



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 61 OF 2013 (OS)

L N N.....PLAINTIFF

VERSUS

P M M.....DEFENDANT

JUDGMENT

1. The Originating Summons herein dated 9th October 2013 was filed at this registry on 10th October 2013 by the plaintiff seeks: -

(a) A declaration that properties acquired and developed by the joint funds and efforts of the plaintiff and the defendant during their marriage and registered in the name of the defendant are so registered in trust by the defendant for the benefit of the plaintiff;

(b) A declaration that the properties listed in paragraph 2 here below are jointly owned by the plaintiff and the defendant having been acquired and developed with the joint funds and efforts of the parties during marriage;

(c) An order that the properties and the income aforesaid be settled in the proportions aforesaid or to be determined by the court;

2. The assets in question are listed as –

a) LR No. *[particulars withheld]* (matrimonial home) Embakasi, near *[particulars withheld]*;

b) Motor vehicles registration marks and numbers *[particulars withheld]* and

c) Household goods – gas cooker, refrigerator, wall unit, microwave, sofa settee, children’s beds and dining table.

3. The facts upon which the application is founded are set out in the affidavit sworn on 9th October 2013 by the plaintiff. She deposes that the defendant is her former husband, having married him in 1996 under statute. They have two (2) children together and jointly contributed to the acquisition of the property set out in paragraph 2 here above. She avers that both of them worked for the Nairobi City Council. She has listed the loans that she took for the purpose of the development of the said properties. She indicates that she has also been settling council rates for the same assets.

4. She has attached several documents to support her case. There is a certificate of marriage serial number *[particulars withheld]* showing that the parties went through a ceremony of marriage in church. There are

copies of certificates of birth to show that they got two children between them. There is a bundle of pay slips showing that she worked for the city authority, and demonstrating what she was being paid. There is copy of a share certificate from [particulars withheld] Holdings Company Ltd showing that both parties were entitled to a plot number [particulars withheld]. Copies of records from the Kenya Revenue Authority indicate that motor vehicle [particulars withheld] was in the name of the defendant while [particulars withheld] was in the name A M. There are copies of four cash receipts from [particulars withheld] Holdings Company Ltd issued to the joint names of the parties where a total of Kshs. 228,000.00 was received. There is also copy of a bank statement in respect of the plaintiff's account at Family Bank. It shows that she was given a loan of Kshs. 600,000.00, and that she made monthly repayments. There also documents showing payment of rates to the Shalom Bridge Court and Utawala Residential Association, and also of payments to the Nairobi City Council. There are also receipts from various hardware stores with regard to construction materials. Some are in the name of the plaintiff. The last attachments are a bundle of photographs displaying the construction in progress. The same documents are also displayed in the plaintiff's list of documents dated 9th October 2013.

5. The defendant replied to the Originating Summons vide his affidavit sworn on 16th October 2015. The marriage is conceded and the fact that both parties worked for the Nairobi City Council. He avers that the marriage ended in divorce on 24th April 2014. He states that the only property that he acquired jointly with the plaintiff was LR No. [Particulars withheld], which was registered in their joint names, custody of the title thereof is with the plaintiff. He says he solely acquired the motor vehicle [particulars withheld] on 28th January 2013 after he had separated from the plaintiff, without any contribution whatsoever from her. He adds that he sold the same to another in 2014. Regarding [particulars withheld] he avers that he had acquired the same during coverture but using his own funds, sourced from a loan which he had since repaid. The said motor vehicle was thereafter sold in 2007.

6. The defendant has attached several documents to his affidavit. There is a certificate of decree *nisi* dated 14th April 2014 issued in Milimani CMCD No. 262 of 2013. There are two sale agreements in respect of [particulars withheld] dated 2013 and 2014. There are car loan documents relating to a loan issued in 2004, and bank statements to evidence disbursement and repayment. There is also a sale agreement relating to [particulars withheld] dated 6th November 2007.

7. That reply elicited a response from the plaintiff through a supplementary affidavit sworn on 13th January 2016. She avers that the two had agreed to acquire two plots, being LR No. [particulars withheld]. She avers to have cleared the purchase price singlehandedly for LR No. [particulars withheld], while the defendant, who was to pay for LR No. [particulars withheld], neglected to pay for it, causing the plot to be repossessed and the purchase price refunded to him. She also alleges to have singlehandedly funded the construction of the house on LR No. [particulars withheld]. She allegedly acquired a development loan from Family Bank for that purpose. She contends that she has been paying the rates and rents due to the state as well as service charge. She also claims that she also acquired the household goods listed. She has attached copies of the same documents as those exhibited in her other affidavits.

8. It was directed on 18th February 2016 that the matter be disposed of orally.

9. The oral hearing happened on 16th March 2017, a date obtained at the registry by representatives from both sides. The plaintiff was in attendance, but the defendant was not. The plaintiff testified, giving vent to the averments made in her papers. At the conclusion thereon it was directed that the parties do file written submissions, the plaintiff filed hers, but the defendant did not. I have perused the same and noted the arguments made therein.

10. The law on distribution of matrimonial property upon divorce or separation is the Matrimonial Property Act, No. 49 of 2013. The relevant provisions are sections 6, 7, 13, 14 and 15 of the said Act. Section 6 defines matrimonial property to mean the matrimonial home or homes, household goods and effects in the matrimonial home or homes, or any other immovable and movable property jointly owned or acquired during the subsistence of the marriage. Section 7 defines ownership of matrimonial property by stating that the same vests in the spouses according to the contribution of either spouse towards its

acquisition. Section 14 states that where matrimonial property is acquired during marriage certain rebuttable presumptions arise. Where the property is registered in the name of one spouse, it shall be presumed that the property is held in trust for the other spouse, while where it is in the joint names of the spouses it shall be presumed that their beneficial interest are equal.

11. There is also the Constitution. Article 45 thereof is on the family. Article 45(3) states that parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of marriage. This has been interpreted to mean the parties go into the marriage as individuals, but bond to form one unit, where they enjoy equal rights, and upon dissolution of the marriage they would be entitled to equal rights. Section 3(2) of the Matrimonial Property Act echoes the provision in Article 45(3) of the Constitution.

12. When parties enter into marriage, they do so on the understanding that their union would be permanent, until death. They never contemplate dissolution thereof, and they build their lives around that notion. They then have children and begin to acquire property believing that they would be together for life. The property is acquired for the benefit and betterment of the family. It is generally regarded as family property. It is into this union then that the notion of equality is implanted by the Constitution and the Matrimonial Property Act. It is then reinforced by the Christian notion that upon marriage husband and wife become one flesh. By extension, it would mean that whatever property one spouse acquires during marriage is intended to be shared with the other spouse. Upon dissolution of the marriage, it would follow, by virtue of the equality principle stated in Article 45(3) of the Constitution, that the estate would be shared equally between them.

13. The matter herein should be determined with the above in mind.

14. From the record it is not in dispute that LR No. *[particulars withheld]* is registered in the joint names of the parties hereto. The plaintiff alleges that she is the one who singlehandedly paid for the plot, yet the receipts she presented as evidence show that the receipts were issued in their joint names. There is nothing indicating that the money in respect of which the receipts were issued came from any of the two. She says that she is the one who single handedly developed the subject plot. She presented receipts to show that she funded the construction through a development loan from Family Bank. However, she did not display any material indicating both the projected and actual cost of the development as evidence that she was the person who solely covered that cost.

15. On the motor vehicles, the evidence points to acquisition by the defendant. The plaintiff has not offered any material suggesting that she contributed in any way to the acquisition thereof. She also did not seek to demonstrate that the vehicles were ever at her disposal and utility at any time. I am not persuaded that she contributed to the acquisition of the motor vehicles to warrant orders in her favour being made in respect thereto.

16. On the household goods, there is material which suggests that she is the one who acquired these items. The defendant did not present any material thereon.

17. The final orders that I feel compelled to make in the circumstances are –

(a) that I declare that the assets named in paragraph 2(a) hereof were acquired during matrimony with the joint funds and efforts of the plaintiff and the defendant, and I declare that the same shall be shared equally between the plaintiff and the defendant;

(b) that the property named in paragraph 2(b) herebove were acquired with the sole efforts of the defendant and I hereby declare the said assets were the sole property of the defendant;

(c) that the property named in paragraph 2(c) herebove were acquired with the sole efforts of the plaintiff and I hereby declare the said assets were the sole property of the plaintiff; and

(d) that each party shall pay their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF SEPTEMBER, 2017.

W. MUSYOKA

JUDGE