2000 in the name of the respondent and his second wife Lucy now deceased long after the parties had divorced.

(e) Plot No. [particulars withheld] Umoja 2 Estate

30. This property was bought from City Council of Nairobi by the respondent in 1987. Payment was made in installments which the respondent claimed stalled leading to repossession of the house. To the contrary, the applicant claimed that the house was sold by the respondent at a price she does not know after their divorce.

31. After admitting that the property was acquired during the subsistence of their marriage the same is deemed to have been acquired with the joint effort of both parties. However, it is not clear whether the house was reposessed or sold. Whereas the respondent has tried to show steps taken by county council to reposess the house which is not in dispute, the applicant has not proved that the house was sold. For lack of clear evidence, I will not make a declaration as to ownership. That property is left out of distribution until the applicant furnishes proof which she will do by seeking review of the judgment to include that property for distribution when appropriate.

(f) House [particulars withheld] Siwaka

32. The applicant said that the house was bought in 1994. That they moved in briefly and then they separated (1996) when she left her children and the respondent staying there. She claimed that she did contribute towards its acquisition. On the other hand, the respondent claimed that the property was acquired through a mortgage in 1996 after they had separated and divorce proceedings instituted. He attached a bank statement of 1996 (document No. 12 of list of documents as proof of loan repayment). However, in the same bundle of documents, he attached a second letter from Savings and Loan Kenya Ltd dated 21st October 1993 asking the respondent to allow them give an undertaking for the loan they were to disburse towards the purchase of the house. It is not in dispute that the couple did separate in 1994 and divorce proceedings commenced 1996.

33. The respondent has shown that he started the process of paying for the house in October 21st October 1994 through a mortgage. By 1994

they were not staying together. He continued repaying the loan after taking a mortgage from the bank of Barodha. I am convinced that this house was purchased through a mortgage taken by the respondent which he started repaying in 1994 which period the couple had separated. The loan is still outstanding. It is my holding that the applicant did not contribute towards its acquisition hence it's the respondent's sole property.

(g) Motor vehicle KAE [particulars withheld] Mercedes Benz, Motor Vehicle KAL [particulars withheld] Range Rover, Motor vehicle KAG [particulars withheld] BMW

34. These motor vehicles were all acquired by the respondent after separation and or while divorce proceedings were either going on or completed. It is common knowledge that when divorce proceedings are going on nobody would venture into joint business. These properties are entirely the respondent's properties.

35. Are the children entitled to a share in the property in question? This court is dealing with division of matrimonial property to which children have no beneficial interest towards their acquisition. Children have no claim in a case of this nature. In any event, there are no children dependent upon the parties herein. The so called children are mature adults who should be having their own properties. If any party wishes to benefit their children who are now adults, then it should be out of his or her own share **(See Peter Njuguna Njoroge vs Zipporah Wangui Njuguna Civil Appeal No. 128 of 2014 Court of Appeal Nairobi)**. Having held as above, it is hereby ordered that:

(a) Property known as Brite Print K Ltd is not available for distribution as that is company property to be dealt with in accordance with the company law.

(b) L.R. No. 36/914/1 Masionette No. [particulars withheld] Eastleigh to be valued by a joint valuer and sold in conjunction with Barclays Bank and then proceeds be shared into half share(50%) with the respondent's half offsetting the loan due and owing to Barclays Bank and then retain the balance if any.

(c) House No. [particulars withheld] Siwaka is hereby given to the respondent absolutely at 100%.

(d) Plot No. . [particulars withheld] Umoja 2 Estate left in abeyance with the parties to establish the status of the property and thereafter seek review to distribute it afresh.

(e) Motor vehicles Registration No. KAE . [particulars withheld] , KAL . [particulars withheld] and KAG . [particulars withheld] are declared to be the respondent's property absolutely at 100%.

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

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF AUGUST, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of :

M/S Nafula holding brief for Mr. Enonda.....Counsel for the applicant

M/S Kivindu H/Brief for Mr. Gaituri.....Counsel for the respondent

Edwin..... Court Assistant