



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 1 OF 2017 (OS)**

**IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013**

**BETWEEN**

**J M R A.....APPLICANT**

**AND**

**B O O.....DEFENDANT**

**JUDGMENT**

1. The applicant, an Australian national, and the respondent were married on 20<sup>th</sup> November 1989. They established [Particulars Withheld], a Christian Ministry, which was registered as a society on 5<sup>th</sup> May 1992. They also adopted the respondent's two grandchildren as their own. Due to irreconcilable differences, the marriage was dissolved on 7<sup>th</sup> 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 16<sup>th</sup> 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 17<sup>th</sup> 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 [Particulars withheld], 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 16<sup>th</sup> May 2017 and a supplementary affidavit sworn on 17<sup>th</sup> November 2017. She also gave oral testimony to support her case. The respondent opposed the originating summons through his replying affidavit sworn on 19<sup>th</sup> October 2017 and his statement dated 25<sup>th</sup> January 2018. He also gave oral testimony. The respondent's children, A O O' (DW 2) and E O O (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 immoveable 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 [Particulars withheld]. The respondent's position the matrimonial home was at KISUMU/WATHOREGO/[Particulars withheld] ("Plot [Particulars withheld]") and not at Maseno.

6. I will first deal with Plot [Particulars withheld]. The applicant's evidence is that the Plot [Particulars withheld] 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 21<sup>st</sup> March 1990 was between the beneficiaries of A O O and C O O and the applicant for purchase of part of Plot [Particulars withheld] in consideration of Kshs. 60,000/-. The second agreement dated 8<sup>th</sup> May 1991 was between Florence Odipo and the applicant for purchase of part of Plot [Particulars withheld] for Kshs. 27,000/- and the final agreement between Michael Njera Awiti and the applicant dated 7<sup>th</sup> March 1992 for purchase of part of Plot [Particulars withheld] for Kshs. 100,000/-. Thereafter the whole property was registered in the applicant's name and a title deed issued to her dated 6<sup>th</sup> January 1995. Following the registration of [Particulars Withheld] as a Society, she transferred Plot [Particulars withheld] to the Society and the property registered in the name of [Particulars Withheld] and a title deed issued to it dated 20<sup>th</sup> January 1997.

7. The respondent's case is that the matrimonial home is situated on Plot [Particulars withheld]. He stated that he purchased part of the property from Hellen Ajode Omoga through an agreement dated 19<sup>th</sup> 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 [Particulars withheld] 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 [Particulars withheld] 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 [Particulars Withheld] Mission which he left when went to live Maseno in 2007.

8. Although the evidence before the court is that the parties resided on Plot No. [Particulars withheld] when they were setting up the [Particulars Withheld] 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 in 20<sup>th</sup> January 1997. The [Particulars Withheld] Mission is a separate entity and is not subject to proceedings for division of matrimonial property. I therefore find and hold that Plot [Particulars withheld] 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, KISUMU/WATHOREGO/[Particulars withheld] ("Plots [Particulars withheld]"), Maseno Plots [Particulars withheld] and a commercial plot in Maseno being Plot [Particulars withheld].

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 [Particulars withheld]. 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 [Particulars withheld] are matrimonial property.

12. Maseno Plots [Particulars withheld] 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 applicant planned to construct their matrimonial home in Maseno in 2000 hence they purchased Plot [Particulars withheld] from Johnson Oyieyo Ochieng by an agreement dated 2<sup>nd</sup> December 2000 for Kshs. 80,000/-. They purchased Plot [Particulars withheld] from Gad David Ojuando Owango by the agreement dated 29<sup>th</sup> July 2007.

13. The applicant further testified that when they began developing their house on Plot [Particulars withheld], they discovered that the house was occupying other plots. She recalled that the house was actually occupying Plot [Particulars withheld] and was overlapping onto Plot [Particulars withheld] and touching on Plot [Particulars withheld]. 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 [Particulars withheld] from Eliakim Apunda Aketch for Kshs. 310,000/- as evidenced by the agreement dated 12<sup>th</sup> 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 [Particulars withheld]. She signed an agreement with Florence Amondi Abonyo dated 17<sup>th</sup> March 2014 purchasing the plot for Kshs. 300,000/-.

14. In response, the respondent testified that he bought Plot [Particulars withheld] for rental business and not as their matrimonial property. He took the position that the house constructed on Plots [Particulars withheld] 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 [Particulars withheld] from Johnson Benjamin Oyieyo 1999 and a Committee of the Kisumu County Council approved the transfer on 7<sup>th</sup> 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 [Particulars withheld] 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 [Particulars withheld]. He contended that the Maseno property which the applicant claims to be matrimonial home is not built of Plot [Particulars withheld] or Plot [Particulars withheld] but on Plot [Particulars withheld] and that a part of the property is on Plot [Particulars withheld] 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 [Particulars withheld] were purchased and or acquired by both parties during the marriage and are accordingly matrimonial property. Plot [Particulars withheld] was purchased by both parties as evidenced by the agreement dated 2<sup>nd</sup> December 2000. Plot [Particulars withheld] was purchased by both parties as evidenced by the agreement dated 29<sup>th</sup> July 2007 while Plot [Particulars withheld] was purchased by the applicant who signed the agreement dated 12<sup>th</sup> December 2013.

17. The applicant admitted that Plot [Particulars withheld] 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 [Particulars withheld] was matrimonial property.

18. Having found that Maseno Plots [Particulars withheld] 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** 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 [Particulars withheld] 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 [Particulars withheld] are owned in equal shares.

22. Plot [Particulars withheld] 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 [Particulars withheld] was purchased by both parties. According to the letter dated 12<sup>th</sup> January 2011 addressed to the Kisumu County Council Clerk to the Commissioner of Lands, Plot [Particulars withheld] was transferred to both parties and the application approved by a Committee of the Council on 15<sup>th</sup> March 2010 and approved by the Full Council on 13<sup>th</sup> April 2010. Accordingly, the property is in both names. While Plot [Particulars withheld] 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 [Particulars withheld] were purchased by both parties while Plot [Particulars withheld] 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 [Particulars withheld] 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 [Particulars withheld]. Since the house stands on the three properties, each party ought to have demonstrated the extent of his or her contribution. While the appellants contend 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 [Particulars withheld] 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 [Particulars withheld] 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 [Particulars withheld] 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 [Particulars withheld] 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 [Particulars withheld].

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 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 **KISUMU/WATHOREGO/ [Particulars withheld]** and **Maseno Plots [Particulars withheld]** 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 27<sup>th</sup> 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.