



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MATRIMONIAL CIVIL SUIT NO. 7 OF 2016(05)

J W N.....APPLICANT

VERSUS

P G.....RESPONDENT

JUDGEMENT

The originating summons dated 22.3.2016 seeks the following orders:-

- 1. That it be declared that the movable and immovable properties acquired by the joint efforts of the applicant and respondent during their marriage and registered in the name of the respondent and as more specifically shown in the annexed affidavit of the Applicant are owned by the Applicant and the Respondent jointly.*
- 2. That the said properties be shared equally by the Applicant and the Respondent and or be sold and the net proceeds of the sale be shared equally between the Applicant and the Respondent(or in such other manner as the court may deem just to order).*
- 3. That the Respondent be restrained from alienating and or encumbering or evicting in any other way disposing of the said property pending the hearing and determination of the suit.*
- 4. That this Honourable Court be pleased to grant such further or other reliefs as may be just and expedient.*
- 5. That the Respondent be condemned to pay the costs of this application and incidental thereto.*

The originating summons is supported by the affidavit of the plaintiff sworn on 22<sup>nd</sup> March, 2016. The defendant filed a replying affidavit sworn on 12<sup>th</sup> April, 2016 and a further affidavit sworn on 22.3.2017.

In her evidence before the Court, the plaintiff testified that the defendant has been her husband since 2010. They were blessed with one child. She had one child before the marriage and the defendant also had another child. After the marriage, they lived in their matrimonial home at [Particulars withheld]. She still reside in the premises with the three children. The Plaintiff's further evidence is that during the marriage, they bought two vehicles as well as the matrimonial house. The defendant paid Ksh.600,000 as dowry to the Plaintiff's parents. That money was used to buy a house in Murang'a. That a house is not part of the matrimonial property as it was bought using the money paid as dowry.

It is the plaintiff's evidence that before the marriage, she had her own business. She had to close the business so that she could take care of the kids. The defendant was paying school fees for the children. He was also paying water and electricity bills. She met the defendant in 2009. The matrimonial house does not belong to the defendant's daughter, S. Initially, the defendant used to give her Ksh.70,000 monthly for the household expenses. That amount was reduced to Ksh.50,000 and has now been reduced to Ksh.10,000 monthly. The Plaintiff had a hair saloon in 2012 but she closed it.

In his evidence, the defendant testified that he met the plaintiff in 2009. He was previously married to P M who is now deceased. The deceased was the mother or his daughter S. The marriage broke down in 2008 but the divorce had not been passed. P died in 2011. When he met the plaintiff in 2008 his wife was still alive. The plaintiff was living in his other daughter house at Watamu plot number *Kilifi/Jimba* [Particulars withheld].

The defendant further testified that the Plaintiff moved into the house in February, 2010. They disagreed and the Plaintiff left. They then got married in 2012 after the death of P M. He visited the plaintiff's parents in Muranga three times. He saw a home that was being sold. He bought the house for Ksh.700,000. The house stands on about two acres of land. He paid the purchase price in three instalments. The money was transferred from his bank account to the seller's account. He bought the property for his own family and it was not dowry to the

plaintiff's parents. The plaintiff declined to move to the Muranga house. By that time the defendant was working in Nairobi and used to visit Muranga to oversee the renovation on the property. There was no Kikuyu customary ceremony. They got married at the registrar of marriages office at Malindi.

The defendant further testified that he is now 66 years old and unemployed. He was declared redundant in May, 2016. He now lives in rented premises in Watamu with another woman with whom they have two children. He paid money to the plaintiff to open a saloon. He paid rent for the salon for six(6) months as agreed but he continued to pay the rent yet he never received any money from the business. Initially he was giving Ksh.70,000 monthly to the plaintiff. He reduced it to Ksh.50,000. He had two loans. They bought two vehicles. One is being driven by the plaintiff while he uses the second vehicle. The parties are now divorced. The plaintiff has refused to give him their daughter. According to him, the only properties acquired during the marriage are the two vehicles. The Watamu property was bought in 2001 and payment was done by instalments upto 2004. The Watamu house belongs to his daughter. It is still registered in the names of the original owner as there is a problem with titles involving Jimba registration area. He is claiming his share of the Muranga house and would like his share to be given to his daughter.

Counsel for the Plaintiff filed written submissions. I was not able to see submissions by the defendant's Counsel. It is submitted for the plaintiff that the properties acquired during the marriage were:-

- 1. Kilifi/Jimba/[Particulars withheld]**
- 2. Motor vehicle No. [Particulars withheld]Toyota Station Wagon**
- 3. Motor Vehicle No. [Particulars withheld]- Toyota Celica.**
- 4. Murang'a property with a house.**

It is submitted that the plaintiff made some improvement to the Watamu property. She took care of the children in the house during the period the defendant was working in Nairobi. The Murang'a property was built by the plaintiff's parents partly with money paid as dowry. It is further submitted that the distribution of matrimonial property is anchored in Article 45(3) of the Constitution. Which provide as follows:-

***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.***

Further, Section 7 of the matrimonial property act, 2013 states that matrimonial property vests in the spouses according to their contribution toward its acquisition and shall be divided between the spouses if they divorce. Contribution include domestic work and management of matrimonial home, companionship, management of farm property and farm works. Counsel submit that the plaintiff is entitled to a bigger share than the defendant and that the plaintiff is entitled to 60% of the Watamu house.

The issues for determination in this suit are:-

- a) What constitutes the matrimonial property**
- b) How should the property be divided.**

It is not disputed that the two vehicles were bought during the subsistence of the marriage. This is agreed between the two parties and I will not dwell much on it.

The evidence shows that the Muranga property was bought in around late 2010. The bank statement by the defendant shows that money was transferred to M/S Risphine Enterprises in three tranches as follows:-

- i) 15.11.2010 -Ksh 200,000**
- ii) 26.11.2010-Ksh 200,000**
- iii) 3.12.2010-Ksh 300,000**

The Plaintiff maintains that the property was bought and developed through money paid to her parents as dowry. The dowry was Ksh.600,000. The defendant's position is that he bought the property for his family and the plaintiff refused to move to Muranga. It is clear from the evidence that the defendant transferred money directly to the seller of the property. The plaintiff's contention that the money was her dowry is not supported by any independent evidence. The sale documents for the property have not been produced but the defence evidence proves how the purchase price was paid. By November, 2010, the parties had not entered into a formal marriage. The defendant's position is that the property was bought for the family. I hold and find that it is part of the parties' matrimonial properties.

The two parties were married on 4.5.2011 at the District Commissioner's Office, Malindi. The marriage was dissolved on 16<sup>th</sup> March, 2016. In essence the marriage lasted for five years. Parties met in 2009 and must have been together before the formal marriage as the Muranga property was bought in 2010. The documents provided by the parties indicate that a sale agreement for the Watamu property was entered into on 10<sup>th</sup> May, 2009. The plaintiff maintains that the property was bought in 2011 but final instalment was made in 2014. The sale agreement indicate that by the date of 10.5.2004, the purchase price of Ksh.500,000 had already been paid. The title deed is still in the name of the vendor, Federico Violi. The transfer document signed by by vendor indicate that the property was to be transferred to **S G G**, the defendant's other daughter who resides in England.

It is evident that the property was bought in 2004. By that time the parties had not met. Section 7 of the matrimonial property Act No.49 of 2013 provides as follows:-

***Subject to section 6(3), ownership of matrimonial property vest 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.***

The plaintiff maintains that she contributed towards the renovation and improvement of the Watamu property. That contention is aimed at making the plaintiff come within the provisions of section 9 of the matrimonial property Act. Unfortunately, the property was bought before the marriage. Further, there is no evidence of contribution towards improvement of the property by the plaintiff. Section 2 of the matrimonial property Act, 2013 defines contribution to include domestic work, child care, companionship and farm work. The property had already been acquired, No evidence was tendered as to the improvements made by the plaintiff. Farm work, child care and companionship does not amount to improvement of a property which has already been bought. It amounts to contribution towards a property that is bought during the marriage. There is no evidence tendered indicating that the plaintiff supervised repair works on the property or that the property did undergo some form of renovations.

It is my finding that the Watamu property was bought before the marriage. It was bought in 2004 which is over six years before the parties got married in 2011. There were no renovations on the property during the marriage. The plaintiff never contributed towards its acquisition and cannot benefit from that property. I do find that the Watamu property does not form part of the matrimonial properties.

Counsel for the plaintiff contends that the plaintiff's contributions was higher than that of the defendant. The evidence proves that there was no financial contribution by the plaintiff. The defendant met all the financial obligations as well as paid a monthly household expenditure to the plaintiff.

Each of the parties is utilizing one vehicle. I do order that the plaintiff takes the vehicle she is using while the defendant retains the one he is using. With regard to the Muranga plot, I will go by the defendant's wish. The plaintiff shall take 50% of the property while their daughter shall take the other 50%. By their daughter I mean the parties joint daughter and not their children from their previous relationships.

In the end, I do find that the matrimonial properties for the two parties are the two vehicles and the Muranga house. The properties shall be divided as hereinabove stated.

Parties shall meet their respective costs. The originating summons dated 22<sup>nd</sup> March, 2016 is determined in the above terms.

**SAID CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Malindi this 17<sup>th</sup> day of October, 2017**

**WELDON KORIR**

**JUDGE**