

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCC NO. 34 OF 2013

N K.....PLAINTIFF

VERSUS

D K M.....DEFENDANT

JUDGEMENT

1. The Plaintiff herein commenced this suit by way of a plaint dated 27th September, 2012. The Plaintiff then sought to amend the plaint and filed the amended plaint pursuant to Order 8 Rule 1 on 10th May, 2013. She prays for judgment against the Defendant for dissolution of the joint ownership over that property known as Flat [*particulars withheld*] Mbaazi Korosho Road and division of the said property into two and registration of the resultant two parts of the said property. One in the Plaintiff's name and the other in the Defendant's name. In the alternative she prays that the Defendant do pay to her the market value of her half share. She also seeks payment to her by the Defendant of half share at the prevalent market rates of the rent payable for Flat [*particulars withheld*] Mbaazi Korosho Road from the year 1995 to the date of dissolution of the joint ownership of Flat [*particulars withheld*] Mbaazi Korosho Road.
2. In the plaint, the plaintiff has averred that until the year 1995, the two parties were wife and husband and that their marriage was dissolved in the aforesaid year. Both parties herein had one issue of the said marriage, namely A M. During the course of the marriage they acquired jointly the property known as Flat [*particulars withheld*] Mbaazi Korosho Road. The during the said marriage the plaintiff earned income both as a business woman and as an employee. The Plaintiff has averred that from the year 1981 to 1996, she did interior and exterior designs at showground stands for the Ministries of Culture, and Tourism, Kenya Power & Lighting Company Limited, Co-operative Bank of Kenya and National Bank of Kenya. She also did exhibitions of her own work and painting at French Cultural Centre and Gallery Watatu among others. From the year 1985 to 1988 the plaintiff worked as a teacher of Fine Art at Loreto Convent Msongari Primary and Secondary School. She also from around 1986 to 1989 she ran her own school of art known as Nairobi School of Fine Art. She also worked as a freelance illustrator for advertising companies like McCann Ericson, Hill Ayton, Marketing & Communication and Young Rubican Co, among others etc. The Plaintiff has averred that she gave services to book publishers like Longman Kenya Limited, Heinemann Kenya, Oxford University Press and Jomo Kenyatta Foundation, among others.
3. It was the Plaintiff's averment that she conducted the aforesaid business and rendered the aforesaid services for income at all material times and she was as a result able to raise sufficient income to contribute financially to the purchase of the suit property. Besides making financial contributions towards the purchase of the suit property, the plaintiff single handedly met maintenance cost for A after the dissolution of marriage, and made substantial contribution to his maintenance during the aforesaid marriage as much of the time the Defendant was engaged in his studies in Russia.
4. Besides the grant of property the plaintiff was also able to make other monthly financial contributions and or purchases. She purchased solely that property known as House PL [*particulars withheld*] Greenfield's Estate. She also purchased a car for the Defendant by giving the Defendant Kshs. 250,000.00 to buy two cars out in Japan while he was studying in Russia

something he failed to do as he only bought a car for himself in 1991. She also gave the Defendant Kshs. 145,000 to buy a computer for his own use, and another the defendant Kshs. 350,000.00 for travelling expenses and foreign exchange to live and study in Russia. She also maintained the premises at Flat *[particulars withheld]* Mbaazi, Korosho Road for 4 years, while living at the premises. She equally maintained two cars, being registration numbers *[particulars withheld]* and *[particulars withheld]*, one of which belonged to the Defendant and one was hers.

5. She averred that the aforesaid financial contribution or purchases by the plaintiff are a clear indication of the plaintiff's financial ability to contribute to acquisition and purchase of property during the subsistence of both parties marriage which ran from the year 1979 to the year 1995. Pursuant to the plaintiff's contribution to purchase of proprietary interest in Flat *[particulars withheld]* Mbaazi, Korosho Road and leasehold interest in the suit property, both parties were registered joint owners of the suit property and to date both parties are still the joint owners of the proprietary and leasehold interest in the suit property. She avers that during the year 1994, the plaintiff brought a suit against the Defendant herein seeking transfer to her of the half share owned by the Defendant in Flat *[particulars withheld]* Mbaazi, Korosho Road as she solely shouldered the burden of bringing up and educating both parties' issue of marriage, but the court however declined to grant the plaintiff's prayer.
6. The Defendant did not enter appearance neither did he file any response despite being served.
7. When the matter proceeded to hearing, the Plaintiff gave evidence as PW1, where she reiterated the contents of the plaint. She further filed written submissions on 18th November, 2013. The Plaintiff submits that she made a larger contribution to the purchase of the suit property which is registered in their joint names. The plaintiff submits that she called sufficient evidence during the hearing of the suit to show that she was at all material times in gainful business that generated income that she used to purchase the said two properties.
8. Counsel for the Plaintiff contends that the plaintiff called evidence sufficient to show that she was at all times in gainful employment as an arts teacher and was for much of the time in gainful business of rendering fine art services to big institutions and book illustrations with major book publishers. She further contends that she over the years generated enough funds that enabled her to purchase not only the aforesaid properties but also motor vehicles. She well as catered substantially for her family that included the Defendant and the couple's only son it was her submission that she was not registered as a joint owner of the suit property merely because she was the wife of the Defendant but because she was a bigger contributor to the acquisition of the suit property. Further, she submitted that the Defendant was at the time of the purchase of the suit property engaged in his studies in the plaintiff's motherland, Russia, while the plaintiff remained in Kenya all those years. She submitted that although the Defendant was served with the plaint and the Amended Plaint, he never found it necessary to enter appearance and file a written statement of defence. She contends that has called sufficient evidence to prove her case not only on a balance of probabilities but also sufficiently and has established that she deserves half share of the suit property not only by virtue of joint registration but also by virtue of contribution to its acquisition.
9. This is a case on division of matrimonial property. The plaintiff tendered oral evidence in court, the defendant did not enter appearance nether did he file statement of defence being duly served. There is on record an affidavit of service dated 12th June, 2013 sworn by Benson Karanja, a court process server and filed in court on even date. At paragraph 6 of the said affidavit of service, the deponent avers as follows:-

“That I served the Defendant a copy of the said Amended Plaint and further list of documents and he accepted service but declined to endorse his signature on my copy.”

10. There is no doubt that the parties had been married at the material time. From the evidence on

record, the marriage was solemnized between D K M and K N K on 19th March 1979 at Leningrad Palace in the then Soviet Union. The said marriage was dissolved on 24th July 1995 by this court. The Plaintiff has averred that during the subsistence of the said marriage two properties were purchased namely House No. *[particulars withheld]* Green field Estate Nairobi and LR. No. *[particulars withheld]* Korosho Road, Nairobi. Further, the Plaintiff claims to have purchased House No. *[particulars withheld]* Green field Estate Nairobi which is registered in her sole name. With regard to the second property, LR. No. *[particulars withheld]* Korosho Road, Nairobi it is the plaintiff's assertion that she made a larger contribution to the purchase of the said property which is registered in the joint names of the two parties herein. She has stated that she was earning an income and therefore contributed jointly with the Defendant to the acquisition of the said suit property.

11. Upon considering the plaint and evidence given by the Plaintiff, there is no doubt that the said suit property is jointly owned and since the said suit property is registered in the joint names of the Plaintiff and the Defendant, this court finds that their share is equal and also that the Plaintiff has sufficiently established that she did make substantial contribution to the acquisition of the said suit property and patently deserves half share of the said property.

12. I am satisfied that the plaintiff has proved her case on a balance of probabilities. I hereby give her judgment in terms of prayers (a) and (b) of the Amended Plaint dated 9th May, 2013. She is also awarded the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 28th DAY OF March, 2014

W. MUSYOKA

JUDGE