



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL CASES NO. 35 OF 2011

A N G.....APPLICANT

VERSUS

L M G.....RESPONDENT

JUDGMENT

1. The applicant herein moved the court by way of an Originating Summons dated 1st July 2011 seeking:-
 - (a) a declaration that LR No. [Particulars Withheld] Kitsuru was acquired by the applicant and the respondent jointly;
 - (b) an order that motor vehicle [Particulars Withheld] Mitsubishi Pajero registered in the name of Log Associates Limited where the respondent held shares was a property of the applicant and Log Associates Limited that was held in trust for the applicant;
 - (c) a declaration that the money paid to the Log Associates Limited as compensation for the loss of the said motor vehicle was so paid in trust for her;
 - (d) an order for the release of the funds the subject of (c) above to the applicant;
 - (e) an order that all properties acquired during the marriage between the parties which had been transferred in the names of the respondent's agent's, servants and or anyone else claiming through the respondent be deemed to be so held for the benefit of the parties; and
 - (f) an order that all such properties be sold and the proceeds of sale divided equally between the parties.
2. In the affidavit in support of the summons, the applicant states that she had married the respondent on 4th September 1992 under statute, which union was blessed with issue. She avers that there were pending divorce proceedings. She states that during the currency of the marriage the couple jointly acquired the property known as LR No. [Particulars Withheld] Kitsuru. She further avers that in 2006 she gave the respondent a sum of Kshs. 740, 000.00 for the purchase of motor vehicle [Particulars Withheld], which was thereafter registered in the name of Log Associates Limited, and was subsequently stolen sometime in 2007. The insurer thereof later paid a sum of Kshs. 1, 280, 000.00 to Log Associates Limited as

compensation.

3. Directions were given by the court on 7th March 2013 that the matter be heard in Nairobi for one day, with further directions for filing of documents.

4. The respondent did file a reply to the originating summons, taking the form of a replying affidavit sworn on 22nd October 2013. He concedes that LR No. [Particulars Withheld]Kitsuru was acquired jointly by him and the applicant. He proposes that instead of the said property being sold, it ought to be transferred to a trust for the benefit of their two children. However, should the court find that the same ought to be sold, he proposes that the proceeds of sale should be shared in a ratio of 1:3 in his favour, on the basis that he contributed a greater proportion of the purchase price, and also that he was the one who was solely meeting the school needs of their children. It is his case that the fact that the applicant was not meeting those expenses enabled her to buy several vehicles, a house and an apartment in Nairobi. He proposes that the applicant do declare those assets to be treated as matrimonial property. He has attached documents to his affidavit to support his assertions.

5. There is no reply to the respondent's affidavit.

6. The matter was heard orally on 30th April 2015. The applicant attended court and testified, but the respondent was not in court, neither was her advocate although the hearing date had been fixed at the registry by consent of both sides. The applicant breathed life to the averments made in her affidavit sworn in support of the application. She testified that she was by the time of her testimony divorced from the respondent.

7. Perusing through the documents filed herein it is plain that there are only two assets that the parties are contesting, the property in Kitsuru and [Particulars Withheld]Mitsubishi Pajero.

8. It is common ground that the Kitsuru property, LR No. [Particulars Withheld] Kitsuru was acquired by the joint efforts of both parties. There is a sale agreement attached to the affidavit of the applicant. It was a tenant purchase agreement between the National Social Security Fund Board of Trustees and the parties hereto, Lawrence Gumbe and Alice Gumbe, entered into on 26th August 2004 in respect of LR No. [Particulars Withheld].

9. It is not clear whether a title document was actually issued over the said property for none of the parties have exhibited such title to their papers. And if there is such a title document, it is not clear whether the same was issued in the joint names of the two purchasers. It is also not made clear from the papers whether the parties made the premises their matrimonial home, although the applicant in her oral evidence alluded to her no longer living there, which would suggest that the property became their matrimonial home after they bought it.

10. Whatever the case, the parties hereto acquired LR No. [Particulars Withheld]Kitsuru jointly to the extent that both of them were the purchasers who transacted with the seller of the property. They may have contributed to the sale and development of the property at different levels, but the acquisition was a joint effort, the property was meant to be their family home, and it would appear that it indeed became their family home. The said property was therefore clearly matrimonial property.

11. Division of matrimonial property is now governed by the Matrimonial Property Act, Act No. 49 of 2013. Section 14(b) thereof provides as follows:-

'Where matrimonial property is acquired during marriage –

(a)...

(b)In the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.'

12. I have already found that the property in question was matrimonial property. It was acquired in the joint names of the parties hereto. There is a dispute as to the actual contributions of each party to the acquisition, but it is my view that the issue of who contributed what thereto may be altogether irrelevant so long as we have before us a joint acquisition. What needs to be considered is the intention of the parties in jointly acquiring the asset. Was it intended that the property would be jointly owned by both of them, or was the intention that one of the co-purchasers was to hold their interest in trust for the other?

13. The applicant's position appears to be that the two parties intended that they would be joint owners of the property, and appears to imply that the property was meant to be their matrimonial home. The respondent appears to hold the view that the ownership was not meant to be joint but in common, with the shares of either co-purchaser being proportionate to their contribution to the purchase.

14. However, the respondent did not lead any evidence to bring out the position articulated in his replying affidavit. There is nothing from the papers before me that communicates the intention of the respondent in getting into a joint purchase of the subject property with the applicant. In the circumstances, I am inclined to agree with the applicant that the property was jointly owned, and since the shares were not stated, it should be presumed that the property was owned in equal shares.

15. Regarding motor vehicle [Particulars Withheld]Mitsubishi Pajero, the applicant's position is that the money that acquired it came from her. She gave the money to the respondent, who then purchased the car and had it registered in the name of his company. She appears to claim entitlement to the car absolutely. Curiously, the respondent did not in his replying affidavit address himself to the claim by the applicant. Her allegations are therefore uncontroverted.

16. Both sides appear to suggest that the other side had other assets that have not been brought to the division table. Both invite me to make orders on such assets. I will not accept the invitation and make orders on assets that have not been disclosed for there is no certainty as to their existence. If such assets do indeed exist, there is no proof that either party contributed to their acquisition. The court ought not to make orders where there are no supporting facts.

17. The respondent has asked the court to consider having the Kitsuru property held in trust for the children. I find difficulty in that request. This is a motion for division of matrimonial property as between spouses. The children did not contribute to the acquisition of the property and there is proof that the property was acquired for their benefit, in terms of it being intended to be held in trust for them. In any event there is no proof that the children are not able to access any other house for the purpose of their accommodation. The applicant testified at the trial that she moved out of the subject property, and it is to be presumed that she is accommodated elsewhere with the children. The respondent himself averred in his affidavit that the applicant has another house and an apartment.

18. In the end I do hereby make the following orders:-

(a) That I hereby declare and decree that LR No. [Particulars Withheld]Kitsuru was acquired through the joint efforts of the parties hereto;

(b) That the said property shall be sold and the proceeds of sale therefrom shared equally between the parties hereto;

(c) That I hereby declare and decree that motor vehicle [Particulars Withheld]Mitsubishi Pajero was held by Log Associates Limited in trust for the applicant, and the money received by the said Log Associates Limited as compensation for the loss of the motor vehicle was held by the said company in trust for the applicant;

(d) That the money referred to in (c) above shall be paid to the applicant in the next thirty (30) days of the date of this order; and

(e) That the applicant shall have costs of this suit.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE