

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 32 OF 2016 (OS)

N M.....PLAINTIFF

VERSUS

F S K.....DEFENDANT

JUDGMENT

1. The Originating Summons herein, dated 8th August 2016, was filed at this registry on 10th August 2016 by the plaintiff seeking that the joint ownership of LR No. [particulars withheld], Pepo Lane, off Windy Ridge, Karen between the parties hereto be severed and the same be deemed as be held in tenancy in common as between the parties hereto, that the said property be sold and the proceeds thereof be shared equally between the parties and the Deputy Registrar be empowered to sign the relevant documents that the defendant may refuse to sign.

2. In the affidavit in support, the plaintiff states that the parties married in 1996, the marriage was dissolved through proceedings in HCDC No. [...] and that the property in question was acquired during matrimony and was the couple's matrimonial home. He states that he contributed to the acquisition thereof both directly and indirectly. He has attached to the said affidavits relevant documents to support his case.

3. There is an affidavit of service on record, sworn on 27th September 2016 and filed in court on even date, returning service of the Originating Summons upon the defendant. The defendant neither entered appearance nor filed a response to the originating process, although she did attend court on 27th April 2017 and her plea for time to file papers was granted.

4. Directions were given on 8th June 2017 for disposal of the matter as undefended. The hearing was conducted on 20th July 2017, upon the court being satisfied that there had been proper notice of the hearing on the defendant. The plaintiff testified and breathed life to his pleadings.

5. The principal statutory basis for division of matrimonial property is the Constitution and the Matrimonial Property Act, 2013. Article 45(3) of the Constitution pitches for equality of the parties to a marriage at the time of its celebration, during its course and at its dissolution. Section 7 of the Matrimonial Property Act, 2013 requires that ownership of matrimonial property be determined on the evidence of contribution of either spouse to the property.

6. The two provisions appear to be mutually inconsistent. The Constitution appears to say that parties to a marriage have equal rights, so that when property is acquired during marriage for the benefit of the family, then, at dissolution of the marriage, it shall be divided equally between the parties. The other provision appears to advocate for proof of contribution to acquisition as basis for assessing the rights of either party to the property. Of course faced with such contradictions, the constitutional provision must hold sway. The principle to apply in the circumstances should thus be the constitutional imperative.

7. In this case, whether there was contribution or not is not relevant for the purpose of determining the proportions of ownership that they court may order. The plaintiff pitches for equal distribution, even though he pleads substantial contribution. The defendant has not defended the suit, and therefore I do not have her proposals. That leaves me only with what the plaintiff pleads.

8. In the end the orders that I am moved to make are as follows:-

a. That I hereby allow the Originating Summons dated 8th August 2016 in the terms proposed; and

b. That there shall be no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 8TH DAY OF DECEMBER, 2017.

W. MUSYOKA

JUDGE