



REPUBLIC OF KENYA

High Court at Mombasa

Originating Summons 1 of 2012

IN THE MATTER OF: DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF: SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

AGELLA alias ANGELINE MWENDE MAINGI SIMON.....APPLICANT

VERSUS

RICHARD MBOLE KIMUYU.....RESPONDENT

RULING

BACKGROUND

The Applicant claims that she and the Respondent herein (the parties) began cohabiting as husband and wife sometime in 1997. They were then married first under customary law sometime in April 1999, and later solemnizing the union under the African Christian Marriage and Divorce Act, Cap 151 of the Laws of Kenya on 14th December 2002. They were blessed with one issue. The parties have since separated and now come before this court seeking the division of matrimonial property.

2. In the Originating Summons dated 20th January 2012, the Applicant seeks declaration of joint ownership of property, division of property and an account of all property, rents and profits obtained from the property. The application also seeks restraining orders to prevent the Respondent from evicting the Applicant from any of the properties, alienating, wasting, damaging or otherwise interfering with any of the properties. The grounds for the application broadly captioned are that the properties were acquired and developed during the marriage, and the Respondent has sold some of the properties to third parties.

3. By a Notice of Motion of the same date 20th January 2012 the Applicant seeks interim relief pending the hearing of the Origination Summons in the nature of an order for account and injunction to restrain the Respondent from evicting the Applicant from the matrimonial home and disposal of alleged matrimonial property and in the alternative to restrain any third party and the Registrar of Titles if the property has already been disposed.

4. The application is opposed. The Respondent has filed a Replying Affidavit sworn on 8th February 2002. In the affidavit, the Respondent swears that while they did get married under customary law sometime in April 1999, they did not cohabit as husband and wife until after the marriage was solemnized on 14th December 2002. He also denies, with reasons for each property, the Applicant's entitlement to the listed properties.

5. The Respondent further denied threatening to evict the applicant and the issue of the marriage from the matrimonial home, denied allegations of assault or that he had any intentions of selling the house. He instead demanded an account of the proceeds of motor vehicle KAS 240 D which he had purchased for the Applicant but which the Applicant sold without his knowledge.

6. The parties filed their respective submissions, their counsels highlighted them on 15th March 2012 and Ruling reserved.

ISSUES

Did the parties cohabit as husband and wife before their formal marriage on 14th December 2002?

7. The court cannot make final findings of fact at the interlocutory stage. However, it has not been denied that the parties were married. It has been suggested by the Respondent that the marriage status was attained in December 2002 when the union was solemnized. However, this proposition is defeated by the Respondent's own admission contained in an affidavit sworn on 9th February 2001, which he admits to signing, stating that they were for all intents and purposes, married sometime in April 1999. In the Respondent/deponent's own words at paragraphs 2, 3 and 6 of the affidavit of marriage, **“THAT sometime in April 1999 I got married to (the Respondent) under Kamba Customary Laws...we have since lived together as husband and wife and have one child... I swear this affidavit to confirm that ANGELINE MWENDE SIMON is lawfully married to me and by reason thereof is entitled to all rights, benefits and privileges that may accrue from her status as such”** thus giving the Applicant coverture during the said period.

8. The Respondent is estopped from approbation and reprobation on the issue of cohabitation on this ground. There is sufficient evidence to the effect that the parties have been in married cohabitation at least from April 1999 until 2007 when the divorce case was filed in 2006 and again between 2006 - 2011 when they separated.

Whether the listed properties constitute matrimonial property

9. The Blacks Law Dictionary defines matrimonial property as, “....property that is acquired from the

time when the marriage begins until one spouse files for divorce.....” In the case of Essa vs Essa, Civil Appeal No. 101 of 1995 which is supplied by the Applicant, Hon. Omolo, JA stated that, “ There is of course, no presumption and there could not have been any, that any or all property acquired during the subsistence of the marriage must be treated as being owned jointly by the parties” thus requiring proof of contribution before the court can make a declaration as to ownership. Matrimonial property therefore is all property acquired by joint contribution of the spouses, either directly or indirectly during the subsistence of the marriage.

10. In Kivuitu v Kivuitu (1982 – 1988) 2 KAR 241, Hon. Omolo, Ag JA (as he then was), laid down the rule that where property acquired during coverture is registered jointly, it shall be presumed to be held in equal shares. In Karanja v Karanja, (1976) KLR 307 the court held that when property is purchased jointly by both spouses and registered in the name of the husband with the wife's approval, a resulting trust can be inferred in her favour. In Njoroge –vs- Ngari (1985) KLR 481 where the plaintiff sought declaration that half of the property registered in the name of her husband was held in trust beneficially for her, the court therein held, inter alia, that: **“If property is held in the name of one person but another contributes towards acquisition of the property, then both persons have proprietary interests in that property...”**

If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person.”

11. In Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997, the Court of Appeal ruled that such contribution need not be in monetary terms, but that in the typical Kenyan context, indirect contribution “will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution.” The Applicant has sought to rely on the case of Chakupewa vs. Mpenzi & Anor (1999) 1 EA wherein Hon. Mackanja, J of the High Court of Tanzania also opined at page 39, “Now contribution to the acquisition of matrimonial property is not restricted to material contributions. It includes intangible considerations such as her love; the comfort and consolation she gives to her husband; the peace of mind the husband gets from a loving wife; the food she prepares for him. All these, and other psychic satisfaction go a long way to contribute to the acquisition of property which is acquired through the joint effort of the parties.”

12. In Echaria vs Echaria (2007) eKLR, the Court of Appeal sitting as a five judge bench settled that the cases of Essa vs Essa, Civil Appeal NO. 101 of 1995, Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997, Kamore vs Kamore (1998) LLR 714 CAK, Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 were correctly decided in that in each case, “...the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property.” The Court however held that such contribution must be of financial nature.

Whether the orders of injunction sought may be granted.

13. The principles upon which an injunction may be granted as submitted by the Respondents, are set out in Giella vs. Cassman Brown & Co. Ltd. (1973) EA 358. The Applicant has sought temporary injunction restraining eviction, sale, waste or transfer of the properties and an account to disclose and account for all the properties. To qualify for the grant of interlocutory injunctive orders, the Applicant needed to demonstrate that she has a *prima facie* case with a probability of success; irreparable injury which cannot be compensated by damages and when the court is in doubt, decide on a balance of probability.

In this case, the restraining orders are sought in relation to several pieces of property. Some of the property appear to have changed hands already in ownership, in favour of purchasers for value without knowledge of the encumbrance. For some property, it is alleged never to have belonged to the Respondent/Applicant, and for some the Respondent is the registered owner.

Applicant's entitlement to specific property

a) Kiembeni House and Plot No. 3642 (Orig. 161/7) Section II/MN

14. This house is said to be the matrimonial home. The Applicant has stated that she is in occupation of the said house, where she lives with the issue of the marriage. She produced a Certificate of Postal Search as at 15/3/2007 indicating that the same was registered in the name of the Respondent. She also produced receipts and hand written notes with lists of building materials to indicate her contribution towards the construction of the house. She has also produced receipts in her name indicating that she paid for water, electricity and post office box rent. The Applicant placed a caveat on the property on 13/7/2009 claiming matrimonial interest. She has further produced copies of her payslips to prove her income over the years. She also provided receipts for the payment of a house-servant, invoices for a poultry business that she ran, and documents for a loan she took. Her contribution is not denied.

There are handwritten notes which the Applicant claims are threats received from the Respondent with regard to his attempt to evict her from the house. However, the notes seem to suggest that the parties have jointly been seeking buyers for the property.

The Respondent contended that it was acquired on 15th February 2002, prior to the marriage. Further, that the house on the said plot was developed through a bank loan, which he is still repaying singlehandedly. It is his contention that this property, does not form part of matrimonial property. The Applicant has demonstrated, prima facie, that she contributed to construction of the house and other liabilities related to the matrimonial home, and that the parties had married under the customary law since April 1999 before the property was allegedly acquired.

b) Matrimonial House in Machakos built in 1999 – 2000

15. It is the Respondent's contention that this house was built in 1999 before the marriage and that as the house is on the Respondent's father's compound, it ought not be considered as matrimonial property.

The Court of Appeal held in Muthembwa –VS- Muthembwa, Civil Appeal No. 74 of 2001 that “.....property inherited and gifted to one spouse before the marriage, and the property exists in the same condition as it was gifted or inherited, no problems arise. The spouse to whom it was gifted should be allowed to retain it. Problems however arise where improvements are made using matrimonial resources and then the property ceases to be in its original form and increases in value....”

In this case, the Applicant claims to have contributed to the development of the property, but avails to proof in that regard. In the case of Florence Wairimu Kanyora vs. Njoroge Kinyanjui (2005) eKLR, the High Court (Hon. Lady Justice Koome, as she then was) upheld the apportionment of the Land District Tribunal which awarded the Applicant a portion of the suit premises (the respondent's inheritance) where she had demonstrated contribution in its development.

In the absence of proof of contribution to the development of the Machakos matrimonial home, the Applicant cannot at the interlocutory stage maintain a claim for injunction against it.

c) Piece of Plot bought from Henry Muthoka Mulei in May 2005 for Kshs.500,000/-

16. On this property, the Respondent replied that the sale had not been successful and the plot still belongs to Mr. Mulei. This allegation has not been disproved by the Applicant. There is no basis for the grant of injunction in relation to this property, but the Respondent should account for the purchase price.

d) Plot in Athi River bought in 2006

17The Respondent denied any knowledge of this property. This allegation has not been disproved by the

Applicant, and there is consequently no basis for orders in respect thereto.

e) **Plot No. 173/II/MN near Turkey Base**

18. The Respondent alleged that this was sold to Stephen Nganga Kamau at Kshs. 260,000/- on 3/5/2009, and the proceeds used jointly by the parties as there was mutual consent to sell the plot. The Applicant is at liberty, however, to demonstrate at the hearing that she did not share in the proceeds of sale and/or that the sale was at a higher price.

f) **Plot No. Subdivision 6111 (Orig. 212/4) Section I/MN in Utange near Wema Centre**

19. The Applicant produced a copy of receipt issued to the Respondent for Kshs.200,000/- being the purchase price paid to a firm of auctioneers for the property on 2/9/2004. The Respondent's response was that the property sale was not finalized, the same was never acquired. This allegation has not been disproved by the Applicant. The Respondent should however account for the Ksh.200,000/= that would have been the purchase price or part purchase price.

g) **Motor Vehicle KAS 392W**

20. The Respondent stated that this motor vehicle had been purchased purely for purposes of sale and was sold on 3/12/2005. The applicant did annex to her supporting affidavit a sale agreement dated 3/12/2005 which indicates that the motor vehicle had been registered under the Respondent's name and was sold by the Respondent for Ksh.390,000/-. She further produced copies of documents including email messages exchanged in the process of purchasing the car, which were all in the Respondent's name. The Respondent should account for the proceeds of sale of the motor vehicle.

h) **Motor Vehicle KAU 322 C**

21. The Respondent stated that this motor vehicle had been purchased purely for purposes of sale although details of the sale if any were not provided. This allegation has not been disproved by the Applicant but the Respondent should account for the proceeds of the sale.

i) **Plot bought from Mrs. John Kauondo Mulei in May 1999 for Kshs.100,000/- in Machakos.**

22. The Respondent has denied knowledge, and without any further evidence, the Applicant has not discharged her burden of proof, at the interlocutory stage, to establish prima facie case and tilt the balance of convenience in her favour.

FINDINGS

23. I have in previous rulings held that the Balance of Convenience test of the **American Cyanamid Co. v. Ethicon (1975) 1 ALL ER 504** is to be preferred to the prima facie test of the **Giella v. Cassman Brown (1973) EA 358**. I have, however, applied the **Giella v. Cassman Brown** test as both parties' counsel submitted on the basis of that test, and I considered the Applicant's claim to each property, separately. Moreover, as held by the Court of Appeal in **Mbuthia v. Jimba Credit (1988) KLR 1** it is usual to grant injunction in cases involving land and therefore damages are not adequate remedy.

24. Applying the above principles to the facts of the case, I find that the Applicant is entitled to the injunction and other orders sought, in relation to the specific properties and I make the following orders:

(1) The Respondent shall provide within 30 days from the date of this ruling, an account of the property acquired during coverture of the parties since April 1999 when the parties contracted a Kamba Customary Law Marriage.

(2) The Respondent is restrained by an order of injunction from evicting or otherwise interfering with the Applicant's occupation of the matrimonial home and parcel of land being Plot No. Subdivision No. 3642 (Original No. 161/7) Section II MN and from transferring or otherwise disposing the said property.

(3) Without prejudice to the generality of Order No. 1 above, the Respondent shall provide an account for the proceeds of sale and or purchase price of the following specific properties:

(a) Purchase price for Plot which was to be bought from one Henry Muthoka Mulei in May 2005.

(b) Proceeds of sale of Plot No. 173/II/MN near Turkey Base.

(c) Purchase price paid for Plot No. Subdivision 6111 (Orig. 212/4) section I MN Utange near Wema Centre.

(d) Proceeds of sale for Motor Vehicle KAS 392 W.

(e) Proceeds of sale for Motor Vehicle KAU 322 C.

(4) The Applicant shall provide account for the proceeds of sale of Motor Vehicle KAS 240 D, within 30 days of the ruling.

(5) Costs in the cause.

25. The hearing of the Originating Summons shall be fixed on a convenient date in consultation with the parties.

Dated and delivered this 19th February 2013.

EDWARD M. MURIITHI

JUDGE

In the presence of:

N/A for the Petitioner

N/A for the Respondent

Miss Linda Osundwa - Court Clerk