



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
DIVORCE 1 OF 2005
M.K.N.....PETITIONER
VERSUS
A.W.N.....RESPONDENT

JUDGMENT

This issue outstanding in this Divorce suit is the distribution of matrimonial properties. Both parties gave oral evidence in court on how the properties were acquired and their proposals of how the division should be ordered. The former husband is the petitioner and the wife is Respondent. The issues to be determined are:-

1. What is matrimonial properties for distribution
2. In what proportion should the said properties be distributed

The properties identified by both parties are:-

1. Motor vehicle (Toyota)
2. Plot of land
3. Sacco Shares worth Shs.165,000/=
4. Shs. 68,000/= (savings account)
5. 90 bags paddy rice.

The respondent denies having a Savings Account with the particular bank [particulars withheld]. The petitioner did not produce evidence to disprove this claim. He just made allegations. It is a rule of evidence that he who asserts must prove. I therefore make a finding that there is no such account held by the Respondent in that Bank. The other issue is of 90 bags of paddy rice. The petitioner only alleged that the Respondent harvested 90 bags of rice in the year 2004. He was not able to prove the harvesting or selling of the rice. He admitted that the rice was cultivated after he left the matrimonial home. In the circumstances I find he has no claim of the proceeds of the rice if any. I therefore find that the properties available for distribution are:-

1. Motor vehicle
2. Plot of land

3. Sacco Shares worth Shs. 165,000

The evidence of the petitioner is that both purchased the Plot in the year 1998. They paid Shs.90,000/= on this plot and thereafter they both financed the construction.

I have perused the decision of ***Court of Appeal of Echaria Vs Echaria No. 236 of 2001*** where the court of appeal held that in such suits the property should be divided in the same proportions as their contribution to acquiring the same or substantial contribution to its improvements. This is a great deviation to the earlier authorities where the parties' contribution was not strictly proved. In this case the petitioner readily agreed in his evidence that he was entitled to 60% of the family assets and that the Respondent is entitled to 40% thereof. According to evidence at the time of marriage of the parties the petitioner was a driver of his own matatu which was later sold and another matatu vehicle was purchased. This vehicle has been sold through court order and a sum of Shs.290,000/- was deposited into court. The petitioner was also employed at the offices of Sacco but was later dismissed. As for the Respondent she was holding Rice fields which she continued to farm during their cohabitation. She was also trading with rice buying and selling in the market. I have perused the evidence and I find the parties have not been able to produce in court their exactly statements of contribution. Whereas the petitioner concedes sharing of 60:40 he does not support his claim for 20% excess with evidence. On the other hand the Respondent proposes a 50:50 subdivision. In the circumstances of this case where both parties were earning money, It is my view that the division should be on the basis of 50%:50%. The Petitioner does not show why he should take a higher share. He simply says he contributed a larger share. The evidence of ownership of the motor vehicle shows it was joint therefore on principle of joint ownership the parties share on the basis of 50:50. The other item of shares in the Sacco is related to the motor vehicle. Exhibit 19 shows that the account was joint between the parties.

Regarding the home on the plot the Respondent claims to keep it together with developments so as to provide a home for the two children of the marriage. The petitioner moved out in the year 2004 and has established another family. Respondents contribution was 50,000/= paid through Advocate Kibicho & Co. She later paid Shs.40,000/= also Shs.10,000/= toward council rates and Shs.30,000/= to the agents. The cost of construction was Shs.481,000 out of which she contributed Shs.300,000/= and the petitioner 181,000/=. The evidence is contained in page 2 - 16 of her exhibits. The petitioner produced no evidence to support his contribution claims. The Respondent produced a current valuation by transcounting Valuers Limited who gave the figure of Shs.520,000/=. The petitioner's valuation was Shs.975,000/=. It is trite law that where in a suit there are minor children between the parties the court has to take care of their interest in terms of Children Act. In this case the Respondent has been left with the two children sired by the petitioner. There is no dispute on this. The Respondent, the mother, prays that she be awarded the house which has been and is the only home the children have known. I agree with her statement. The children lives should not be disrupted because their father is no longer interested in them. The court is of the view that it is for the best interest for the matrimonial home on the plot to be retained by the Respondent and the children. In that case taking the valuation by Zemith Valuers the plot was purchased at Shs.90,000/= which the Respondent paid out of rice proceeds. Therefore the current valuation of plot being Shs.250,000/= goes to her. The improvements which were contributed to by Respondent mainly from rice proceeds and partly by the contribution of the petitioner are valued at Shs.725,000/= to be divided on 50:50 basis. The Respondent shall pay Shs.362,500/= to the petitioner for his share of the value of home. The upshot is that the Petitioner shall share the property with Respondent on 50:50 basis. The respondent shall keep the matrimonial home. The share of the petitioner being Shs.362,500/=.

On the issue of Sacco shares together with motor vehicle being Shs.290,000/= deposited in court and Shs.131,950 of Sacco shares each will take total Shs.210,975. The Respondent shall therefore pass her share in the sum of Shs.210,975/= to the petitioner and to that figure add Shs.151,525/= to cover his the share in the matrimonial home which was with Respondent.

Therefore the total share of Petitioner on 50:50 basis is:-

- Shs. 362,500 for the house

- Shs. 210,975 value of shares

- **Total 573,475** and the Respondent shall remain with the plot. The respondent shall pay to the Petitioner Shs.151,525/= being the balance in favour of the petitioner. That is the Judgment of court. Each party shall pay its own costs. The sum shall carry interest as from date of this Judgment.

It is so ordered.

J. N. KHAMINWA

JUDGE

22/2/2008

Khaminwa – Judge

Njue - Clerk

Ms Mercy HB for Ndungu

Mr. Kahiga present

Judgment read in open court.

J. N. KHAMINWA

JUDGE