



REPUBLIC OF KENYA



KENYA LAW
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JPKN v PNK (Divorce Cause 44 of 2004)
[2004] KEHC 1332 (KLR) (Family) (29 October 2004) (Judgment)

J.P.K.N v P.N.K [2004] eKLR

Neutral citation: [2004] KEHC 1332 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
DIVORCE CAUSE 44 OF 2004
MK KOOME, J
OCTOBER 29, 2004
IN THE MATTER OF THE MARRIAGE ACT (CAP 150)
IN THE MATTER OF THE MATRIMONIAL CAUSE ACT (CAP 152)

BETWEEN

JPKN PETITIONER

AND

PNK RESPONDENT

JUDGMENT

1. This is a unique application filed by the petitioner/husband and brought under the provisions of Section 27, 28 of the Matrimonial Causes Act, Section 102 of the Registered Land Act and order 39 Rules 1,2,2A,3, 8 of the Civil Procedure Rules.
2. On the same date of filing this application, the petitioner filed a petition seeking for the dissolution of the marriage and he filed a Notice of an application for ancillary relief under Rule 3 (2) of the matrimonial Cause Rules.

The applicant has sought for orders inter alia.

- a) That this honourable court be pleased to issue an order stopping the release of Kshs.700,000/=, being part payment of proceeds from the Sale of plot No. LR No.[particulars withheld] which is currently in the custody of R.M. Mutiso Advocate, to the respondent therein.
- b) That the said money be deposited in court pending the hearing and determination of the Divorce Petition



The application is premised on the grounds that,

- (i) That there is a pending petition for Divorce.
 - (ii) That LR No. [particulars withheld] is a matrimonial property which was acquired during the subsistence of the marriage between the petitioner and the respondent.
 - (iii) That the respondent has sold a matrimonial property and is in the process of receiving Kshs.700,000/= being part payment.
 - (iv) That the marriage between the petitioner and the respondent has broken down, and the respondent has threatened to use all the proceeds of the said property to her own benefit to the exclusion of the petitioner and the rest of the family.
3. The application is also supported by the affidavit of the applicant, the matters deposed to in the said affidavit can be summarized as follows:
 4. That the parties have been married since 1974, and on 11th July 1991 the respondent/wife was allocated plot No. [particulars withheld] Kileleshwa, Nairobi by the Government of Kenya.
 5. That the allocation was on condition that the allottee should pay to the government Kshs.162,270, according to the affidavit of the applicant, he and the respondent put their resources together and paid the said sum to the Lands Office. In 1999 they decided to sell one of the plots to JMM as per the copy of the Sale Agreement, whereby the purchase price of the plot was Kshs.2.5 million which was payable in quarterly installment of KShs.655,000/=.
 6. The applicant therefore argues that this property which was bought during their marriage should be presumed a joint property following the decision of the Court of Appeal in C.A. No. 74 of 2001 Cosmas Muthembwa - Vs – Eunice Kyalo Muthemwa.
 7. The applicant also invoked in the provisions of Section 27 of the Matrimonial Causes Act. Counsel for the applicant therefore urged this court to grant the orders to the effect that the respondent was holding the suit premises in Trust of the applicant and intercept the balance of the purchase price held by the respondent's advocate.
 8. The application was opposed by the respondent. Her replying affidavit has raised two issues as follows:
Firstly, she argued that the application is bad in law,
 9. Secondly, the application was over taken by events. All the sale proceeds held by R.M. Mutiso & Co. Advocates were released to the respondent as the sale transaction took place in December 2002 and the court cannot issue orders in vain.
 10. I have carefully considered this application and the provisions of the law under which it is founded. I found relevance of the matters raised only in Section 27 of the matrimonial causes Act. In deed according to Section 27 (1) of the M.C.A. the court has power to order settlement of wife's property but this is in a case where the court pronounces a decree for divorce or for Judicial Separation by reason of the adultery, desertion or cruelty of the wife.
 11. This court has not yet pronounced any decree, the court has not inquired into the allegations of adultery, desertion and cruelty, accordingly this application is premature, and without merit and must fail on that score.
 12. Secondly even if the application was property before the court, there is no evidence that was produced to support the applicant's argument that he contributed to the acquisition of the suit premises.



13. If he paid money, how much did he contribute? No payment receipts and so forth were produced.
14. If the applicant was relying on indirect contribution, what form was it in, was he looking after the family while the respondent was working and earning money or was he looking for the children, cooking for them, washing and other household chores? One has to prove either direct or indirect contribution. In reference to the Muthembwa case I beg to differ with tremendous respect, as in my understanding that decision dealt with the twin issues of whether property inherited gifted to one spouse either before or during corveture is subject to an order under Section 17 of the M.W.P.A.
15. Secondly whether shares in a company in which both spouses are shareholders can also be determined under Section 17 of the M.W.O.A.
16. In this regard therefore, this application was not brought under the said Section 17 of the M.W.P.A. nor did it torch on the issues raised in the above authority.
17. In the result, the application dated 26th March 2004 is without merit and is hereby dismissed with costs to the respondent.

It is so ordered.

RULING READ AND DELIVERED ON 29TH OCTOBER 2004.

MARTHA KOOME

JUDGE

