



SA v AA (Civil Case 18 of 2019) [2024] KEHC 8137 (KLR) (Civ) (4 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 18 OF 2019

SN RIECHI, J

JULY 4, 2024

**IN THE MATTER OF SECTION 17 OF THE
MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

AND

IN THE MATTER OF APPLICATION FOR DECLARATION OF PROPERTY RIGHTS.

BETWEEN

SA APPLICANT

AND

AA RESPONDENT

JUDGMENT

1. The Applicant Silas Aduda Filed the suit by way of Originating Summons dated 28.3.2019 seeking the following orders.
 1. That it be declared and decreed that all that property described as Title No.: Nairobi/Block 62/2X0 (hereinafter "the Property") is not Matrimonial property and all income received by the Respondent is held in trust for the Applicant.
 2. That the Respondent vacate the property immediately and in default eviction orders to issue.
2. The grounds for the application are that:
 1. The marriage between the parties irretrievably broke down and has since been dissolved.
 2. That the Applicant acquired the Property in 2000 before the marriage to the Respondent in 2004 and the Respondent did not make any contribution towards the improvement of the Property.



3. The application is supported by the affidavit of the applicant sworn on 28.3.2019 in which he depones that he was initially a tenant on the property since 1997 and bought the same in 2001. He deponed he bought the property through a mortgage finance before he married the Respondent. He avers that the Respondent did not contribute to the acquisition of the property and therefore the property should be declared as his and not matrimonial property.
4. The Respondent filed a Replying affidavit sworn on 30th September, 2019. She depones that she has been staying on the property since 2004 as their Matrimonial Property. She avers that though he applicant is the registered proprietor she has a beneficial interest as they have 2 children. She contends that the applicant holds the property in trust for the children. Finally, Respondent contends that she contributed to the acquisition of the Property as she was taking care of the children of the marriage.
5. The matter processed by way of viva voce evidence before Thande J. The applicant testified that she married the Respondent in 2004 under Customary Law. He had earlier married his first wife in 1998 and stayed with her until 2003 when they parted ways. He testified when they divorced he married a 3rd wife who he is staying with. In 2001 he bought Nairobi/Block 62/2X0 Ayany Estate Kibera through a bank loan. He testified that he took a further bank loan and the Respondent signed the spousal consent. He stated he paid school fees and was earning Ksh.100,000 per month.
6. The Respondent AAM adopted her witness statement and documents dated 26.11.2019 as her evidence in chief and exhibits. She in her statement she states that she has been staying in the suit property. That she has made contribution to the acquisition of the Property and that the court should declare that the applicant holds the Property in trust for her and their children. She stated that the applicant abdicated his role as a husband since 2011 and that the rent she receives is what sustains them and confirm that when she was working she took the responsibility of paying the house-helps. On being cross examined by Achieng' for the applicant she confirmed she got married in 2004. She stated she made monetary contribution towards the Mortgage.
7. Directions were issued by Thande J that the parties file Written Submissions.
8. Mr. Achieng for the Petitioner/Applicant submits that the issue for determination is whether Property No. Nairobi/Block 62/2X0 is Matrimonial Property. Counsel submits that Section 6 of the *matrimonial Property Act* defines Matrimonial Property. He submits that the subject property was acquired in 2000 before he married the Respondent in 2004. Counsel submits that the Respondent was a 3rd wife and the property was acquired during the subsistence of the other earlier marriage. On whether the Respondent made any financial contributions to the acquisition of the Property. Counsel referred to Section 7 of the *Matrimonial Property Act* and Submits that the property was purchased by the applicant through mortgage while at the same time supporting the family expenses. Counsel submits that the Respondent did not make any monetary contribution to the acquisition or improvement.
9. On whether the property should be distributed among the parties, counsel submits that the law provides that separately owned assets remain assets of the owner. Finally, he urges the court to find that the property is not matrimonial property.
10. M/s Kipkenda & Co. Advocates filed submissions for the Respondent. He identifies the two issues for determination as whether the suit property is Matrimonial Property, and whether the respondent made any contribution to the Property.
11. On whether the property is Matrimonial Property. Counsel for Respondent submits that the applicant and Respondent have lived in this property since the date of their marriage and it will be unfair for



applicant to want the Respondent vacate the suit property. He submits that despite the fact that he bought it through Mortgage it remains Matrimonial Property acquisition or improvement. On whether the respondent made any contribution to the Property, Counsel submits that the Respondent made monetary and non-monetary contribution towards the repayment of the Mortgage as she took care of the family expenses while the applicant was repaying the mortgage.

12. From the evidence and submissions the issues lending themselves for determination are:
 - a. Whether Suit Property is Matrimonial Property.
 - b. Whether the Respondent made any contribution to the acquisition of the Property to entitle her a share of the Property.
13. On whether the subject property is Matrimonial Property section 6 of the *Matrimonial property Act* provides that Matrimonial Property is:
 - (a) the matrimonial home or homes;
 - (b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
 - (2) Section 10 of the Matrimonial Act states that:
 - (a) Any Liability incurred by a spouse before the marriage and relating to the property shall, after marriage, remain the liability of the spouse who incurred it.
14. The applicant tendered in evidence transfer of lease dated 14.12.2000 effecting a transfer from the seller Jane Wamuyu Waruinge to Silas Aoko Aduda at consideration of 1,900,000/-. He produced a charge over the same property with Barclays Bank of Kenya for Mortgage and search dated 23.4.2014 indicating that the property is registered in his name. The property had a charge over the suit property for Ksh.700,000/-.
15. From these documents I find that the following is established:
 1. The Property is registered in the name of the applicant.
 2. That the Property was bought in 2000 with a mortgage from Barclays Bank.
 3. The property is still charged to Barclays Bank.
16. The Respondent in her testimony and submissions confirms that the applicant and respondent began their union in 2004. She also confirms that prior to the marriage the applicant had acquired the suit property in the year 2000 through a mortgage. The purchase or acquisition of this property was therefore fully financed by a mortgage taken by the applicant.
17. Is a property acquired by the applicant before marriage to the Respondent Matrimonial Property? Section 6 (g) gives the meaning of matrimonial property a:
 - a. Matrimonial home or homes. Section 2 the interpretation states “matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property.



A matrimonial home under this definition does not necessarily denote a proprietary interest. As a leased or rented house while it can be a matrimonial home the spouses have no proprietary interest.

- b. Household goods and effects in the home or homes or
 - c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
18. In my considered view from the definition above any property that is acquired by either spouse prior to the marriage shall and is separate property owned by the person who acquired it. The other spouse can only acquire interest if she makes contribution to the improvement of the property. That interest will be commensurate with the improvement made. This is provided for by section 9 of the Act which provides:

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.

19. This concept of separate property is further extended to liabilities incurred before marriage. Section 10 Matrimonial Property Act Provides:

Spousal liability

Any liability incurred by a spouse before the marriage and relating to the property shall, after marriage, remain the liability of the spouse who incurred it.”

20. In my view therefore for a property to qualify as Matrimonial Property it must have been acquired during the subsistence of the marriage between the parties. Any property acquired before marriage and registered in the names of one spouse is and remains separate property belonging to the registered owners.
21. On Whether the Respondent made any contribution to the acquisition of the property counsel for the Respondent submits that the Respondent made both monetary and non-monetary contributions towards the repayment of the Mortgage during the subsistence of their marriage. However, in her evidence she stated:

He was not responsible during our stay and it led to many issues coming up. He could disappear on Thursday and come on Tuesday following week and leave us with no food and I had young minor. Since I did not have work and I had child and I took drastic action to survive. I sold some of my items in the house which he has accused me of selling. I am surprised when he says he provided. From 2004 – 2011 I was not paying for mortgage but I took responsibility to meet some expenses. His pay slip was squeezed as he had other commitments for 7 years and I supported him.”

22. The Respondent in her evidence above confirmed that during the subsistence of the marriage – from 2004 – 2011. She did not make any direct contribution to the payment of the mortgage taken by the applicant. From her evidence therefore I find that she did not make any direct financial contribution to the property. Reference was made to her giving spousal consent to a further loan. Spousal Consent in loan application does not confer any proprietary interest to the spouse. It only confirms that he/she



is a spouse of the loan applicant. That she knows about the transaction and that she has no objection to the transaction between the owner of the properties and lender.

23. Upon considering all the evidence, I find that the Property Nairobi/Block/62/280 was acquired by the applicant before he married the Respondent. I also find that the Respondent did not contribute directly or indirectly to the acquisition of the Properties. There is no evidence that the Respondent did contribute or make any improvement to the property.
24. I therefore find that Nairobi/Block 62/2X0 is not Matrimonial Property and belongs exclusively to the applicant.

DATED AT NAIROBI THIS 4TH DAY OF JULY, 2024.

S. N. RIECHI

JUDGE

