

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MATRIMONIAL CAUSE NO. 23 OF 2014

P.B.....PETITIONER

VERSUS

A.W.N.B.....RESPONDENT

JUDGEMENT

The petitioner and the respondent got married on 9.12.1986 at the Registrar's office, Nairobi. The marriage was dissolved through Divorce cause No. 10 of 2013. The applicant later filed these originating summons seeking distribution of the mentioned properties, namely Plot Number [particulars withheld], Plot Numbers [particulars withheld], [particulars withheld] and [particulars withheld], Section III. Mtwapa.

The applicant's evidence is that he comes from Switzerland. He has been living in Kenya since 2006. He married the respondent in 1986. They had two adopted children now aged 35 and 32 years. They got divorced in March 2014. During their marriage, they acquired two properties. One property is at Gachie, Plot Number [particulars withheld]. The other property is located at Mtwapa on three plots namely [particulars withheld], [particulars withheld] and [particulars withheld]. The Kiambaa plot was bought in 1991. The Mtwapa property was bought in¹ December 2006. They bought the properties together.

It is the evidence of the applicant that the title documents are with the advocate who handled the transactions, Mr. Rafael Ng'ethe who is based in Nairobi. The applicant's prayer is to have the properties divided equally between them. The value for the Gachie plot is quite high and the applicant's alternative prayer is to have the Mtwapa property while the respondent retains' the Gachie plot which is not developed.

The applicant produced a valuation report by Elite Africa Valuers Ltd dated 8.4.2016. The valuers give the value of the Mtwapa property at Kshs.24,500,00/=.

I have gone through the pleadings herein'. The affidavit of service by the process server, Morris Mwavuo Ngonyo sworn on 23.3.2015 indicate that summons were served upon a watchman at the Mtwapa house. The valuation report does not show the inside image of the house meaning that the applicant' has no access to the house. The only image is that of the gate. It is difficult for this court to conclude that indeed the house is a matrimonial property. No official searches for the three plots were produced. At least an official search could have shown the registered owner of the property. Even if the title documents are with an advocate, the applicant should be in a position to either get copies of the documents being a joint purchaser or official searches from the land Registries in Kilifi or Mombasa and Nairobi. As it is now, this court cannot determine who is the registered owner of the suit properties. Where a spouse is claiming a share of a property, he/she should be in a position to give details of the property and how it was acquired. How could the applicant co-own the Mtwapa property without having access to it. If he has lived there, he could, have the courage of taking the valuers to the property and show them around. The watchman could easily open the gate for him.

This is a civil dispute which has to be proved on a balance of probabilities. It is possible that the Mtwapa and Gachie properties belong to third parties as no ownership record has been produced. I will not take it as the truth the averments of the process server that the respondent lives in Switzerland. The applicant, in

his supporting affidavit, indicate that the respondent lives in Switzerland. It could have been quite simple for the applicant to go-to Switzerland and serve the court documents upon the respondent through the proper legal channels. The properties are allegedly registered in the respondent's names. There is no evidence to that effect. The court cannot also confirm that the properties were bought in 1991 and 2008 as claimed by the applicant. This can only be established through documentary evidence.

The process server indicates that he served the respondent for the second time through registered post. It's not established whether indeed the service was made. The annexed copy of received is not conclusive evidence of service.

Since the issues involve distribution of property. I do find that the applicant has not done enough to serve the respondent. I also find that the applicant has not done enough to prove his case on a balance of probabilities. He does not state for how much the properties were bought and how much he contributed.

In the end, I do find that this case has not been proved. The only reasonable order to give is to strike out the originating summons dated 24.11.2014 to enable the applicant file another suit and retrace his steps. There shall be no orders as to costs.

Dated and delivered in Malindi this 19th May, 2016.

S.J. CHITEMBWE

JUDGE