



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO 59 OF 2012 (O.S.)**

**S J B.....APPLICANT**

**VERSUS**

**J K M K.....RESPONDENT**

**JUDGMENT**

1. The parties are husband and wife. For reasons that are not germane to this claim, the couple got estranged in the year 2012. On 27<sup>th</sup> March 2012, the wife filed an originating summons claiming half a share of two properties known as *[particulars withheld]* and *[particulars withheld]* (hereafter *the matrimonial properties*). The originating summons is predicated upon section 17 of the Married Women's Property Act (1882), now repealed.

2. The applicant relied on her witness statement dated 17<sup>th</sup> April 2013. In that statement, she claimed that she cohabited with the respondent from the year 2000. They solemnized the union on 16<sup>th</sup> November 2005. A marriage certificate is exhibited. Subsequently, they bought the matrimonial properties. The land known as *[particulars withheld]* measures  $\frac{1}{4}$  of an acre; the plot at *[particulars withheld]* at Naivasha Town in which Roka Building has been erected measures  $\frac{1}{4}$  of an acre. She also said that they bought motor vehicle registration *[particulars withheld]*.

3. The applicant testified that she worked for the *[particulars withheld]* and used her salary and loans towards purchase of the properties. She gave an example the year 2001 when she received a cheque for Kshs. 250,000 from her employer to buy the motor vehicle. She gave the cheque to the respondent but he registered the vehicle in his name. He later sold it. She expressed fears that the respondent might unilaterally dispose of the matrimonial properties. She said the respondent threatened her before chasing her out from their matrimonial home.

4. Upon cross-examination, she said there is a caution on *[particulars withheld]*. She claimed that she used to send money to the respondent to an account in Kenya Commercial Bank (KCB). Her advocate wrote to Elite Ventures. On 20<sup>th</sup> December 2010 and 31<sup>st</sup> January 2012 (documents 3 and 4 respectively in the bundle) she attended a meeting with the Land Registrar. The respondent was absent. She said she lodged the caution because the respondent intended to dispose of the property. She said she is living in rented premises yet she had contributed to the purchase of the matrimonial properties.

5. The respondent denies the claims. In his written statement adopted in evidence-in-chief, he said that he purchased *[particulars withheld]* from Highlands Valuers. It is yet to be transferred to his name. It was by way of a trade in from the proceeds of the sale of *[particulars withheld]*. He said that the applicant has frustrated the transaction by lodging the caution. He denied that she contributed towards the acquisition of the property.

6. Upon cross-examination he stated he said he no longer owns any plot in Naivasha. He had a property in Naivasha [*particulars withheld*] which he said he bought in 1996. He said that is the property he exchanged for the property in Eldoret, [*particulars withheld*]. His son is living on the property. He denied that during the marriage, he acquired any land jointly with the applicant. When he was shown document 1 in the applicant's exhibit 1 (a cheque for 250,000 from the Postal Corporation) and a receipt, he conceded they related to the purchase of motor vehicle [*particulars withheld*]. The receipt was issued in his name. He said he sold the property known as Naivasha [*particulars withheld*]. He stated that the applicant initially lived in Gilgil while the respondent lived in Naivasha. When they moved into Eldoret, they lived on the [*particulars withheld*] property. He said he used to have an account at KCB between the years 1995 and 2000. He claimed the cheques the applicant was depositing into the account were from him. He was then living abroad. He did not have copies of the cheques in court.

7. The applicant produced a bundle of documents dated 19<sup>th</sup> April 2013 and filed on same date. (Applicant's exhibit 1). By consent of the parties, the respondent produced the documents annexed to his affidavit sworn on 19<sup>th</sup> May 2012. Both parties have filed detailed written submissions. Those by the applicant are dated 16<sup>th</sup> June 2015; those by the respondent 19<sup>th</sup> June 2015.

8. I have considered the pleadings, witness statements, oral testimony, the documents and rival submissions.

9. The current law governing matrimonial property is the Matrimonial Property Act, 2013. It came into effect on 16<sup>th</sup> January 2014. Section 19 expressly repealed The Married Women's Property Act (1882) of England. The properties in contest in this suit were purchased well before the coming into force of the new Act. It follows that certain rights and privileges had crystallized. Section 23 (3) (c) of the Interpretation and General Provisions Act Cap 2 states-

*“Where the law repeals in whole or in part another written law, unless a contrary intention appears; the repeal shall not; affect a right, privilege, obligation or liability acquired, occurred, or incurred under a written so repealed.”*

10. I thus find that section 17 of the Married Women's Property Act (1882), now repealed, is the operative statute. See *R M M v B A M* Nairobi, Court of Appeal, Civil Appeal 267 of 2011 [2015] eKLR. It is common ground that the applicant and respondent were married under the Marriage Act (now also repealed). There is no decree of divorce. The principles applicable in division of matrimonial property, where the properties are registered in the name of one spouse, were restated in *Peter Mburu Echaria v Priscilla Njeri Echaria, Civil Appeal No. 75 of 2001 [2007] eKLR*. See also *Burns v Burns* [1984] 1 All ER 244, *Essa v Essa* [1996] E.A. 53, *SNK v MSK and 5 others*, Nairobi, Court of Appeal, Civil Appeal 139 of 2010 [2015] eKLR.

11. There are *five* questions proposed for determination in the summons: first, whether the properties were acquired during the subsistence of the marriage; secondly, whether the applicant contributed to the purchase of the property; thirdly, if she is entitled to half a share of the properties or in any other proportion; fourthly, whether the respondent can sell the properties or deny access to the applicant; and, fifthly, who should meet the costs.

12. Although some evidence was led relating to motor vehicle registration [*particulars withheld*], it is not part of the claim in the *originating summons*. Parties are bound by their pleadings. The motor vehicle was registered in the name of the respondent and sold to a third party. I am satisfied from the document numbered 1 in the applicants bundle (exhibit 1) that the vehicle was purchased for Kshs 250,000 by the applicant. I think the probative value of the evidence is two-fold: first it demonstrates that the applicant possessed financial resources to buy properties; and, secondly, that the respondent was disposing of property without her consent. Beyond that, I decline the invitation to make a finding whether it constituted matrimonial property.

13. From the marriage certificate number [*particulars withheld*] produced by the applicant, the marriage

was only solemnized on 16<sup>th</sup> November 2005. The applicant claimed they started cohabiting with the respondent in the year 2000. The respondent did not controvert it. I thus find that the marriage subsisted from the year 2000.

14. The property in Naivasha, [particulars withheld] was bought on 27<sup>th</sup> June 1996; four years prior to the marriage in 2000. The applicant claimed in court to have bought the property for Kshs 200,000. She submitted that upon sub-division, the property became known as Naivasha Block [particulars withheld]. It is instructive that in her witness statement, she never claimed to have bought the property or disclosed the consideration. In the prayers sought in the originating summons, she had pleaded that the properties were purchased *subsequently* to their marriage. She has exhibited a copy of the sale agreement in which *she* is indicated to be the purchaser. That document was *not* annexed to her original affidavit in support of the summons sworn on 27<sup>th</sup> March 2012.

15. The respondent in turn has exhibited a *similar* sale agreement of the same date but indicating that *he* was the purchaser. The two conflicting agreements are attested to by the same advocate named P.W. Ngunjiri of Post office Box number 1127 Naivasha. Quite obviously one of the documents is a forgery. From the surveyor's documents annexed to applicant's exhibit 1, the applicant was claiming ownership of Naivasha Municipality Block [particulars withheld]. The respondent was emphatic that *his* sale agreement is the genuine copy. I have examined the two documents closely. *Prima facie* they could *not* have been made from the *same* original. I will order that the Office of Director of Public Prosecutions investigates the matter for forgery; and, possibly perjury by one of the parties. The Deputy Registrar will serve a copy of this judgment upon the Director of Public Prosecutions.

16. Having said that, there are telltale signs. If the applicant bought the property in 1996 prior to the marriage, why would she be claiming only *half* of it? Secondly, in paragraph 5 of the supporting affidavit to the originating summons, the applicant states as follows:

*“That I have also been making deposits to my husband’s account at Kenya Commercial Bank, which money we used to buy the two cited plots.”*

17. I have examined the receipts annexed to the applicant's affidavit sworn on 27<sup>th</sup> March 2012. They relate to deposits made into the respondents account at KCB in the year 2006. The respondent claimed he used to give the applicant cheques to deposit into his account. He said he was abroad. I am prepared to accept the applicant's version that she was depositing the money into the respondent's account. She had a job at the Postal Corporation. Unfortunately, the Naivasha property was purchased way back in 1996. The deposits into the KCB accounts *ten* years later in 2006 could not possibly have been towards the purchase price. Under the two impugned sale agreements, the balance of the purchase price was payable on or *before* 9<sup>th</sup> September 1996.

18. There is no mention in the affidavit of 27<sup>th</sup> March 2012 that the applicant had bought the property in 1996 before she was married. The copy of the sale agreement she produced at the trial was, on the face of it interfered with. The copy annexed to the list of documents dated 19<sup>th</sup> April 2013 is blank on the execution pages. The one shown in court and annexed to her submissions is signed and indicates she was the purchaser. I am *not* saying the one produced by the respondent is clean or is not a forgery. That is why I have recommended investigations by the Director of Public Prosecutions. I have also found that the deposits into the KCB accounts *ten* years later in 2006 could not have been towards the purchase price of the Naivasha property. The pay slips annexed (exhibit SJB2) do not expressly show that the deductions were towards a loan to acquire the Naivasha property.

19. But there is a point that should not be lost in all this: the evidential burden to prove the Naivasha property was a matrimonial asset lay squarely upon the applicant's shoulders. I am unable to say she discharged it on a balance of probabilities. I have arrived at the conclusion that the Naivasha property L.R. [particulars withheld] did *not* constitute a matrimonial property having been bought *before* the marriage came into effect. Fundamentally, I am not satisfied that the applicant owned it.

20. The respondent testified that he exchanged the Naivasha property for the Eldoret property known as *[particulars withheld]*. I did not hear the applicant to say she *paid* any money directly towards the purchase of the Kimumu property. Nor did I hear the applicant to seriously contest the fact that proceeds of sale of the Naivasha property were used to buy the one at Kimumu. I am prepared to accept the submission by the applicant's counsel that L.R. *[particulars withheld]* was subdivided to become Naivasha Block *[particulars withheld]* which the respondent sold to buy the Kimumu property. That version tallies with the respondent's evidence. If that be the case, and having found that the applicant's claims over the Naivasha property have not been proved, it follows as a corollary that the claim over the Kimumu property is baseless. My decision on that point is reinforced by the receipts issued by Elite Ventures Limited to the respondent annexed to his replying affidavit sworn on 19<sup>th</sup> May 2012. The receipts were admitted into evidence by consent on 25<sup>th</sup> May 2015.

21. My answers to the four proposed questions in the originating summons are thus as follows. First, the two properties are *not* matrimonial properties. To be specific, the Naivasha property, L.R. *[particulars withheld]*, was acquired in 1996; four years before the marriage. Its sale proceeds were used to buy *[particulars withheld]*. Secondly, the applicant has *not* proved on a balance of probabilities that she *contributed* to the purchase of the property. Thirdly, she is *not* entitled to *half* a share of the properties or in any other proportion. Fourthly, there is no legal basis to restrain the respondent from dealing with *[particulars withheld]* in any manner. It is not lost on me that the property has not been conveyed to the respondent.

22. In the result, the originating summons is *dismissed*. That leaves the question of *costs*. Costs are at the discretion of the court. This is a bitter contest between an estranged couple. The circumstances of the applicant are meager. In the interests of justice; and, considering the plight of the applicant, I order that each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 29<sup>th</sup> day of July 2015.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:**

Ms. Sawe for Mr. Kibii for the applicant instructed by Limo R. K. & Company Advocates.

Mr. Obudho for the respondent instructed by G.O. Obudho & Company Advocates.

Mr. J. Kemboi, Court clerk.