



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HCC CAUSE NO. 26 OF 2011**

**D W M.....APPLICANT**

**VERSUS**

**P M G.....RESPONDENT**

**RULING**

**THE APPLICATION**

The Applicant, P M G moved this court through an application by way of a Notice of Motion filed on 18<sup>th</sup> September 2015. The application is premised under the provisions of **Sections 3, 3(a) and 63 of the Civil Procedure Act, Sections 8 and 12 of the Matrimonial Property Act and Article 23 of the Constitution**. The Applicant seeks orders from this court inter alia an order directing the Respondent, D W M to render an account of all rentals received by her in respect of eight (8) ‘rooms’ rented out on property known as Plots 494 and 504 (being portions of L.R No. *[particulars withheld]*/11, Nairobi) (herein after referred to as the “*properties*”) at a monthly rent of Kshs. 20,000 from January, 2010 to September, 2015. The Applicant further seeks an order from this court to compel the Respondent to pay to him half share of the rental income received in the period. He also seeks an order from this court to allow him to collect rent due from the properties with effect from October, 2015 and to share the same amongst his family members. The Application is supported by the affidavit of the Applicant.

The reasons advanced by the Applicant in support of the application are that he purchased and developed the properties to derive income for the benefit of his family. He avers that he was chased away from the properties by the Respondent who has since then had the control of them. The Applicant avers that the Respondent has been collecting rental income from the properties to his exclusion. He claims that he has no other income other than the said rentals.

The application has been opposed by the Respondent through a replying affidavit filed on 13<sup>th</sup> October 2015. The Respondent avers that the suit properties are hers and the Applicant’s matrimonial home. She avers that they both constructed the rentals on the properties to derive income for the family. She avers that there are currently five (5) ‘rooms’ which are rented out at a monthly sum of Kshs. 12,500. The Respondent admits that she has been collecting rent from the properties. She avers that she depends on the rentals as her only source of income.

**BACKGROUND**

The Applicant married the Respondent as a second wife on 7<sup>th</sup> December 1991. The couple was blessed with five (5) children who are now adults. The couple however separated sometime in 2010 and the marriage eventually broke down. The Respondent lodged a claim in this court on 10<sup>th</sup> June 2011 in terms

of **Section 17** of the **Married Women Property Act (repealed)**. The Respondent sought in her application, a declaration by this court declaring her interest in the suit properties together with land parcel known as L.R No. Laikipia/ Tigithi Matanya Block [Particulars Withheld]. She claimed that the said land parcels are their matrimonial properties. The Respondent claimed that the properties were acquired jointly by herself and the Applicant. She averred that although they both contributed towards the acquisition, of the properties, they were registered in the Applicant's name. She further averred that they constructed five (5) rental rooms on the suit properties which on completion were rented out. The Respondent stated that she has been collecting rental income from the suit properties which she utilizes to sustain her family. She claims that the Applicant deserted the matrimonial home in May 2010 leaving her to fend for the family.

On his part, the Applicant denies the Respondent's claims. He avers that the suit properties were acquired through the joint contribution of both him and his first wife. He avers that the properties were acquired between the years 1983-1984 prior to his marriage to the Respondent. The Applicant claims that their matrimonial home has been in Naro Moru and not the suit property as claimed by the Respondent. He claims that they relocated to the suit property in 2005. According to the Applicant the suit property was only a residential holding since they maintained their matrimonial home in Naro Moru. He claims that he had to move out of the suit property in 2010 following his domestic differences with the Respondent. The Applicant has since registered the suit properties in the joint names of both himself and his first wife.

### **EVIDENCE**

During the hearing of the application, the Applicant was represented by Mr. Momanyi, learned counsel while learned counsel, Mr. Wachira appeared for the Respondent. In his submission on behalf of the Applicant, Mr. Momanyi reiterated the contents of the Applicant's application and affidavit in support of the Application. Counsel for the Appellant disputed the Respondent's claims there only five (5) rental units in the premises. He invited the court to conduct a site visit on the premises to confirm the exact number of units rented out by the Respondent. That notwithstanding, learned counsel for the Applicant suggested that since the Respondent had admitted to having collected rent from five (5) units, this court could in the meantime allow the Applicant's application in respect of the five rental units. He submitted that the Respondent has not adduced evidence to show how she has utilized the rental income received to offset debts supposedly incurred by the Applicant.

In response to the Applicant's submission, learned counsel for the Respondent was of the view that the Applicant's application is malicious as it seeks to deprive the Respondent and her children of their enjoyment of their matrimonial home. He questioned the Applicant's motive in filing the application six (6) years after deserting them. He was of the view that Applicant should also render an account in respect of land parcel L.R No. Laikipia/ Tigithi Matanya Block [Particulars Withheld] which is under his exclusive control. In determining the Applicant's application, learned counsel for the Respondent urged the court to take into consideration the fact that the Applicant is in employment working at Nairobi University whereas Respondent is unemployed and relies on the rental income as her sole source of income. He urged the court to further take into consideration the fact that the Applicant has not provided financial assistance to his family since he deserted them. In concluding his submission, learned counsel for the Respondent submitted that the Applicant has transferred the suit premises to his 1<sup>st</sup> wife in a bid to steal a march on the Respondent.

In a rejoinder, learned counsel for the Applicant admitted that there is a dispute as to the ownership of the suit property. He nonetheless argued that the Applicant, being the head of the family should be the one collect the rent. He contended that the Applicant is unemployed and is relying on the rental income from the suit premises for his upkeep. He therefore urged the court to grant the orders sought by the Applicant.

### **EVALUATION**

This court has given due consideration to the pleadings and the submissions made in court by the parties. From the evidence adduced in court it is not in dispute that the Applicant and the Respondent are married. The Applicant's case is that suit properties were acquired by himself and his first wife between the years

1983-1084. He claims he married the Respondent in the year 1991 as a second wife and cohabited with her in their matrimonial home in Naro Moru. The Applicant therefore denies that the suit properties were their matrimonial home as claimed by the Respondent. He claims that the suit properties were just but a residential holding which they moved into in 2005. He claims that he single handedly constructed eight rental rooms out of which he was to derive an income. On the other hand, the Respondent maintains that the suit properties were their matrimonial home where she cohabited with the Applicant since the celebration of their marriage. She contends that the suit property was acquired and developed through both their joint efforts. According to the Respondent, they put up five (5) rental rooms which they have rented out. The Respondent avers that she receives Kshs. 12,500 monthly as rental income for the family.

From the foregoing, the Applicant's case is that the Respondent has no claim in the properties. According to him, she did not contribute towards their acquisition. He further claims that it is neither their matrimonial home. From the Respondent's perspective she admits that the Applicant contributed towards the purchase and development of the suit properties.

## **THE LAW**

**Section 7 of the Matrimonial Property Act, 2013** states as follows:

***"7. 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."***

With regard to cases of dissolution of polygamous marriages **Section 8 (1) (b) of the Matrimonial Property Act** provides:

***8." (1) (b)matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives." With regard to cases of dissolution of polygamous marriages section 8 (1) (b) of the Matrimonial Property Act provides:"***

In light of the provisions of Matrimonial Properties Act cited, this court cannot conclusively at this stage determine the ownership of the suit properties, the contribution of the parties to the acquisition of the properties and if it constitutes matrimonial property until and unless the parties offer cogent evidence and proof of their respective allegations, their contribution cannot be determined.

## **COURT ORDERS**

**In the premises therefore, the Applicant's application shall await.**

- 1. The issue for determination shall constitute oral and documentary evidence produced in an inter parties hearing of each party's claim of ownership.**
- 2. The hearing date to be obtained by the parties in the registry**
- 3. The Deputy Registrar shall visit the suit properties being land parcels known as Plots 494 and 504 (being portions of L.R No. [particulars withheld]/11, Nairobi) to determine the number of rental 'rooms' being rented out and submit a report in court within thirty (30) days.**

**READ AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22<sup>nd</sup> DAY OF APRIL, 2016**

**MARGARET W. MUIGAI**

**JUDGE**

***In the presence of,***

Mr. Wamae holding brief J. M. Njengo for the Respondent