REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 86 OF 2012

J A O .....…...PLAINTIFF

VERSUS

N A ..... DEFENDANT

J U D G M E N T

J A O, the Plaintiff herein married N A, the Defendant herein at Mariakani Church of God, Nairobi on 11th August, 1979 under the African Christian Marriage and Divorce Act. Their marriage was blessed with six issues five of whom are surviving, the last born having died. Sometime in 2006, the Plaintiff filed a Divorce Cause No. [...] in the Senior Principal Magistrate's Court where she sought for among other orders judicial separation. The case was heard and on 28/07/2010 her prayer for judicial separation was granted.

On 22nd May, 2012, the Plaintiff took out an originating summons under Section 17 of the Married Women's Property Act 1882. The Plaintiff seeks among other orders that a declaration be issued that properties which are listed in the originating summons and are in the name of the Defendant and which were acquired during the subsistence of the marriage are owned equally and that the same should be sold and proceeds shared equally or as the Court may deem fit.

The properties subject of the originating summons are the following:-

1. *Kitale Municipality Block[particulars withheld]*
2. *Kitale Municipality Block [particulars withheld]*
3. *A quarter an acre of the ancestral land at [particulars withheld]*
4. *A fully developed Plot[particulars withheld]at Nairobi.*
5. *West Bunyore[particulars withheld]*

On 20th March, 2013, the Advocates for the parties herein agreed that the matters herein be decided on the basis of written submissions. Each of the parties subsequently filed their submissions for the determination of the Court.

The questions which arise for determination can be summarized as follows:-

1. *Whether the properties disclosed in this suit are matrimonial properties acquired during the subsistence of the marriage.*
2. *Whether the Plaintiff directly or indirectly contributed to the acquisition of the properties as to entitle her to the benefit of the same.*
3. *Whether the registration of the said properties in the name of either of the parties to the marriage excluded the other party from ownership thereof.*

All the properties the subject of this suit are in the name of the Defendant except Kitale Municipality Block [particulars withheld] which is in the name of the Plaintiff. To answer the question whether the properties are matrimonial properties acquired during the subsistence of the marriage, I will briefly state on how each of them was acquired.

1. **Kitale Municipality Block [particulars withheld]**

This property is 2.276 hectares and this is where the matrimonial home of the parties herein is built. The property was registered in the name of the Plaintiff on 21/12/1999. The property is said to have been acquired in 1984.

2. **Kitale Municipality Block [particulars withheld]**

This property was acquired in 1984 at Kshs. 209,000. There is an agreement between the seller and the Defendant dated 8th July, 1984.

3. **A fully developed Plot [particulars withheld] at Nairobi.**

This property was acquired in 1974. It was registered in the name of the Defendant on 24th August, 1984.

4. **West Bunyore[particulars withheld]**

This property was registered in the name of the Defendant on 01/08/1983.

5. **A quarter an acre of the ancestral land at [particulars withheld]**

This property is described as ancestral land. It is not known when it was acquired or given to the Defendant. There is no evidence as to what use the plot is being put into. The Plaintiff seems to have given up on this particular plot as she does not list it among the properties which she seeks the Court to make a determination on as shown in paragraph 15 of her Further Affidavit sworn on 19th March, 2013.

It is clear that the properties listed from No. 1 to 4 hereinabove were acquired during the subsistence of the marriage between the Plaintiff and the Defendant. They are therefore matrimonial properties and shall be subject to distribution as provided by the law. As I have indicated hereinabove, the quarter acre of ancestral property at Luanda cannot be subject of distribution as it does not fall under property acquired during the subsistence of the marriage. In any case, the Plaintiff has excluded it in her Further Affidavit sworn on 19th March, 2013. It is noted that property LR [particulars withheld] in Nairobi has already been sold by the Defendant but the proceeds from the sale have been frozen in a bank account following a Court order. The property was sold for Kshs. 12,600,000/-.

This now brings me to the question of whether the Plaintiff made any contribution to the acquisition of the matrimonial properties. As at the time of marriage, the Plaintiff was working as a secretary with the Ministry of Transport and Communications. She was earning a salary of Kshs. 3,000 which grew gradually and at the time she started experiencing marital problems, her salary was Kshs 24,000 per month. There is no doubt that the properties were mainly acquired through loans secured by the Defendant. The Defendant contends that the Plaintiff's salary was negligible and could not have made any contribution to the purchase of the properties. The Plaintiff contends that there was a time the Defendant was interdicted from her employment. During this period, she was the one taking care of the family. She even used to contribute towards offsetting the loans outstanding then.

When it comes to distribution of matrimonial property, there are a number of decisions which have laid down principles which are used to determine contribution of a spouse towards matrimonial property. It has been held that a spouse's contribution need not only be financial. It can even be in form of giving the other peaceful time as he acquires the property e.g. by taking care of the children of the marriage, taking care of the home or even improvement of the property.

In Kenya, under the Constitution of Kenya 2010 Article 2 (5) provides that the general rules of international law shall form part of the Law of Kenya. Article 2 (b) further provides that any treaty or convention ratified by Kenya shall form part of the Law of Kenya.

Article 6(1) (h) of the International Convention on the Elimination of All Forms of Discrimination against Women enjoins state parties:

> ***"To ensure on the basis of equality the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration".***

Article 16(1) of the Universal Declaration of Human Rights provides as follows:

> ***"Married women of full age without limitation due to race, nationality or religion have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution".***

Article 7(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa provides as follows:-

> ***"In cases of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the property deriving from the marriage".***

Article 45 (3) of the Constitution of Kenya 2010 provides as follows:-

> ***"Parties to a marriage are entitled to equal rights as at the time of marriage, during the marriage and at the dissolution of the marriage"***

Article 159 (2) of the Constitution provides that in exercising judicial authority, the Courts and Tribunals shall be guided by the following principles:-

a. **…...**
b. **…...**

> **e)** ***the purpose and principles of this Constitution shall be protected and promoted.***

In the case of **Peter Mburu Echaria Vs Priscillah Njeri Echaria [2007] eKLR**, the Court of Appeal judges had this to say:-

> ***"In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the Court has invariably given the wife an equal share (See Essa Vs Essa (Supra); Nderitu Vs Nderitu, Civil Appeal No. 74 of 203 of 1997 (unreported), Kamore Vs Kamore (Supra); Muthembwa Vs Muthembwa, Civil Appeal No. 74 of 2001 and Mereka Vs Mereka, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather 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 considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband".***

The Judges went on to state thus:-

> ***"This Court had occasion in Kamore Vs Kamore (Supra) to clarify the law applicable in disputes of this kind. What this Court said at Page 89 paragraph (b) is worth repeating:***

"We would like to add our observations, that is to say, that until such time as some law is enacted, as indeed it was enacted in England as a result of the decision of Pettit Vs Pettit and Gissing Vs Gissing to give proprietary rights to spouses as distinct from registered title rights Section 17 of the Act must be given the same interpretation as the law Lords did in the said two cases. Such law should be enacted to cater for the conditions and circumstances in Kenya. In England the Matrimonial Homes Act of 1967 was enacted which was later replaced by the Matrimonial Proceedings and Property Act 1970. The Matrimonial Causes Act of 1973 also made a difference".

Seven years after the observations in the Kamore Vs Kamore case quoted above, the Court of Appeal judges had the following to say:-

"It is now about seven years since this Court expressed itself in Kamore Vs Kamore, but there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our Law Reform Agenda to keep the country shackled to a 125 year old foreign legislation which the mother country found wanting more than 30 years ago! In enacting the 1967, 1970 and 1973 Acts, Britain brought justice to the shattered matrimonial home. Surely, our Kenyan spouses are not the product of a lesser god and so should have their fate decided on precedents set by the House of Lords which are at best of persuasive value! Those precedents as shown above, are of little value in Britain itself and we think the British Parliament was simply moving in tandem with the times. Human rights issues, and in particular women rights issues took centre stage on the global theatre from the 1960's. There were, for example, International Covenants on "Civil & Political Rights" and "Economic, Social and Cultural Rights" which were adopted in 1966 and came into force in 1976; the "Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW) which came into force in 1981; and the "African Charter on Human & People's Rights" which was adopted in 1981. Kenya has ratified all those international instruments and they therefore provide a source of law which, in appropriate cases, the Courts in this country may tap from".

What the Court of Appeal judges were lamenting on during the Echaria Vs Echaria case was seen in what is now the Matrimonial Property Bill of 2012 which has not been enacted into law. The International conventions mentioned in their judgment are now fully part of the Kenyan Law Courtesy of Article 2(5) & (6) of the Kenya Constitution 2010.

There is no doubt that the way to go is towards the principle that matrimonial property should be shared on 50:50 basis. This will be in furtherance of the principles of the Kenyan Constitution and the International treaties and conventions which have been ratified in Kenya. We do not have to wait until the matrimonial property bill is enacted into law to start applying what is contained therein. The constitution, international conventions and treaties which have been ratified by Kenya have shown the way.

The Plaintiff herein has demonstrated that she contributed towards the acquisition of the properties in question. Her contribution need not necessarily have been financial. I find that she is entitled to half share of all the properties which have been found to be matrimonial property. I therefore make the following orders:-

1. The proceeds of sale of Nairobi property described as LR [particulars withheld] in the sum of Kshs. 12,600,000 be shared equally at Kshs. 6,300,000/-.
2. Kitale Municipality block [particulars withheld] which comprises the matrimonial home be valued and whoever will retain the same do pay the other half of the valued price in exchange of retention of the property. In the alternative, if the parties cannot agree on the above arrangement, the property to be sold and proceeds therefrom be shared equally. Parties to share valuation fees equally.
3. Kitale Municipality Block [particulars withheld] to be surveyed and subdivided into two equal portions of 10.72 hectares to be given to each of the parties. Survey fees to be shared equally.

4. West Bunyore[particulars withheld] to be valued and sold and each party to get half of the proceeds with the option of either party buying off the other party's share of the valued property with a view to retaining the land. Valuation fees to be shared equally.

   Each party shall bear his or her own costs.

Dated, signed and delivered in Open Court on this 27th day of June, 2013.

E. OBAGA

JUDGE

In the presence of Mr. Bundi for Defendant and Mr. J. M. Wafula for M/S Nyakibia for Plaintiff. Court Clerk: Joan.

E. OBAGA

JUDGE

24/06/2013