



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**HCCC NO. 50 OF 2011**

**M.W.G.....PETITIONER**

**VERSUS**

**W.P.G.....RESPONDENT**

**JUDGMENT**

**PLEADINGS**

The Petitioner/Applicant instituted the matter presented in Court for determination on 19<sup>th</sup> December 2012. The Applicant relied on **Section 17 of the Married Women Property Act 1882 (repealed) Section 28 and 99 of Land Laws of Kenya (2012)** and sought

1. Injunction restraining the Respondent his agents or servants from wasting, disposing, selling, alienating, disposing the following properties;
  - i. Nairobi /Block *[particulars withheld]*
  - ii. Nairobi /Block *[particulars withheld]*
  - iii. Nairobi/Block *[particulars withheld]*
  - iv. Nairobi/Block *[particulars withheld]*
2. And /or in the alternative grant conservatory orders preserving these suit properties pending hearing and determination of the main suit housed in the Originating Summons filed on 16<sup>th</sup> September 2011 seeking similar orders and including;
3. The motor vehicle Registration *[particulars withheld]* acquired, purchased and maintained during their marriage and contribution from the Petitioner though registered in the Respondent's name.
4. The Petitioner/Applicant's share in each of the said be determined and transferred to the Applicant's name.

The Respondent filed Replying Affidavit on 28<sup>th</sup> September 2011 that the Applicant made various false statements intent on misleading the Court.

These suit properties and motor vehicle; he purchased single handedly without any contribution or any other support from the Applicant. Secondly, he purchased properties for the Applicant registered in her name that she did not disclose to the Court. Thirdly he obtained consent from Land Registrar to lift the caution placed by the Applicant over the suit properties. He sold 3 of the properties and bought a retirement home in England.

He annexed consents from the children that they had no objection to the sale of the properties.

The Respondent filed a Further Affidavit of 19<sup>th</sup> October 2011 and attached the consent from their youngest son; the other 2 children's affidavits could not be traced.

## **HEARING**

### **APPLICANTS CASE**

On 12<sup>th</sup> March 2015, the Petitioner / Applicant testified

That she was married to the Respondent in 1989 as evidenced by the marriage certificate attached to her application marked **MWK 1**. They had 3 children, the first one was adopted and the other 2 were children of the marriage as per the attached birth certificates to her application. They are all adults today.

The Respondent was in fulltime employment as a teacher. She was a housewife and she took care of the children and maintained their home. While the Respondent was at work, she kept the home clean and intact, cooked, washed and took care of the children. The Respondent did shopping.

Later during their marriage; they employed house-help and she engaged in money-making ventures. She reared chicken, sold scrap metal and later opened a hardware shop. She applied for a loan from Equity Bank of Ksh. 1.6 million and repaid monthly as shown by the attached statements of account annexed to her List of documents filed on 24<sup>th</sup> September 2014. The Respondent guaranteed the loan and provided security for the said loan. The Respondent did not repay the loan,

She used the money to expand her business, part of the proceeds she provided groceries and upkeep of the home. She bought clothes for the Respondent and children and the rest for personal effects.

When they married they did not own property. They discussed, she identified the properties and once they agreed, the Respondent paid for the same and registered it in his name. She was young she did not know about registration of joint property. They purchased the suit properties and later developed them. She supervised construction of the properties, ran her businesses and took care of her family while the Respondent continued with employment.

The Applicant participated in the merry go round groups and got funds, which she used to put up Kiosks and rent out at monthly rent of ksh16, 000/-The Respondent's mother gave some money that, she put to building the kiosks.

In 2010, the Respondent did not discuss any sale of properties with her. They separated and she requested to collect the rent from the kiosks. He agreed but the caretaker hurled insults at her and told her the property was sold. She was shocked, as they were in Court and she placed caution on the suit properties. The properties in question are

- i. Nairobi /Block **[particulars withheld]**- title deed dated 21<sup>st</sup> December 2005
- ii. Nairobi /Block **[particulars withheld]** -title deed dated 6<sup>th</sup> July 1992
- iii. Nairobi/Block **[particulars withheld]**- title deed dated 2<sup>nd</sup> August 2005
- iv. Nairobi/Block **[particulars withheld]**- title deed dated 21<sup>st</sup> December 2000

The 3 properties were sold as evidenced by the copy of Agreement for Sale marked **WPG2**

Nairobi /Block **[particulars withheld]** is the only remaining property which is where the Applicant and the children reside. The home was vacated awaiting sale. The Applicant moved in and developed the property built a perimeter wall through a loan from Equity bank.

They bought property Iambus Number/ Raba/ **[particulars withheld]** and they paid KS. 2million they

have a dispute and she is trying to pay the balance in installments.

In cross - examination, the Applicant clarified that from 1989 -1996 she was at home taking care of the family and the Respondent provided for all the expenses. However, from 1996 the Respondent helped her start a spare part shop and gave her KS 60,000/= which she refunded.

She started a salon with KS 50,000/-She paid goodwill of KS 90,000/- from the Respondent and she refunded the money. She confirmed that she has a spare parts business in Mike, the suit property Raba/Number where there are 6 flats and where she lives. There was the motor vehicle that she contributed KS. 100,000/- and the Respondent sold.

### **RESPONDENT'S CASE**

The Respondent testified that they married in 1989 when the Applicant was 21 years old. She was unemployed and he supported her training in College.

With regard to the suit properties; He bought these properties;

- i. LR Nairobi Block *[particulars withheld]* in1990
- ii. LR Nairobi Block *[particulars withheld]* in 1991
- iii. LR Nairobi Block *[particulars withheld]*
- iv. LR Nairobi Block *[particulars withheld]*

They built 4 bed roomed houses at the plot from his savings as a teacher and started building in 1991-1992 on LR Nairobi Block *[particulars withheld]*. The Applicant was not working at the time and she had no source of income. At first she looked after the home but later they employed house help and she started running a shop in 1995-1996 and later ran other businesses. She was generous and provided food, clothing and met other expenses.

The other 3 properties were developed 8 years later and this was from his investments in the UK and savings as a teacher.

He paid for the construction to the Caretaker of the Construction and the Applicant's brother G.

He paid school fees and school expenses for the 3 children as evidenced by the bundle of receipts in the Defendant's list of documents filed on 18<sup>th</sup> November 2015 totalling Ksh. 10 million.

The Respondent confirmed guaranteeing the Applicant's loan , she repaid it but he cleared the balance but could not confirm how much he paid. He contributed to the purchase of the Mwiki property but could not recall how much he paid. There were 2 plots, he sold 1. He also bought her a tea farm in Lari /Kiambu which she sold and built 14 flats and godown. He paid Ksh 2m towards the purchase of Ndumberi/Riabai property. She built 2 bedroomed house for herself and 4 - 6 flats and a shop.

During their marriage he gave the Applicant money as loans which she refunded and at times he gave her money as gifts. He tabulated the amounts as per the list attached and marked as **WPG8**

The Applicant left home in February 2010 with her furniture and belongings and he did not hear from her for 18 months.

He sold the 3 suit properties as the caution was removed and he got Ksh. 12.4 million and purchased a retirement home in the UK. The Respondent confirmed the developments by the Applicant in the sole property LR Nairobi Block/ *[particulars withheld]*. The applicant has built half perimeter wall a kitchen and garage converted as room for the boys. He does not wish to settle in the property and since he has no other property in Kenya, he wishes the house transferred jointly to the boys and the Applicant to reside in Kirigiti where she has a home.

In cross-examination, the Respondent admitted that they consulted and agreed on purchase of the properties. The petitioner did not contribute financially but in non-financial aspects. She looked after the home and the children as he paid school fees for the children.

He did not see any registrable interest in the Mwiki and Kariobangi properties.

He did not seek the Applicant's consent before selling the properties as she left home. She discovered this before he told her.

The Applicant did not consult him before she moved into the sole suit property LR Nairobi Block/ **[particulars withheld]** over the wall when he put it up for sale. He admitted she made financial contribution to the said property.

The Applicant's and Respondent's Counsel filed written submissions on 31<sup>st</sup> August 2015 and 18<sup>th</sup> November 2015 respectively.

This Court considered the pleadings, oral evidence adduced in Court and submissions the evidence on record discloses the following issues for determination.

### **ISSUES**

- a. The application was filed under the Married Women Property Act 1882 now repealed and there is the Matrimonial Property Act 2013 which is the applicable law?
- b. What property comprises of matrimonial property?
- c. Should division of matrimonial property be equitable or equal between the Applicant and Respondent?

### **DETERMINATION**

With regard to the first issue, **Section 19 of Matrimonial Property Act 2013** repealed the Married Women Property Act 1882 therefore this matter is properly under the new law. This is because, at the time of filing the application instituting the suit in 2011, the repealed law was the relevant law applicable then. The subsequent legislative enactment should not vitiate a party's right to dispute resolution.

**Article 159 (2) (d) Constitution 2010** provides that ***justice shall be administered without due regard to procedural technicalities*** [and instead address the substantive issue(s) in Court.]

Therefore the fact of non- amendment of the pleadings to conform to the new law should not prejudice the determination of the dispute. The prevailing law shall apply.

In the case of ***D.T. Dobie & Company Ltd vs Muchina [1982] KLR 1,9 Madan JA*** stated;

***“No suit ought to be summarily dismissed unless it appears hopeless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action; provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of the case before it.”***

Therefore the matter shall be determined under the new law and not dismissed for lack of amendment to the pleadings to conform to the new law.

With regard to the second issue, what comprises of matrimonial property is spelt out by Section 6 (1) (a) (b) & (c) of Matrimonial Property Act 2013. The property includes

***Matrimonial home (s), household goods and effect in the matrimonial home (s) any other immovable and movable property jointly owned and acquired during the subsistence of the***

**marriage.**

He believed and confirmed to the Court that he bought the properties singlehandedly with no contribution from the Applicant. The funds were from his savings and investments in UK. At the time of purchase, the Applicant did not have a business or source of income. The Applicant made no contribution to the development thereof. Therefore, the properties did not form part of matrimonial property. The Respondent confirmed sale of 3 of the properties without informing the Applicant his spouse the Applicant at the time.

The Applicant informed Court she made non- financial contribution at first during the early years of the marriage but later she also contributed financially to these properties especially in development of the properties.

These are conflicting positions and in the absence of cogent evidence from documents this court cannot determine the same. It is one's word against the other. In the circumstances this Court shall rely on **Section 6 of the Act**. In the instant case from the evidence on record the properties that were acquired during the subsistence of the marriage and comprise matrimonial property include;

- i. Nairobi /Block **[particulars withheld]**
- ii. Nairobi /Block **[particulars withheld]**
- iii. Nairobi/Block **[particulars withheld]**
- iv. Nairobi/Block **[particulars withheld]**
- v. Motor Vehicle Registration **[particulars withheld]**
- vi. Mwiki property
- vii. Kariobangi property
- viii. Ndumberi/Riabai property

With regard to the third issue, the issues are whether the listed properties are subject to distribution and if so in what proportion if at all to each or either of the parties to the marriage.

The Applicant through Counsel in the filed submissions stated as follows;

The plaintiff / Applicant did not contribute financially to the acquisition of the properties

In reliance of the Applicant's contribution as provided by section 7 of matrimonial Property Act 2013 would amount to 15% of the sole property Nairobi /Block **[particulars withheld]** and the rest of the Respondent's share he would leave to the children jointly and equally.

The Respondent relied on the case of **U.M.M. vs. I.M.M. [2014] eKLR** where the Court held;

***“I take the view that on dissolution of marriage each partner should walk away with what she/he deserves. What one deserves must be arrived at by considering her/his respective contribution whether it is monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that non- monetary contribution entitles the spouse to half the property, then Courts should give effect.....”***

In **N.W.N.vs J.N.K.2015 eKLR** the Court held;

***“She thus made reasonable contribution towards his effort to acquire the property. This was an indirect contribution which entitles her to a share of an interest in the property.....at 15%”***

Therefore in light of these facts and the law the Respondent is of the position that the Applicant is not entitled to the 3 properties;

1. Nairobi /Block **[particulars withheld]**
2. Nairobi/Block **[particulars withheld]**

### 3. Nairobi/Block *[particulars withheld]*

The Respondent acquired single handedly from his own funds purchase of the properties which were registered in his name and later sold between February 2010-2011 when the Applicant left the matrimonial home. The Applicant made no contribution to the said properties.

The Applicant through submissions by Counsel relied on **Articles 45 (3) Constitution 2010** which provides equal rights to parties at the time of marriage, during marriage and after marriage.

**Section 28 and 93(2) of the Land Registration Act 2012** provide for overriding interests and coownership and other relationships between parties.

**Section 2 and 7 of the Matrimonial Property Act 2013** spells out contribution and division of matrimonial property.

The Applicant deposed that she took of the children and catered for her family. At the time of marriage she was a dressmaker and the Respondent requested her to stop and take care of the family.

She later engaged in business rearing chicken for sale, operated a scrap metal business and finally a hardware shop. She obtained a loan of Ksh. 1.6 million and ploughed in the business and used part of the funds to food, clothing and paying utility expenses for the family.

The suit properties were purchased during the subsistence of their marriage different dates. The Respondent worked fulltime as a teacher and she identified the properties, negotiated the sale prices and facilitated registration of the said properties. She supervised development and construction of the properties.

In 2008 when she borrowed the loan from Equity bank she repaid it. The Respondent guaranteed the loan. During their marriage the Respondent gave her money that was to be repaid. She contributed Ksh. 100,000/= to the purchase of the car that the Respondent sold.

She obtained a loan of Ks. 2 million and has developed the sole property with a perimeter wall and gate and kitchen and the garage turned to another room for the house.

She is therefore entitled to the said property in its entirety.

This Court will rely on the following provisions;

**Section 2 of the Matrimonial Property Act 2013** defines contribution in a detailed manner;

Means monetary and non -monetary manner;

- a) Domestic work and management of the matrimonial home
- b) Childcare
- c) Companionship
- d) Management of family business or property
- e) Farm work

**Section 7 of Matrimonial Property Act 2013** provides

***“Ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition.....”***

Section 14 of Matrimonial Property Act 2013 provides

***“Where matrimonial property is acquired during marriage in the name of one spouse , there shall be a rebuttable presumption that the property is held in trust for the other spouse and where it is registered in names of both spouses there shall be a rebuttable presumption that their beneficial interests in the property are equal.”***

In the instant case this Court finds from the evidence on record, that the Applicant and Respondent during the 21 years of marriage brought up a family of 3 boys with joint responsibility and acquired properties for the benefit of the benefit until they parted ways.

At the onset of the marriage the Respondent was on fulltime employment and the Applicant provided care and upkeep of the family, her husband the Respondent and nurtured the 3 boys from infancy to adults. She carried out housework, cleaning washing ironing cooking and shopping. Later in the marriage as the children grew up, they hired house-help. This amounts to indirect contribution to the acquisition of property by the Respondent. This amounts to contribution in terms of domestic work and management of the home, child care and companionship of her husband. There is determinate worth, percentage or amount that is pegged on non- financial contribution. Though the law provides examples of contribution there is no mathematical precision or weight attached to domestic work, management of the home, childbearing and caring family business and farming. To this Court it is an integral role to the stability and development of a family and should therefore bear reasonable weight in determining the share a spouse ought to benefit from the matrimonial property.

She began small businesses, rearing chicken, putting up kiosks, running a scrap metal business until she got a bank loan of Ksh 1.6 million and operated a hardware business.

She repaid the loan. All these business ventures were for the interest and benefit of her family; she contributed financially to the household expenses and improved her family’s financial situation by supporting her husband so as to have extra funds to buy the said properties.

In ***Burns vs Burns [1984 I All ER 244]*** it was held;

***“If there was substantial contribution to family expenses and the house was purchased on a mortgage [read purchased property] her contribution is indirectly referable to the acquisition of the house one way or the other”***

In ***Nderitu vs Nderitu 1977 KLR 2731***; the Court held;

***“Wife’s contribution and more particularly a Kenyan African wife, will more often than not take the form of back -up services on the domestic front rather than a direct financial contribution. It is incumbent therefore upon a Trial judge hearing an application under Section 17 of MWPA to take into account this form of contribution in determining the wife’s interest in the assets under consideration”***

These cases augment the fact that where a spouse has made both non- financial and financial contribution to the upkeep of the home then the surplus funds are available for acquisition of assets or properties for the family, the applicant from the evidence is depicted not as a spouse who relied solely on her husband’s support but one who tried hard and was industrious to support her family and her former husband acquire properties.

The evidence on record admittedly by the Respondent is that they consulted and agreed on purchase of property and the Applicant identified and he paid. During construction she was on site to oversee the projects. In the sole property the Respondent admitted he had witnessed the improvements she made to the property, the perimeter wall, gate, kitchen and garage converted as room for the boys. She resides in the home with the 3 boys of the family.

The Respondent has taken care of the family and provided financially for the children education. He supported the Applicant in startup capital in her business ventures and guaranteed loans. He also purchased directly from his own funds the properties acquired during the marriage.

From the sale of 3 properties he realized Ksh.13 million and purchased a home in UK for his retirement. He did not provide for the Children of the marriage. He was on the verge of selling the sole property which the Applicant moved in, developed and now resides with the children of the marriage. He sold the car the Applicant contributed to its purchase and the Applicant did not get her share back.

The Respondent already has singly benefited more the larger part of the matrimonial property.

Relying on **Articles 27 (1) & (3) and 45 (3) Constitution 2010**; each person is entitled to equal benefit and protection of the law and the Applicant deserves her beneficial share of the properties in light of the financial and non- financial contribution she made to the acquisition of the properties acquired during marriage.

**COURT ORDERS**

1. **The Applicant and Respondent are entitled to equal shares of the properties listed as matrimonial properties.**
2. **Since 3 of the properties and 1 car were sold and proceeds utilized solely by the Respondent to the detriment of the Applicant and children of the marriage; the Applicant is entitled to the ownership of the sole property Nairobi /Block *[particulars withheld]***
3. **Once the dispute over Ndumberi/Riabai is concluded, the Respondent may claim beneficial interest of Ksh. 2 million paid upon the valuation of the said property.**
4. **The Respondent shall retain solely the new home bought from proceeds of sale of 3 properties.**
5. **The applicant shall retain the business and property in Mwiki.**
6. **Each party to bear its own costs.**

**READ AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY, 2016**

**MARGARET W. MUIGAI**

**JUDGE**

**In the presence;**

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