



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 62 OF 2006 (OS)

S R W.....APPLICANT

VERSUS

S W.....RESPONDENT

JUDGMENT

S R W (the Applicant) and S W (the Respondent) were married on 11th March 1986. Their marriage was blessed with one issue, a daughter, who is currently studying in a university in Denmark. The marriage was dissolved by this court on 19th October 2006. The present suit was filed by the Applicant for division of matrimonial property. The suit is predicated upon **Section 17** of the **Married Women's Property Act 1882**. This was a statute of general application which was applicable to Kenya. That **Act** is now repealed by the **Matrimonial Property Act (Act No.49 of 2013)**. However, since the suit was filed before the enactment of the **Matrimonial Property Act**, this suit will be determined on the basis of the law as it was then applicable.

According to the Applicant, the court should declare that the property known as LR. No. **[Particulars withheld]** Westlands (the suit property) is matrimonial property and therefore should be divided at the ratio 50:50 taking into account the contribution that the Applicant made. It is the Applicant's case that she substantially contributed towards the purchase and the development of the extensions in the suit property and therefore she is entitled to half a share of the same. The suit is opposed. The Respondent swore a replying affidavit in opposition to the claim. He swore that he was the one who solely purchased the suit property. He explained how he came to acquire the property, how he secured a mortgage to pay the balance of the purchase consideration, and finally how after repaying the mortgage for several years, he opted to pay off the entire loan in 2001 when he inherited some money after the death of his mother. In essence, it is the Respondent's case that the Applicant contributed nothing towards the purchase of the suit property and therefore she ought not to benefit at all from the property.

Directions were taken in this matter. It was agreed that the case be disposed of by the parties adducing *viva voce* evidence. Hearing commenced before G.B.M. Kariuki J (as he then was). He heard the evidence of the Applicant. This court then took over the proceedings from where it had reached. It heard the evidence of the Respondent. After the conclusion of the case, counsel for the parties filed written closing submission. This court has carefully considered the evidence adduced by the parties to this case. It also had the benefit of reading the written submission filed by counsel for the parties. The issue for determination by this court is really whether the Applicant established, to the required standard of proof on a balance of probabilities, that she contributed, either directly or indirectly towards the purchase and the development of the suit property. This court is also cognizant of the fact that under **Article 45(3)** of the **Constitution**, this court is required to treat the parties to this matrimonial dispute equally. The court is

also required to take into account that the contribution of the wife includes her role in taking care of the child of the marriage and where there is evidence, the contribution of the wife in purchasing food and generally in performing her duties as a homemaker.

What was the evidence that was adduced in this case? According to the Applicant, she contributed towards the purchase of the property. In particular, she testified that she paid the sum of Kshs.45,000/- towards the deposit of the purchase of the house after she sold her jewelry. She also testified that she borrowed money from her friends which enabled her to give to the Respondent the sum of Kshs.550,000/- which was paid as a deposit. She further testified that the balance of the purchase consideration was paid from a mortgage which was obtained from Savings & Loans. Apart from that, the Applicant testified that she purchased the furniture for the house. She further testified that the mortgage was repaid from the rent that she received from her property at Dandora. It was common ground that the mortgage repayment sum was Kshs.22,000/- per month. The suit property comprises three (3) mansionettes with extensions, one of which has been occupied from the time of its purchase by the Applicant and the Respondent as their matrimonial home. The two mansionettes attracted at the time rental income of Kshs.17,000/-. The Applicant testified that she paid the balance from the rental income that she received from her Dandora property. There was dispute whether at the time the said Dandora property attracted rent of Kshs.300/- or Kshs.2,500/-. Be it as it may, it is the Applicant's evidence that she substantially contributed towards the purchase of the suit property. It was her case that the equity in the property that resulted from the repayment of the mortgage should accrue to her in the same manner that it will accrue to the Respondent.

On his part, the Respondent was emphatic. He testified that he purchased the suit property using his savings from Denmark. He narrated how at the time the property was purchased, it was intended that it be jointly owned with others. Unfortunately, before the transaction was completed, the other partners withdrew from the transaction. This left the burden of purchasing the three (3) mansionettes (which was contained in one title) to the Respondent. The Respondent produced evidence which showed that indeed he transferred funds from his savings accounts in Denmark towards the purchase of the suit property. At the time also, the Respondent benefitted from an inheritance after his father's death. He used part of this money to pay the then deposit of Kshs.1.5 million. The Respondent explained that he could have paid off the entire purchase consideration of Kshs.3.6 million at the time but for the fact that he did not want to use his entire savings towards the purchase of the suit property. It was then that the Respondent made the decision to borrow the balance of the purchase consideration from Savings & Loan Kenya Limited.

The suit property was charged after it had been transferred to his name. He was required to repay the mortgage by paying the sum of Kshs.22,000/- per month. The Respondent testified that the rental income from the two mansionettes was Kshs.17,000/-. He topped up the amount of Kshs.5,000/- from the salary that he earned as a structural engineer at the time. The Respondent explained that using his expertise, he was able to improve the property by constructing guest extensions to each mansionette. In 2001, he paid off the mortgage using the funds that he had obtained as an inheritance when his mother died. The Respondent denied the suggestion by the Applicant that she contributed monetarily towards the purchase of his suit property. He testified that he was the one who purchased the Dandora property for the mother of the Applicant. He was not consulted when the Applicant decided to sell the Dandora property in 2002. This sale was made after the Respondent had fully repaid the mortgage. The Respondent urged the court to take into account the fact that due to differences he had with the Applicant, he was compelled by court orders to pay maintenance for the upkeep of the Applicant and the child of the marriage from 1993 onwards. The Respondent urged the court to take into consideration the fact that the Applicant wholly depended on him and had no independent income. She could not therefore have participated financially in the purchase of the suit property.

Having evaluated the facts of this case, it was clear to this court that there are two (2) sub- issues from the one main issue for determination that have emerged. The first sub-issue for determination is what constitutes the matrimonial property. There is no dispute that the suit parcel of land is registered in the name of the Respondent. The suit property, although contained in one title, actually constitutes of three (3) mansionettes. The Applicant has been residing on one mansionette while the other two have, since their purchase, been leased out. There is no dispute that it is the Respondent who has been receiving the rental income from the two mansionettes. In this court's assessment, what constitutes matrimonial home

in this case is the property that the husband and wife occupied during the subsistence of their marriage. The other sub-issue for determination is whether the Applicant established, to the required standard of proof on a balance of probabilities that she contributed directly towards the purchase of the suit property.

This court evaluation of the evidence clearly leads it to the conclusion that the Applicant contributed nothing directly towards the purchase of the suit property. From the evidence adduced, it was evident that from the time the Applicant and the Respondent got married, the Applicant wholly depended for support from the Applicant. This fact was recognized in the Judgment of Rawal J (as she then was) in the Divorce case (**Nairobi HC. Divorce Cause No.95 of 1993 – S W –vs- S R W**). At page 10 of the Judgment, the Learned Judge made the following observations:

“The Respondent has also agreed that she has filed many applications for variation upwards of the maintenance order during pendency of this cause. The very poignant point raised by the Petitioner is that the Respondent came back to him only after it was learnt that he had purchased the property and which, has not been denied by the Respondent. Even in her testimony during cross-examination, she openly concentrated on her financial need and emphasizes that if the divorce is granted she would insist on half share of the property. These factors do suggest the Respondent is only interested in the financial side of the marriage.”

In her testimony before court, it clearly emerged that the Applicant depended on the Respondent for her upkeep. The Respondent paid maintenance of various sums from 1993 to 2006 when the divorce case was heard and disposed of by the court. The maintenance was paid over and above the fact that the Applicant was occupying the matrimonial house to the exclusion of the Respondent.

In her evidence, the Applicant testified that she got part of the money that was paid as deposit when the suit property was purchased from a friend. She never said how she was able to repay the friend such colossal sum of Kshs.965,000/-. Although she testified that she earned her living as a hairdresser and also from the rental income she got from her property at Dandora, this court is of the view that she could not have got the money to pay the deposit as she claimed in her evidence. On the other hand, the evidence adduced by the Respondent was clear. He narrated how he became aware when the suit property came to the market, how he purchased the same, where he got the money to pay as deposit, and finally how he repaid the mortgage that he had taken from Savings & Loans Kenya Limited. From his evidence, it was clear that the Respondent solely contributed towards the purchase of the suit property.

However, that is not the end of the story. The law recognizes that a woman during marriage makes indirect contribution towards acquisition of property by performing her wifely duties and chores. This was recognized by the Court of Appeal in the case of **Agnes Nanjala William –Vs- Jacob Petrus Nicolas Vander Goes Civil Appeal No.127 of 2011 (Mombasa)**. In the case, the Court observed that since the promulgation of the **Constitution** in 2010, there was a presumption that in case of dissolution of marriage, any property acquired during the marriage is to be shared equally. In the present case, it was clear that the Applicant took care of the child of the marriage in the period of about four (4) years that the Respondent lived with her. However, the Respondent separated from her in 1993 when he filed the divorce. He left her in occupation of the matrimonial home.

In answer to the first sub-issue for determination, this court holds that the extent of what constitutes matrimonial home is the house that the Applicant occupied during the subsistence of the marriage. Any indirect contribution made by the Applicant is restricted to that house. The other two mansionettes cannot in the circumstances be considered to constitute matrimonial home. This is because in the short period that the Applicant and the Respondent lived together, the rental income from the two mansionettes was applied to pay off the mortgage. In the premises therefore, this court holds that the Applicant has established a case, to the required standard of proof on a balance of probabilities, that she is entitled to the mansionette that she is currently residing in. Judgment shall therefore be entered in her favour for the mansionette.

As regard the other two mansionettes, the same belong to the Respondent. Since the three (3) mansionettes are contained in one title (the suit property), the parties have two options: they can partition

the property so that the two properties are delineated and two separate titles issue for the same, or alternatively the mansionette occupied by the Applicant be valued and the Respondent pays for the value of the mansionette. If the first option is to be exercised, the court will require a report to be made by a Planner and a Surveyor to determine if it is possible to partition the property as directed by the court. If not, the second option shall be invoked. This matter shall be mentioned forty-five (45) days from the date of this judgment for the parties to inform the court what option they have chosen to exercise. There shall be no orders as to costs as this dispute involves a family.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2014.

L. KIMARU

JUDGE