



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C.C.C. NO. 31 OF 2015 (OS)

H K W.....PLAINTIFF

VERSUS

N I I.....DEFENDANT

JUDGMENT

1. By Originating Summons dated 22nd May, 2015 but filed in court on 9th June, 2015, the applicant herein H K W is seeking for various orders against her former husband N I I (hereinafter referred to as the respondent).

2. Pursuant to order XXXVII of the Civil Procedure Rules 2010 and Section 17 of the Matrimonial Act 2013, applicant prayed for the following orders:

(1) That a declaration do issue that the immovable property known as L.R. No. Ngong/Ngong/29707 and the developments thereon acquired by the joint funds and efforts of the applicant and the respondent during the marriage and registered in joint names of the parties be termed as matrimonial property.

(2) That this honourable court be pleased to issue a declaration that the said properties are jointly owned by the parties and the same should be sold and/or divided and the income derived from the sale be shared equally between the applicant and the respondent as this honourable court deems fit and just.

(3) That in the alternative, this honourable court do order that the applicant be compensated for her share in the immovable property.

(4) That the honourable court do make a determination that any liabilities accruing on the matrimonial house be shared equally.

(5) That the respondent do meet the costs of this application.

3. The application is supported by grounds on the face of it and an affidavit in support sworn by the applicant on the 22nd May, 2015 but filed in court on 9th June, 2015.

4. The applicant avers that, on 13th August, 1994, she got married to the respondent at Nairobi Central Kingdom Hall under the African Christian marriage and divorce Act Cap 151. That during the subsistence of their marriage, they acquired jointly a piece of land known as L.R. [Particulars Withheld] and subsequently developed the same as their matrimonial home.

5. However, following their separation and subsequent divorce, she moved out of their matrimonial home leaving the respondent alone in the said property.

6. She contends that, having taken out several loans from her Sacco at Stima Sacco for purposes of making her contribution towards the acquisition and development of the subject property, she is entitled to half share hence the prayer for the sale of the same so as to equally share the proceeds or in the alternative, the respondent to refund a value equivalent to her share.

7. Despite service of the application herein, the respondent did not endeavour to file any response. A return of service was duly filed in court on 10th May, 2016 by a process server by the name of Angel Njue Nthia who confirmed that he effected service upon the respondent while in his house.

8. In the absence of any response, the file was placed before a judge for directions on 6th October, 2016 wherein the court ordered for the matter to proceed before a single Judge for one day.

9. The matter therefore was fixed for formal proof hearing on 9th February, 2017. During the hearing, the applicant who is an employee of Kenya Power and Lighting Company working as an accounts clerk, told the court that having married the respondent on 13th August, 1994, and having not been blessed with a child, their marriage hit the rock consequences whereof they divorced on 22nd November, 2015 after living separately for a period of 3 years. She produced a Divorce certificate (marked Exh 1) to serve as a proof that the said marriage is no longer subsisting.

10. It is her evidence that, after acquiring the said land jointly, they proceeded to develop a three bed roomed mansionette (house) through their joint effort towards making monetary contribution.

11. After their separation the year 2012, the applicant moved out of their matrimonial home and rented one bed roomed house where she is staying up to now. She produced rent receipts for November and December, 2016 as proof that she is renting a house (rent receipts marked Exh. 3 A and B).

12. In an effort to prove monetary contribution, the applicant produced her bank statements in respect of account No. [Particulars Withheld] Stima Sacco showing deductions for loan repayment for a sum of 1.5 million. The account statement is marked Exh. No.4.

13. To ascertain the monetary value of the property, the applicant engaged a valuer one Bill Ndungu (PW2) who filed a valuation report dated 6th March, 2015 in respect of L.R. [Particulars Withheld] jointly owned in the names of H K W and N I K.

14. According to the valuer, the property was worth 7,500,000/= by then and currently, has an estimated appreciation rate of 500,000/= to 1,000,000/= thus placing the property worthness at about 8 million to 8.5 million or thereabouts.

15. In submission, Mrs. Ngaruiya counsel for the applicant stated that, there is no doubt that the applicant and respondent were once married but have now divorced and that during the subsistence of their marriage they jointly acquired property ([Particulars Withheld]). She further submitted that, under Section 7 and 10 of the matrimonial property Act No. 49/2013, the applicant has a right to claim her rightful share out of the matrimonial property.

16. I have carefully considered and evaluated the pleadings herein, evidence by the applicant, materials placed before me (exhibits) and submissions by counsel for the applicant.

17. Issues for determination are:

- Were the applicant and respondent married prior to the institution of the suit herein;
- If the answer is yes, is the said marriage still subsisting;

- Did the two acquire any property jointly during the subsistence of their marriage;
- If yes, does it qualify as matrimonial property;
- What was the contribution of each party;

Is the applicant entitled to any share;

18. There is no doubt that the applicant and respondent got married sometime on 13th August, 1994 and divorced on 22nd November, 2015. This is evidenced by production of Divorce Certificate in respect of Divorce cause No. 108/2012 Milimani Commercial Court.

19. Did they acquire property jointly during the subsistence of their marriage? According to the title deed produced in court and marked P Exh.2, it was issued on 10th March, 2008 in the joint names of HKW and NIK. From the date of registration indicated on the title deed, it is clear that the property was acquired during the subsistence of their marriage.

20. What was the contribution of each party if any? According to the applicant, she did contribute about 1.5 million after securing a loan from Stima Sacco. She produced loan application form for a sum of 1,570,000 and her bank statement to show how deductions were effected from her salary while serving as an employee of Kenya Power and Lighting Company.

21. Although the applicant did not tell the court how much the purchase price of the land and development cost was as at the year 2008, the court does not have the advantage of comparative evidence from the respondent to challenge her testimony. The court is therefore left with the averment by the applicant that she did make her half contribution for purchase of land and development of the same.

22. Division of matrimonial property prior to the enactment of the current matrimonial property act 2013 was governed by Section 17 of the married women property Act of 1882. This suit having been filed after the repeal of married women property Act, the relevant law therefore is Section 17 of the current Matrimonial Property Act No 49/2013.

23. What is matrimonial property? Matrimonial property is defined under Section 6 of the Matrimonial Act No. 49/2013 as:

Sub-section(1) – **“For purposes of this Act, matrimonial property means**

(a) The matrimonial home

(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”.

24. In accordance with the above definition, the property referred to herein is a matrimonial property acquired during the subsistence of the marriage.

25. Section 7 of the same Act deals with what constitutes ownership and contribution towards matrimonial property as:-

“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”.

26. The applicant has sufficiently demonstrated that she had contributed towards acquiring the property

and its development.

27. As I said, although the applicant did not shade much light as to how much the land was paid for and the cost of development, there is a presumption in law that when spouses are jointly registered in respect of property, they are deemed to be joint owners in equal shares. This was the position held in the case of **Kivuitu vs Kivuitu in 1991 eKLR 248** where the court observed,

“the fact that the property is registered in the joint names means that each party owns an undivided equal share therein. – Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the interest of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the whole ownership”.

Similar position was held in the case of **Kamore vs Kamore (2000) EA 81**, where the court held that:

“where property is acquired during the course of coverture and is registered in the joint names of both spouses, the court in normal circumstances must take it that such property being a family asset is acquired in equal shares”.

28. Presumption to property acquired during marriage is unequivocally addressed in Section 14 of the matrimonial Act which provides

“where matrimonial property is acquired during marriage”

(a) In the name of the spouse, there shall be a rebuttable presumption that the property is held in trust for the spouse and

(b) In the names of spouses family, there shall be rebuttable presumption that their interests in matrimonial property are equal.

29. This position echoes the holding of a five Judge bench in **Echaria vs Echaria (2007) eKLR** where the court clearly held that

“there is no presumption that any or all property acquired during the subsistence of the marriage must be treated as being jointly owned by the parties. Where disputed property is not registered in the joint names of the spouse but is registered in the name of one spouse, the beneficial share of each would ultimately depend on their proven respective proportions of financial contribution, either direct or indirect towards the acquisition of property”.

30. The applicant in this case has not only proven joint ownership in which case a presumption of ownership in undivided equal shares would be deemed as upheld in Echaria vs Echaria, she went further to prove actual contribution which is not challenged.

31. In the recent decision in **Civil Appeal No. 128/2014 Nairobi between Peter Njuguna Njoroge vs Zipporah Wangui Njuguna delivered on 3rd March, 2017**, the court upheld division of matrimonial property equally on the basis of Article 45 (3) of the 2010 Constitution which provides 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”.

32. On the basis of that decision the applicant herein meets both the criterion set out under Echaria vs Echaria case and the Peter Njuguna Case which in my opinion seems not to have clearly and unequivocally settled the issue of contribution in the light of the new constitutional dispensation – (Article 45 (3) against the subsequent legislation of Matrimonial Property Act 2013 in particular Section 14 hence leaving a cloud hanging on that issue.

33. Unfortunately, the court of appeal did not categorically and in clear terms state that in view of Article 45 (3), Section 14 of the Matrimonial Property Act is not applicable. Even in the said case (Peter Njuguna), the court still distributed the property in issue based on contribution of each party. The matrimonial property act having been enacted after the promulgation of the constitution, one would then conclude that Parliament was implementing Article 45 (3) by clearing any ambiguity with regard to division of matrimonial property. Judge Kiage in that case held a dissenting opinion that Article 45 (3) did not give a blank cheque to married couples to get property entitlement at 50% to 50% at the time of dissolution of marriage. Both Judges however did not conclusively make a definite clear cut distinction between Article 45 (3) of the constitution and Section 14 of the Matrimonial Property Act. That being the position, contribution whether direct or indirect is still a key element for consideration.

34. Nonetheless, the evidence of the applicant is not controverted. Nobody should harvest where he or she has not sown. The applicant deserves what rightfully belongs to her.

35. The applicant prayed that in case the court makes a finding of division of property on the basis of 50%:50%, then the court should take into account her outstanding loan as a liability attached to the property and therefore should be paid first and balance shared equally.

36. I do not find this to be a plausible approach. The half contribution claimed by the applicant is on the basis of the amount she injected towards acquisition of the property in issue. It then means that, she has to sell her share first as her contribution and then out of her share refund the money from where she got it from (Stima Sacco).

37. If the court was to minus the outstanding loan first and then share out equally the balance, it will mean that, the applicant would be eating into the share of the respondent. To that extent, that prayer is disallowed.

38. In a nut shell, this court is satisfied that the applicant has proved her case on a balance of probability and thus enter judgment in her favour with orders as follows:

(a) that the immovable property known as L.R. No. [Particulars Withheld] and the developments thereon acquired by the joint funds and efforts of the applicant and the respondent during the subsistence of their marriage be and is hereby declared as matrimonial property.

(b) That the applicant is entitled to half share beneficial interest in the property known as [Particulars Withheld].

(c) That the said property shall be shared based on the valuation report filed in court dated 6th March, 2015 prepared by Bill M. Ndungu and the proceeds be shared equally between the applicant and respondent.

(d) That in the alternative, either party shall buy out the beneficial interest of the other in the said property in monetary terms.

(e) That the applicant shall have costs of the suit.

Right of Appeal 30 days.

DATED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF MARCH, 2017.

J.N. ONYIEGO (JUDGE)