



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

MATRIMONIAL CAUSE NO. 33 OF 2015 (O.S)

P A W-M..... PLAINTIFF

VERSUS

C M A W-M.....DEFENDANT

JUDGEMENT

The two parties got married on 31st May, 1997 in the United Kingdom under the 1949 Marriage Act. The marriage was dissolved on February, 2016 vide Malindi Divorce Case No. 1 of 2010. The plaintiff filed the Originating Summons dated 29th October, 2015 seeking the following two main prayers:

- 1. THAT the Honourable Court be pleased to declare and do issue a declaration that the property being Plot No.[particulars withheld] of Group V Kilifi situated in the Kilifi District registered as title No. CR No. [particulars withheld] measuring one decimal eight four five (1.845) Ha registered in the name of the respondent is a matrimonial property being held by the respondent in trust for the applicant.***
- 2. THAT the Honorable Court be pleased to declare and issue a declaration that the Plot No. [particulars withheld] of Group v Kilifi situated in the Kilifi District registered as title No. CR No [particulars withheld] measuring one decimal eight four five (1.845) Ha and registered in the name of the respondent is a matrimonial property of the applicant and the applicant is entitled to exclusive possession of the said property under Common law.***

The Plaintiff's Case

The plaintiff's case is that the marriage between the two is now dissolved. The parties bought a house at Rashmoore in the U.K. in 1997 but the defendant sold it behind her back. In 2007 the defendant brought the plaintiff in Kenya and they settled at the suit property, Kilifi Plot Number [particulars withheld], Group V registered as C.R No. [particulars withheld] measuring 1.845 hectares. It is the plaintiff's evidence that when she came to Kenya in 2007 the house required extensive repairs. Initially the house had been leased out to KEMRI but the tenant refused to continue with the lease as it was in need of repairs.

The plaintiff further testified that the suit property was inherited by the defendant from his parents. The defendant inherited 50% share of the property while his brother inherited the other half. The defendant bought his brother's half share for U.K. 40,000 pounds and was duly registered as the proprietor in 1995. The tenant could not continue leasing the property as it required major repairs. She supervised the

renovations from 2007 for a period of eighteen (18) months and was occupying one room until the renovations were complete. The property became their matrimonial home. The defendant provided the money for the renovations. He used to pay for maintenance until 2009 when he stopped. Since 2007, the plaintiff has been living in that house to date. She has been paying all the bills as well as the workers' salaries. She bought a generator and a lawn mower. The defendant on three occasions tried to have her evicted from the property and she obtained a court order restraining him from interfering with her occupation. The defendant was barred from staying in the property.

It is the plaintiff's further evidence that the defendant filed a divorce cause in the U.K in 2009. The cause was stayed. The defendant was ordered to pay her 2,000 U.K sterling pounds monthly by the U.K court but he later stopped. She had to sell her bought nicknamed "*Second Chance*" for Kshs.1.3 million as she had no money. All the proceeds went to the settlement of the bills and maintenance of the house. There are three workers. Some are part time. The defendant does not pay their salaries.

The plaintiff also testified that she is now a pensioner. She has her own house in the U.K. There is normally a yearly fishing competition in Kilifi. During that period, she accommodates about eight fishermen for one night and charges them about Kshs.2,000/= each. The money used for the renovations was in the parties' account at the Kenya Commercial Bank. She had undertaken in the U.K case not to file divorce proceedings in Kenya but was later advised to do so as the defendant tried to evict her from the Kilifi house. It is her position that the Kilifi house became that matrimonial home. The renovations were done by Dinesh Contractors Ltd. The company was recommended to them by a family friend. Apart from selling the boat "*Second Chance*", she also sold another boat (dingy) that was in her name. She prays that she be allowed to continue living in the Kilifi house.

Defendant' Case

The defendant's evidence is that the two were married in 1997 in the U.K. He sold the Rushmore house in the U.K and the plaintiff was aware about the sale. The house had a charge over it in favour of his trustees. The sale proceeds were later released to him in December, 2010. The house in Kilifi was bought by his late parents in 1968. They lived in Kilifi. His mother died in 1983 in Kilifi while his father died in 1993. Originally, the house had two bedrooms. In 1970, his parents built a second storey and moved upstairs. The plaintiff lives in the bedroom used to be occupied by his parents. Upon the demise of his father, the house was left to him and his brother I W M who lives in Australia on equal shares. He bought his brother's 50% share for 40,000 sterling pounds in 1993. Both himself and his brother are beneficiaries of a trust established by their grandparents. The trustees transferred the 40,000 pounds used to buy the 50% share to his brother's account.

The defendant further testified that by May 1997 when they got married, the property was already in his name. The Kilifi house was rented to KEMRI. It is true it required extensive repairs. He had wanted to renew the lease so as to earn the rent. Between 2007 to 2009, he stayed in Kenya for about 301 days. He too helped in the supervision of the renovations. The contractor had good reputation and did not require personal supervision. The cost of the renovations was about Kshs. Nine (9) million. He had deposited about Kshs.13 million in their KCB joint account. The Kshs.9 million used for the renovations was drawn from that account. He transferred the money to the KCB account from his England account. He had received about 85,000 pounds from his mother's trust that was set up in 1997. This was a loan. He bought a Rev 4 vehicle for the plaintiff, bought the furnishes for the house, bought the "*dingy*" boat that was later sold by the plaintiff and also spent about 12,000 pounds paying the balance of the purchase price and repairs for the plaintiff's boat, "*the Second chance*". The plaintiff bought the boat in 2008 for about U.K 16,000 pounds. She paid 10,000 pounds and he repaid the balance of 6,000 pounds.

In March 2009, he went back to England for a wedding. He suggested to the plaintiff to go to England as he wanted to file divorce proceedings. The plaintiff asked him to come to Kenya to discuss the matter. He used to pay the plaintiff 750 pounds monthly both in the U.K and in Kenya but this stopped. Since March 2009 he has not slept in the Kilifi house. He obtained a court order to enable him access his Ford Renger vehicle that had been parked at the Kilifi house.

It is the defendant's evidence that he sold the Rushmoore house in September, 2009 for 850,000 pounds. He could not sell the house without the plaintiff's knowledge and consent under the U.K Laws. The sale proceeds were to be held until when the divorce proceedings were finalized. He came to Kenya with the plaintiff in 2006. They came again about three times. They came back in 2007 to start the renovations. While the renovations were on-going, they used to sleep in the house. At times the plaintiff would travel to the U.K while he was in Kenya supervising the renovations. The renovations did not change the style of the house. KEMRI had converted the garage to a study. It is now renovated as a bathroom. Since 2009 he was barred from visiting the house. He made the last monthly payment to the plaintiff in 2010. He saw no reason for someone to manage the property between 2007 and 2009 as the contractor was in place. The parties had no child together. The plaintiff has two children from her previous marriage while the defendant has a son from his previous marriage.

Plaintiff's Submissions

M/s Chepkwony & Associates, counsels for the plaintiff submit that the suit premises fall within the definition of a matrimonial property under sections 6 and 7 of the Matrimonial Property Act, Number 49 of 2013 Laws of Kenya. The property falls within the definition of matrimonial home under section 2 of the Matrimonial Property Act. An inherited property can also become a matrimonial home. Counsel relies on the case of **M V M, Civil Appeal No. 74 of 2002 (2008) 1 KLR, 247** where the Court of Appeal stated as follows: -

"... Property inherited and gifted to one spouse before the marriage, and the property exists in the same condition as it was gifted or inherited, no problems arise. The spouse to whom it was gifted should be allowed to retain it. Problems however arise where improvements are made using matrimonial resources and then the property ceases to be in its original form and increases in value...."

Counsel for the plaintiff submit that the plaintiff did contribute towards the maintenance of the property. The property was renovated and its structure changed leading to an increase in its valued. A valuation report by Burn & Fawcett which is not dated gives the value of the property as Kshs. sixty million (Kshs.60,000,000).

Counsel further maintain that the plaintiff has been living in the suit premises since 2007. She has been paying all the bills. She supervised the renovations. Since 2009 the defendant has not been paying for the maintenance of the property. It is submitted that plaintiff is entitled to the property through her non-monetary contribution. The parties shared their companionship in the property until when the defendant was stopped by the court from accessing the premises.

Counsel further contend that Article 45 of the Constitution calls for equal rights of couples before, during and after the marriage. Similarly, Article 7 (d) of the Protocol to the African Charter on Human and Peoples rights provide for equitable sharing of property derived from a marriage between the couple. Article 16 of the Universal Declaration of Human Rights provide that married women are entitled to equal rights during the marriage and at its dissolution. The Kilifi property is the only matrimonial property since the defendant sold their matrimonial home in U.K. The renovations were done during the subsistence of the marriage. The defendant acknowledged that the plaintiff was a hardworking wife.

Defendant's Submissions

M/s Kinyua Muyaa & Co. Advocates, counsel for the defendant submit that the property is not a matrimonial home or property. Further, the Matrimonial Property Act, 2013 does not apply retrospectively as the marriage was celebrated in 1997. Similarly, the Land Registration Act, 2012 does not apply retrospectively. The plaintiff has no interest in the suit premises as she did not contribute to its improvement. The defendant made over payment towards the renovations. All the renovation funds were provided by the defendant. The renovations were done in 2007 and 2008 before the promulgation of the new Constitution. Counsel relies on the case of **SAMUEL KAMAU MACHARIA & ANOTHER V KENYA COMMERCIAL BANK & 2 OTHERS** where the Supreme Court of Kenya held that a

retroactive law is unconstitutional if amongst other things it divests vested rights. Article 45 of the Constitution does not give each spouse 50% share of the other spouse's property. Article 40 of the Constitution entitles the defendant to individually own property.

The parties were divorced in February 2016. They have lived separately for seven years. The circumstances of the case do not support the definition of a matrimonial home under the Matrimonial Property Act, 2013. It is submitted that a matrimonial home is the property where a husband lives with his wife. The property was undergoing renovations in 2007 and 2008. The defendant returned to England in March, 2009. The property cannot be a matrimonial home when the spouses are living an ocean apart and more so when they are undergoing divorce proceedings. The plaintiff had a return air ticket to England. The Rushmoore house was the matrimonial property and it was only sold in 2009

Counsel for the defendant contend that the defendant applied for a resident permit in Kenya but was denied. He needs a visa to come to Kenya. The premises cannot be matrimonial home as the defendant needs a visa to come to Kenya. The property ceased to be a matrimonial home when the defendant was denied a resident permit. The plaintiff is claiming ownership of the property under Common Law. The property belong to the defendant. No trust exists on the property in favour of the plaintiff.

It is further submitted that the defendant deposited Kshs.12,679,292/= in the KCB account. The renovations did cost Kshs.9,233,584/= leaving credit balance of Kshs.3,445,1707/= in the account. The plaintiff utilized all that money and did not use her own money towards the renovations. The plaintiff has her own house in England and receives her pension. There is no family business. The plaintiff did not contribute to the improvement of the suit premises and therefore section 9 of the Matrimonial Property Act cannot assist the plaintiff. Counsel maintain that the plaintiff cannot be compensated for the maintenance of the suit premises. She obtained an order of injunction which kept the defendant away from the property. The plaintiff therefore maintained the property for her own benefit and the defendant should not be called upon to compensate her. The plaintiff has been paid a lot of money by the defendant. She utilized the credit balance in the joint KCB account. She was paid 14,000 U.K pounds in October 2016, received 2,000 pounds monthly from December 2009 to March 2010, sold off the defendant's dingy which had been bought for 3,000 pounds and benefited from the rental proceeds from the property during the fishing competitions. Further, there is a court order for maintenance for 1,000 pounds monthly which amount has not been paid and the plaintiff is seeking to commit the defendant to civil jail.

Analysis and Determination

The originating summons raises the following issues: -

- (1) Whether the suit premises namely Plot No. [particulars withheld] Kilifi registered as CR No. [particulars withheld] is a matrimonial home or matrimonial property
- (2) Whether the plaintiff contributed towards the acquisition of that property.
- (3) Whether the plaintiff is entitled to exclusive possession of the property and
- (4) Whether the plaintiff supervised the renovations of the property and should be compensated for that.

Counsels for both parties dwelt in detail on the issue of the Rushmoore house which is located in England. The issues relating to that property are before the court in the U.K and I will not deal with it. Counsel for the plaintiff did acknowledge in her submissions that that issue is not for this court to determine. There is also allegations that the defendant has concealed other matrimonial properties. There is no clear indication as to what those properties are and where they are located. The court will not speculate on the alleged properties.

The parties herein got married in 1997 in the U.K. Their divorce was dissolved by this court in February

2016. The parties stayed the divorce proceedings in the U.K and agreed to have their divorce determined by the Kenyan Court. The divorce petition was filed in 2010. The court gave directions that the divorce cause be heard separately. This led to the filing of the current originating summons. There are uncontested facts namely that the marriage between the two was not blessed with any child, that the plaintiff did not make any financial contribution towards the acquisition of the property, that the property was inherited by the defendant from his parents whereby he got 50% share and bought off the other 50% from his brother I W M for 40,000 sterling pounds. It is also not in dispute that the parties got married in 1997 and by that time the Kilifi property had already been registered in the defendant's name way back in 1995.

The Matrimonial Property Act No. 49 of 2013 came into effect on 16th January, 2014. The originating summons were filed in 2015 thereby coming within the provisions of the Act. Section 2 of the Act defines matrimonial home as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property. The plaintiff maintains that she was brought to Kenya in 2007. The Kilifi house required extensive repairs as it was in a pathetic condition. She occupied one of the rooms as the renovations proceeded. She calls the premises as the matrimonial home since the defendant sold their matrimonial home in the U.K. On his part, the defendant maintains that between 2007 and 2009 he came to Kenya on different occasions. He computed the total number of days he stayed in Kenya as 301 days. According to him the Kilifi property cannot be the matrimonial home as he was denied a resident permit by the Kenyan Authorities. It is also contended that from 2009 the parties were undergoing divorce proceedings in the U.K.

The pleadings show that the renovations of the Kilifi house started in early 2007. The drawings for the renovations were done in March 2007. Several quotations were annexed by the plaintiff but unfortunately they have no dates. The defendant annexed an extract of his passport giving a breakdown of his entry and exit in Kenya. It is according to that extract the defendant entered Kenya on 21st January, 2007 and left in February 2007. He was back on 29th May 2007 and left on 12th June, 2007. He came back in August and left on the same month 2007. He visited again on 6th November, 2007 and left on 13th November, 2007. He came again on 18th December, 2007 and left on 8th January, 2008. There are five visits in 2008. He left on 9th March, 2009 and came back on 21st June 2010. By this time the divorce proceedings in the U.K and in Kenya had been filed.

As defined by section 2 of the Matrimonial Property Act a matrimonial home means premises occupied by the spouses. There is no evidence that the spouses used to live anywhere else apart from the Kilifi house. Between 2007 and 2008 there were no divorce proceedings. Although the premises were undergoing renovations, that cannot be a reason to disqualify the Kilifi house as a matrimonial home. That is where the two parties used to reside as husband and wife. It was therefore their matrimonial home. The plaintiff has known no other home in Kenya other than the Kilifi house. The premises were already owned by the defendant and she has been residing there upto now. The contentions by the defendant that the premises cannot be made to be the matrimonial home in view of the distance between Kenya and U.K and in view of the fact that a court injunction was issued in 2010 barring the defendant from accessing the house cannot hold. The defendant lived in the house with the plaintiff for the period 2007 up to March 2009. The length of time taken between the occupancy of the premises is quite reasonable. That is where the defendant took the plaintiff as their home. I therefore find that the Kilifi house was a matrimonial home.

The next issue is whether the plaintiff contributed towards the acquisition of that property. As indicated hereinabove it is clear that the defendant inherited 50% share of the property from his parents. It is the defendant's evidence that he used money from a trust to pay off the 40,000 pounds to his brother. This was in 1993. By that time the parties were not married. Therefore, the plaintiff did not make any financial contribution towards the acquisition of the property.

The next issue involves the plaintiff's claim that she is entitled to exclusive possession of the property. It is clear that the plaintiff came to know of the property in 2006 when she was brought to Kenya by the defendant. The property was initially leased to a tenant, KEMRI, but the tenant declined to renew the

lease as the property was in bad condition. The roof required replacement. The fact that the plaintiff has been occupying the premises from 2007 to date does not entitle her to exclusive possession of the same. She made no monetary contribution towards the purchase of the 50% share and only came to know about the property in 2007. The renovations were financed by the defendant and the money was deposited in the Kenya Commercial Bank account. This court has already ruled that the defendant is entitled to access the premises. The historical background of the property is that it was bought in 1968 by the defendant's parents who made improvements in 1970 by building the second floor. The plaintiff cannot claim exclusive possession on the property. She came to the property by virtue of her marriage and her rights to the property are tied with the marriage status. She cannot claim to be the owner of the property as exclusive possession is reservation of a property owner.

There is the issue as to whether the plaintiff supervised the renovations on the property and should be compensated for that work. The issue of whether the Kilifi property was a matrimonial home also included whether the property is a matrimonial property. Section 6 of the Matrimonial Property Act, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Section 7 provides for ownership of matrimonial property and states 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.”

Similarly, section 9 of the Act provides as follows: -

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in property equal to the contribution made.”

The plaintiff contends that she acquired interest in the Kilifi property because of contribution towards the renovations. Although the plaintiff testified that she sold her boat (second chance) for Kshs.1.3 million and all the proceeds went towards the renovation and maintenance of the property, there is no documentary proof to that effect. It is clear from the record that the renovations did cost around Kshs.9 million and that money was in the joint account. The plaintiff did acknowledge that there was a credit balance of Kenya shillings 3 million in the account that was not utilized by the renovations. The plaintiff cited the case of **M V M** (supra) where the Court of Appeal held that an inherited property raises problems where improvements are made on it using matrimonial resources. The evidence on record does not show that the parties herein were working. The defendant maintains that he had a chauffeur business but it collapsed. The defendant is a pensioner and there was no family business. Therefore, the improvements on the Kilifi house were not financed from proceeds of matrimonial resources. Although the value has increased but does not mean that the property was improved through the use of matrimonial resources.

This raises the issue as to whether the plaintiff did contribute towards the improvement on the property. It is clear from the above that the plaintiff made no financial contribution on the renovations. Section 2 of the Matrimonial Property Act defines contribution to include: -

- a) domestic work and management of the matrimonial home;***
- b) child care;***
- c) companionship;***
- d) management of family business or property; and***
- e) farm work***

There was no child care or management of family business or farm work undertaken by the plaintiff. However, it is clear that even though there was an independent contractor carrying out the renovations, the plaintiff was always there to ensure that the renovations were done according to the parties' liking. She was there all the time and had to endure sleeping within the premises while the renovations were ongoing. It is the plaintiff's evidence as per her statement that the renovations lasted for 18 months. Giving out money for the renovations is one thing and ensuring that the renovations are done according to plan is another. The plaintiff was always in Kilifi supervising the renovations while the defendant kept on coming and leaving for the U.K. There was no monetary contribution towards the renovations but the plaintiff did domestic work and management of the matrimonial home. That qualifies as non-monetary contribution but does not qualify to have the property exclusively occupied by the plaintiff. It is quite difficult to quantify non-monetary contribution. Regard has to be made to the time taken by the plaintiff to supervise the works as well as the total costs of the renovations. The property was already owned by the defendant. The plaintiff dedicated her time and mind towards the renovations not knowing that the defendant was going to file for divorce in the U.K. The issue of divorce was dealt with by this court and all the parties wanted to go their separate ways. The much the court can do for the plaintiff is to award her some monetary compensation for the supervision she did during the renovations. It should also not be lost that there was a credit balance of Kshs.3 million after the renovations. I am also aware that since early 2010 to date the plaintiff has been taking care of the property including payment of salaries and bills. There is also the fact that the plaintiff sought an injunction restraining the defendant from accessing the property. In essence therefore the plaintiff has had exclusive occupation of the premises from 2010 to date. Obviously, the defendant has been inconvenienced due to the denial of access to the property taking into account that it was inherited from his parents. He has had to live in a neighbour's property whenever he is in Kenya instead of staying in his own property.

Taking all the circumstances of this case into account, I do find that an award of Kshs.2 million shall be enough compensation towards the role of supervision played by the plaintiff during the renovations. The renovations costs was Kshs.9 million. The defendant was also paying maintenance to the plaintiff during the period 2007 and 2008 when the renovations were ongoing. By that time the parties were a happy couple.

In the end, I do answer the issue as to whether the plaintiff is entitled to monetary compensation for her role in the renovations in the above terms. I do find that the property in Kilifi was not being held in trust for the benefit of the plaintiff. She went to the property by virtue of her marriage. Now that the marriage is dissolved she should exit the property. The facts of the case show that even the plaintiff has her own property in the U.K. The supervision of the renovations by the plaintiff does not raise any trust in her favour. I also find that the plaintiff is not entitled to exclusive possession of the property under any type of law. The property belongs to the defendant and was acquired before the marriage. Article 45 (3) of the Constitution provides for equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. The Article does not give 50% percent share to each spouse to a marriage irrespective of their contribution towards property acquired during the marriage.

The upshot is that the originating summons dated 29th October, 2015 lacks merit and is hereby dismissed. In view her non-monetary contribution towards the renovations of the suit property, this court awards the plaintiff a sum of Kshs.2 million being her share of contribution towards the renovations. The plaintiff to continue occupying the premises until when the above amount is paid to her. Thereafter she should look for alternative premises. Each party shall bare their own costs.

Dated and delivered in Malindi this 24th day of October, 2016.

S.J. CHITEMBWE

JUDGE