



**REPUBLIC OF KENYA**

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

**CIVIL SUIT N0.50 OF 2012 (O.S.)**

**T .W. N.....APPLICANT**

**VERSUS**

**I. K. M.....RESPONDENT**

**JUDGMENT**

The Applicant, T. W. N brought an Originating Summons under **Section 17** of the **Married Women Property Act 1882** (now repealed and replaced by the **Matrimonial Property Act**) seeking the following declarations from the court:

***“I) That this Honourable Court be pleased to declare that the property acquired by the Applicant and the Respondent during their marriage and registered in the joint names as more specifically shown hereunder, is owned by both the Applicant and the Respondent being LAND REFERENCE particulars withheld***

***II) That this Honourable Court be pleased to order that the property known as LAND REFERENCE particulars withheld be shared equally on a ratio of 50% to 50% between the Respondent and the Applicant respectively both parties having acquired the same jointly and the property being registered in both their names.***

***III) That the property known as LAND REFERENCE PARTICULARS WITHHELD be valued, sold at full value and the proceeds shared equally between the Applicant and the Respondent.***

***IV) That this Honourable Court be pleased to grant such further or other reliefs as may be just in the circumstances.”***

The uncontested facts of this case are that the Applicant and the Respondent were married on 3<sup>rd</sup> September 2005. Their marriage was celebrated under the **Marriage Act** (now repealed and replaced by the **Marriage Act, 2014**). The Appellant and the Respondent were blessed with one child. He is a special needs child. Their marriage unraveled soon thereafter. The Applicant and the Respondent were separated. At the time this case was heard, the divorce proceedings were pending hearing before this court. During the subsistence of the marriage, the Applicant and the Respondent purchased a property known as *Particulars Withheld*) (*herein after referred to as the suit property*). This property is a proximately one acre and is located at *Particulars Withheld* in Karen, Nairobi. Apart from some servant quarters, the property is undeveloped.

In the affidavit in support of the Originating Summons, the Applicant averred that the suit property was jointly bought and acquired by both of them during the subsistence of their marriage. He therefore asked the court to order that the property be valued and thereafter sold at its full value and the proceeds

therefrom be shared equally between himself and the Respondent. The Respondent filed a replying affidavit in response to the suit. While acknowledging that the suit property was indeed purchased during the subsistence of their marriage, she denied the averment by the Applicant that they jointly and equally purchased the suit property. She averred that although the suit property was jointly registered in their names, she substantially contributed to the purchase of the suit property. In particular, she stated that her father contributed the sum of Kshs.2.7 million towards the total purchase consideration. The Respondent further deponed that a substantial part of the purchase consideration was obtained from Barclays Bank after she charged her flat situate on LR No. *Particulars Withheld* – Nairobi. In March 2009, she paid off the balance of the remaining debt of Kshs.3.3 million to the bank. The Respondent further reiterated that she had taken care of the property since she took possession. She had incurred costs to maintain and secure the property. She had also singlehandedly taken care of their special needs child after the Applicant had refused to do so despite being compelled to do so by the Children’s Court. She urged the court to take this into account in determining both her direct and indirect contribution. In her assessment, she was of the view that she had contributed at least 85% of the value of the property while the Applicant contributed 15%. She was opposed to the Applicant’s claim to be awarded 50% of the value of the suit property.

During the hearing of the case, this court heard oral evidence adduced by the Applicant and the Respondent. The Applicant testified that the suit property’s purchase consideration was Kshs.5.6 million. This sum was raised through a deposit of Kshs.560,000/- consisting of the sum of Kshs.500,000/- given to them by the father of the Respondent as a wedding gift and the sum of Kshs.60,000/- contributed equally between the two of them. The balance was paid by a bank loan which was secured by the Respondent’s apartment. He testified that they paid off the loan from their respective salaries. Both the Applicant and the Respondent worked as pilots at Kenya Airways. He serviced the loan from his personal account between the years 2006 and 2009 through monthly standing orders. In total, he paid a sum of Kshs.2.7 million. He also paid the sum of Kshs.120,000/- being land rates. He conceded that before the loan was disbursed, the Respondent’s father paid the sum of Kshs.2.2 million towards the purchase consideration. It was his evidence that this sum was repaid to the Respondent’s father. However, he did not produce any evidence to support the claim that he, or the Respondent, repaid this sum to the Respondent’s father. It was the Applicant’s evidence that his contribution towards the suit property is 50% of the value of the property.

On her part, the Respondent testified that she had substantially contributed towards the purchase and maintenance of the property. She testified that out of the initial deposit of Kshs.560,000/-, her father contributed the sum of Kshs.500,000/-. Subsequently thereafter, her father loaned them a further sum of Kshs.2.2 million towards the purchase of the property. The Applicant had not repaid this sum to her father. The Respondent stated that the balance of the purchase consideration was secured from a bank loan. She mortgaged her flat to secure the loan. She conceded that the Applicant serviced the loan for a period of three (3) years from July 2006 to 2009 when she took over the loan and paid off the remaining balance of Kshs.3.3 million. The Respondent testified that she had also indirectly contributed towards the maintenance of the property since 2006. She has paid the caretaker and also paid the monthly dues due to Karen-Langata District Association. She stated that she was currently living with their special needs child who requires constant medical attention. She urged the court to take this into consideration taking into account that the Applicant did not participate towards settling the child’s medical bills. She proposed that the property be divided at ratio of 85:15 in her favour. She also indicated to the court that any form of settlement should give her the priority of retaining the property and she be allowed to pay off the Applicant his share.

After evaluating the evidence adduced in this case, the issue for determination by this court is whether the Applicant made a case for this court to divide the suit property in the proportion that he has proposed. There are certain facts that are not in dispute in this case. It is not disputed that the suit property is registered in the joint names of the Applicant and the Respondent. The Applicant has relied on the case of **Kivuitu –vs- Kivuitu (1991) 2 KLR 241** where the Court of Appeal held that there is a presumption that a matrimonial property which jointly registered is equally owned between the husband and the wife. In **Peter Echaria –vs- Priscillah Echaria [2007] eKLR**, the Court of Appeal clarified its decision in the **Kivuitu –vs- Kivuitu** case. At Page 8 of its judgment, the court held thus:

*“It is not in our view, difficult to decipher the ratio decidendi of Kivuitu-vs- Kivuitu, or the reasons for the decisions. We have set out six observations made by Omollo Ag.J.A in the leading judgment. The ratio is embraced by the observations (i), (iv) and (vi) above. However, it is clear from the judgment of Omollo Ag. J.A that he awarded the wife a half - share for three reasons. Firstly, the court presumed equal ownership from the fact of registration in joint names, secondly, the wife had made substantial indirect financial contribution towards the purchase of the matrimonial home, and thirdly, the parties had bought the property as a family venture and had intended to hold it in equal shares as a family asset.”*

The Applicant further relied on the case M.W.K. –vs- C.W.N. [2014] eKLR where Musyoka J held thus in Paragraph 16 of his judgment:

*“In the case of Kivuitu vs. Kivuitu (1991) 2 KAR 241 it was observed that: “The fact that the property is registered in the joint names means that each party owns an undivided equal share thereon...Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the intention of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the entire ownership.” This was also the case in Kamore –v. Kamore (2000) 1 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 spouse, the court in normal circumstances must take it that such property, being a family asset is acquired in equal shares.” Further, in Gathiya Essa vs. Mohamed Alibhai Essa (CA No 141 of 1998), the court, observed that “where the property is acquired during the subsistence of a marriage is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares.”*

The Applicant placed reliance on these decisions in support of his contention that the fact that they were jointly registered meant or implied that they equally or intended to equally own the property. On her part, the Respondent relied on the case of W.M.M. –vs- B.M.L. [2012] eKLR where G.B.M. Kariuki J (as he then was) in paragraph 61 of his judgment while interpreting Article 45(3) of the Constitution held that:

*“The rights enshrined in this Article connote equality of parties in a marriage and are intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedom. The equality in this Article does not create nor is it intended to create equal spousal ownership of property regardless of which spouse has acquired and paid for it or regardless of how it has been acquired and paid for. Rather, and contrary to the assumption that it makes property acquired during marriage the property of both spouses in equal shares, it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices.”*

Section 7 of the Matrimonial Property Act 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.”*

Section 6(3) of the Act deals with pre-nuptial agreements which are not relevant to this case.

The thrust of the Applicant’s case is that since the property was jointly registered in their names, then the court, applying the above cited decisions should divide the property equally between himself and the Respondent. In essence, the Applicant is saying that since the property was jointly registered, then there was a presumption that the property would be jointly owned in equal shares. On the other hand, it is the Respondent’s case that the court should take into consideration the actual contribution each of them made to determine their respective shareholding in respect of the suit property.

Upon evaluation of the evidence and the applicable law, this court holds that in the peculiar circumstances

of this case (*i.e* the fact that the marriage between the Applicant and the Respondent collapsed barely two years after its celebration, and the fact that the Applicant and the Respondent continued making payments towards the settlement of the loan long after they had separated) the suit property shall be divided according to the contribution of each spouse. Although the property was jointly registered between the Applicant and the Respondent, the Applicant and the Respondent did not reside on the property during the subsistence of their marriage. The property cannot therefore be said to be a matrimonial premises where both the Applicant and the Respondent resided. It was clear that the couple intended the property to be a family investment. From the evidence adduced in court, the Respondent has always been in occupation of the suit property.

The respective contribution of each spouse according to the evidence adduced is not in dispute. The Applicant contributed Kshs.2.7 million towards the purchase of the property. The sum of Kshs.500,000/- that was given to the couple by the father of the Respondent as a wedding gift shall be divided equal between them. The sum of Kshs.60,000/- contributed towards the initial deposit shall be shared equally between the Applicant and the Respondent. The total contribution therefore made by the Applicant for the purchase of the suit property is Kshs.2.7 million + Kshs.250,000/- + Kshs.30,000/- = **Kshs.2,980,000/-**. The Respondent made the following contributions: Kshs.3.3 million that was used to pay off the loan + Kshs.2.2 million that was advanced to the Respondent by her father to settle the loan + Kshs.250,000/- + Kshs.30,000/- = **5,780,000/-**. A question may be asked why the contribution made respectively by the Applicant and the Respondent exceeded the purchase price of Kshs.5.6 million. The amount over and above the said sum of Kshs.5.6 million consists of interest of 15.9% per annum that was paid by both the Applicant and the Respondent during the period that the loan remained unpaid.

This court will also, in addition to the above direct contribution, take into account the indirect contribution made by the Respondent. The Respondent adduced uncontroverted evidence to the effect that she is the one who has maintained and secured the property the ten (10) years that she has been in possession. There is no evidence that the Respondent did anything to improve the property. However, she has paid the caretaker a monthly sum of Kshs.5,000/- and also pays Karen-Langata District Association a monthly sum of Kshs.5,000/-. There is no evidence that the Respondent earned any income from the property. The period that she has taken care of the property shall be taken into account as indirect contribution. This indirect contribution is assessed by this court at 4% of the current value of the property.

In the premises therefore, the total contribution made by the Applicant and the Respondent towards the purchase of the suit property is **Kshs.2,980,000/- + 5,780,000/- = Kshs.8,760,000/-**. If the contribution is converted into a percentage, the Applicant's share in the suit property is 34% less 4% the indirect contribution of the Respondent. The Respondent's direct contribution is 66% + 4% indirect contribution. The Respondent therefore owns 70% of the suit property.

Prior to conclusion of the hearing, this court ordered the suit property to be valued. According to a valuation report prepared by Lloyd Masika Limited dated 3<sup>rd</sup> March 2016, the suit property valued is Kshs.45 million. Another valuation was done by Crystal Valuers Limited on 8<sup>th</sup> February 2017. The suit property was valued at Kshs.56 million. Both valuers undertook the valuation of the properties on instructions of the Advocate for the Applicant. For the purposes of this case and guided by the two valuations, this court assesses the value of the suit property as Kshs.50 million. The Applicant's share in the suit property is therefore Kshs.15 million while that of the Respondent is Kshs.35 million. Since the Respondent indicated that she was willing to pay the Applicant the value of his share in the property, this court gives the Respondent six (6) months to pay the Applicant the said sum of Kshs.15 million.

Upon payment of the sum, the Applicant shall execute all the necessary conveyancing documents that will enable his half share to be transferred to the Respondent. Should the Respondent be unable to pay the said sum of Kshs.15 million within the stipulated period, the suit property shall be sold and the proceeds therefrom divided pro-rata in their respective shares between the Applicant and the Respondent. Since this is a family dispute, there shall be no orders as to costs.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JUNE 2017**

**L. KIMARU**

**JUDGE**