REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CIVIL MISC APPLICATION NO. 1 OF 2016

H. W.....APPLICANT

versus

G. D. B.....RESPONDENT

JUDGMENT

1. **H. W.,** a female (**the applicant**) and **GDB** a male (**the respondent**) were married on 26th November 2001 under the Islamic Law. They were divorced on 12th April 2009. Both of them are [particulars withheld]. Both of them profess the Muslim faith. They have three children of the marriage. First was born on 11th May 2003, the second 6th July 2006 and the third on 28th June 2012.

2. The applicant's originating summons dated 15th December 2014 seeks the following prayers:-

> **"2. That it be declared that the properties (movable and immovable) acquired by the joint funds and efforts of the Applicant and the Respondent during the subsistence of marriage and registered in the sole names of the Respondent and in possession more particularly shown in the annexed affidavit of the applicant are held in trust for the applicant and the same be subdivided and/or sold and the proceeds of sale or subdivision be shared equally or according to each party's contribution towards its acquisition.**
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> **3. That the respondent be restrained by an order of injunction from alienating, encumbering, disposing of, selling or in any manner dealing with properties known as NANYUKI MUNICIPALITY BLOCK [Particulars Withheld] (KILIMO), Motor vehicle registration number [Particulars Withheld] TOYOTA CARINA as well, as unregistered 2 plots in Marsabit and any other property to be identified as jointly acquired by the applicant and respondent during the subsistence of marriage.**
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> **4. That the Honourable Court be pleased to grant such further orders or reliefs as it may deem just to grant in the circumstances and in the interest of justice.**
>
> **5. That the costs of the originating summons be paid by the respondent."**

3. By her originating summons the applicant stated that during the subsistence of her marriage to the respondent they acquired moveable and immovable properties viz:-

> **"(a) Title No. NANYUKI MUNICIPALITY [Particulars Withheld] (KILIMO)**

(b) Motor vehicle registration No. [Particulars Withheld].

(c) Two unregistered plots in Marsabit."

4. The applicant adduced evidence that she directly and indirectly contributed towards acquisition of those properties. Accordingly she prayed that although the Kilimo property and the motor vehicle were registered in the name of the respondent, that the court do determine that he held half share in trust for her.

5. Respondent denied that he held half share of the stated properties in trust for the applicant. In his testimony the respondent emphasized that he and the applicant were divorced on 26th April 2009 before Marsabit Kadhi Court. The Respondent state he married another lady by the name N M L (N) on 28th February 2010 with whom he has been living with to date. That the properties which are the subject of this action were acquired by him with the assistance of his wife N. Respondent terms the applicant's claim as false and stated that the applicant's claim had been actuated by the compensation which was about to be paid by Kenya Power and Lighting (K P & L) for an easement created over the Kilimo property. The amount of compensation offered by KP & L for that easement is Kshs.8,917,940 which amount, by consent of the parties, is held in the joint accounts of the counsels of the parties in this action and the counsel for K P & L.

6. The issues for determination are:

(a) Is there presumption of marriage between the applicant and the respondent?

(b) If the answer to (a) is in the positive were the properties listed by the applicant acquired by the joint funds of the parties;

(c) If the answer to (b) is in the positive what is each parties share of those properties?

7. In respect to issue **(a)** I begin by considering the meaning of marriage as set out in **Section 3** of the **Marriage Act No. 4 of 2014**. It provides:-

"3. Meaning of marriage:-

1. **Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.**

2. **Parties to a marriage have equal rights and obligations at the time of marriage, during the marriage and at the dissolution of the marriage.**

3. **All marriages registered under this Act have the same legal status.**

4. **Subject to subsection (2), the parties to an Islamic marriage shall only have rights granted under Islamic law."**

8. The different kinds of marriages recognised under **Act No. 4 of 2014** are set out in **Section 6** of that Act, as follows:-

"(a) In accordance with the rites of a Christian denomination;

(b) as a civil marriage;

(c) in accordance with the customary rites relating to any of the communities in Kenya;

(d) in accordance with the Hindu rites and ceremonies; and

(e) in accordance with Islamic Law."

9. The applicant and respondent were granted a divorce by the Kadhi's Court on 24th April 2009. The applicant stated in evidence that in 2010 she and the respondent were reconciled and that they resided together from August 2010. They however did not remarry. The applicant further said that on being reconciled the respondent transferred the issues of the marriage to a better school and began to pay the school fees. In their reconciled state the applicant stated that they began to plan their future together. That on 18th August 2010 the respondent picked the applicant and their children from Embu and took them to Nanyuki to show them where their matrimonial home would be. That plot however that the respondent showed the applicant as the land that they would build their matrimonial home had been sold by the time they arrived. That night the applicant said that she and the children slept at Nanyuki Police Line house, where the respondent was stationed. In December 2010 the applicant said the respondent showed her the land where they would build their matrimonial home and that land is the Kilimo property. That the Kilimo property was purchased by the respondent for that purpose.

10. On being cross examined the applicant said that she and the respondent became reconciled in August 2011. That the two then went to their parents to inform them of the same. This is what the applicant stated in evidence:-

"There was a ceremony of both sides. They talked that we were to live together. The second marriage has no documents."

11. The respondent in respect to issue (a) above stated that before they were divorced in Aril 2009 he and the applicant had been separated. He said after their divorce he married N that is 6 months through Sharia Law after the divorce.

12. The last born child having been born after their divorce the respondent said that child was conceived when he had taken his children for an outing. On returning them to the applicant and because they cried when he wanted to leave he slept there. He said he was drunk and only realised the following day that he had sexual intercourse with the applicant. Later the applicant told him that she was pregnant.

13. The applicant on the issue (a) adduced evidence that after the divorce she and the respondent lived together as husband and wife. The implication of her evidence is that she seeks this court to presume a marriage existed after their divorce. In the case **NUFR -v- MS (2015) eKLR** the learned Judge W. Musyoka had before him the issue of presumed marriage. The learned judge traced the common law presumption of marriage and noted it was first applied in the case of **HORTENSIA WANJIKU YAWE –v- THE PUBLIC TRUSTEE NAIROBI CACA NO. 13 OF 1976**. In that matter the parties had co-habited from 1963 to 1972. The learned judge discussed the evidence adduced that the deceased husband had referred to the lady both in writing and orally as his wife and that the community including the mother of the deceased regarded them as husband and wife. The learned judge said that the court in Hortensia Case (supra) found that the long cohabitation, even though Kikuyu Customary Law had not been complied with was sufficient for marriage to be presumed. The learned judge continued the following discussion which is pertinent to this present matter. The learned judge stated:-

"Marriage creates a family, which is the most basic unit of society. A fact recognized in Article 45 of the Constitution of Kenya 2010. Much as marriage is treated as a private affair, it has very strong public element ……. It is communal affair, involving two individuals their families and friends ……. A presumed marriage is often referred to as marriage by reputation. One of the considerations is how the couple is viewed and treated by their community. The community here means the families of the two parties, their friends, neighbours and acquaintances."

14. The applicant on being cross examined stated that she was reconciled to the respondent and that they even went to their parents to inform them of that reconciliation. That evidence of the applicant was not corroborated. The fact that they had a child after their divorce was not indicative of a presumed marriage. The applicant did not call the parents to testify of such reconciliation, if indeed it occurred. Considering the discussion above the applicant did not meet the parameters of presumption of marriage.

Even the evidence of the watchman who testified that the applicant was involved in construction of the matrimonial home on Kilimo property did not suffice. The learned judge in the case **NUFR –v- MSC** (supra) further commented on the evidence adduced, which is of relevance here as follows:-

> **"The applicant had the burden to marshal evidence from which I could decide whether to declare existence of a marriage from prolonged cohabitation or not. She did her best adducing such evidence, unfortunately the element of reputation or what may be referred to as the community view of the cohabitation fell short. Evidence of the community element can only be adduced by members of the community themselves."**

15. I echo that finding and state that the evidence of the parents touching on reconciliation of the parties and their intent to remarry could only be adduced by the parents. They did not testify and the applicant therefore failed to prove that there was presumed marriage between her and the respondent from the year 2010 to 2014.

16. I have reached a negative conclusion in respect to issue (a). It follows that any property acquired after divorce of the parties is not within the meaning of matrimonial property as per **section 6** of the **Matrimonial Property Act No. 49 of 2013** and is therefore not available for distribution as sought in this action by the applicant.

17. My conclusion on the above issue (a) will lead me to combine my consideration of issues (b) and (c) together. My above conclusion on issue (a) excludes the Kilimo Property and the vehicle registration No. **[Particulara Withheld]** from distribution as provided under Act No. 49 of 2013. Those two items were purchased after the parties divorced. The only properties acquired prior to divorce were the two plots in Marsabit. Both of those plots are unregistered. One of the those plots was acquired on 12th October 2007. The agreement, which was the respondent's exhibit No. 6, shows that it was the respondent who purchased that plot. However an application of **section 7** and **section 14** of **Act No. 49** of **2013** will lead the court to presume that plot was purchased during marriage and is therefore held in trust for the applicant. **Section 7** is in the following terms:-

> ***"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 of their marriage is otherwise dissolved."***
>
> **Section 14** of that Act provides:-
>
> **"Where matrimonial property is acquired during marriage:-**
>
> a. **In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and**
>
> b. **In the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interest in the matrimonial property are equal.**

18. That Marsabit plot was sold by the respondent during the subsistence of this case. He sold it for Kshs.500,000. That is the only value the court has of that plot since the applicant did not produce a contrary value of the same. The court will therefore presume that each party is entitled to 50% of the amount of the plot was sale as per section 14 above. The respondent will therefore in respect to that plot pay the applicant Ksh.250,000 half the sale value.

19. The other plot also in Marsabit, according to the applicant was given as a gift to her and the respondent by her uncle. The parties in turn constructed a house thereof which is where the respondent's parents reside. That evidence implies that that plot is not available for distribution amongst the parties hereof because it was given to the respondent's parents as a gift to occupy. That being so no order will be issued in respect to that plot.

20. In the end the judgment of the court is:-

(a) The applicant is entitled to kshs.250,000 being the sale value of the Marsabit plot. Accordingly the amount held in the joint account of the advocates in this matter shall be released to the respondent less kshs.250,000 which amount shall be paid to the applicant.

(b) Each party shall bear its own costs.

DATED AND DELIVERED THIS 24TH DAY OF NOVEMBER 2016

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: ……..…..

Applicant: ……....

Respondent: ……..….

For Applicant: …….

For Respondent: ……...….

COURT

Judgment read in open court.

MARY KASANGO

JUDGE