



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL SUIT NO.75 OF 2014 (O.S)**  
**In The Matter Of The Matrimonial Property Act 2013**  
**And**  
**In The Matter Of The Land Registration Act**  
**M W M.....APPLICANT**  
**VERSUS**  
**H M M.....RESPONDENT**  
**RULING**

**PLEADINGS**

The applicant filed Originating Summons under **Section 3A of the Civil Procedure Act and Order 37 Rule 11 of the Civil Procedure Rules 2010, Section 2, 6, 7, 9 and 17 of the Matrimonial Property Act 2013 and Section 93(3) of the Land Registration Act.** She prayed for the following orders:

- a. That the joint ownership in respect of L.R Number [particulars withheld] Ruiru, be severed and that the same be held by the parties herein as tenants in common.
- b. That the said property be sold and the proceeds be shared equally between the parties herein.
- c. That the Deputy Registrar be empowered to sign any documents that the respondent may refuse to sign.
- d. That this Honourable court be pleased to declare that the suit property listed herein as Plot No. [particulars withheld] -Kayole is held by the respondent beneficially and in trust for the applicant.
- e. That this Honourable court be pleased to grant such further or other relief as may be just in the circumstances.
- f. That the respondent be condemned to pay the costs of this application and incidental thereto.

The application is based on grounds that: the property namely L.R No. **[particulars withheld]** -Ruiru herein is held by the parties jointly; that the above property was acquired, developed and/or improved by the joint efforts of the applicant and the respondent during the course of their marriage; that the above property is registered in the joint names of the applicant and the respondent and is their matrimonial home; that the applicant's contribution was in the nature of monetary and non-monetary contribution including child care, compassion, management of the matrimonial home, management of the family businesses and properties; that it is in the best interests of both parties that the same be severed and sold;

That Plot No. **[particulars withheld]** -Kayole which was purchased by the applicant was fraudulently and illegally registered in the name of the respondent; and that it is in the best interests of justice that the prayers above be granted by court.

The application is supported by the applicant's affidavit dated 27<sup>th</sup> November 2014 and 13<sup>th</sup> May 2015 in which she stated, *inter alia*,:

**i. That the respondent and applicant were married under Kikuyu customary Law in 1994 and later solemnized their marriage on 10<sup>th</sup> April 1999 under .....and were blessed with two children born on 8<sup>th</sup> April 1995 and 17<sup>th</sup> April 1998 respectively.**

**ii. That due to their matrimonial differences the applicant petitioned for divorce in the District Court of Sedgwick County, Kansas HCDC No. [particulars withheld] . The matter was heard and determined and the court dissolved their marriage on 26<sup>th</sup> March 2003.**

**iii. That during the subsistence of their marriage they acquired the following two properties; Plot No. [particulars withheld] -Kayole and L.R No. [particulars withheld] -Ruiru.**

**iv. That the properties were acquired through their joint efforts and contribution.**

**v. That she operated various businesses .....from which she made money which she used towards the acquisition of the properties.**

**vi. That she purchased Plot No. [particulars withheld] -Kayole from Esther Njoki Gitau in 1996 at a purchase consideration of Kshs. 235,000/= but the transfer process did not take place at the time due to the land grabbing problem. Sometimes in 1998 she developed the property, rented it out and collected rent in respect thereof from 1998 up to 2001 when she left for the United States of America (USA).**

**vii. That upon leaving the country she had left her sister, W, to manage the property and collect rent until the year of 2009 when the respondent forcefully removed her sister from managing the property.**

**viii. That she left the respondent with all the paperwork so that he could follow up on the transfer process.**

**ix. That the respondent joined her in the year of 2000 and informed her that he had left the property documents in his bank.**

**x. That unfortunately their marriage broke down in the same year.**

**xi. That the respondent changed the name on the said property to reflect his name and this was done without her knowledge and consent but was unable to change the names of the water and electricity accounts which are still in her name to date.**

**xii. That the monthly rental income collected from this property is the sum of Kshs. 60,000 which income is used by the respondent exclusively.**

**xiii. That L.R No. [particulars withheld] -Ruiru is registered in their joint names and is their matrimonial property which was jointly developed by the parties in the year of 2000.**

**xiv. That she desired that the said property be sold and the proceeds thereof be shared equally.**

**xv. That unless and until this Honourable Court proceeds and grants the orders the respondent will continue to fully control and utilise the said property to her exclusion.**

**xvi. That she is entitled in law and in equity to a share of the matrimonial properties aforesaid.**

S W W swore an undated affidavit filed on 23<sup>rd</sup> February 2017 in support of the applicant's case stating that she is a business lady and that she met the applicant when the applicant bought building materials from her. She further stated that she later found out the material were for construction of a plot in Kayole and that from their interaction she knew that the plot belonged to the applicant. In further support of the applicant's case, P W R filed a witness statement dated 21<sup>st</sup> November 2016, filed on 23<sup>rd</sup> February 2017's stating that she is the biological sister of the applicant and that she witnessed her sister work very hard during the time she was married to the respondent and develop the Kayole property. She further stated that she later learnt that her sister had travelled to the United States of America and left the respondent behind with the children. Later, the respondent followed the applicant to the USA leaving the Kayole property with her elder sister W to manage it and live there, but when he returned from the USA he evicted them from the property and took over its management.

The application is opposed by the respondent through his replying affidavit dated 8<sup>th</sup> January 2015, his statement dated 17<sup>th</sup> October 2016 and a further replying affidavit dated 3<sup>rd</sup> April 2017. The following is the summary of his case:

**i. That the application is defective in law and in fact ought to be dismissed on a preliminary point because it is over reliant on an invalid divorce decree HCDC No. [particulars withheld] issued by the District Court of Sedgwick County, Kansas United States of America .**

**ii. That to the best of his knowledge he is still legally married to the applicant.**

**iii. That the invalid divorce decree is neither registered with the registrar as provided for in the Marriage Act nor is it based on any ground for divorce recognised under Kenyan law.**

**iv. That on or about 24<sup>th</sup> July 1998 he purchased Land reference No. [particulars withheld] Ruiru at Kshs.250,000/= which was registered in their joint names.**

**v. That he began construction of their home on Land reference No. [particulars withheld] Ruiru a few months after the wedding with the help of the applicant after which they later moved into the unfinished house in December 2000.**

**vi. That the applicant got her visa and moved to the USA in July 2001 leaving the respondent behind with the children.**

**vii. That he singlehandedly developed Land reference No. [particulars withheld] Ruiru after the applicant deserted him and went to live in the USA where she got married and started a new life with her new husband.**

**viii. That the electricity and water bills for his property Land reference No. [particulars withheld] Ruiru are registered under his brother's name and that the same are not property ownership documents and they in no way confer any legal right to property.**

ix. That he left for the USA on 19<sup>th</sup> August 2002 but returned back to Kenya on 26<sup>th</sup> December 2006 and is rightfully in occupation of Land reference No. [particulars withheld] Ruiru having purchased it with his hard earned money and having developed it without the applicant's contribution.

x. That during his children's stay in Kenya they reside in his home in Ruiru with him and at no time has he denied the applicant access to the property.

xi. That he purchased Plot No. [particulars withheld] -Kayole on which he built apartments in 1993 before marrying the applicant.

xii. That in order to sustain his children during his absence when he left for the United States of America, he left Kayole apartment to his sister in law to manage and from the apartment his sister-in-law would collect Kshs.60,000/= for the upkeep of his children.

xiii. That Plot No. [particulars withheld] -Kayole has never been a matrimonial property but rather a separate property, and is registered under his name as the sole proprietor hence the applicant has no claim against it.

xiv. That the applicant removed the children from the schools he had enrolled them and re-enrolled them to very expensive schools which he was not able to raise the school fees for.

xv. That the applicant later got visas for the children and took them to USA without his consent and knowledge and has since denied him access to his children.

xvi. That his relationship with his in-laws deteriorated after they participated in taking his children away from him to the applicant in the USA. After he returned to Kenya he requested Applicant's family to move out of the Kayole apartment.

xvii. That the applicant through her lawyers wrote to him accusing him of trespass and he was summoned to the OCPD's office together with his sister in law who used to manage the Kayole apartment but after listening to both of them his sister in law was advised to move out.

xviii. That the application is an abuse of court process meant to cause him anguish and as such it should be dismissed.

The respondent filed a Notice of Preliminary Objection dated 22<sup>nd</sup> June 2015 on the grounds that: there is no valid divorce decree and therefore this Honourable Court cannot entertain an application seeking to sever matrimonial property; that the application contravenes **Section 7 of the Matrimonial Property Act (No. 49 of 2013), Section 60, 61 and 65 of the Marriage Act (No. 4 of 2014)** and that the application is bad in law. The objection was canvassed by way of written submission and later dismissed by the ruling by this Court dated 16<sup>th</sup> November 2015.

## ISSUES

Both parties filed their lists of documents and their written submissions which I have considered together with all the evidence on record. The following are the issues for determination:

a. Whether the marriage between the applicant and the respondent was dissolved by the decree of the District Court of Sedgwick County, Kansas HCDC No. [particulars withheld] ?

b. Whether Land reference No. [particulars withheld] Ruiru and Plot No. [particulars withheld]-Kayole are matrimonial properties available for distribution?

c. In what ratios should the same be distributed as between the parties?

## **DETERMINATION**

To determine whether the marriage between the applicant and the respondent was dissolved by the decree of the District Court of Sedgwick County, Kansas, the Court considered the parties' domicile at the time the decree was issued. The law of domicile plays an important role in the determination of whether or not the court to which a dispute has been presented has jurisdiction. Crucially, the court will only have jurisdiction over a suit for dissolution of marriage where the parties have been domiciled within the jurisdiction of that court for the period allowed by the relevant law. In the decision of Honourable Justice W. Musyoka in **HCCA No. 53 of 201, M N M v P N M** the learned judge stated as follows:

The jurisdiction of a family court to entertain a divorce cause is therefore guided by the law of domicile. Whether a court before which such matter has been placed is competent to handle it will depend on whether the parties or either of them have been resident within the jurisdiction of that court for the period stipulated by the relevant law.

**Section 67 of the Marriage Act, No. 4 of 2014** provides as follows:-

***‘Where a foreign court has granted a decree in matrimonial proceedings whether arising out of a marriage celebrated in Kenya or elsewhere, that decree shall be recognized in Kenya if***

a. Either party is domiciled in the country where that court has jurisdiction or had been ordinarily resident in Kenya for at least two years immediately preceding the date of institution of proceedings;

**b. Being a decree of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them.’**

In this case the applicant had been a Kenya resident before moving to Kansas in the USA in the year 2001 where she has continued to live to date. The respondent joined her in the USA in the year 2002 and lived there until 2006 when he returned to Kenya. At the time when the divorce decree was issued in the year 2003, both parties were domiciled in Kansas, USA. No doubt the Kansas court had jurisdiction in a marital matter in the circumstances. Although the respondent has argued that the Kansas court had no jurisdiction to dissolve their marriage, no material was placed before court to show that the parties had not been resident in the Kansas long enough to confer jurisdiction or competence on the Kansas court to handle their matter. As such I find that the District Court of Sedgwick County, Kansas had jurisdiction to dissolve the marriage between the applicant and the respondent. Consequently, the order by the District Court of Sedgwick County, Kansas dissolving the parties' marriage is an order of a court of competent jurisdiction. It is valid and binding, unless it is set aside, reversed or varied by the court which made it or by a higher court on appeal in the same jurisdiction. On whether the said decree is valid in Kenya to amount to dissolution of the parties' marriage; this Court had occasion to canvass the same under the Preliminary Objection proceedings. In a nutshell, the law requires the Registrar of marriages to register such a decree, but it is not a mandatory requirement. Therefore this Court found that the decree dissolved the Parties marriage.

On whether Land reference No. **[particulars withheld]** Ruiru is matrimonial properties available for distribution, **Section 6(1) of the Matrimonial Property Act** defines matrimonial property as- the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

The respondent herein argued that he purchased the said land at Kshs.250,000/= on or about 24<sup>th</sup> July 1998, before they exchanged their marriage vows on 10<sup>th</sup> April 1999, and that they began construction of the house a few months after the wedding then later moved into in December 2000. The applicant later got her visa and moved to the USA in July 2001. The applicant stated that they got married under Customary Law in 1994 and later solemnized their marriage on 10<sup>th</sup> April 1999, a fact that was not disputed by the respondent. This means by the time the respondent purchased Land reference No.

**[particulars withheld]** Ruiru in 1998, he was married to the applicant under customary law and they were in fact blessed with two children from their marriage. The respondent even confirmed that the two later moved into the property after it was built and lived together before the applicant left for the USA. It goes without saying that Land reference No. **[particulars withheld]** Ruiru was acquired within the subsistence of marriage and is matrimonial property as far as **Section 6(1) of the Matrimonial Property Act** is concerned.

With regard to Plot No. **[particulars withheld]** -Kayole, both parties claimed to separately to have purchased the said property. The applicant claimed to have purchased the said property from E N G in 1996 at a purchase consideration of Kshs.235,000/= but the transfer process did not take place at the time. She further claimed to have developed the property sometimes in 1998, rented it out and managed it from 1998 up to 2001 when she left for USA. Her witness S W W swore an undated affidavit in support of the applicant's case claiming to have sold building materials to the applicant for construction on the said property.

The respondent however stated that he purchased the Kayole plot on which he built apartments in 1993 before marrying the applicant and that the plot is registered under his name as the sole proprietor hence the applicant has no claim against it.

**Under section 26(1) of the Land Registration Act** the title of a registered proprietor is *prima facie* evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court however lacks jurisdiction to address the illegality and fraud alleged by the applicant against the respondent with regard to Plot No. A3-524-Kayole as this issue regarding title to land should be challenged in Environment and Land Division of the High Court created under **Article 162(2)(b)** of the Constitution of Kenya 2010 and **section 13 of the Environment and Land Court, 2011 (Cap 12A)** of the Laws of Kenya).

I note that as much as the title for Plot No. **[particulars withheld]** -Kayole is registered in the respondent's name, the applicant demonstrated her contribution to the development and management of the property. She also filed the undated affidavit of S W W who went to corroborate the applicant's evidence that she had indeed participated in the development of the property. As such, much as the property may have been acquired by the respondent, I find that the applicant substantially contributed to its development and management of the property during the subsistence of her marriage to the respondent. It was the joint effort in acquisition and development of the property that resulted in finished apartments which are now rented out. I find that Plot No. **[particulars withheld]** -Kayole is also matrimonial property as far as **Section 6(1) of the Matrimonial Property Act** is concerned

Having found that Land reference No. **[particulars withheld]** Ruiru and Plot No. **[particulars withheld]** -Kayole are matrimonial properties, how should they be distributed? **Article 45 (3) of the Constitution** 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."**

The interpretation of this Article has been subject to great heated and diverse debate on division of matrimonial property after dissolution of marriage. The Court of Appeal in the case of **Peter Njuguna Njoroge vs Zipporah Wangui Njuguna Civil appeal 128 of 2014** exhaustively explored the litany of authorities and interpretation of **Article 45 (3) and Section 2, 6 & 7 of Matrimonial Property Act 2013**.

The Bench considered the case of Agnes Nanjala William vs Jacob Petrus Nicolas Vander Goes Civil

Appeal 127 of 2011 that held as follows in interpreting Article 45(3) COK 2010;

***This Article clearly gives both parties to a marriage equal rights before, during and after marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that matrimonial property is shared 50%/ 50% in the event that the marriage ends.***

This case was decided before the Matrimonial Property Act 2013. The appeal in the instant case was that division of matrimonial property was 50-50 without interrogating each party's contribution to the acquisition and/or development of the properties.

The Court of Appeal conceded that the parties did not offer oral evidence that would be subjected to cross-examination and allow the Trial Court to take into account demeanour of witnesses. Instead parties through Counsel agreed to file pleadings and written submissions. Secondly by the time judgment was delivered the present Act was not in place. However, with the Act in place the Appellate Court made reference to **Section 2, 6 & 7 of the Act.**

In summary the Court allowed the appeal in part and in reliance on the case of **VWN vs FN 2014 eKLR** stated the following;

***The provisions of Sections 2, 6 & 7 of the Matrimonial Property Act, 2013 breathe life into the rights provided in Article 45(3). The Matrimonial Property Act recognizes that both monetary and non monetary contribution should be taken into account in determining contribution.***

In the case of **PWKvs JKG 2015 eKLR** the Court said;

***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. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788.***

The gist of the above cited case-law is that the Trial Court ought to interrogate the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties so as to inform the division of matrimonial properties after dissolution of the marriage.

In the instant case; the parties were married from 1994- 2003 about 10 years. In evaluating the evidential materials filed by the parties in Court; this Court finds that the suit property Land reference No. **[particulars withheld]** Ruiru was purchased by the Respondent in 1998 Kshs.250,000/= registered in their joint names. He began construction of their home on Land reference No. **[particulars withheld]** Ruiru a few months after the wedding with the help of the applicant, after which they later moved into the unfinished house in December 2000.

Although the Respondent purchased the property, he admitted that the Applicant assisted him. There must have been financial contribution. From 1994-2001 the Applicant also provided non monetary contribution; management of the matrimonial home, child care of the 2 children of the marriage, companionship and management of family businesses. Suffice is that the property which is matrimonial home is registered in both names of Applicant and Respondent. Taking into account the circumstances above, the property shall be shared equally between both Applicant and Respondent.

With regard to Plot No. **[particulars withheld]** -Kayole; the parties' evidence is contradictory; each party claims to have directly purchased the suit property. The applicant claimed to have purchased the said property from E N G in 1996 at a purchase consideration of Kshs.235, 000/= but the transfer process did not take place at the time. She further claimed to have developed the property sometimes in 1998,

rented it out and managed it from 1998 up to 2001 when she left for USA. Her witness S W W swore an undated affidavit in support of the applicant's case claiming to have sold building materials to the applicant for construction on the said property. The applicant alleged fraud on the part of the Respondent, that while in USA, she left the Respondent documents to facilitate transfer instead he transferred to his name.

On the other hand, the respondent stated that he purchased the Kayole plot on which he built apartments in 1993 before marrying the applicant and that the plot is registered under his name as the sole proprietor hence the applicant has no claim against it.

Unfortunately it is one's word against the other, the parties did not testify in Court so as to test veracity and credibility of their evidence through cross examination.

In the absence of evidence of actual contribution by each party and competing versions of acquisition and development of the suit property, I find that the Applicant and Respondent each is entitled to 50% share in Plot No. **[particulars withheld]** -Kayole.

### **DISPOSITION**

- 1. The properties Land reference No. [particulars withheld] Ruiru and Plot No. [particulars withheld] -Kayole. shall be sold and the proceeds shared equally between the parties.**
- 2. Each party to give priority to the other party to buy the other out on any of the properties after valuation of the properties.**
- 3. Each party to bear own costs.**

It is hereby ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN NAIROBI ON 30<sup>TH</sup> OCTOBER, 2017.**

**M.W.MUIGAI**

**JUDGE**

### **IN THE PRESENCE OF;**

Ms Lynn Ng'ang'a for the Applicant.

Ms. Waithera for the Respondent.