



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL SUIT NO. 50 OF 2008 (OS)**

**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT OF 1882**

**BETWEEN**

**M H A D.....APPLICANT**

**VERSUS**

**P J S.....RESPONDENT**

**JUDGEMENT**

1. Before court for determination is an Originating Summons dated 8<sup>th</sup> October 2008. It was taken out under Order 36 rules 1, 7, and 8 of the Civil Procedure Rules and Section 17 of the Married Women's Property Act, 1882. The application seeks a declaration that the applicant is entitled to a share of 80% of all that piece of land known as LR No. **[particulars withheld]** (Original Number **[particulars withheld]**) but registered in the joint names of the applicant and respondent as joint tenants, and upon the making of that declaration that on payment of 20% of the value of the property to the respondent, the Registrar of Titles do cancel the name of the respondent from the title and issue the applicant with a new certificate of title in her name. She seeks a further declaration she is entitled to a share of 50% of all that parcel of land known as Kwale/Diani Beach Block/ **[particulars withheld]** but registered in the name of a nominee company known as **[particulars withheld]** Limited.
2. The application is predicated on the grounds set out on the face of the application, as well as on the facts deposed to in the affidavits of the applicant, M H A D, sworn on 8<sup>th</sup> October 2008 and 18<sup>th</sup> September 2012. It is averred that the applicant and respondent were married under Islamic Law on 1<sup>st</sup> November 2003, but the marriage hit the headwinds and the applicant instituted divorce proceedings before the Kadhi's Court in civil case number 107 of 2008. The applicant alleges to have paid a significant portion of the purchase price for the two alleged matrimonial properties stated in the Originating Summons. She states to be ready and willing to reimburse the respondent his 20% contribution to the acquisition of LR No. **[particulars withheld]** (Original Number **[particulars withheld]**). She also alleges to have contributed 50% of the purchase price for the parcel of land known as Kwale/Diani Beach Block/ **[particulars withheld]**. She argues that it would be just, fair and equitable that the orders she seeks in the suit are granted to safeguard her rights in the properties acquired during coverture. She gives details of her employment history, the bank accounts she maintained, how the couple managed their financial affairs and how she contributed to the acquisition of the assets in question.

3. The application is opposed, and the respondent has filed affidavits sworn on 29<sup>th</sup> October 2009, 14<sup>th</sup> March 2011, 9<sup>th</sup> May 2012 and 2<sup>nd</sup> August 2012 in reply to the application. He avers that the applicant has misled the court by concealing from it the number, nature and whereabouts of the bank accounts, principally in her sole name, into which their monies were paid during coverture. He further avers that the property the subject matter of the suit was principally purchased with his money taking the form of both his earnings and his inheritance from his parents. He states that the applicant has arrogantly excluded him from the matrimonial home which is registered both their names. He asserts that applicant contributed only a maximum of 20% of the purchase price of LR No. **[particulars withheld]** and that the property should be shared in the ratio of about 4:1. On the Diani property, he avers that the applicant did not contribute even a cent towards its purchase as it was purchased from his inheritance; consequently the said property is held upon trust for him by the company known as **[particulars withheld]** Ltd. He details the accounts he operated individually and corporately with the applicant, and how the moneys held in those accounts were spent. He has also provided information on his inheritance from his parents, and explained how the proceeds from the inheritance were utilized.
4. The matter was disposed of by way of oral evidence. The parties gave sworn testimonies on divers dates in 2013 and 2014. In their respective testimonies, they breathed life to the allegations made in their respective rival affidavits filed in the matter. They also made efforts to explain the contents of the various documents that they had put in as annexures to the affidavits filed in court to support their respective positions.
5. It was the applicant's testimony that she had contracted an Islamic marriage with the respondent on 1<sup>st</sup> November 2003 before a Kadhi in Nairobi. During the subsistence of the marriage she was working for the United Nations as a Humanitarian Affairs Officer, and the respondent was working as a consultant for a non-governmental organisation called **[particulars withheld]** Aid. She affirmed that she held two personal accounts with Kenya Commercial Bank (KCB), a Kenya shilling current account and a US dollar account. Apart from the two personal accounts, she also maintained a joint United Nations Federal Credit Union (UNFCU) savings account with the respondent. She stated that together with the respondent, they purchased LR No. **[particulars withheld]** (Original Number **[particulars withheld]**) from Ms. J E R A vide a sale agreement dated 22<sup>nd</sup> March 2005 executed by both parties, for a sum of Kshs. 30,500,000.00. She gave a background of her employment with the United Nations, her earnings and how the said earnings were utilized in the purchase of the property in question. She also testified that some of the money she contributed to the said purchase came from her parents, specifically her father.
6. On his part, the respondent testified that he was a British citizen resident in Kenya since 1999. He confirmed the celebration of the Islamic marriage between the parties in 2003, and went on to give details of the various places he worked in Kenya and in the general East Africa region. He averred that he did not operate bank accounts in Kenya before he married the applicant, stating that he held accounts in the United Kingdom (UK) instead, one of which was an offshore account. His salary was paid into those foreign accounts. After the celebration of the marriage, he began to have his salary paid into the applicant's account with the UNFCU. It was his evidence that the money expended to acquire the property would be transferred from the UNFCU account, converted to Kenya shillings and paid into the KCB accounts held by the applicant. He also stated that he transferred money from some of his UK accounts into the applicant's accounts with UNFCU or KCB. It was his evidence that it was these transfers that made it appear as if the applicants Kenyan accounts were very active, otherwise she earned a small salary with which she could not possibly afford to acquire the assets in question.
7. At the conclusion of the trial the parties were directed to file written submissions, to summarize their respective clients cases and to place before the court their various legal arguments. Both sides did file their written submissions. The applicant's submissions were filed on 2<sup>nd</sup> October 2014, while those for the respondent were filed on 24<sup>th</sup> July 2014.

8. It is submitted on behalf of the applicant that the evidence on record confirms that she contributed a substantial portion of the purchase price of the matrimonial property, and that an analysis of the contributions, including repayment of the bank loan, aggregates her contribution at more than 60% and closer to 80%. She however contends that as the property was registered jointly without her contribution being reflected, she is entitled to 50% of the matrimonial property. On whether the applicant is entitled to be issued with a new certificate of title in her sole name over the Nairobi property, it is submitted that she is so entitled for reason that she made most of the payments towards the purchase of the Nairobi property. She urges the court to exercise its discretion to order a refund of the respondent's share and the Registrar of Titles to cancel the title granted jointly to the applicant and the respondent and to issue the applicant with a new title to the property as the sole proprietor.
9. On behalf of the respondent, it is submitted that the applicant did not have the Kshs. 20,000,000.00 she claimed she paid, and further that the applicant did not produce any documents to prove that she had savings either in New York or in Kenya or in both places, and what, if any, contributions came from her parents who had not bought themselves a house in Nairobi. The respondent contends that the applicant's father was unable to provide his wife, who is also the applicant's mother, with accommodation, and that the immediate cause for the search for a house to purchase at Nairobi was to address her anxieties and the couple's need for a home. He submits that the applicant's only source of income was her job with United Nations as from 1997 and her parents' means were humble. It was submitted that the decision to buy the Nairobi property was taken when the respondent realized that the applicant's mother needed accommodation and her family could not afford to buy a house in Nairobi for her accommodation. The only solution then was for them to buy a big property which would provide her with accommodation. The respondent contends that the applicant is an instrument being used by members of her family to take away from him his self-acquired movable and immovable property.
10. The respondent relied on the Court of Appeal decision in *Peter Mburu Echaria vs. Priscilla Njeri Echaria* (2007) eKLR, where the court held that a spouse who claims a right to a property acquired during coverture must prove that he or she made financial contributions to its acquisitions. He also cited the Court of Appeal decision in *Muthembwa vs. Muthembwa* Civil Appeal No. 74 of 2002, where it was held that where a property is acquired through a loan and other payments, the party which services the loan is taken to have made a financial contribution. It is submitted that it is also the law that an applicant must prove how the property was acquired in addition to proving his or her financial contribution.
11. It is trite law that he who asserts must prove. Section 107 of the Evidence Act, Cap 80, Laws of Kenya, places the burden of proof upon anyone who asserts a fact. In *Koinange vs. Koinange* (1986) KLR 23 (at p. 43), Amin J stated that - 'it is a well-established rule of evidence, that whoever asserts a fact is under an obligation to prove it in order to succeed.'
12. I have carefully considered the material that was placed before me by both sides, in terms of their individual circumstances, employment history, and their earnings before and after their marriage, their financial arrangements and the movement of their finances from various places. I am convinced that most of the resources for the purchase of the subject property were raised by the respondent. He made the greater percentage of the contribution in financial terms to the acquisition of the assets for he was undoubtedly in a more superior financial position than the applicant. From the material before me, I find that the respondent contributed 70% towards the said purchase as against the applicant's 30%.
13. However, whether I should order that the property in question, and in particular the Nairobi property, be divided as between the two parties in the ratio that I have stated in paragraph 12 hereabove, should ultimately depend on the matter of the law on property registered in the joint names of spouses.
14. The applicant cites the Court of Appeal decision in *Kivuitu vs. Kivuitu* (1991) KLR 248, where it

was held that the fact that property is registered in the joint names of the parties means that each party owns an undivided equal share in the said property. She relies too on the decision in the case of *Peter Mburu Echaria vs. Priscilla Njeri Echaria*, where it was held that where a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the court must take it that such property, being a family asset, is owned in equal shares.

15. The Nairobi property, that is to say, LR. No. **[particulars withheld]**, is registered in the joint names of the parties herein. The material placed before me is clear that the same was intended to be a family asset, acquired specifically to meet the needs of the parties to this suit as well as the applicant's extended family. It cannot, therefore, in my view, be argued that the respondent did not intend it to be family property. Going by *Peter Mburu Echaria vs. Priscilla Njeri Echaria* I hold that the said property is held by the parties to this suit in the ratio of 50:50.

16. Regarding the Diani property, that is to say Kwale/Diani Beach Block/ **[particulars withheld]**, I have noted from the record that the same is registered in the name of a limited liability company, called **[particulars withheld]** Limited, which is currently subject to winding up proceedings at the Commercial Division of the High Court in HCWC No. 23 of 2009. It is before a bench of concurrent jurisdiction, and I therefore shall not delve into matters that touch on it. I shall in the circumstances not make any orders on it.

17. In view of everything that I have said above, I do hereby dispose of the matter in the following terms:-

- a. **That the applicant and the respondent are each entitled to an equal share or interest in LR. No. [particulars withheld] (Original Number [1/1297/2]);**
- b. **That as there stand two houses on the said property, I direct the Registrar of Titles to cause the subdivision of LR. No. [particulars withheld] into two equal portions with each of the parties hereto taking a portion with a house on it;**
- c. **That should execution of (b) above be impossible for whatever reason, as alternative to (b) above, I order that: -**
  - i. **a valuation of the said property shall be carried out by a professional valuer to be agreed upon by the parties or failing which the court shall appoint one;**
  - ii. **based on the value arrived at from the valuation mentioned in (i) above, the applicant shall buy out the respondent by paying to him half the value of the property, upon which the respondent shall transfer his interest in the suit property to the applicant;**
  - iii. **should the applicant fail to buy out the respondent as ordered in (ii) above within six (6) months of the date of this judgment the respondent shall be at liberty to buy out the applicant; and**
  - iv. **there shall be liberty to apply; and**
- d. **That there shall be order as to costs.**

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>ST</sup> DAY OF JULY, 2015.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Miss Chepkoria for the applicant.**

**In the presence of Miss Muhoro for the respondent.**