



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NUMBER 7 OF 2015

L W W.....PLAINTIFF

VERSUS

J G T.....DEFENDANT

JUDGMENT

1. By way of an originating summons dated 13/10/2011, L W W (plaintiff) sought orders;

1. Spent.

2. IT BE DECLARED THAT all that piece of land known as NAKURU MUNICIPALITY BLOCK 23/[Particulars Withheld] is owned jointly and in equal shares by the plaintiff and the defendant and the defendant is registered and holds the same as a trustee for the benefit of himself and the plaintiff herein.

3. The plaintiff and the defendant be registered as joint proprietors/owners of the suit land herein and or in such other manner as this honourable court may deem fit taking into consideration the circumstances of this case.

4. Further and or in alternative to prayer 3 above, this honourable court be pleased to order that the suit property be sold and proceeds thereof be shared in such shares as this honourable court may deem fit,

5. This honourable court may be pleased to issue any other declarations, orders and or directions as it may deem fit, proper and justifiable in the circumstances of this case.

6. Costs of this originating summons be provided for.

2. In support of the originating summons is a supporting affidavit sworn on 13/10/2011.

3. The gravamen of the plaintiff's case is that the plaintiff married the defendant on or about the year 1990 under Kikuyu Customary Law. This marriage was solemnized at Nairobi in 1997.

4. At all material time the plaintiff was a high school teacher and the defendant was a lecturer. The two shared financial obligation. The plaintiff took care of household expenses and some bills while the defendant catered for other needs including acquiring properties. It is through this arrangement that the defendant bought the suit land which was registered in his name.

5. The couple established their matrimonial home on this land at Nakuru.

6. The plaintiff annexes her payslip showing repayment of a development loan of Kshs. 134,000/= which was used to do the foundation of their house. She had earlier borrowed Kshs. 16,000/= to fence off the plot. She annexes documents showing access to a loan of Kshs. 200,000/= towards roofing of the house.

7. She exhibits a bank advice showing that she obtained a bank loan of Kshs. 90,000/= which she utilized in putting finishes to the home. They eventually moved into the house on or about February, 2005.

8. On or about May of 2009, the defendant chased her and siblings (I think she means children) after cruelty to her and the children. Since then the plaintiff took over all family obligations.

9. The application is opposed and the defendant has sworn a replying affidavit dated 11/4/2013.
10. The defendant deposes that he sold a plot at Kahawa West Nairobi and used the proceeds to buy the subject property at [Particulars Withheld] in Nakuru.
11. He adds that he took a loan of Kshs. 40,000/= and a further Kshs. 300,000/= towards the construction of the house in question.
12. He was even forced to sell a plot he had bought in Nyeri to enable him complete the construction. He adds that a comparison of his payslip and that of the plaintiff would show the court the possible contribution of each party to purchase the subject property.
13. It is denied that the plaintiff used Kshs. 16,000/= to construct any structures on the land. It is urged that the Kshs. 134,000/- mentioned by the plaintiff was used to open a clothing shop at [Particulars Withheld] Building in Nakuru Town which business she later closed.
14. The co-operative loan of Kshs. 200,000/= allegedly used by the plaintiff towards the construction was used to buy a sewing machine and to expand her clothes business. The defendant acknowledges that the plaintiff gave him Kshs. 109,000/= to purchase iron sheets for the house but he (defendant) later refunded the money to the plaintiff when he deposited Kshs. 170,000/= in her bank account at Kenya Commercial Bank which money she used to buy motor vehicle registration number KAR [Particulars Withheld]. She never refunded Kshs. 61,000/= to the defendant.
15. The defendant adds that he pays school fees for all his children who are in boarding school. The plaintiff only feeds them when they are on holiday.
16. On the date appointed for hearing only the plaintiff appeared and the hearing proceeded ex parte as the defendant was absent.
17. In her testimony, the plaintiff adopted her supporting affidavit and a further affidavit as her evidence. She emphasized that they contributed equally in acquisition of the matrimonial home.
18. Counsel for the plaintiff filed written submissions. Despite indulgence by court, no submissions were filed by the defendant.
19. I have considered the pleadings, the affidavit evidence, the oral evidence of the plaintiff and learned submissions by counsel.
20. Of determination is whether the plaintiff has established her claim over the ownership of the matrimonial property and if in the affirmative what share if any is available to the plaintiff.
21. The applicable law in respect of the proceedings is the **Matrimonial Property Act, 2013**. This position is fortified by the finding of the **Court of Appeal** in **PBW vs. JWC [2017] eKLR** where the Court stated;

“The summons leading to this appeal was filed on 21st October 2011 under the Married Women’s Property Act, 1882, which was a statute of general application in Kenya (See I v. I [1971] EA 278 and Karanja v. Karanja [1976 -80] 1KLR 389). During the pendency of the summons, Parliament enacted the Matrimonial Property Act, 2013 which came into effect on 16th January 2014. By Section 19 of that Act, the Married Women’s Property Act ceased to apply in Kenya. When the summons was heard and determined on 9th July 2015 therefore, the Matrimonial Property Act was in force. Before we consider the merit of the appeal, it is important to highlight a provisions of the Matrimonial Property Act that are relevant to this appeal.”

22. The legal position is further illuminated by the **Court of Appeal** in **PNN vs. ZWN** where the Court had this to say;

“The matter before us relates to the perennial war between husband and wife over matrimonial property after the collapse of their marriage. It has always been a murky waterway for the courts in this country to navigate since the applicable procedural law was a piece of archaic legislation enacted in England in 1882 and inherited as a statute of general application in this country. That was the Married Women’s Property Act, 1882, (MWPA)... The opportune moment for change came during negotiations on the new constitution which was promulgated in August 2010, three years after the Echaria case. The people of Kenya in a referendum decided to expressly pronounce themselves on the institution of family in Article 45 as “the natural and fundamental unit of society and the necessary basis of social order” which must enjoy the “recognition and protection of the state”. As relates to marriage, Article 45(3) provides as follows: “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.”... Parliament indeed rose to the occasion two years after that decision and enacted The Matrimonial Property Act, 2013 which received assent on 24th December, 2013, and commenced on 16th January, 2014... A combination of the above provisions of the Constitution 2010 and the Matrimonial Property Act 2013, has settled the law on matrimonial property and charted a clear vision for the future.”

23. At the outset, directions were given by the Court on 12/4/2013 based on agreement between the parties whereby the originating summons was to be treated as the plaint and the replying affidavit by the defendant was to be treated as the defence.
24. In support of their respective cases only the plaintiff testified. She has adduced evidence that she used Kshs. 16,000/= to fence the subject property. There is evidence of a loan of Kshs. 134,000/= which the plaintiff maintains was used to do the foundation of the house. She has testified and exhibited the obtaining of loans of Kshs.200,000/= and Kshs. 90,000/= which she has stated was used in roofing the house and doing finishes.

25. The plaintiff has exhibited a photo of the completed house. She has stated that they occupied the matrimonial home on or about February 2005.

26. This evidence was not controverted by any alternative evidence and neither was its veracity shaken in cross examination.

27. The defendant having failed to appear and testify to controvert the plaintiffs case and to substantiate his averments in the replying affidavit which was treated as a defence left the plaintiffs evidence intact and believable.

28. As held in the case of **John Gitonga Germano & Another vs. Rispa Paul Ogal & Another** [2011] eKLR it is necessary for a defendant to testify otherwise the Court is left with only the evidence of the plaintiff to consider.

29. The Court stated;

“The appellants did not adduce any evidence at the hearing of the two suits. The evidence therefore for consideration is that of the respondents and their witnesses. It is to be noted that a defence filed in court *per se*, in the absence of evidence in support is a mere denial and of no evidential value. And therefore in this case the evidence of the respondents remained uncontroverted.”

30. **Section 6** of the **Matrimonial Property Act 2013** defines matrimonial property to mean;

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

31. By dint of **Section 7** ownership of matrimonial property is vested 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. On the other hand **section 2** defines **“contribution”** to mean monetary and non-monetary contribution and includes domestic work and management of the matrimonial home, child care, companionship and management of family business or property (**see VWN vs. FN, CA No, Sup 3 of 2014**). **Section 14(a)** of the Act is also relevant to this appeal. Under that Section there is a rebuttable presumption that the property is held in trust for the other spouse.

32. In our instant suit, the plaintiff has on a balance of probability proved that the subject property is matrimonial property. She has gone ahead to prove contribution to its acquisition in both monetary and non-monetary contribution. I am satisfied that the plaintiff has proved her case to the required degree.

33. I find the plaintiff’s case wholly successful and make the following orders;

1. A declaration do issue that all that piece of land known as Nakuru Municipality Block 23/ [Particulars Withheld] is owned jointly and in equal shares by the plaintiff and the defendant and that the defendant as the registered owner holds the same as a trustee for the benefit of himself and the plaintiff.

2. The property be sold and the proceeds be shared between the plaintiff and the defendant equally.

3. In the alternative to Order 2 above, the property be valued and the defendant proceeds to compensate the plaintiff at the rate of ½ the value of the property.

4. In view of the relationship of the parties, each party to bear its own costs.

Dated and Signed at Nakuru this 26th day of September, 2018.

A. K. NDUNG’U

JUDGE