



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 6 OF 2016

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013

M M M.....APPLICANT

VERSUS

L O O.....RESPONDENT

RULING

1. The applicant and the respondent were married under the Luhya and Teso custom rites, ceremonies and customary marriage agreements dated 19th February 2005, 4th March 2006, 7th March 2006 and 30th December 2006 about December 2006. They cohabited as husband and wife in various locations between 2005 and 2009. The marriage was, however, dissolved on 5th August 2016 by an order of the Chief Magistrates court at Milimani in **Divorce Cause No. 140 of 2015**. The couple was not blessed with children.

2. Through the application by way of originating summons dated 26th February 2016, the applicant moved the court under certificate of urgency seeking the following orders:

a. that the properties hereunder both immovable and movable, acquired by the joint efforts and funds of both parties during their marriage and period of coverture and presently in possession of the respondent be declared matrimonial property and/or jointly owned by the applicant and the respondent:-

- i. Apartment A4 in Block A of Swara Court, Sunrise Park located on L.R. 209/[particulars withheld] Imara Daima;
- ii. Apartment A6 in Block A of Swara Court, Sunrise Park located on L.R. 209/[particulars withheld] Imara Daima;
- iii. house in Phenom Phase 1 Estate situated on Land reference No. 209/[particulars withheld] Nairobi;
- iv. parcel of land in Pioneer estate, Eldoret;
- v. parcel of land L.R. No. [particulars withheld] in Amboseli; and
- vi. motor vehicle registration number KBF [particulars withheld], Toyota Surf.

b. that the above matrimonial property acquired during the existence of the marriage and coverture be valued and sold and the proceeds thereof be shared in equal proportions between the applicant and the respondent, and further the respondent be ordered to execute all the necessary transfers to the purchasers and in the event of default, the Registrar of the High Court of Kenya or any other such officer be authorized to execute the same instead of the defendant;

c. that in the alternative and without prejudice to the foregoing, the matrimonial property be valued and the respondent be ordered to pay the applicant a sum equal to half the value of the matrimonial property; and

d. that this court be pleased to direct that the rental proceeds derived from the property known as Apartment A4 in Block A of Swara Court, Sunrise Park located on L.R. 209/[particulars withheld] Imara Daima be shared equally between the applicant and the respondent.

3. The summary of her case was that during the marriage and period of coverture they jointly acquired the listed matrimonial properties; that at the time of acquiring the properties she was already employed as a Human Resource Officer at [particulars withheld] in Sri Lanka; that she contributed to the purchase of the various properties which were registered in the respondent's name in trust for her by making cheque payments drawn in favour of the respondent to his Standard Chartered Bank account upon his request; that during the period 2005 to 2008 they both resided and worked in Sri Lanka and it was mutually agreed that they would jointly invest in properties in Kenya with the respondent handling the transactions of acquisition of the property; that about October 2008, while purchasing the suit motor vehicle, the respondent requested her to issue a cheque towards payment of import duty for Kshs.540,000/= cheque No. 100003 to his sister Judith Oduma, who was assisting them clear the motor vehicle; that on diverse dates between 1st January 2006 and 30th March 2009, she made both cash and cheque payments to the respondent's Standard Chartered Bank account totaling to Kshs.3,412,510/= towards the purchase, maintenance and improvement of the suit properties; that the respondent deserted her in 2009 leaving her in Apartment A6 in Block A of Swara Court, Sunrise Park located on L.R. 209/[particulars withheld] Imara Daima which was their matrimonial home at the time; that the respondent has since married another wife with whom he has children and cohabits with his new family in House in Phenom Phase 1 Estate situated on Land reference No. 209/[particulars withheld] Nairobi; that the respondent is now selling Apartments A4 and A6 in Block A of Swara Court, Sunrise Park located on L.R. 209/[particulars withheld] Imara Daima and has altered the original sale agreement dated 3rd September 2007 in order to exclude her from the sale transactions of the properties; and that she was apprehensive that if the property is not shared between them the respondent will maliciously, fraudulently and unlawfully proceed to dispose of the same. The application was supported by the affidavit of the applicant dated 26th February 2016 and a further affidavit dated 29th November 2017.

4. The summons was opposed by the respondent. It was his case that the applicant did not make any contribution, material or otherwise, in the acquisition of the suit properties and that the said properties were acquired exclusively and solely through his own funds without any financial or other input by the applicant. Regarding the motor vehicle registration No. KBF 714A Toyota Surf, it was his case that he imported the same in the year of 2008 and paid the full purchase price of Euro 6,670 from his Euro currency account No. [particulars withheld] Standard Chartered Bank Eldoret Branch. Regarding L.R. No. Eldoret Municipality Plot No. 12/[particulars withheld] (sub-plot 4) Pioneer Estate Eldoret, it was his case that he purchased the plot at a price of Kshs.625,000/= pursuant to an agreement dated 17th March 2006 and paid the entire purchase price without any contribution from the applicant who was then without any income. Regarding L.R. No. 209/[particulars withheld] Phenom Estate, Nairobi, he stated that he issued several cheques amounting to Kshs.4,700,000/= which was the purchase price and an additional Kshs.188,000/= being for stamp duty for the house, and that despite the applicant insisting to have the house registered in both their names, she did not make any payments towards the purchase of the same. Regarding L.R. No. 209/[particulars withheld] Flats in Swara Court, Nairobi, he stated that he made the full payments for both properties which were assessed at Kshs. 3,200,000/= for each property without any contribution from the applicant. Regarding Sub Plot 58 L.R. No. [particulars withheld] Amboseli Court, Nairobi, he stated that the sale commenced following a letter of offer addressed to him dated 8th April 2011 and paid a deposit of Kshs.400,000/= but since the said sale fell through he was refunded the deposit of Kshs.400,000/=. This last property is therefore
not among the matrimonial property.

5. Parties agreed to have the originating summons dated 26th February 2016 be determined through the filed affidavits and the written submissions. Neither party cross-examined the material contained in the other's affidavits.

6. Section 6(1) of the **Matrimonial Property Act, 2013** defines matrimonial property as-

“the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

7. There is no dispute that the parties cohabited as husband and wife between 2005 and 2009 during which period the suit properties were acquired. Apartments A4 and A6 in Block A of Swara Court, Sunrise Park located on L.R. 209/[particulars withheld] Imara Daima were purchased between 19th December 2006 and August 2007, with the final instalment and stamp duty paid in May 2010. The house in Phenom Phase 1 Estate situated on Land Reference No. 209/[particulars withheld] Nairobi was bought between February 2006 and July 2009. The parcel of land in Pioneer estate, Eldoret was purchased in March 2006 while motor vehicle registration No. KBF [particulars withheld] Toyota Surf, was purchased in the year of 2008. I find that the properties are matrimonial properties in terms of section 6(1) of the **Matrimonial Property Act**.

8. Having found that the suit properties are matrimonial properties, how should they be distributed? In dealing with the issue, it is important to determine how the properties in this case were acquired and the contributions made by each party.

9. According to section 2 of the **Matrimonial Property Act, 2013**,

“ “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) farm work. ”

10. The issue of contribution was dealt with in the case of **PWKvs JKG 2015 eKLR** where the Court said;

“Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788”.

It is the responsibility of the court to interrogate the evidence to determine how the matrimonial property was acquired, and what contribution each party made towards that acquisition.

11. In the evidence of the applicant she was employed as a Human Resource Officer at [particulars withheld] in Sir Lanka from March 2007 to March 2008 and she was receiving a monthly salary of €2,500. She stated that from that source of income she made both cash and cheque payments to the respondent’s Standard Chartered Bank totaling to Kshs.3,412,510/= which was towards the purchase, maintenance and improvement of the disputed properties. She attached copies of bank statements to substantiate the allegation. Though the respondent questioned the authenticity of the statements, he did not provide any evidence to rebut the same.

12. From the evidence of the respondent, he was employed [particulars withheld] in Germany from March 2004 to February 2005 earning US \$2,500 monthly, from March 2005-2006 he earned US \$3,500 per month which was increased to US \$3,600 monthly from March 2007-March 2008 after which the contract was varied to increase his salary to US \$4200 effective December 2006. He was later employed by [particulars withheld] for the period 26th January 2009 to 25th January 2011 at the monthly salary of Pounds Sterling 26,698. It was the respondent’s submission that he bought the suit properties from the substantial amounts received from [particulars withheld]. He filed copies of cheques evidencing payments towards the acquisition of the properties as follows:

- a. L.R. No. Eldoret Municipality Plot No. 12/[particulars withheld] (sub-plot 4) Pioneer Estate Eldoret- Kshs.625,000/=
- b. L.R. No. 209/[particulars withheld] Phenom Estate, Nairobi - Kshs.4,700,000/= for the purchase price and Kshs.188,000/= for stamp duty
- c. L.R. No. 209/[particulars withheld] Flats in Swara Court, Nairobi - Kshs. 3,200,000/= for each property.
- d. Sub Plot 58 L.R. No. [particulars withheld] Amboseli Court, Nairobi - a deposit of Kshs.400,000/= which was later refunded.

In total, his contribution towards the acquisition of the properties was Kshs. 11,913,000/=. This evidence regarding his part of contribution was not challenged.

13. The respondent did not produce any statements to dispute that he received money from the applicant’s earnings.

14. There is no evidence that either party had any other source of income besides their salaries. I note that although the respondent brought into the family most of the income which he used to purchase the properties, the applicant contributed to the purchase directly through the cheques she wrote to the respondent. Further, it is apparent the salary of the applicant was used on the family. This helped relieve the respondent from the burden of singlehandedly applying his income towards the purchase of the properties. I find that the applicant contributed directly and indirectly to the acquisition of the matrimonial properties.

15. I have considered the income differences between the applicant and the respondent. The applicant’s direct contribution was Kshs.3,412,510/=. Her indirect contribution included companionship. The respondent’s direct contribution was Kshs.11,913,000/=. I consider that the applicant stays in Apartment [particulars withheld] in Block A of Swara Court, Sunrise Park on LR No. 209/[particulars withheld] Imara Daima. It cost Kshs.3,200,000/=. On the evidence tendered and doing the best that I can, I allow the applicant to keep this house. On top of that, she will be paid Kshs.3,000,000/= (Three Million Kenya Shillings) by the respondent within six months from today. These will constitute the applicant’s contribution to the acquisition of the matrimonial property. In reaching this determination, I have considered the applicant’s evidence that she paid Kshs.540,000/= towards the purchase of motor vehicle registration number KBF [particulars withheld] Toyota Surf. For the avoidance of doubt, the respondent is ordered to transfer Apartment [particulars withheld] Block of Swara Court, Sunrise Park on LR. 209/[particulars withheld] to the applicant within 30 days failing which the Deputy Registrar shall sign all papers to effect the transfer.

16. The respondent shall keep vehicle KBF [particulars withheld] Toyota Surf, Apartment [particulars withheld] in Block A of Swara Court, Sunrise Park on LR No. 209/[particulars withheld] Imara Daima, the house on LR No. 209/[particulars withheld] Phenom Estate, Nairobi and Plot No. 12/[particulars withheld] (sub plot 4) Pioneer Estate Eldoret in Eldoret Municipality.

17. This was a family dispute. Each party shall bear own costs.

DATED and SIGNED at NAIROBI this 22ND OCTOBER 2018

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 23RD OCTOBER 2018

A.N. ONGERI

JUDGE