



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

DIVORCE CASE NO. 5 OF 2006

R A G.....APPLICANT

VERSUS

G R N G.....RESPONDENT

J U D G M E N T

The applicant and the respondent were lawfully married for 38 years until the dissolution of the marriage on 29/06/2009 in this divorce cause.

The applicant has now applied for division of property after divorce whereas she petitions for a declaration that all the properties listed in this application were acquired during the existence of the marriage and that she is entitled to half share of each of the properties. The application seeks for an order for sub-division of the properties and subsequent transfer of half share of each of the properties to the applicant. This is followed by a prayer for orders to authorize the Deputy Registrar to execute all the relevant documents to give effect to the orders sought.

The applicant further seeks for an order that the County Land Registrar dispenses with the production of the original title deeds and for provision of security during the sub-division process.

The applicant in the supporting affidavit states that she worked as a secretary with the [Particulars withheld] until she retired. The respondent worked as a banker in various stations in the country and has also retired. The applicant states that the parties were engaged in various side jobs in order to subsidize their income. During the existence of the marriage the parties acquired several properties in various parts of the country.

The respondent opposed the application in his replying affidavit sworn on 6th October 2014. He states that he worked with [Particulars withheld] from 1966 to 2000 when he retired. He further states that most of the properties listed herein were acquired by him through bank loans given to him by his employer. He worked in various stations within and outside Kenya including Mombasa, Kerugoya, Meru, Migori, Chuka, Holland, Embu, Kisumu and Muranga.

The respondent explains that he solely acquired all the listed properties which are registered in his name and also those in joint names of the parties. He states that the applicant had separated from him from 1988 to 1998 when one property LR. No. [Particulars withheld] was acquired.

The respondent has annexed bank statements and other correspondence to show that he acquired most of the properties by himself through bank loans and from his personal savings and that the respondent did not give any financial contribution to the purchase of the properties.

The respondent states that he got married to his second wife A N and that he lives with her on LR. No. [Particulars withheld] after the applicant deserted him. The respondent states that he acquired plot No. [Particulars withheld] between 1966 and 1969 before he got married to the applicant and that this property should not be shared with the applicant. He further states that he acquired all the shares listed herein by himself and has since disposed of all the Kenya Commercial Bank shares. He argues that the shares were also acquired through bank loans and personal savings.

The application was heard by way of *viva voce* evidence followed by submissions filed by both parties.

It was submitted by the applicant that the listed properties and shares were acquired during the marriage and therefore constitutes matrimonial property which is subject to division between the parties. She argued that the respondent worked far away from home leaving her to take care of his children and to oversee the family investments. The applicant said that she would look for the properties the couple required to purchase, then negotiate the price before the parties transacted. She relied on Section 2 and 4 of the Matrimonial Properties Act 2013 which defines “matrimonial property” and provides that contribution has a wider meaning other than financial.

The respondent states that the application has been brought a bit late in the day and ought to have been filed during the divorce case and for that reason, this court is *functus officio* in this matter. He further argues that the application ought to have been brought by way of originating summons and not by notice of motion. He further states that none of the properties listed fall under the description of matrimonial property under the Act for the reason that he bought all of them single handedly. The ones registered in joint names of the parties are still the respondent's properties since the applicant did not contribute to the purchase and that that she obtained the joint registration without his consent.

It was argued that this court is *functus officio* after the divorce case was concluded. The respondent further submitted that the application was brought late.

The record shows that the divorce cause was concluded on 25/06/2013. This application for division of property was filed on 28/07/2014 which was one year later. The respondent did not cite any law which bars the applicant from applying for division of property a year or so after the conclusion of the divorce case.

I have looked at the relevant law and I find no provision which gives limit of time as to when an application for division of property may be filed. The application cannot be said to be time barred. It is after conclusion of the divorce cause that a party can move the court for division of matrimonial property. This application was filed after the conclusion of the divorce cause. This court is therefore not *functus officio* and had jurisdiction to hear and determine the cause.

It was argued that the application ought to have been brought by way of originating summons instead of by way of notice of motion. Article 159 of the Constitution provides that courts should not have undue regard to procedural technicalities. The focus should be in the substance rather than the form. I find this argument on the procedure untenable.

The details of the properties listed in this application are as follows:-

1. Nairobi/Blk82/[Particulars withheld] registered in the respondents name and was acquired in 1992
2. Inoi/Kamondo/[Particulars withheld] registered in the respondents name
3. Inoi/Kerugoya/[Particulars withheld] in the joint names of the parties
4. Gaturi/Nembure/[Particulars withheld] Karingani/Ndangani/ [Particulars withheld] which was sub-divided into LR. No. [Particulars withheld] in the name of the respondent.

5. Mutira/Kiaga/[Particulars withheld] registered in the name of the respondent.
6. Plot at Kongowea Market -Mombasa City
7. 6666 shares with Kenya Commercial Bank (KCB)
8. 5097 shares with I.C.D.C.
9. 3330 shares with British American Tobacco BAT
10. 2000 shares with Kenya Airways
11. 1952 shares with National Industrial Bank
12. 1875 shares with National Bank of Kenya
13. 1500 shares of Uchumi Supermarket
14. 1050 shares of Standard Bank
15. 1065 Barclays Bank of Kenya shares

Before the Matrimonial Property Act 2013 was enacted, courts in this country relied on the English Matrimonial Property Act in division of matrimonial property. There is a host of decisions on the subject based on contributions of the parties whether financial or otherwise. In most of the cases, division of property at 50/50 between the parties was upheld by courts even before the Matrimonial Property Act 2013 (MPA) was enacted.

In the case of **PETER MBURU ECHARIA VS PRISCILLAH NJERI ECHARIA [2007] eKLR**, the Court of Appeal judges had this to say:-

*“In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this court, the court has invariably given the wife an equal share (see *Essa Vs Essa (supra)*; *Nderitu, Civil Appeal No. 74 of 203 of 1997 (unreported)*, *Kamore Vs Kamore (supra)*; *Muthembwa Vs Muthembwa, Civil Appeal No. 74 of 2001 and *Mereka Vs Mereka, Civil Appeal No. 236 of 2001 (unreported)*. However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather in each case, the Court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The Court considered the peculiar circumstances of each case and independently assessed the wife’s contribution as equal to that of the husband”.**

The provisions of the Act are now clear on the issues involving division of property. The term “contribution” is defined as meaning monetary and non-monetary contribution and includes *domestic work and management of the matrimonial home, child care, companionship, management of family business or properties and farm work.*

Matrimonial property is defined in Section 6 which provides:-

(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.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

Ownership of matrimonial property is explained in Section 7 as follows:-

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

Article 27 of the Constitution provides:-

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2).....

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

The parties in this case were lawfully married on 28/11/1981 and were blessed with three children who were all aged over 30 years at the time the marriage was dissolved.

The land Mutira/Kiaga/[Particulars withheld] was registered in name the respondent on 2/01/1982 about one month after the parties got married. Given the nature of land transactions which in most cases are concluded within 90 days, it follows that the respondent must have entered into the transaction to purchase the land about two or more months before the date of the marriage. Transfer and registration of the land is usually on completion of the transaction. In this case, the respondent must have bought the land Mutira/Kiaga/[Particulars withheld] before he got married to the applicant. It is noted that the applicant did not adduce any evidence to the contrary. I find that this property is not matrimonial property as defined in the Act.

As for Gaturi/Nembure/[Particulars withheld] the copy of register was not produced by any of the parties. The applicant did not adduce any evidence to show that it was registered in the name of the respondent and that it was matrimonial property. The respondent testified that the land was given to him by his clan which evidence was not disputed by the applicant.

It is not in dispute that the BAT shares were acquired in 1969 two years before the marriage of the parties.

Under Section 9 of the Act, any property acquired before marriage does not become matrimonial property. I find that Mutira/Kiaga/[Particulars withheld], Gaturi/Nembure/[Particulars withheld] and BAT shares are matrimonial property and are therefore not subject to division.

As regards the plot at Kongowea market, the respondent denies owning it. The applicant had a duty to prove that such a plot existed. He who alleges must prove and the applicant failed to discharge this burden. The plot cannot therefore be said to exist.

The respondent testified that he sold plot LR No. [Particulars withheld] which was a result of sub-division of parcel No. Karigani/Ndangani/ [Particulars withheld] to one Eliphaz Njeru. He produced a copy of register to that effect. None of the parties testified on how the proceeds of sale were utilized and for that reason the matter is put to rest.

However, the other remaining plots from the sub-division LR No. [Particulars withheld] remain intact. It is not in dispute that the original parcel was acquired during the existence of the marriage. The said plots are therefore subject to division between the parties.

The KCB shares were all sold according to the respondent and there was no evidence to show that the said shares were in existence at the time of hearing this application. It is assumed that the proceeds may have been used for the benefit of the family in the absence of evidence to the contrary.

The respondent claimed that LR. No. Nairobi/Block82/[Particulars withheld] was acquired during the separation of the parties resulting from a troubled marriage. However, the periods of separation were on and off and most importantly, the marriage was still in existence. The property is therefore matrimonial one.

It is not in dispute that Inoi/Kerugoya/[Particulars withheld] are both registered in the joint names of the parties and that they were acquired during the marriage.

Section 14 of the Matrimonial Property Act 2013 provides that;

Where matrimonial property is acquired during marriage—

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

In the case of ***KIVUITU VS KIVUITU [1991] 2 KAR 241*** cited in the case of ***PETER MBURU ECHARIA VS PRISCILLA NJERI ECHARIA [2007] eKLR*** the court of appeal the court held that the fact that the property is registered in the joint names of husband and wife means that each party owns an undivided equal share therein.

It is not in dispute that the following properties are registered in the name of the respondent and were acquired during the existence of the marriage.

- (a) Nairobi/Blk82/ [Particulars withheld]
- (b) Inoi/Kamondo/ [Particulars withheld]
- (c) Karingani/Ndagani/ [Particulars withheld]
- (d) Karingani/Ndagani/ [Particulars withheld]
- (e) Karingani/Ndagani/ [Particulars withheld]
- (f) Karingani/Ndagani/ [Particulars withheld]

SHARES

- (g) 5097 shares with I.C.D.C.
- (h) 2000 shares with Kenya Airways
- (i) 1952 shares with National Industrial Bank

- (j) 1875 shares with National Bank of Kenya
- (k) 1500 shares of Uchumi supermarket
- (l) 1050 shares of standard bank
- (m) 1065 Barclays Bank shares

Section 14 creates a rebuttable presumption that the property acquired during the marriage is held in trust for the other spouse. It was held in the case of **KIVUITU VS KIVUITU [1991] KLR** that:-

“The fact that the property is registered in the joint names of husband and wife means that each party owns an undivided equal shares therein”.

The applicant testified that the respondent used to work far away from their matrimonial home for a long time and during this period the applicant would take care of their home, their children and family investments. The respondent even admitted that the applicant used to scout for properties for which the respondent would deposit the purchase price in the applicant's account for her to negotiate the price and pay the vendors. The respondent in paragraph 18 of the replying affidavit admitted that it is the applicant who represented him in all the transactions for acquiring property.

The applicant has satisfied the court on the balance of probability that she made contribution in form of child care, management of matrimonial home, management of family business and limited financial contribution. She is therefore entitled to half the share of the following matrimonial property;

- (a) *Nairobi/Blk82/ [Particulars withheld]*
- (b) *Inoi/Kamondo/ [Particulars withheld]*
- (c) *Karingari/Ndangani/ [Particulars withheld]*
- (d) *Inoi/Kerugoya/ [Particulars withheld]*
- (f) *5097 I.C.D.C. shares*
- (g) *2000 Kenya Airways shares*
- (h) *1952 National Industrial Bank shares*
- (i) *1875 National Bank of Kenya shares*
- (j) *1500 Uchumi supermarket shares*
- (k) *1050 standard bank shares*
- (l) *1065 Barclays Bank shares*

In view of the above, the court makes the following orders:-

1. *That Inoi/Kerugoya/ [Particulars withheld] where the matrimonial home sits, be valued and sold, the proceeds thereof be shared equally between the parties with the option of either party buying off the other's share of the valued property with a view of retaining it.*
2. *The other immovable properties be sub-divided in equal shares between the parties or alternatively be valued and sold and proceeds shared equally.*

3. The shares be sold at the market price and the proceeds shared equally.

4. The costs for valuation, sub-division and other related expenses be shared equally between the parties.

5. Each party to meet his/her costs of this application.

6. Each party to meet the transfer and registration charges in respect of their shares of immovable properties.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF MARCH, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muthoni for Abubakar for respondent

Petitioner present

Respondent present