



JMRA v BOO (Civil Suit 1 of 2017) [2018] KEHC 8895 (KLR) (27 September 2018) (Judgment)

Neutral citation: [2018] KEHC 8895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 1 OF 2017
DAS MAJANJA, J
SEPTEMBER 27, 2018
IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013**

BETWEEN

JMRA APPLICANT

AND

BOO DEFENDANT

JUDGMENT

1. The applicant, an Australian national, and the respondent were married on 20th November 1989. They established Disciples of Mercy, a Christian Ministry, which was registered as a society on 5th May 1992. They also adopted the respondent's two grandchildren as their own. Due to irreconcilable differences, the marriage was dissolved on 7th September 2015 following proceedings in Kisumu CM Divorce Cause No. 65 of 2015.
2. The parties acquired several properties during the subsistence of the marriage. Following the divorce, the applicant filed the Originating Summons dated 16th May 2017 seeking determination of the following question set out on the face of thereof;
 1. Whether in light of the fact that the marriage between the applicant and the respondent has been dissolved by way of a court decree given on the 17th day of September 2016, all the property comprising the matrimonial properties herein be now divided between them.
 2. Whether in view of the total property holdings by the parties, it is just and expedient and necessary that the matrimonial home of the parties currently standing on the parts of plot numbers 429, 430, 431 and 432, Maseno Township, be given to the applicant.
 3. Whether it will be fair and just that the rest of the matrimonial properties of the parties comprising commercial apartment complexes situate in Maseno and Kajulu within Kisumu County be given to the respondent.



4. Whether the respondent and his mistress currently occupying the matrimonial home of the parties should hence be ordered to vacate the same and handover vacant possession and peaceful custody to the applicant.
 5. Whether in view of the past relationship of the parties herein, each party ought to be ordered to bear his/her own costs of this application.
3. The summons was supported by the applicant's supporting affidavit sworn on 16th May 2017 and a supplementary affidavit sworn on 17th November 2017. She also gave oral testimony to support her case. The respondent opposed the originating summons through his replying affidavit sworn on 19th October 2017 and his statement dated 25th January 2018. He also gave oral testimony. The respondent's children, AOO (DW 2) and EOO (DW 3) swore affidavits and testified on his behalf.
4. Resolution of this matter is governed by the *Matrimonial Property Act*, Act No. 49 of 2013 ("the MPA"). Matrimonial home is defined under section 2 thereof as, "any property that is owned or leased by one or both spouses and occupied or utilised by the spouses as their family home, and includes any other attached property." Section 6 thereof defines matrimonial property as follows;
- 6(1) For purposes of this Act, matrimonial property means;
- a. the matrimonial home or homes;
 - b. household goods and effects in the matrimonial home and homes; or
 - c. any other immovable and moveable property jointly owned and acquired during the subsistence of the marriage.
5. The first issue to resolve is to determine what properties constitute the matrimonial properties in light of section 6 of the MPA. The applicant alluded to several properties acquired by the parties during the marriage but she renounced her claim to them and claimed the house in Maseno which she contended was the matrimonial home. The property in Maseno comprises several plots; Plots 429, 430 and 431. The respondent's position the matrimonial home was at (Particulars withheld)/97 ("Plot 97") and not at Maseno.
6. I will first deal with Plot 97. The applicant's evidence is that the Plot 97 belonged to several families. Due to succession proceedings involving several deceased owners, the parties purchased the property piecemeal through several sale agreements with the beneficiaries. The first agreement dated 21st March 1990 was between the beneficiaries of Alex Odong Ojany and Calleb Otiende Oyuga and the applicant for purchase of part of Plot 97 in consideration of Kshs. 60,000/-. The second agreement dated 8th May 1991 was between Florence Odipo and the applicant for purchase of part of Plot 97 for Kshs. 27,000/- and the final agreement between Michael Njera Awiti and the applicant dated 7th March 1992 for purchase of part of Plot 97 for Kshs. 100,000/-. Thereafter the whole property was registered in the applicant's name and a title deed issued to her dated 6th January 1995. Following the registration of Disciples of Mercy as a Society, she transferred Plot 27 to the Society and the property registered in the name of Disciples of Mercy and a title deed issued to it dated 20th January 1997.
7. The respondent's case is that the matrimonial home is situated on Plot 97. He stated that he purchased part of the property from Hellen Ajode Omoga through an agreement dated 19th March 1991 for Kshs. 80,000/- signed by himself and the applicant. He testified that they built a house and resided on the property after it was purchased and it became their matrimonial home according to Luo customs. When his daughter died in 2000, she was buried on the said property which signified that it was the matrimonial property. The respondent testified that his home was built on a portion of Plot 97



and that he resided there until he was forced out of the home by the applicant. He testified that he contributed substantially to the development of Plot 97 which includes buildings housing a bible school, administration block, mission houses and workers' quarters. DW 1 and DW 2 testified that the respondent owns a house within the compound of the Disciples of Mercy Centre which he left when he went to live Maseno in 2007.

8. Although the evidence before the court is that the parties resided on Plot No. 97 when they were setting up the Disciples of Mercy Mission, it also shows that both parties voluntarily ceded their interests in each part of the property they had purchased to the Society. The property and the structures constructed now belong to a registered society, Disciples of Mercy Mission, which was issued with a title deed on 20th January 1997. The Disciples of Mercy Mission is a separate entity and is not subject to proceedings for division of matrimonial property. I therefore find and hold that Plot 97 is not matrimonial property within the meaning of the MPA and is therefore not subject to division in this suit.
9. The other properties in contention are a residential home in Anyiko in Gem within Siaya County, (Particulars withheld)/206 and 207 ("Plots 206 and 207"), Maseno Plots 429,430 and 431 and a commercial plot in Maseno being Plot 358.
10. The applicant contended that the applicant had constructed a home in his ancestral home in Gem, Siaya County. The respondent denied that he had constructed such a home and that the house exhibited by the applicant in her deposition was constructed by the grandchildren for their father. The full particulars of this property were not given and its description was rather vague. Since the property was ancestral property and the applicant did not show that it was acquired or jointly owned during the marriage, I find that it was not matrimonial property.
11. The respondent did not deny that he owned Plots 206 and 207. According to DW 2, the property had four developed houses which were constructed in the mid-1990's. He testified that he was living in one of the houses and that the respondent had permitted him to collect rent from the other tenants. Since the property were acquired during the marriage, I find and hold that Plots 206 and 207 are matrimonial property.
12. Maseno Plots 429,430, 431 and 358 do not have title deeds. They are plots allocated by the then local authority, Kisumu County Council. From her depositions and testimony, the applicant explained that she and the respondent planned to construct their matrimonial home in Maseno in 2000 hence they purchased Plot 429 from Johnson Oyieyo Ochieng by an agreement dated 2nd December 2000 for Kshs. 80,000/-. They purchased Plot 430 from Gad David Ojuando Owango by the agreement dated 29th July 2007.
13. The applicant further testified that when they began developing their house on Plot 429 and 430, they discovered that the house was occupying other plots. She recalled that the house was actually occupying Plot 431 and was overlapping onto Plot 429 and touching on Plot 430. She decided that it would be in their interests to purchase the other properties and when she approached the respondent to discuss and agree to purchase the property, he declined to assist her. She therefore purchased Plot 431 from Eliakim Apunda Aketch for Kshs. 310,000/- as evidenced by the agreement dated 12th September 2013. The original agreement was not signed by the respondent so she went ahead and signed another agreement with the vendor on the same day. The applicant further testified that she went ahead to look for the owner of Plot 429. She signed an agreement with Florence Amondi Abonyo dated 17th March 2014 purchasing the plot for Kshs. 300,000/-.



14. In response, the respondent testified that he bought Plot 429 for rental business and not as their matrimonial property. He took the position that the house constructed on Plots 429 and 432 could not be a matrimonial home because one could not bury their dead or build traditional huts for sons. He stated that he purchased the plot 429 from Johnson Benjamin Oyieyo in 1999 and a Committee of the Kisumu County Council approved the transfer on 7th September 2001. He also showed the application for transfer signed by the Town Clerk and evidence that he paid land rent and rates. He contended that Florence Abonyo Amondi had never owned Plot 429 although in his testimony he stated that, “I went to follow up the matter and found that the plot was in the name of Florence Abonyo. She told me that the plot was repossessed and re-allocated to her. I continued to follow up but the name had not been changed. One day in 2014, I was told that the plot was sold to a white lady.”
15. The respondent also stated he had been paying rent and rates for Plot 430. He contended that the Maseno property which the applicant claims to be matrimonial home is not built of Plot 429 or Plot 430 but on Plot 431 and that a part of the property is on Plot 432 and a smaller section extends to the road reserve.
16. In as much the parties dispute who purchased what property, the fact is that Plots 429, 430 and 431 were purchased and or acquired by both parties during the marriage and are accordingly matrimonial property. Plot 429 was purchased by both parties as evidenced by the agreement dated 2nd December 2000. Plot 430 was purchased by both parties as evidenced by the agreement dated 29th July 2007 while Plot 431 was purchased by the applicant who signed the agreement dated 12th December 2013.
17. The applicant admitted that Plot 358 was purchased by the respondent. In cross-examination, the respondent denied that he was the owner of the said plot and according to the records he produced, it belonged to Dixon Alolo. Having considered the evidence, I did not see any sale agreement or basis to hold the Plot 358 was matrimonial property.
18. Having found that Maseno Plots 429, 430 and 431 and Plots 206 and 207 are matrimonial properties as they were acquired during marriage, the next issue is how these properties should now be divided. Section 7 of the MPA governs the manner in which matrimonial property is vested as follows:
 7. 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.
19. Section 2 of the MPA defines contribution as follows;

“contribution” means monetary and non-monetary contribution and includes —

 - a. domestic work and management of the matrimonial home;
 - b. child care;
 - c. companionship;
 - d. management of family business or property; and
 - e. farmwork.
20. In apportioning the properties, the court is also guided by section 14 of the MPA which provides as follows;
 14. Where matrimonial property is acquired during marriage—



- a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
 - b. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.
21. Plots 206 and 207 are registered in the respondent's name. In light of section 14(a) aforesaid, there is a rebuttable presumption that the property is held trust for the other spouse. The party seeking to avoid the trust bears the burden of proving, on the balance of probabilities, that the other spouse did not make any contribution to acquisition or improvement of the property in the manner contemplated under section 2 of the MPA. There is nothing in the evidence of the respondent, DW 1 or DW 2 shows that the applicant did not contribute, in the manner defined by section 2 of the MPA, to acquisition of these properties. I find and hold that the respondent did not discharge this burden. Consequently, Plots 206 and 207 are owned in equal shares.
22. Plot 429 was purchased by both parties and they are entitled to it equally. Although the applicant stated that she realised that it actually belonged to Florence Abonyo and that she paid her to regularize the position, I find and hold that the intent of the parties was to purchase the property, both parties contributed to its purchase hence it is owned by both of them. Moreover, in terms of section 14(a) of the MPA, the applicant did discharge the burden of showing that the respondent did not contribute to the acquisition of the property.
23. Plot 430 was purchased by both parties. According to the letter dated 12th January 2011 addressed to the Kisumu County Council Clerk to the Commissioner of Lands, Plot 40 was transferred to both parties and the application approved by a Committee of the Council on 15th March 2010 and approved by the Full Council on 13th April 2010. Accordingly, the property is in both names. While Plot 431 was purchased by the applicant when, according to her, the respondent refused to sign the sale agreement, the presumption in section 14(a) of the MPA applies and as such the property is owned by the parties in equal shares.
24. The totality of the evidence is that Plot 429 and 430 were purchased by both parties while Plot 431 was purchased by the applicant. All the plots are adjacent to each other and the house which the applicant claims as the matrimonial home extends to all the plots. The applicant stated that the house extended to Plot 432 but she did not produce documents showing that either of the parties purchased it. What is clear though it that the house matrimonial house stands on Plot 429, 430 and 431. Since the house stands on the three properties, each party ought to have demonstrated the extent of his or her contribution. While the applicant contends that she contributed to the construction and finishing of the house, the respondent and his witnesses denied this and testified that the house was constructed wholly by the respondent without any contribution by the applicant.
25. I find that both parties contributed to the development of the house and since neither party showed the precise amounts they contributed to construction of the house and the fact that they both contributed to the purchase of the plots on which the house stands, I find and hold that both parties are entitled to Plots 429, 430 and 431 and all developments thereon in equal shares. Whether or not the house constituted the matrimonial home does not affect this finding because, it falls within the definition of matrimonial property under section 6(1)(c) of the MPA.
26. Before I conclude this judgment, I wish to observe that apart from Plot 431 which the Kisumu County Council confirmed that belonged to the parties after it was transferred to from the original allottee, Gad Ojuando Owango, there is no evidence that the transfers of Plots 429 and 430 were concluded by a full Council resolution. This position does not affect my findings as the declarations only affect the



property rights in the plots acquired by the parties. They are at liberty to regularize their ownership as it is clear that they both purchased the plots and constructed their house.

27. The final issue for determination is whether I should award the applicant Plots 429, 430 and 431 as framed in question (2) and (3) of the originating summons. The answer to this issue is to be found in section 7 of the MPA which I have cited at paragraph 7 above. The property is vested in the spouses, “according to the contribution of either spouse toward its acquisition...” The duty of the court is to declare the proprietary right of each party acquired according to his or her contribution towards acquisition. I do not read those provisions to vary the rights of the party in the manner suggested by the applicant which includes for example, giving one or either party their preferred choice of property absent their consent. I therefore dismiss the applicant’s claim to exclusive entitlement of the house on Plots 429, 430 and 431.
28. In question (4) of the originating summons the applicant seeks relief that the respondent and his mistress currently occupying the Maseno House be ordered to vacate the property and hand it over to her. I decline to grant such relief as the proprietary rights of the parties to the house have now been settled by this judgment. The parties are now at liberty to deal with the property in terms of judgment.
29. As regards the issue of costs, I hold that in view of the relationship between the parties and the conclusion that they own the matrimonial properties equally, the costs shall be shared on that basis.
30. In conclusion, I now make the following orders;
 - a. I declare (Particulars withheld)/206 and 207 and Maseno Plots 429,430 and 431 are matrimonial property and that the applicant and respondent are each entitled to a 50% share thereof.
 - b. That the matrimonial properties shall be valued within ninety (90) days and sold thereafter and the proceeds shared equally between the applicant and the respondent. The costs of valuation and all incidental costs of the sale shall be shared equally between the parties.
 - c. In the alternative, either the applicant or respondent shall be at liberty to buy out the share entitlement of the other should they deem fit.
 - d. Each party shall bear its costs.
 - e. Either party shall be at liberty to apply for further and other orders.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 27TH _DAY OF SEPTEMBER 2018

F. A. OCHIENG’

JUDGE

Mr C. Onyango instructed by Olel, Onyango, Ingutiah and Company Advocates for the applicant.

Respondent in person.

