



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

ORIGINATING SUMMONS NO. 42 OF 2013

H W K.....PLAINTIFF

VERSUS

F M G.....DEFENDANT

JUDGEMENT

1. H W K, the Applicant has filed the Originating Summons herein dated 1.10.13 against F M G, the Respondent seeking the determination of the following questions:

“1. Is the Plaintiff entitled to the declaration that Properties No. [particulars withheld]/III/MN Kilifi District and all erections thereon (hereinafter referred to as the “Suit Properties”) are owned by the Defendant jointly?

2. Should an order that the suit properties be sold and the net properties (sic) be divided equally between the Plaintiff and the Defendant?

3. An Order that the Defendant herein do pay to the Plaintiff with effect from the date of their separation, in 2010, half of the sum being the assessed rental income of the said premises jointly owned by the parties such as they would attract and which properties have been exclusively used by the Defendant and or have been in his exclusive possession.

4 An order restraining the Defendant from disposing off any of the suit properties until this suit is determined.

5. That further and in the alternative, and in the event that title and ownership in any of the suit properties has already been transferred to the favour of any third party, an order that the Defendant does account for the proceeds therefrom and the same be divided between the Plaintiff and the Defendant equally.

6. That the Defendant does render accounts for the rents received from the suit properties from the period 2010 to date and the Plaintiff be paid 50% thereof.

7. The Cost of this Suit be awarded to the Plaintiff.”

2. The parties herein got married under Kikuyu customary law in 1988 in the then Muranga District. They were blessed with 2 sons, G aged 25 and K aged 20 at the time of filing suit in 2013. The marriage experienced difficulties and was dissolved on 29.8.10 in Divorce Cause No. 2 of 2008 in the Senior Resident Magistrates Court at Mombasa. The Plaintiff avers in her affidavit in support of the Originating Summons that for 3 years in the marriage, she worked as Secretary to Branch Manager of [particulars withheld]. However on the advice of the Defendant she quit to look after the children. Thereafter the parties registered [particulars withheld] Limited, which used to get contracts from the Port of Mombasa. Between 2008 and 2010 when the Defendant lost the contract at the Port.

3. The Plaintiff further avers that during the subsistence of the marriage, the parties acquired the suit properties. She made direct and indirect contribution towards the construction of the matrimonial home on the suit properties. She contributed financial and also supervised construction of the home. She also contributed to the upkeep of the family as well as payment of school fees for the children. She has been advised that the suit properties should be divided equally between her and the Defendant or in the alternative sold and the proceeds divided equally between them.

4. In his Replying Affidavit filed on 21.11.13, the Defendant avers that prior to the filing of the divorce in 2007 the parties lived in rented

premises at Mama Ngina Flats. Thereafter they separated and the Plaintiff left for the United Kingdom. The Plaintiff worked on contract basis at [particulars withheld] until 1996 when she declined to renew the contract without the knowledge of the Defendant. He denies asking her to resign as he too was out of work having also left employment at Gailey & Roberts. Their company was opened in 1994 with both parties having equal shares but began operations in 1997. The Plaintiff resigned as a director of the company in 2000 and thereafter the Defendant lost the contract. According to the Defendant, he had custody of the children and single handedly took care of them. The Plaintiff only contributed to the subsistence of the family in 2001-2003 when she assisted in paying school fees for the children which sums she claimed back. The Defendant avers that he acquired the suit properties without any contribution from the Plaintiff. He paid for the properties in instalments and in good faith had the same registered in their joint names for the sake of the children.

5. The Defendant further asserts that in 2002, he purchased Plot No. [particulars withheld] from one Paul Chege Gitahi whose whereabouts is unknown as he relocated to the United States of America and the purchase was not completed. The plot is next to the suit properties and upon which the Defendant built his home from 2002 till completion in 2012 without any contribution from the Plaintiff. He denies that the home is the matrimonial home. He further avers that he remarried and lives in the home which is not part of the suit properties. Given that the Plaintiff made no contribution in the acquisition of the properties, it would be unjust to have the same or the proceeds of sale thereof divided between the parties equally. In any event the properties are charged to the bank to secure loan for school fees for the children and cannot be disposed of. The outstanding loan balance is about 30%. The properties do not generate any income and there are no accounts to be rendered. He prayed that the application be dismissed with costs.

6. At the hearing, the Plaintiff gave vent to the allegations in the Originating Summons. She asserted that the suit properties were bought in 1997/1998 from their friend. Their home is built on Plot No. [particulars withheld] upon the hill. Her contribution was through her earnings. In 2002, the Plaintiff went to the United Kingdom where she worked 3 jobs to assist financially as the Defendant had lost his job. Between 2003 and 2007 she came home twice a year and the Defendant and the children also visited her in the United Kingdom. The Defendant brought another woman into the matrimonial home which led to the divorce. Other than the matrimonial home, the other suit properties are not developed. Her prayer is that the Court divides the suit properties between them so that she can have closure. She also prayed for a stipend to assist her since she is out of the matrimonial home.

7. The Plaintiff further stated that they got married in 1988 and lived in Ngumba estate, Nairobi. In 1991 they moved to Mombasa where they lived in several locations such as Nyali, Kenya Re, Mama, Ngina Flats, Bamburi. She went to the UK in 2002. She finally returned to Kenya in 2008. She filed the divorce in 2007 and got decree nisi. She did not get the decree absolute as she was advised that if no one raised any issue the marriage would automatically end. The construction of the house on Plot No. [particulars withheld] was completed in 2012 and took about 10 years. The Plaintiff stated that she worked at [particulars withheld] between 1992 and 1995. The Defendant always complained about her going home late and would beat her up. She chose to resign for the sake of peace in the home. He too left employment shortly after.

8. The Plaintiff further stated that she is aware that the Defendant purchased another property on his own which is near the suit properties. She asserted that she contributed towards the purchase of the suit properties and the construction of the house. She has no statements to show that she sent money to the Defendant from the United Kingdom or from her bank. The parties supervised construction of the house and the Defendant did the supervision while the Plaintiff was away. When she heard that the plot on which the house was built is not 3579 she was shocked.

9. The Defendant in his testimony confirmed that the parties got married in 1988 under customary law. The parties initially lived in Nairobi and then moved to Mombasa in 1992 upon the Defendant's transfer by his employer. They lived in a company house until 1994 when he resigned and they rented a house. In 1997 the parties separated and the Plaintiff went with the children for a period of 1 year. The parties reconciled and they stayed together in Nyali till 1999 when they moved to mama Ngina Flats in Bamburi. In 2002, the Plaintiff then left for the United Kingdom leaving the Defendant with the children. The Defendant looked after the children, helped with homework, school and saw them through their formative years. She used to come to Kenya on holiday and would see the children. When she returned to Kenya in 2008 she went to live in Nairobi. In 1999, the Defendant purchased the suit properties from a friend of the Plaintiff's and had them registered in their joint names as the Plaintiff was the mother of his children. He paid in instalments from his own resources. He cleared the thicket in the suit properties and built a perimeter wall which is $\frac{3}{4}$ complete.

10. In 2003 he purchased Plot No. [particulars withheld] but the sale was not completed. The title is still in the vendor's name. He completed building his house on this plot in 2012 and moved in in 2013. The Plaintiff has never lived in this house. The Defendant denied that the Plaintiff contributed at all towards the construction of the house. He alone built the house. It took him 10 years to build the house. It was tough taking care of the children and business was up and down. He took and overdraft from the bank on the security of the suit properties to cater for school fees. He repays the loan alone. His desire is to develop the suit properties for his children and their children. The suit properties are vacant save for a chicken shed and do not generate any income so he has no accounts to render. He is willing to give the Plaintiff one of the properties or its equivalent values but no more. The Defendant is not willing to sell the properties which in any case are encumbered.

11. Parties filed written submissions which I have given due consideration. I now consider each prayer individually:

Whether the Plaintiff is entitled to a declaration that the suit properties and all erections thereon are owned by the Plaintiff and Defendant jointly

12. It is not disputed that the suit properties are registered in the joint names of the Plaintiff and the Defendant. Both parties acknowledge this fact in their pleadings, testimony and in their submissions. The certificates of titles of each of the suit properties show that the same are registered in the joint names of the Plaintiff and the Defendant. It follows therefore that the suit properties are indeed jointly owned by the parties.

Whether the suit properties should be divided or sold and the net proceeds thereof divided between the Plaintiff and Defendant equally.

13. It is the Plaintiff's claim that the suit properties were purchased in 1997/1998 and that she contributed in cash and in kind towards the purchase. The Defendant denies this and asserts that he purchased the suit properties single handedly and he did so in instalments. Other evidence is that the Plaintiff resigned from her job in 1996 and the Defendant resigned from his job in the same year. The company known as [particulars withheld] Limited which they incorporated began operations in 1997 and both had equal shares. The entries in the titles of the suit properties indicate that the transfers in favour of the parties herein were registered on 7.9.99 for Plot No. *****, 6.10.99 for Plot No. *****, and 30.11.99 for Plot No. *****.

14. Section 6 of the Matrimonial Property Act defines matrimonial property thus:

“(1) For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(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.”

15. As stated above, the suit properties were registered in the joint names of the parties in 1999. This was during the subsistence of the marriage. The suit properties accordingly fall within the definition of matrimonial property as they are jointly owned and were acquired during the subsistence of the marriage. Section 14(b) of the Act provides:

“Where matrimonial property is acquired during marriage –

(a) ...

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

16. The Plaintiff claims that she contributed directly and indirectly towards the purchase of the suit properties. The Defendant on the other hand denies any contribution from the Plaintiff and states that he alone purchased the suit properties. No evidence was however tendered by either party as to what the purchase price for the suit properties was and how much each contributed towards the same. Further, no evidence was produced as to how much each party was earning at the time of the purchase or indeed at any time of their marriage. In view of the dearth of evidence on the part of both parties the beneficial interests of the parties in the suit properties is presumed to be equal. This presumption though rebuttable has not been rebutted by either party. This finding is further buttressed by the equality principle between spouses in Article 45(3) of the Constitution of Kenya 2010 which provides:

“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.”

17. The Court notes that the suit properties are all charged to secure what the Defendant referred to as an overdraft to cater for the children's school fees. It was not stated how much was borrowed and how the amount borrowed was utilized. No evidence was produced to show that the amount borrowed went towards school fees for the children. The Plaintiff stated that she contributed towards the children's school fees. She also did not state how much she contributed towards school fees and upkeep of the children.

Should an order that the suit properties be sold and the net properties (sic) be divided equally between the Plaintiff and the Defendant?

18. Having found that the interests of the parties herein in the suit properties are equal, it follows then that each of them is entitled to the same in equal shares.

An Order that the Defendant herein do pay to the Plaintiff with effect from the date of their separation, in 2010, half of the sum being the assessed rental income of the said premises jointly owned by the parties such as they would attract and which properties have been exclusively used by the Defendant and or have been in his exclusive possession.

19. The Plaintiff seeks half the sum of assessed rental income of the suit properties from 2010 during which time the suit properties were in the exclusive possession of the Defendant. It is noted that the parties divorced in 2010. The Plaintiff tendered no evidence on this point as to what the rents of the suit properties ought to attract. The Defendant on his part stated that the suit properties were vacant and were not leased out and that no income is being derived from the property. In the circumstances I find that the Plaintiff has laid no basis for the claim for the assessed rental income.

That further and in the alternative, and in the event that title and ownership in any of the suit properties has already been transferred to the favour of any third party, an order that the Defendant does account for the proceeds therefrom and the same be divided between the Plaintiff and the Defendant equally.

20. Given that the suit properties are jointly held by the parties, the same cannot be legally sold without the involvement of the Plaintiff. In the unlikely event that any of the suit properties has been sold the Defendant would be liable to account for the proceeds thereof.

21. As regards the house that was built, the Plaintiff insists that she contributed towards the construction of the same while the Defendant

denies such contribution. The Plaintiff insists that the house stands on Plot No. [particulars withheld] while the Defendant maintains that the same is on Plot No. [particulars withheld]. There is on bed of file a cadastral plan that shows the location of all the 4 plots. The location of the house is easily verifiable. If the house is on Plot [particulars withheld], then this presents a challenge to the Plaintiff's claim therein. To begin with the Plot is not in the name of Defendant. Secondly, the Defendant states he alone purchased the same, a fact that the Plaintiff has admitted. Thirdly, it is trite law that parties are bound by their pleadings. Plot No. [particulars withheld] is not amongst the suit properties in the Plaintiff's pleadings. This Court cannot frame an issue not stated in the Plaintiff. In Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR the Court of Appeal stated:

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.

This Court is also bound by the Plaintiff's pleading and is consequently unable to make any finding in favour of the Plaintiff in respect of Plot No, [particulars withheld].

22. In the result, having evaluated the evidence and the law relevant in this matter, I do make the following orders:

- a) Plots Nos. [particulars withheld]/III/MN Kilifi District and all erections thereon being registered in the joint names of the Plaintiff and Defendant are hereby declared to be jointly owned by the Plaintiff and Defendant.
- b) I direct that Plots Nos. [particulars withheld]/III/MN Kilifi District be sold and the proceeds thereof be shared equally by the parties. In the alternative, valuation of the suit properties shall be done and the Defendant shall pay to the Plaintiff 50% of the value. The outstanding loan balance secured by the said Plots shall be paid out of the Defendant's entitlement in the suit properties.
- c) In the event that title and ownership in any of the suit properties has already been transferred to the favour of any third party, the Defendant shall account for the proceeds therefrom and the same be divided between the Plaintiff and the Defendant equally.
- d) Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 24th day of November 2017

M. THANDE

JUDGE

In the presence of: -

.....for the Plaintiff

.....for the Defendant

..... Court Assistant