



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 5 OF 2015

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

MIM.....APPLICANT

VERSUS

FMM..... RESPONDENT

AMA.....INTERESTED PARTY

JUDGMENT

1. This claim for matrimonial property was commenced by way of Originating Summons dated 18th February, 2015 and supported by an affidavit sworn on the same day. The applicant filed her statement and list of documents in further support of her claim on 1st October, 2015 and 3rd December, 2015 respectively.

2. In her summons, the applicant seeks to have the court declare that the movable and immovable properties listed therein had been acquired by the parties jointly and that the same were held by the Respondent beneficially and in trust for the Applicant. She also urged this court to *inter alia* issue a declaration that she is entitled to a 50% share of the properties listed or the proceeds of sale of the properties or such other proportion as the Court may deem fit.

3. She listed the properties as follows;

a. L.R. No. S/Maragoli/Mahanga/[...]

b. Kayole Plot C***

c. Kayole Plot C***

d. L.R. No. Kajiado/Kitengela/[...]

e. Kibera Plot NB [...]

f. Kitale Plot No. [...]

g. Kitale Farm (5.5 Acres)

h. One plot in Ruai

i. Shares in

a. Kenya Commercial Bank Ltd

- b. Co-operative Bank of Kenya ltd
- c. National Bank of Kenya ltd
- d. Kenya Airways
- e. ICDC
- j. Motor Vehicle registration number K[...], Peugeot

4. The Respondent on the other hand filed his Replying Affidavits on 2nd March, 2015 and on 22nd June 2015; a Supplementary Affidavit on 16th September, 2015 and a List of documents on 15th November, 2016 in response to the Applicant's claim.

THE APPLICANT'S CASE

5. Applicant stated that she and the Respondent got married in 1985 and solemnized their marriage in 1996 at the Attorney General's chambers. The union was blessed with 4 children and during the subsistence of the marriage, they acquired the properties listed in her Summons. The Applicant subsequently petitioned for divorce and the marriage was officially dissolved on 4th April, 2014.

6. The Applicant claims that she raised the children, paid their fees on her merge earnings and struggled to make ends meet as the Respondent squandered the family's investments. She did all sorts of odd jobs to survive including cutting grass and selling scrap metal and at one point had to visit FIDA and file a maintenance suit to compel the Respondent to take responsibility for his children. On this alone, the Applicant submits that her contribution was significant and actually more than 75 %.

7. In her testimony and submissions, the applicant in her earlier averments claims that she got married to the Respondent in 1984. With regards to **L.R. No. S/Maragoli/Mahanga/[...]**, the applicant submitted that the same was purchased by the Respondent in January 1985 from his father to save the property from auction. She stated that she gave the Respondent money to utilize when he travelled to Kakamega on numerous occasions to deal with the matter.

8. As for **Kayole Plot [...]** and **Kayole Plot [...]**, the Applicant stated that Kayole Plot [...] was acquired fully in December 2000 through the process commenced in 1998. Kayole Plot C***on the other hand, had been acquired in 1997 and construction on the plot completed around 2000. She tendered copies of electricity bills and construction material receipts to prove her monetary contribution. She stated that she had singlehandedly managed the construction as the Respondent spent his time in the bar drinking. She refuted the Respondent's allegations that Kayole [...] was subject of a court dispute and that he had since sold Kayole Plot [...] to the Interested Party as this was not supported by any evidence. There was no proof of payment for the purchase of Kayole Plot [...] by the interested party and furthermore, her consent as a spouse had not been sought prior to the sale. She insisted that the Nairobi City County records still reflected the Respondent as the proprietor of the two plots.

9. She stated that **Kibera Plot NB [...]** had been purchased following the sale of another plot they had bought at **[particulars withheld]** Cooperative Society. She claimed that the Respondent had developed this property and was collecting rental income from it.

10. The Applicant rejected the Respondent's claim that he had sold **Kitale Plot No. [...]** stating that he had not revealed the purchase price of the property. She also refuted the claim that the Respondent had sold his shares in Kenya Commercial Bank ltd, Co-operative Bank of Kenya ltd, National Bank of Kenya ltd, Kenya Airways and ICDC. She submitted that **Motor Vehicle registration number [...], Peugeot** was acquired during the subsistence of the marriage and that the Respondent's claim that the vehicle was in the possession of his son was not proved.

11. As for **LR. No. Kajiado/Kitengela/[...], Kitale Farm (5.5 Acres)** and the **plot in Ruai** the Applicant stated that these properties were still in existence and that the Respondent had not denied this fact.

12. In conclusion, the Applicant averred that all the properties were acquired during the subsistence of the marriage. She had been working throughout their lives together. She reiterated that the Respondent was still collecting rental income from some of the properties which he spent lavishly. She strongly refuted the Respondent's claim that she owned other properties which she had not disclosed stating that the only asset in her name was motor vehicle [...], which she uses to take the deaf boy to school when she can.

13. She submitted that the Respondent had not proved any contribution at all and as such, she was entitled to a 50% share of all the properties listed in her application.

THE RESPONDENT'S CASE

14. Conversely, the Respondent averred that **L.R. No. S/Maragoli/Mahanga/[...]** was ancestral land given to him by his father in 1984 before his marriage to the Applicant and as such the same was not matrimonial property as envisaged by the Matrimonial Property Act.

15. He stated that **Kayole Plot [...]** had been sold to the Interested Party and putting it up for division as matrimonial property was exposing him to legal repercussions. As for **Kayole [...]**, the Respondent submitted that the same was the subject of Chief Magistrate's Court Case No. 7797 of 2006 at Nairobi and asked the Applicant to peruse the court file if she doubted the veracity of his claims. He claimed that **Kitale Plot No. [...]** had similarly been sold off, and attached a copy of the sale agreement to that effect.

16. The Respondent stated that **L. R. No. Kajiado/Kitengela/[...]** was a gift from his friend the Late N and he wished that the same be reserved as inheritance for his children. He also admitted the existence of the **Kitale Farm** and submitted that he wished the same be considered family property.

17. The Respondent averred that after his marriage to the Applicant broke down; he had sought refuge in his current home in **Kibera Plot NB 6***** where he lived with his wife, H K L and daughter S. H testified to this fact. He stated that this was the only home his wife and daughter knew and they would be rendered homeless if it was divided.

18. He submitted that the **plot in Ruai** could go to the Applicant as she was the one holding the documents. He further stated that the **shares** in Kenya Commercial Bank ltd, Co-operative Bank of Kenya ltd, National Bank of Kenya ltd, Kenya Airways and ICDC had been sold by his agents [**particulars withheld**] Investment Bank, while he was still married to the Applicant.

19. He averred that **Motor Vehicle registration number K***, Peugeot** had been repaired by his son who was currently in possession of the vehicle.

20. The Respondent claimed that the Applicant did not disclose the properties she owned. He enumerated them as including Plot No. [...] Dandora Women Group Share Certificate dated 25th July 2011, Plot No. [...] Wendani Enterprises Ltd Share Certificate dated 25th July, 2014, Two Plots Syokimau Bright Houses Ltd Share Certificate No. [...] and Motor Vehicle registration number [...], Toyota Saloon.

21. He urged the court to consider the Negative Contribution Doctrine stating that the Petitioner had been hostile and violent to him. He described their home as a war zone and submitted that the Applicant had subjected him to treatment akin to slow poison and that he had never been at his best performance at work or in acquiring wealth.

INTERESTED PARTY'S CASE

22. The Interested Party filed an application to be enjoined in the suit on the grounds that she was the beneficial and actual owner of **Kayole Plot[...]** and **Kayole Plot [...]**. She did not give viva voce evidence but filed submissions, in which she reiterated that she had purchased **Kayole Plot C***** from the Respondent on 15th April, 2010. She stated that she had visited the Nairobi City County offices to register the sale but was barred from doing so by a court order. She submitted that the Affidavit evidence she had tendered was admissible before the court in place of testimonial evidence and that the claim of forgery of documents raised by the Applicant in her submissions had denied her the chance to give evidence to the contrary. She backed the Respondent's position that the Applicant had not adduced evidence showing that the loans she had taken had been for the purpose of developing Kayole Plot [...]. She submitted that the Applicant had not proved that Kayole Plot [...] was matrimonial property and that in any case, the same had been acquired before the Land Registration Act, The Marriage Act and the Matrimonial Property Act were in force and thus no legal requirement for spousal consent.

ISSUES FOR DETERMINATION

23. The Applicant by her pleadings, testimony and submissions raised the following issues for determination;

- a. Whether the movable and immovable properties listed in her Summons were acquired by the parties jointly and that the properties are held by the Respondent in trust for the Applicant; and
- b. Whether the Applicant is entitled to 50% share of the properties listed in her Summons or the proceeds of sale of the same or such other proportion.

24. On his part, the Respondent raised the following issues;

- a. Whether the properties listed had been identified as matrimonial property and if so whether the same could be distributed on the grounds of contribution; and
- b. Whether the Applicant made negative contribution to the welfare of the family.

DETERMINATION

25. Though it is not clear when the Applicant and Respondent got married, it is not in dispute that they were married for a considerable amount of time during which they got 4 children and acquired property. The Applicant testified that she got married to the Respondent in 1984 whereas the Respondent stated that they got married in 1985. The parties got their first child in 1985. They subsequently solemnized their marriage in 1996 which was later terminated in Divorce Cause No. 241 of 2013.

26. Other than **L.R. No. S/Maragoli/Mahanga/[...]**, the parties agree to the fact that all properties were acquired during the subsistence of the marriage.

27. Section 6 of the Matrimonial Property Act defines matrimonial property as;

“(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.”

28. The Act at section 7 further provides that;

“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.”

29. The Applicant submitted that she had contributed to the acquisition of the listed properties which had been acquired during the subsistence of the marriage.

30. **L.R. No. S/Maragoli/Mahanga/4***** was purchased by the Respondent from his father at the purchase price of Kshs. 11,000. The Applicant argued that she had given the Respondent fare for him to travel to Kakamega and attempt to save the property from auction. The Respondent claimed that this was ancestral property handed down to first born sons in the family and was not matrimonial property. He also argued that the same had been acquired before marriage and was not open to distribution.

31. Despite the Applicant’s testimony and submissions, the general consensus, based on her Originating Summons, supporting affidavit and the preceding Divorce Cause is that the parties got married in 1985. Title to **L.R. No. S/Maragoli/Mahanga/4***** was transferred to the Respondent on 7th January, 1985.

32. In **Muthembwa v Muthembwa (2002) 1 EA 186** it was held that,

“no spouse can acquire an interest in any property inherited by the other spouse from his or her parent unless the property had been improved with finances provided by the other spouse.”

33. The Respondent has not advanced sufficient evidence to prove that this property was ancestral property. However, if this claim were taken to be true, the Applicant’s averment that she had contributed monetarily to its acquisition was not sufficiently rebutted as such, I hold that the Applicant has acquired a beneficial interest in this property.

34. It was the Respondent’s case that **Kayole Plot** [...] was not open to distribution as the same was subject to a court dispute. He did not provide copies of pleadings or any evidence to shore this up. The Applicant annexed a copy of sale agreement between the Respondent and the City Council of Nairobi (as it then was) in her list of documents. This evidence remained uncontroverted. Since this property was acquired during the subsistence of the marriage, I find that the same qualifies as matrimonial property.

35. As for **Kayole Plot** [...], a sale agreement between the Respondent and the Interested Party has been provided to show that the same is now beneficially owned by the Interested Party. They both claim that this property was sold on 15th April, 2010 before there was any legal requirement to seek spousal consent. Further, that the property was sold before the marriage had been dissolved.

36. The Applicant on her part, disputes the sale of the property. She claims that the Interested Party is the Respondent’s aunty and that she did not provide proof of payment of the purchase price or the proceeds she was receiving from the property. However, the Respondent’s claim that he had sold the plot to cater for his medical bills following an operation which caused him to become disabled was not refuted. He also annexed proceedings in Criminal Case 5162 of 2007 where the Applicant pled guilty to a charge of assaulting the Respondent and hitting him on his knees.

37. Be that as it may, the issues raised by the parties relate to occupation and title to land which can be better dealt by the Environment and Land Court which has the requisite jurisdiction to hear such matters as per Article 165(5) (b) of the Constitution. As such this court finds that **Kayole Plot C***** is not open for distribution.

38. This also applies to **Kitale Plot No. [...]** where the Respondent provided a sale agreement between himself and one S M A. Moreover, the Applicant did not lead evidence to show the contribution she had made towards the acquisition or development of this property.

39. There was no dispute that the Respondent still maintained title to **LR. No. Kajiado/Kitengela/[...], Kitale Farm (5.5 Acres)** and the **plot in Ruai** and that these had been acquired during the subsistence of the marriage. They therefore qualify as matrimonial property.

40. After his separation from the Applicant, the Respondent made a home in **Kibera Plot NB** [...]. He states that he lives there with his wife and daughter and distributing the property would render him homeless. He further states that he purchased the plot in an auction by the National Housing Finance after his separation from the Applicant. He does not provide any proof of this.

41. This court notes that the marriage between the Respondent and HKL was contracted before the dissolution of his marriage.

42. The Applicant stated that **Kibera Plot NB** [...] had been acquired following the sale of another plot they had bought jointly. She also stated that this property had been acquired following the sale of another property they had acquired jointly. This court is of the opinion that the Applicant has acquired an interest in this property.

43. The Respondent claims that he sold his shares in Kenya Commercial Bank Ltd, Co-operative Bank of Kenya Ltd, National Bank of Kenya Ltd, Kenya Airways and ICDC. What he has produced before this court is a valuation report which shows that he owns shares in The Co-operative Bank of Kenya Ltd, Kenya Airways Ltd, Mumias Sugar Co. Ltd, National Bank of Kenya Ltd and Safaricom Ltd. He has not adduced any evidence to show that these have been sold off. The valuation report shows the Respondent’s portfolio as of 13th February, 2015. Since there is no other evidence to show that these were acquired during the subsistence of the marriage, this court finds that the shares

cannot be deemed as matrimonial property.

44. The Respondent claims that **Motor Vehicle registration number [...], Peugeot** is in the possession of his son, which the Applicant disputes. She however admits that she owns **Motor Vehicle registration number [...], Toyota Saloon**.

45. The Respondent listed some properties which he claimed belonged to the Applicant. He attached share certificates to his list of documents and further claimed that the Applicant had taken a loan to purchase a property in Nyayo estate.

46. This court is not convinced by the probative value of the share certificates tendered by the Respondent. They do not prove that the Applicant is in beneficial or actual possession of Plot No. [...] - Dandora Women Group Share Certificate dated 25th July 2011, Plot No. [...] Wendani Enterprises Ltd Share Certificate dated 25th July, 2014, Two Plots Syokimau Bright Houses Ltd Share Certificate No. [...], hence they cannot be termed as matrimonial property.

47. The Matrimonial Property Act defines contribution to include both monetary and non-monetary contribution which 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;”

48. The parties are in agreement that initially all properties were in the Respondent's name. The Matrimonial Property Act at section 14 (a) provides that

“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;”

49. The court in the case of **PWK vs JKG 2015 eKLR** held;

“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.”

50. The Applicant has adduced evidence to prove that she contributed in cash and kind to the acquisition of the properties. She stated that she had been working and earning a living throughout the subsistence of the marriage first at [particulars withheld] then at Nairobi City County. She averred that she had managed the construction of the Kayole properties and had raised the children on her own, paying their school fees and barely managed to keep afloat.

51. The Respondent disputed the Applicant's evidence and insisted that he had been the one paying all utility bills, school fees and related expenses. He provided copies of receipts in support of this. The Applicant confirmed that the Respondent had been paying the house rent for the home she lived in.

52. The Respondent did however agree that the Applicant was in gainful employment and that she took out loans during the subsistence of their marriage though he was in doubt that the loans taken by the Applicant had been used to develop the properties in dispute.

53. The Court of Appeal in the case of **SNK v MSK & 5 others [2015] eKLR Nairobi Civil Appeal No.139 OF 2010** found that notwithstanding the fact that the 1st respondent in that case had not demonstrated that she had made any direct financial contribution towards acquisition of the three properties, the court was persuaded that she had made some indirect financial contribution.

54. The Respondent submitted that though the Applicant was a salary earner of the same grade as him, there was nothing she could show for her earnings since by her own admission the Respondent provided everything prior to the separation and divorce. He also stated that the bundle of receipts presented by the Applicant between the year 1997 and 2002 amounted to 136,399/= an amount which could not have made substantial improvements to any property.

55. Despite this, it is not in doubt that the Applicant dutifully took care of the family. She worked hard to raise the children even after her separation from the Respondent. Domestic work, management of the matrimonial home and child care are statutorily recognized as a worthy contribution. It is clear that the Applicant made both indirect monetary and non-monetary contribution to the acquisition of the properties in dispute.

56. The Respondent's counsel raised the Negative Contribution Doctrine in support of his case. This principle has been cited with approval

by the Court of Appeal in **P N N v Z W N [2017] eKLR** which held that in certain circumstances, “*an assessment of the inauspicious party’s non-monetary contribution may well turn out to be in the negative.*”

57. Both parties have traded accusations and counter accusations on the other’s conduct leading to the deterioration of the marriage. This court agrees with the court in **AQS v AQR [2012] SGCA 3 (“AQS”)** that “*Where parties were clearly in a highly acrimonious relationship and they have alleged various counts of misconduct against each other, the court should not be too ready to sift through the facts and evidence in order to assign relative blame for the purposes of dividing matrimonial assets.*”

58. Moreover, these issues have been fully canvassed in Divorce Cause No. 241 of 2013.

59. Having considered the evidence adduced on the various contributions made by the parties to the acquisition of the properties in dispute, this court renders itself thus;

- a. **L.R. No. S/Maragoli/Mahanga/4*** shall be shared in the ratio of 80 : 20 in favor of the Respondent;
- b. **Kayole Plot [...]** is allocated to the Respondent;
- c. **LR. No. Kajiado/Kitengela/3*** and Kitale Farm (5.5 Acres)** shall both be shared in the ratio of 50 : 50;
- d. **Kibera Plot NB [...]** is allocated to the Respondent;
- e. The **plot in Ruai** is allocated to the Applicant;
- f. **Motor Vehicle registration number [...], Peugeot** is allocated to the Respondent; and
- g. **Motor Vehicle registration number [...], Toyota Saloon** is allocated to the Applicant.

60. This court also notes that the parties have not addressed themselves to the distribution of the property in Lavington. The parties had cohabited in this home before the Respondent moved out. The Applicant has been living in this quarters and this court finds it just to have the same allocated to her.

61. This being a family matter, I do hold that parties shall meet their respective costs.

62. It is so ordered.

Dated, signed and delivered on the 28th day of November 2018.

R.E.OUGO

JUDGE

In the presence of;

Mr. Mwangi h/b Mr. Kirimi For the Applicant

Mr. Mutisya h/b Mr. Kwengu For the Respondent

Mr. Mutisya h/b Mr. Kwengu For Mr. Khayega for Interested Party