

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCC N0.32 OF 2010 (OS)

P W W.....APPLICANT

VERSUS

F N K.....RESPONDENT

JUDGMENT

P W W filed suit against F N K, the Respondent, by originating summons seeking declaratory orders of the court to the effect that the parcel of land registered as LR. No. ***[Particulars withheld]*** (the suit property) is matrimonial property and therefore, upon the break-up of the marriage should be shared equally between himself and the Respondent. The Applicant further averred that a motor vehicle registration No. Toyota Spacio ***[particulars withheld]*** (the suit motor vehicle) should be declared matrimonial property. The Applicant averred that, although the suit property was registered in the name of the Respondent, he substantially contributed towards the purchase and development of the same. The contribution was both direct and indirectly. In the affidavit in support of the suit, the Applicant deponed that he met with the Respondent in 1994. Soon thereafter, they started cohabiting together as husband and wife. They later got married under Kikuyu Customary Law before they solemnized their marriage under the **African Christian Marriage and Divorce Act** on 30th December 2001 at PCEA Church Kahawa Sukari. The marriage has been blessed with two issues. The Petitioner and the Respondent were separated on 25th December 2009. At the time the petition was filed, there were pending divorce proceedings before the Chief Magistrate's Court Nairobi (Divorce Cause No.283 of 2009). There is also pending a case before the Children's Court regarding the custody and maintenance of the children of the marriage.

As regards the suit for division of matrimonial property, the Applicant averred that when the suit property was purchased in 1996, he contributed towards the purchase of the same. The property was registered in the name of the Respondent in trust for the two of them because at the time the Applicant was studying in Germany. He deponed that in 1998 when he returned back to the country, they agreed to develop the property. Since the Applicant was an engineer, he designed the plan and supervised the construction of the house in the property. He stated that he contributed ***"most of the money for development"***. The Applicant did not however give a specific figure that he contributed towards the development of the house. Neither did he annex any documents in support of his contention that he had contributed towards the purchase and the development of the property. He further averred that the suit motor vehicle was bought by the Respondent using proceeds of the sale of the Applicant's motor vehicle Registration No. ***[particulars withheld]***. It was the Applicant's case that the suit motor vehicle was therefore joint matrimonial property. In the premises therefore, the Applicant urged the court to declare both properties to be matrimonial properties and further that the two properties should be divided equally between himself and the Respondent.

The Respondent filed a replying affidavit to the application. She denied that the Applicant either contributed towards the purchase or development of the suit property. She confirmed that indeed she met the Applicant in 1994. They started cohabiting together as husband and wife in 1995 before they formalized their marriage in December 2000. She conceded that the marriage was blessed with two children. She explained that the marriage broke-up in 2009 when the Applicant started treating her with contempt and hatred. She stated that she solely purchased the suit property in 1997. The property was registered as LR. No.***[particulars withheld]*** Kahawa Sukari for the purchase consideration of Kshs.300,000/-. She annexed a copy of the agreement as ***"annexure FNK 2"***. She also exhibited copies of receipts of various payments that she made towards the survey, legal fees and transfer of the suit

property. She deponed that between 1997 and 1998 she constructed a three (3) bed-roomed house on the suit property. She moved into the house in 1999. She conceded that the Applicant lived with the children whenever he was in the country. She was emphatic that the Applicant contributed no money towards the construction of the house. It was her case that during the period that the Applicant was out of the country, the money he sent her was used for the upkeep of the children. In any event, such money was only sent twice. The Respondent conceded that the Applicant designed the house but denied that the Applicant paid for the cost of construction of the house. In that regard, she deponed that she was the only one who had contributed towards the construction of the house. She conceded that the Applicant had contributed towards the purchase of the suit motor vehicle and therefore the same should be treated as jointly owned property.

Directions were taken in respect to how the case was to be heard. The court directed that viva voce evidence be taken to determine the matters in dispute. Hearing commenced before Njagi J. He heard evidence of PW1 E W and PW2 P W W (the Applicant). The court also heard the evidence in chief of the Respondent. She testified as PW1. Njagi J ceased to have jurisdiction in the Family Division. The matter was placed before this court on 2nd May 2013. The parties agreed that this court proceeds with the hearing from where the proceedings before Njagi J had reached. This court heard the evidence adduced by the Respondent during her cross-examination. After the close of both the Applicant's and the Respondent's respective cases, the parties agreed to file written closing submission. This court only saw the submission filed by counsel for the Respondent.

Upon evaluation of the evidence adduced in this case, the issue for determination by this court is whether the Applicant established, to the required standard of proof on a balance of probabilities, that he indeed contributed towards the purchase of the suit property and the development of the house erected thereon. The Applicant's suit is predicated on **Section 17** of the **Married Women's Property Act 1882**. This **Act** was an **Act** of general application in Kenya before it was repealed by the **Matrimonial Property Act, 2013**. At the time the suit was filed, the applicable **Act** was the said **Married Women's Property Act 1882**. Under the said section, this court had jurisdiction to determine any question between "**husband and wife as to the title to or possession of property....**".

In the present case, the Applicant adduced evidence to the effect that he had contributed towards the purchase of the suit property. He testified that the suit property cost Kshs.240,000/-. He contributed 50% of the sum. The Applicant did not adduce any evidence to support his claim that he indeed paid the said sum of Kshs.120,000/-. On her part, the Respondent produced a copy of the agreement which indicated that the purchase price of the suit property was Kshs.300,000/-. She also produced receipts which showed that she had indeed paid the entire sum of Kshs.300,000/-. The vendor of the property acknowledged receipt of the sum. The Respondent adduced evidence of further payments that she made towards the survey, land rates and land rents and the legal fees. These sums were paid to enable the suit property to be transferred to the Respondent. In his evidence, the Applicant explained that the reason why the property was registered in the Respondent's name was because at the material time he was out of the country. The Respondent reneged in the undertaking that she had made him that the suit property would be jointly registered. The Applicant further testified that the house on the suit property was constructed by **[particulars withheld]**, a company owned by PW1 E W, his father. The Applicant testified that he financed the construction of the house. PW1 testified that the entire cost of the house was about Kshs.500,000/-. The Applicant and his witness did not however produce any document to support their claim that indeed the Applicant had purchased materials which were used to construct the suit property. It was the Applicant's evidence that in his estimation he had contributed 75% of the cost of construction of the house.

The Respondent disputes this claim. She testified that other than supervise the construction of the house, the Applicant contributed nothing towards the construction. It was her evidence that she funded the entire cost of construction of the house. The Respondent did not however produce any receipts to support her claim that she indeed purchased the materials that was used to construct the house. The Respondent conceded however that the Applicant offered her advice and participated in the supervision of the construction of the house in the suit property.

Having carefully evaluated the evidence adduced in regard to the purchase of the suit property, it was clear to this court that the Respondent established to the required standard of proof on a balance of probabilities that she indeed purchased the suit property. The Respondent produced the agreement which indicated the purchase consideration as Kshs.300,000/-. She produced receipts which established that she had paid the said purchase consideration to the vendor. She also paid other outgoings including survey fees, legal fees and land rates. She produced all these documents in support of her case. On the other hand, the Applicant produced nothing. He even did not know the purchase consideration of the suit property. He did not even know the exact particulars of the suit property. As regard the assertion by the Applicant that he contributed towards the construction of the house on the suit property, the Applicant did not avail any evidence to this court to support his claim. It was highly improbable that the Applicant and his father would have participated in the construction of the house in the suit property without keeping any records. This is especially taking into consideration that PWI was a contractor. That being the case, this court is inclined to believe the evidence adduced by the Respondent which was to the effect that she solely contributed towards the cost of construction of the house in the suit property. The role that the Applicant played was in the design and supervision of the construction of the house.

It did not escape this court's attention that at the time the house was constructed, the Applicant and the Respondent were not married. Although the Applicant claimed that he had married the Respondent under Kikuyu Customary Law at the time, he did not adduce any evidence to support that assertion. The more likely scenario is that given by the Respondent who stated that at the time she was cohabiting with the Applicant with a view to later solemnizing their marriage. At all the material times, the Respondent was employed in positions which would have enabled her to pay for the purchase and construction of the house on the suit property. On the other hand, the Applicant was largely out of the country at the time the property was purchased. He returned to the country but later again went out of the country. If indeed the Applicant contributed towards the construction of the house, he should have produced copies of his bank statements, cheque counterfoils, money transfers or any other documents to his claim that he had financed the construction of the house.

This court's evaluation of the evidence adduced leads it to no other conclusion other than the fact that the only contribution that the Applicant established that he made is the design of the house and the supervision of the construction of the house. This was an indirect contribution. It is the Applicant's case that his contribution should be assessed at 50% of the entire cost of the house. This court is of the considered opinion that the Applicant's indirect contribution cannot exceed 25%. Any direct contribution that he may have made is covered within that margin of 25%. As stated earlier in this Judgment, the Applicant failed to establish to the required standard of proof that he made such direct contribution.

In the premises therefore, this court holds that the Applicant established that he only contributed, directly and indirectly, the equivalent value of 25% of the suit property. Judgment is therefore entered in favour of the Applicant equivalent to 25% of the value of the suit property i.e. LR. No. *[particulars withheld]* Kahawa Sukari. This court directs the Applicant and the Respondent to each appoint a registered Valuer who shall present the current value of the suit property to the court for the court to determine the actual sum that shall be paid to the Applicant. Upon payment of the said value, the Applicant shall give vacant possession of the suit property to the Respondent. As regards the suit motor vehicle, the Respondent indeed agreed that the Applicant contributed towards its purchase. Likewise, the motor vehicle shall be valued by two Valuers, each appointed respectively by the Applicant and the Respondent. The valuation report shall be presented to the court. After the determination of the value, the Respondent shall pay to the Applicant 50% of the value of the motor vehicle. Since this was a family dispute, there shall be no orders as to costs.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2014.

L. KIMARU

JUDGE