

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.6 OF 2013

IN THE MATTER OF SECTION 17 OF MARRIED WOMEN PROPERTY ACT

AND

ALL ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF A DECLARATION OF TRUST

BETWEEN

NM.....APPLICANT

VERSUS

JAV.....RESPONDENT

JUDGMENT

1. The applicant filed an Originating Summons dated 21st January 2013 . It is brought under Order 37 Rule 1,11,12 and 14 of the Civil Procedure Rules 2010, Section 1A, 1B, 3 & 3A of the Civil Procedure Act, Section 17 of the Married Women Property Act and all enabling provisions of the Law and she seeks the following orders;

i. A declaration that the properties (movable and immovable) listed herein with all buildings and developments thereon acquired and developed by the joint funds and efforts of the Applicant and Respondent during their marriage and registered in the name of the Respondent and/or in the name of companies are jointly owned by the applicant and respondent.

a) Land Reference number [xxxx] situated in Nairobi, Karen, [Particulars Withheld] – a four bed roomed house.

b) Title number Kwale/[xxxx] situate in Kwale Kenya.

c) Title number [xxxx], the Yonne, [Particulars Withheld], United Kingdom, a 3 bedroom semi-detached house.

d) One car, Toyota held in Jakarta, Indonesia; and one car Honda, held in Nairobi Kenya.

e) Funds held in the following bank accounts and bonds;

Bank	Location	Account number
I & M Bank		
· Kshs.	Nairobi, Kenya	020*****
· US \$		002*****
· Sterling £		02*****
· Euro €		02*****
Commercial Bank of Africa (CBA)	Nairobi, Kenya	015***** (closed)

Natwest Bank	United Kingdom/Isle of Man	711*****
Nationwide Bank	United Kingdom	
Cahoot Bank Current Account	United Kingdom	14*****
Northern Rock	United Kingdom	(Closed)
Barclays Bank	United Kingdom	004*****
UK government/Municipal bonds	United Kingdom	
HSBC Bank · USD · GBP · IDR	Jakarta, Indonesia	107-***** 107-***** 107-*****

ii. A declaration that an order should issue declaring that fifty (50%) percent or such other or higher proportion of the properties aforesaid, is held by the Respondent in trust and for the beneficial interest of the applicant and the children of the marriage namely M virtue and LWN.

iii. A declaration that the properties listed above constitute matrimonial property jointly owned by the applicant and respondent and should only be dealt with, appropriated, and charged for finance or otherwise disposed of in a manner acceptable to and compatible with the rights of the applicant and children of the marriage namely M virtue and LWN.

iv. A declaration that the properties should be shared equally and/or sold and the net proceeds be shared equally between the Applicant and the Respondent or in such manner as the court may deem just.

v. A declaration that the Deputy Registrar ought to be empowered to sign any documents that the Respondent may refuse to sign.

2. Costs be provided for.

The application is premised on the following grounds:

i. The applicant is married to the respondent and the properties listed above were acquired during the said marriage and are therefore held in trust for the applicant, the respondent and the children of the marriage namely M Virtue and LWN.

ii. The applicant's contention is that the Respondent is likely to sell or transfer or and or interfere with the properties listed above to the detriment of and applicant under the trust.

iii. The Respondent has also so far depleted funds from various bank accounts that are in joint names without the authority of the applicant.

iv. That it is equitable in the circumstances to grant the applicant the declaration sought.

Evidence of the Parties

2. The applicant and the Respondent got married on the 31st of October 1998 under the Marriage Act Chapter 150 Laws of Kenya, the marriage has not been blessed with any issues but they adopted one issue namely M Virtue in 2007. They had also initiated the process of adopting a second issue namely; LWN but the Applicant continued with the process after the Respondent left the marriage. During their marriage they lived in various places around the world including Kenya, Tanzania, Uganda, United Kingdom, China, Cambodia, Ethiopia and Indonesia. At the time they got married the applicant was working at KPMG Tanzania while the Respondent was working with the British Council. During their marriage the applicant had a miscarriage. After relocating to Uganda she resigned from her job and stayed home. The applicant accompanied the Respondent to the various work stations he was posted. According to the Applicant during such time she obtained short term contracts and got some earnings. In May 2012 the Respondent left the country and went to work in Indonesia by this time the Applicant and the Respondent were not in good terms and eventually Divorce Cause No 99 of 2012 was filed by the Applicant against the Respondent. They have joint properties in **Land Reference Number** [Particulars Withheld] **situated in Kenya, Nairobi, Karen**, [Particulars Withheld] **Land (a four bedroom house), Title Number Kwale**/[Particulars Withheld] **situated in Kwale, Kenya and**

Title number CH[Particulars Withheld], **41 The Yonne**, [Particulars Withheld], **CH1 2NH**. The account held jointly are I & M Nairobi (Kenya) Shillings account, US Dollar Account, Sterling Account under Euro Account. At Jakarta in Indonesia they have a joint account US Dollar, Sterling and IDR (Rupiah). According to the Applicant they have funds in Natwest Bank in the UK Account number 717*****, National wide Bank and Cahoot Bank UK Account No. 14*****, Barclays Bank UK Account number 00***** and UK Government/Municipal bonds. The closed accounts are Commercial Bank of Africa (CBA) Account no. 015***** and Northern Rock United Kingdom. The Applicant stated that she held short-term job contracts in some of the places lived. That when they lived in India the Respondent asked her to transfer her savings account into their joint accounts in the UK. The Respondent moved the funds into his personal accounts and personal savings scheme (UK) without her consent. The funds in the CBA account 30,000 pounds was transferred to Natwest Bank in the UK. This account was a joint account during their marriage. Nationwide Bank was opened by the Respondent subsequent to her transferring money to Natwest Bank. The Respondent opened the Cahoot Bank in his name. That within a period of 2 to 3 years she noticed the money in Natwest was moved to Cahoot Bank and Nationwide Bank and some money was used to buy the UK bonds which she does not own because she was not a citizen. She testified that withdrawals were made from the I & M Bank for fees, car insurance and maintenance of the family. The sum of 6.5million were funds from Central Bank for an account for a mentally ill sister. The funds do not belong to them so she moved them to her sister's trust account. On the 7th May 2012 she moved 10million from I & M Bank into her account as the Respondent was moving out of the country. The I & M Account was opened in 2005 and was their family account and she used to put her earnings. The Respondent too transferred his earnings into it. Funds from this account was used to remodel the Karen home and they rented it out. She testified that she moved funds from the USD Accounts at I & M Bank, for safe keeping at the time of their separation. She also moved money from the I & M, Sterling and the Euro Bank. She did so to maintain the family. According to her she transferred less than **30million** and not 42million. She stated that she had no control over the Cahoot account or the Respondent's accounts as she was secretive and that the income the Respondent earned largely went to the Cahoot and Natwest Bank. During cross examination the applicant stated that the Shimoni property is in her name and the funds to purchase it came from the UK Account. The UK property was purchased in 2000. That she went to Jakarta Indonesia and withdrew 93,000 USD and on the 7th February 2013. She stated that the money she withdrew is in Kenya in KCB and I & M Bank. She stated that she gets Kshs.40, 000/- for maintenance of the child and the Respondent pays fees directly to the school. The Applicant stated that during her marriage she looked after the family and she had short term job contracts which brought in some income. That she was not totally dependent on the Respondent and that she contributed 50%. She denied spending time drinking whilst at home.

3. The Respondent stated that after their marriage the Applicant stopped working after 3 months and in total she only worked for 12 months during their marriage and brought in an estimated income of Kshs. 3million. That in 2000 they purchased the UK house jointly at 186,000pounds its current value is about 280,000pounds. The Karen house was purchased in 2006 at Kshs. 18million. It was renovated and expanded and is furnished with items shipped from Indonesia. It has been valued at Kshs. 85million. The Shimoni property was purchased in the Applicant's name as he was not a Kenyan citizen. It cost 6.5 million and its current value is 8.5 million. The family owns two cars a Toyota which is 9 years old valued at 500,000/- and a Honda CVR. The Volkswagen was sold in 2008. That the furnishings original arts, Television, electrical appliances, electronics, Kitchen utensils, statues, were purchased for the Karen house, from Indonesia and shipped to Kenya, valued at around US\$ 30,000. His personal belongings are still at Karen. He stated that the amounts in the accounts at I & M Bank in Nairobi came from his single earnings and so did the monies in HSBC Jakarta in Indonesia. He transferred his income into the joint accounts at I & M Bank in 2010. According to him the Applicant without his authority withdrew large sums of money from their joint account totaling to Kshs. 44, 588,950 being Kshs 26,057,550, US\$ 181,000.00, Sterling £3,650.00 and Euro € 2,000.00. The Applicant also withdrew monies from HSBC account in Indonesia totaling to USD93, 000. In October 2011 they purchased treasury bills in the Applicant's name as he was not a citizen the funds were from I& M Bank in Nairobi. Natwest Bank account was closed and monies transferred into their joint account at I & M Bank. Nationwide Bank account in the UK and Cahoot bank are still in operation. According to the Respondent the applicant had private accounts at Barclays Bank in United Kingdom, account No. 00*****, KCB in Kenya at account No. 0111***** Southern Credit Banking Corporation in Kenya at account no 201*****, Barclays card in the United Kingdom at account No. 492***** and Standard Chartered Bank Kenya account No. 015*****. He denied that he refused the Applicant from getting a job stating that the Applicant refused to get employed. He stated that 97.5% is his contributions in purchasing the property and managing the family and that the properties enumerated should be shared according to each person's contribution. He had no objection to the matrimonial property being sold and profits shared according to each person's contribution. That the court should take into account the withdrawals the applicant made and transferred into her account the monies held in her name at Central Bank of Kenya Treasury Bills totaling to 63 million.

Submissions

4. The Applicant submitted as follows; that the suit was filed under the Marriage Women's Act 1882 which was repealed and replaced by the Matrimonial Property Act 2013. The court is rightfully mandated to determine the matter under the provisions of Matrimonial Property Act 2013 and the Constitution. It submitted that the Matrimonial Property Act defines what Matrimonial Property is under Section 6. That the Karen home was the Applicant and Respondent matrimonial home as they cohabited there. The Applicant continues to live there. After the Respondent left in 2010. That with the Respondent's admission that the properties listed were jointly owned the said should be divided equally between the applicant and the defendant. On contribution it was submitted that the matrimonial property act 2013 defines contribution as monetary and non-monetary contribution which includes; domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work. That alongside the said provision the court should also consider Article 45(3) of the Constitution states that 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. That the court should consider the Applicants contribution as she gave up her career and she was with the family as the Respondent worked at various places. The Court should consider the multiple roles the Applicant played in the family. On the properties it was submitted that the Applicant would like the Kwale property valued at 8 million to be declared matrimonial property subject to distribution equally. The court should note that the UK property is valued at 340,000 – 350,000 sterling pounds. This property has been rented out at a monthly rent of 1000sterling pounds which the Respondent receives solely. The court should also consider that the Respondent holds other bank accounts in his own name which he controls. On the allegation of 42million withdrawn by the Applicant it was submitted that the Respondent did not prove the said allegation as it did not tally with the contents set in his replying affidavit that the couple did not have 42million in the Kenyans account at the time he departed. That the Respondent did not assist the family after his departure in 2012. The Applicant bore the sole responsibility and had no choice but to withdraw monies from the joint accounts to cater for the family's needs, food, clothes, medical expenses etc. On sharing the property on the basis of 50:50 it was submitted that the courts have pronounced themselves in matters of matrimonial property. For this argument the Applicant relied on the case of **J A O Vs. N A, Civil Suit No. 86 of 2012**. That the Respondent's argument that all the monies used to purchase suit property was all his salary should be interrogated. The Court was also asked to make a finding on joint registration of assets, the Applicant cited the decision **Civil case 11 of 2006 (OS) CPM vs. VKM**. Lastly, it was submitted that in making a finding on the distribution of Matrimonial Property the court should

allow the Applicant to retain a larger share on the account of the fact that she was shouldering the burden of raising the issues of the marriage while the Respondent is free to live unencumbered life and continues to be gainfully employed. The Applicant suggested mode of distribution of the properties as follows; Property in Karen and Kwale and one Honda vehicle to the Applicant. The Property in UK and the car in Indonesia to the Respondent. On the Joint accounts the court should consider if the parties had a right and access to the funds. The Respondent withdrew an amount from the said applicant. That Applicant withdrew money to provide for the family and the Respondent earned more than triple the amount the Applicant withdrew. That the Applicant claims 50% of the Respondent's earning until the divorce. On the personal items it was submitted that the Respondent collected all the items when he abandoned the family.

5. The Respondent submitted as follows; there was a marriage between the parties. They had no biological but a girl they adopted in 2007. The parties are divorced. Decree absolute was granted on the 11th December 2015. On the properties acquired it was submitted that the Applicant alleged she was earning USD 4000 per month but produced no salary slips or bank statements to prove this. The Respondent produced statements to show his earning at the time of the marriage. He showed that monies were transferred from the individual accounts held in the UK to buy the house at Chester in the United Kingdom, and transferred in the joint account at I & M bank in Nairobi which eventually amongst other things was used to purchase and improve the property in Karen in Nairobi, Kenya. That the Respondent's salary to be paid into the joint account which money was withdrawn to buy Shimoni property. On employment of the parties it was submitted that the Applicant only worked 12 months during their marriage and her salary contribution was about 3million. It was submitted that the Applicant has chosen to make the Respondent a beast of burden who toils day and night to sustain the Applicant's High Standard of life. Reliance was made on Article 45 (3) of the Constitution on the case of **M GNK vs. AMG Civil Appeal No. 280 of 2012** where the court of appeal stated that "In assessing the contribution of the spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances bearing in mind the principles of fairness." That the Respondent produced bank statements on his savings which the Applicant did not. That the Applicant has failed to prove any director monetary contribution to the Matrimonial property. The Respondent urged the Court to note that the Applicant admitted withdrawing around 30million from I & M (Kenya) and HSBC Bank (Indonesia). That she has funds in Central Bank Treasury Bill and the total sum she has is 63million. That if the court allows to retain the Karen Property, Property and the Treasury Bills this would amount to double enrichment as was held in the **MGNK vs. AMG** case. That the said property should be sold and proceeds given to the Respondent. The Respondent submitted that since the Treasury bills were purchased in the Applicant's name using funds from the joint account the court should order her to return the value of the treasury bills or deduct the same from her total contribution. The Respondent relied on the valuation reports to show that the current property is presently valued at 85 million, Kwale at 8 million and the UK house 280,000 sterling pounds which is equivalent to 35.6 million. That the Karen property has doubled the value of the UK house. That the property brought and shipped to Kenya from Indonesia for the Karen house is about 30million inclusive of the Respondent's belongings. That the Applicant withdrew funds equivalent to 44million from the joint accounts which she transferred to her personal accounts at KCB bank at Village Market and Karen, and I & M bank in Kenya which account she did not produce details off. Lastly it was submitted that in considering the division of the matrimonial property given all the facts, the law and to ensure all fairness the ration should be 97.5:2.5% for the Respondent. That an order should be made for the sale of the properties by a respectable valuer and the proceeds be deposited in court for purposes of sharing. The court should deduct the value of the withdrawals invested in private personal accounts by the Applicant and the value of treasury bills in her name, in total amounting to over 63million. That an order should be made for the Applicant to release all personal document, education certificates, books, music, clothing, sporting equipment, photographs, pictures, artifacts, the respondent in the presence of the OCS of Karen police station. That the Applicant refused to sign any documents to facilitate the sale or transfer of the said property, the registrar of this court to sign the same to facilitate the sale and transfer thereof.

DETERMINATION

6. I have considered the parties pleadings, evidence and parties' written submissions. In my view I find that the issues for determination are as follows;

- i. What assets of the parties comprises matrimonial property?
- ii. What contribution did each party make in the acquisition of the matrimonial property?
- iii. What is equitable distribution of the matrimonial property?
- i. What assets of the parties comprise matrimonial property?

The Respondent in his pleadings has urged the Court to note that the Applicant had withdrawn large sums of money from the parties' joint accounts. In her affidavit in support of the said application, she admits to having withdrawn around 30 million from I & M (Kenya) and HSBC Bank (Indonesia). The applicant has failed to reveal to this court where she took the said monies. The said monies were held in joint accounts of the parties and as such forms part of the parties matrimonial property. Hence, the said withdrawals by the applicant will form a share of her matrimonial. Further, the respondent argues that the applicant used money from their joint accounts to purchase the T-bills in her name. The value of the treasury bills at the time of purchase in 2011 stood at 7,200,000. Further, the respondent requests that the furniture, furnishing, art, appliances, electronics and kitchenware imported from Indonesia to Kenya costing approximately 50,000USD. These, the respondent requests should be included in the matrimonial property for distribution.

7. Matrimonial Property Act, No. 49 of 2013, Laws of Kenya, Sections 6(1). 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 or movable property jointly owned and acquired during the subsistence of the marriage ..."

8. I find that the amount of money withdrawn by the applicant and the balance in the joint accounts forms part of matrimonial property.

Further the T-Bills valued at Kshs.7,200,000 as at the time of purchase in 2011, having been purchased with funds from the joint account and the furniture, furnishing, art, appliances, electronics and kitchenware imported from Indonesia to Kenya costing approximately 50,000USD all form part of matrimonial property.

ii. What contribution did each party make in the acquisition of the matrimonial property?

9. According to the variation report dated 6th September 2016 the residential house on I.R. [Particulars Withheld] located at [Particulars Withheld] Lane, Karen estate, Nairobi. The same is valued at 280,000 to 290,000 pounds and the same as per copy of the title document attached is registered in the names of JV and N wa M. Further, the Valuation report dated 14th September 2016 on Beach plot no. Kwale/[Particulars Withheld] the same is valued at Kshs. 8,000,000/-. The said property is registered in the name of N wa M.

10. Section 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.”

11. Section 7 of the said Act provides that, “... 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 dissolve...”. Based on the statements of accounts adduced before this court it is evident that the respondent was the major financial contributor in the said marriage. Going as per the amounts given and which have been evidenced in the statement of account adduced as evidence by the respondent it is clear that the respondent contributed over 95% financially to the accumulation of finances in the said marriage. The applicant as per the figures given barely contributed 5% financially to the said marriage.

12. Though the applicant was not in gainful employment for a larger part of the course of the marriage she definitely made some indirect contribution in the marriage. Section 2 of the Matrimonial Property Act defines contribution to be both monetary and non-monetary. It includes: domestic work and management of the matrimonial home;

- child care;
- companionship;
- management of family business or property; and farm work;

It is not in dispute that when the respondent got various job opportunities abroad the applicant would accompany him. The couple also had adopted a daughter one MV whom the applicant took care of and maintained the home. Further, when the parties bought their Karen home the applicant remained behind to oversee the said renovations. All these can be factored in as indirect contribution to the said marriage and should therefore count for something. In view of the foregoing, I assess the applicant’s indirect contribution at 20%. In total then I find that the applicant is entitled to a 25% share of the matrimonial property acquired by the parties during the subsistence of the marriage.

What forms part of the matrimonial property for distribution?

13. The property Number/Kwale/ in Kwale is registered solely in the names of the applicant. Section 14 of the Matrimonial Property Act states :- Where matrimonial property is acquired during marriage - in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal. It holds then that the said property forms part of the matrimonial property subject of distribution by the parties following the divorce. There is a rebuttable presumption that the property acquired in the name of one spouse is being held in trust for the other spouse. In the case of **NJOROGE -V- NGARI [1985] KLR, 480**, the court held that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property. The decision is in line with Section 14 of the Matrimonial Property Act, 2013.

iii. What is equitable distribution of the matrimonial property?

14. I therefore find that the parties should share the matrimonial property as follows; the applicant has admitted to withdrawal of large sums of monies from the joint account. She has not disclosed before this court where she took the said monies or account for the same as such I will presume that she has the money banked somewhere. The respondent placed the amounts the applicant withdrew at Kshs. 42,000,000. Having gone through the statement of accounts adduced by the respondent I find that the amount withdrawn by the applicant ranges to Kshs.42,000,000/- or thereabout as evidenced by the table below.

	TRANSACTION DATE	AMOUNT WITH DRAWN	Total
002*****	4/8/12 to 31/8/12	Kshs. 26,057,500	26,057,500
002*****	24/4/2012	USD 88,000 (86)	7,568,000

