



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 1 OF 2016 (O.S)**

**IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT, 2013**

**AND**

**IN THE MATTER OF A DECLARATION OF RIGHTS TO PROPERTY**

**S A O.....PLAINTIFF**

**VERSUS**

**F O M.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein filed an application via Originating Summons dated 14<sup>th</sup> January, 2016 seeking that the court declare the property rights between the Plaintiff and the Defendant as follows:

a) All that property being House number 18 erected on Land Reference Number [particulars withheld] – Nairobi in the Republic of Kenya be held solely by the Plaintiff to her benefit and in trust for her children N I M and A A M.

b) The Defendant do sign the requisite transfer instrument in favour of the Plaintiff and in default the Registrar of the High Court to execute such instrument in order to facilitate the Transfer in favour of the Plaintiff.

c) All those matrimonial property being a house in Webuye Town, Bungoma County and in Mumias in Kakamega County and all improvements thereon and any other property acquired by the Defendant during the marriage be held by him alone and absolutely.

2. The summons was supported by an affidavit sworn by the Plaintiff on 14<sup>th</sup> January, 2016, in which she stated that she and the Defendant were married on 3<sup>rd</sup> June, 2000 at the St. Benedicts Parish, Nairobi under the African Christian Marriage and Divorce Act. She annexed a copy of their marriage certificate. The marriage bore two (2) issues, N I M and A A M born in the 2001 and 2003 respectively as shown in their birth certificates.

3. On 1<sup>st</sup> August, 2014, the marriage was dissolved by a judgment of the court in Divorce Cause No. 479 of 2013 filed at the Chief Magistrate's Court in Nairobi. A decree nisi was subsequently made absolute on 1<sup>st</sup> August, 2014.

4. The Plaintiff averred that during the subsistence of their marriage, she and the Defendant acquired various properties namely:

a) House NO. [particulars withheld ]on Land Reference Number [particulars withheld] -South C, Nairobi.

b) House in Webuye.

c) A farm in Mumias.

5. The Plaintiff contended that she and the children stayed in their Nairobi house while the Defendant grew sugarcane on his farm in Mumias, leased out part of the farm and rented out the house in Webuye. That the Defendant moved out of the matrimonial home which act led to their divorce.

6. According to the Plaintiff, it is she who identified the South C property from a press advertisement and negotiated its price to a low of Kshs. 1,900,000/- when other properties in the same court were priced well over Kshs. 3,000,000/-. The Plaintiff states that she paid half of

the deposit required for the sale while the balance was paid through a mortgage by the Defendant who was a banker with CFC Bank Limited at the time.

7. By virtue of him being a banker, the Defendant qualified for a very low interest on the mortgage which saw him pay only Kshs. 10,000/- per month in respect of the principal loan and interest while also receiving a sum of Kshs. 8,000/- as an owner occupier.

8. The Plaintiff opines that when they moved into the South C property, she met all expenses in respect of repairs, fittings, paintings, metal grilling, and the construction and installation of an underground water tank. She further states that it is she who has single handedly provided for maintenance and upgrading of the home in addition to paying its utility bills and taking care of the family. She approximates the total expenditure as a monthly sum of Kshs. 112,450/-.

9. The Plaintiff observed that the Defendant has failed and neglected to meet his family obligations. She applied for relevant notices for the Defendant to show cause why execution should not issue against him for amounts which have accumulated to Kshs. 653,678/- as at June 2014. The court consequently issued warrants of arrest of the Defendant and his comittal to civil jail but the Defendant has not been located since, leaving her the singular burden of raising the children. She urged the court to divide the matrimonial property and grant her the South C property absolutely.

10. In response to the summons, the Defendant swore a Replying affidavit on 20<sup>th</sup> January, 2017 and filed it on 24<sup>th</sup> January, 2017. In the Affidavit, the Defendant states that he only became aware of the divorce proceedings after seeing copies of the Decree Nisi and Decree Absolute attached to the Plaintiff's present application.

11. The Defendant contends that even though it is the Plaintiff who identified the House No. [particulars withheld] on Land Reference Number [particulars withheld] – South C, Nairobi, through a newspaper cutting, he acquired it solely through a loan granted to him as an employee of STANBIC Bank Limited which was known as CFC Bank Limited at the time. He urged that he only included the Plaintiff's name to protect her and the children in the event of his death since the house was acquired during the pendency of their marriage.

12. It is the Defendant's statement that the Plaintiff never paid a single cent towards the repayment of the mortgage. He avers that he solely made the monthly repayments, and upon leaving the Bank in 2008, he paid a lumpsum of Kshs. 400,000/- and a further Kshs. 100,000/- from his pension to offset the loan.

13. He however stated that he and the Plaintiff own the South C property on a 50 percent basis, and hold it in trust for their children. That this co-ownership ensures that the children's rights are guaranteed. He states that granting 100 percent ownership to the Plaintiff would be detrimental to the children since she could pass the house on to her future husband.

14. The Defendant further stated that he only moved out of the matrimonial house when he went to work at Kenya Commercial Bank at Webuye since he could not operate from Nairobi to Webuye on a daily basis. That the divorce came about due to irreconcilable differences between the Plaintiff and himself.

15. The Defendant denied any knowledge of a farm in Mumias stating that he only knows of the South C House and the Webuye House, which was sold by KCB. He however noted, that the Plaintiff failed to mention the two (2) motor vehicles that they own: a Toyota Surf Registration Number [particulars withheld] M and a Nissan Van. He urged that he and the Plaintiff jointly met all the expenses and that he has been meeting all his obligations up until the Plaintiff took off to France with the children in tow.

16. On 28<sup>th</sup> February, 2017, the Plaintiff filed a Further Affidavit dated 27<sup>th</sup> February, 2017 in which she stated that the Defendant was well aware of the divorce proceedings since he was served and an affidavit of service duly filed. She further stated that the **Matrimonial Property Act** is clear on what constitutes matrimonial property, contribution, and what happens upon dissolution of a marriage.

17. She admitted to having had the two motor vehicles which she sold to enable her provide for the children. She however denied any knowledge about the status of the Webuye property or of its sale.

18. M/s Nyawara & Company filed written submissions dated 28<sup>th</sup> February, 2018 on behalf of the Plaintiff and submitted that there are three issues arising from the application:

- a) Whether the properties listed in the originating summons are matrimonial properties.
- b) Whether the applicant contributed towards the acquisition of the property.
- c) How the court should distribute the property.

19. Counsel submitted that the properties listed in the originating summons are matrimonial properties within the meaning of **section 6(1)** of the **Matrimonial Properties Act No. 49 of 2013**. The properties were acquired during the marriage. Some of the assets are however no longer in the control of the parties and the only one available is the South C house.

20. Counsel stated that the Plaintiff was an active participant in her contribution towards the matrimonial home in South C. He urged that she made substantial monetary and non-monetary contribution within the meaning of **section 2** of the **Matrimonial Property Act** towards the acquisition of the property. That when the house was about to be auctioned, it was the Plaintiff who stepped up and made the necessary payments to redeem the property.

21. It was Counsel's submission that it would be just and equitable for the South C property to be solely given to the Plaintiff. He stated that distribution of matrimonial property need not be equal despite the property being jointly owned. That distribution of matrimonial property should be weighed against the peculiar circumstances of each case as stated in the case of **Francis Njoroge vs. Virginia Wanjiku Njoroge Nairobi Civil Appeal No. 179 of 2009**.

22. In opposition, M/s M.A. Abong'o & Co advocates filed written submissions dated 21<sup>st</sup> March, 2018 on behalf of the Defendant and submitted that the South C property should be jointly owned and held in trust for their children.

23. Counsel admitted that the South C property can be termed as matrimonial property having been acquired during the subsistence of the Defendant's marriage to the Plaintiff, while advocating for equal proprietary rights. Counsel observed that **Article 45(3)** of the **Constitution of Kenya** provides for equal rights at the time of marriage, during the marriage and at dissolution of the marriage. That this provision is further enshrined in **Article 6(1)(h)** of the **International Convention on the Elimination of All Forms of Discrimination against Women** and **Article 16(1)** of the **Universal Declaration of Human Rights**.

24. Counsel submitted that the court should distribute the property based on each party's degree of contribution towards its acquisition in line with **sections 2, 7 and 9** of the **Matrimonial Property Act**. To buttress this argument, Counsel cited the case of **U M M vs. I M M High Court Civil Case No. 39 of 2012** which stated that in division of matrimonial property, ownership is vested in each spouse according to their respective contributions be it monetary or non-monetary. Counsel asked the court to hold the Plaintiff accountable for the two motor vehicles as well as the rental income and household effects.

25. I have analyzed the pleadings, oral testimony of the witnesses and the written submissions filed by the parties herein. I have framed three main issues for determination namely:

- a. Whether the property in question constitutes matrimonial property.
- b. Whether the Plaintiff contributed towards the acquisition of the property.
- c. How the court should distribute the matrimonial property if any.

26. Matrimonial property is defined under **section 6(1)** of the **Matrimonial Property Act, 2013** 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 marriage.

27. **Section 14** of the **Act** further states that where matrimonial property is acquired during marriage in the name of one spouse, there is a rebuttable presumption that the property is held in trust for the other spouse; and if in the joint names of the spouses, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.

28. The Plaintiff herein stated that the South C property was acquired during the existence of their marriage and used as their matrimonial home. I will only consider the South C property since the motor vehicles and the Webuye property are said to be no longer in existence. There was no documentation tendered before the court to demonstrate otherwise. In this regard, it is important to interrogate whether the South C property can qualify as a matrimonial home within meaning of the **Matrimonial Property Act**.

29. The matrimonial home is defined under **section 2** of the **Matrimonial Property Act** to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property. From the definition under **section 2** as stated above, it is evident that the South C property can be rightly referred to as a matrimonial home. It was acquired by the parties hereto during the existence of their marriage and utilized as their matrimonial home.

30. The Plaintiff insists that she contributed towards the acquisition of the South C property and that she should be granted 100 percent ownership of the property. In his testimony, the Defendant stated that he and the Plaintiff own the South C property, which is registered in both their names, on a 50 percent basis, and hold it in trust for their children. He however denied the Plaintiff's allegations of contribution while stating that he solely acquired the property, and included the Plaintiff's name since it was for the benefit of their children.

31. Contribution is defined under **section 2** of the **Matrimonial Property Act** to include both monetary and non-monetary contribution. According to the definition, non-monetary contribution includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.

32. The Defendant alleges that the Plaintiff never contributed a cent towards servicing and the full repayment of the mortgage. He produced various materials before the court to demonstrate his finances and how he utilized them in acquiring the South C property. He argued that the Plaintiff did not contribute a cent towards the acquisition of the property. That all she did was identify the property in a newspaper cutout after which he proceeded to acquire it.

33. The Plaintiff on the other hand maintained that she contributed towards the acquisition of the property both in monetary and nonmonetary form. She proceeded to demonstrate her monetary contribution by producing documentary evidence to support her assertions. She also argued that she made nonmonetary contributions since she was the one who catered for their children, the matrimonial home, and the family as a whole. That in addition to paying the utility bills, she met the expenses of upgrading the said property up to its present state. She further

stated after the Defendant left for Webuye, she solely maintained and serviced the property.

34. Having determined that the South C property qualifies as matrimonial property, and that both parties hereto contributed towards its acquisition, albeit in different degrees, the next step is to determine how the said property should be distributed.

35. The parties herein contracted a Christian marriage which has since been dissolved leading up to the current proceedings. In **Civil Suit No. 11 of 2001 E.N.K vs. J.N.K [2015] eKLR**, Musyoka J while deliberating on distribution of matrimonial property upon dissolution of a Christian marriage stated thus:

**“When parties get into a marriage arrangement, they usually intend the arrangement to be for life. Divorce is not in their minds. This is the position regardless of the system of law under which the parties contract marriage...The parties to a marriage there live their lives according to that concept, the permanence of their marriage. They beget children and acquire property believing that they would be together for life. This then creates the presumption that whatever property is acquired by the parties during their marriage must have been intended to be for the benefit of the family...**

**...The Christian notion of marriage, the type of marriage the parties before me got into, is that upon celebration thereof the man and the woman become one unit, one flesh. Whatever the man does, he does for the woman; and vice versa. This would mean that whatever property he acquires during the marriage, he acquires for himself and for the woman, for the two are one. Therein too should lie the answer to the question, what should happen to property acquired by parties to a Christian marriage upon divorce.”**

36. The Christian notion of marriage as outlined above, envisages equality in ownership of property. This notion of equality is further enshrined in the Constitution of Kenya whose **Article 45(3)** provides thus:

**“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.”**

37. The Plaintiff herein sought to have 100 percent ownership of the South C property. This would be contrary to the notion of equality as enshrined in the Constitution. This is in light of the fact that it was not acquired with her sole efforts so as to qualify as her sole property. Further, the lease bears both names of the parties hereto. The Defendant on the other hand is only opposed to the grant of 100 percent ownership of the property to the Plaintiff. He instead proposes that the property be held by both of them on a 50 percent basis and in trust for their two children.

38. Having carefully considered the pleadings filed hereto, the rival arguments advanced by each of the parties and the written submissions filed in this matter, I find that House No. [particulars withheld] erected on Land Reference Number [particulars withheld] Nairobi Area is the only property available for distribution as matrimonial property. The Plaintiff referred to other properties allegedly owned by the Defendant. She did not however adduce adequate evidence to advance her claim.

39. In the premise therefore, and in line with **section 14(b)** of the **Matrimonial Property Act**, I make the following orders:

- a. I declare that the property known as House No. [particulars withheld] on L.R No. [particulars withheld] Nairobi Area was acquired jointly by the Plaintiff and the Defendant during coverture and shall be shared equally (fifty-fifty percentile) between the Plaintiff and the Defendant and held in trust for the issues of the marriage as they both desire.
- b. Either party shall have the option of buying out the other party’s share.
- c. Each party shall bear their own costs.

**SIGNED DATED and DELIVERED in open court this 25<sup>th</sup> day of October 2018.**

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**L. A. ACHODE**

**JUDGE**

**In the presence of M/s Mburu Advocate for the Plaintiff**

**In the presence of M/s Abongo Advocate for the Defendant**