



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL APPLICATION NO. 20 OF 2014 (S.O)

BAHO.....APPLICANT

VERSUS

ACAO.....RESPONDENT

JUDGEMENT

1. **BAHO** (“The Applicant”) and **ACAO** (“The Respondent”) got married on the 30th of January 1988 at the [Particulars Withheld] in Nairobi. Their union had two children now all grown up

2. At the time of their marriage both were in salaried employment. The Applicant was an employee of [Particulars Withheld] where she worked till her retirement in 2007. The Respondent on his part was a university lecturer and from time to time engaged in consultancy work.

3. The marriage between the two encountered challenges as a result the Applicant left the matrimonial home in 2004. In the same year she filed for dissolution of the marriage in **Nairobi High Court Case No. 77 of 2004** which matter was finalized on the 4th of October 2019.

4. The Applicant also moved this court by way of Originating Summons on the 26th of March 2014 which summons was amended on 10th April 2014 wherein she sought for the following declarations; -

a. That properties LR No. xxxx and LR No. xxxx Estate, [particulars Withheld] and a home in (Particulars withheld) Sub-Location, East Ugenya Location, Siaya District be declared to be matrimonial properties.

b. That each party be accorded an independent 50% share of the two properties or an equitable proportion of the parties' contribution to the same.

c. That an independent valuation be carried to establish the value of the said properties.

d. That distribution of the matrimonial properties be as follows; -

i. LR No. xxxx and xxxx goes to the applicant in consideration of 50% share of the established value which the applicant will pay the respondent or vice versa or same be sold and proceeds shared equally.

ii. The 50% share of (Particulars withheld) be paid to the applicant by the respondent.

5. Initially there was a claim on other properties, for now, the court will confine itself to the two properties named above as the evidence and submissions addressed only the two. The claim for other items appears to have dropped on the way. In his pleadings the respondent raised issue with yet another property in Westland Nairobi but did not lead any evidence on how the same was acquired or indeed that it was a matrimonial property.

6. The court directed the matter to proceed by way of *viva voce* evidence and a date for hearing of the matter was fixed in court by consent of the parties. On the date the matter was scheduled for hearing neither the respondent nor his counsel were present in court. The matter proceeded with the Applicant their absence notwithstanding.

7. Pleadings

Applicant's pleadings

In the originating summons the applicant informed the court that LR No. xxxx and xxxx (**[particulars Withheld]** home) were jointly acquired and same are in the joint names of the parties. That the said matrimonial home in the city is built on the two portions. Further the two established a matrimonial home in (Particulars withheld) Sub-Location, East Ugenya Location in Siaya District.((Particulars withheld) home)

As relates to the Roslyn Home, it was her case that the said properties were acquired with the joint effort of both parties and she single-handedly provided for the finances towards the development of the said home whereas the respondent supervised the construction. That she would give building funds to the Respondent and at the completion of construction upon making enquiries the respondent gave the estimated cost of building the house at between Kshs.14 – 15 million.

As for the (Particulars withheld) Home it was her case that each one of them contributed towards development and construction of a three bedroomed home.

8. The applicant's case further is that from her salary, loans and other income she paid school fees, medical expenses, family holidays, bought vehicles for the family, food and other supplies.

9. Further the Applicant contents that she made substantial contributions towards the family welfare emotionally, physically, financially and is therefore entitled to a larger share of the two properties.

10. Respondent's Replying Affidavit

The Respondent objected to the Originating summons by way of a replying affidavit. He denied the applicant's assertion that she single-handedly financed the **[particulars Withheld]** Home, and contributed financially to the well-being of the family. He equally refuted the applicant's claim to (Particulars withheld) Home which he asserts is his ancestral home.

11. He further claimed that at the time of marrying the applicant she was a junior officer at the [Particulars Withheld] whereas he was a PhD holder, lecturing at the University and he also undertook several consultancy jobs that enabled him to acquire assets.

12. He further alleged that the applicant failed to disclose other properties she acquired during the subsistence of the marriage in USA, Germany and Kenya and Bank Accounts she held in USA and Germany.

13. He also alleged to have spent Kshs.29,000,000/- from an account held in New York in constructing the **[particulars Withheld]** home and a further Kshs.4,000,000/- to renovate the same when it burnt down.

14. He laid claim on sums he alleged the applicant receives from *Brilat Libe Insurance* and joint accounts which she has blocked him from accessing.

15. Both parties filed written statements that they were to rely on at the hearing. As indicated earlier in this judgement neither the respondent nor his counsel appeared at the hearing.

16. In her evidence in court the Applicant reiterated that she bought the materials for the construction of the **[particulars Withheld]** home and the Respondent merely supervised the construction. It was also her evidence that she obtained loans and would give the Respondent the money to finance the building materials. She never asked him for receipts at the time as they were then happily married. She did ask him though for the cost of the home upon completion which he never provided. At the time she was in a trusting and loving marriage and was not out to supervise her partner. She spent about 12 million shillings.

The Applicant did confirm that they held a joint account from 1995 from the projects/consultancies of the Respondent. She denied having other accounts save for one in Germany which she opened before marriage and is using the same as she now Resides there.

Further she informed the court that she bought a maisonnette for her children when she left the marriage and it is in their names. She also claimed the Respondent has acquired properties in Kasarani, Karen and has a business in Lavington all acquired after the separation and she has not laid a claim on the same.

Further she claimed that since she left the matrimonial home (**[particulars Withheld]** home) the Respondent rented the same and pocketed the rent exclusively.

At the close of her case, she urged the court to allocate 80% of the **[particulars Withheld]** property to her and the children.

17. Counsel for the Applicant submitted that during the duration of the marriage between the parties they had acquired and developed LR No. xxxx and LR No. xxxx (the **[particulars Withheld]** home) and property in (Particulars withheld) Sub-Location, East Ugenya, Siaya District mainly with funds from the applicant. Both are matrimonial property within the meaning of Section 6(1) of the Matrimonial Property Act No. 49 of 2013 (the Act).

R home is in the joint names of the parties whereas the (Particulars withheld) home though ancestral to the Respondent the Applicant contributed in the development of the same, thus improving its value.

Though the **R** property is joint names, it was urged that the Applicant contributed largely to the construction of the same, through bank loans and her salary. The applicant sought 50% share of both R and R home.

Further she sought to be compensated for the rent the respondent has collected from the premises since 2004 to date.

18. On his part the respondent did not adduce any evidence nor file any submissions, so that his statement in court is not verified on oath or tested by way of cross examination and remains to be mere assertion with no evidential value.

ANALYSIS AND DETERMINATION

19. From the evidence on record both parties were in salaried employment when they got married. The Applicant worked with the United Nations and the Respondent was a University Professor and from time to time engaged in local and international consultancies. Both held local and international accounts at least at some point where funds would be deposited from time to time.

Two properties acquired during matrimony are in contention; LR No. **xxxx and xxxx** where the **R** home stands and another home in **R Sub-Location, East Ugenya Location in Siaya District**. The land was inherited by the Respondent in his rural area and therein stands a three bedroomed house.

20. Section 6(1) of the **Matrimonial Property Act (“The Act”)** defines matrimonial property as follows; -

“6 (1) For purposes of this Act, matrimonial property means –

- 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.”**

21. Section 14 of the Act on the provides;

“14. Where matrimonial property is acquired during marriage –

- a. In the name of one spouse, there shall be rebuttable presumption that the property is held in trust for the other spouse; and**
- b. In the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”**

22. For the (Particulars withheld) property the applicant acknowledges that the land was bought jointly. However, she has attempted to demonstrate through her contract and bank accounts that she financed the development of the home and the respondent only supervised the construction. She has failed however as expected to avail receipts and/or proof of purchase of building materials.

The court is alive to the fact that it is not realistic after very many years to expect receipts and especially for materials purchased for construction of a home which was constructed while the marriage was blissful and with no mistrust between the parties then. In any event it is not expected that spouses would collect receipts to keep expecting to need them in the future.

Having stated the above the court is cognizant of the fact that both parties were in salaried employment and must have contributed to the development of their matrimonial home in one way or another. Further there is evidence that the parties at some point held joint accounts so that in the absence of concrete evidence to the contrary and in the absence of evidence to negate this presumption on a balance of probabilities, it will be safe for this court to turn to Section 14 of the Act which provides that where property is in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the property are equal.

The court therefore finds that each of the parties holds 50% interest in (Particulars withheld) home.

23. The Applicant for reasons discussed in another suit (divorce cause) left the matrimonial home. The Respondent lived in it and at some point, rented the property out. A lease renting the property forms part of the record. The house was said to have also been empty from time to time. There would be need for the parties to ascertain the period the house was rented out and the rental income so that the same may be divided equally between the parties.

24. As for the (Particulars withheld) property the applicant states that she helped to develop a three bedroomed house at their rural home, where land it stands on was inherited by the Respondent.

Section 9 of the Act states;

“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, the spouse who

makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

25. In the context of Kenya, many families have two homes. An urban home where the families live on day to day and where they work and a rural home which they visit from time to time as a holiday home or what eventually becomes a retirement home. Section 6(1) (a) seems to recognize that a family is likely to have more than one matrimonial home. So, it is not strange or odd that the parties here developed two matrimonial homes in Nairobi and (Particulars withheld) ; their circumstances are aptly covered by Section 6(1) (a) of the Act.

Section 2 of the Act fortifies the circumstances the parties find themselves in as it states that matrimonial home is to include;

“Any property that is owned or leased by one or both spouses and occupied by the spouses as their family home and includes any other property.”

26. In **Muthembwa vs Muthemwa [2002] 1 EA** the court held

“When gifted or inherited property had been pooled with whatever other property a couple may have possessed and developed by joint effort so that there was an increase in value, the contribution of the spouse to whom the property had not passed has to be taken into account when it came to determining title to that property. (White vs White [2001] 1 ALL ER 1) in this instance, even if it was assumed that the rural property was gifted to the husband, there was unchallenged testimony to the effect that it had been developed during matrimony and accordingly, it was property taken into consideration.”

27. The **Muthembwa case** holding is on all fours with the situation of the instant case and this court in the absence of evidence to the contrary or challenging the applicant’s testimony find that she contributed to the development of rural home and holds that she has a 50% interest on the same.

28. With the above findings the court makes the following orders;

- a. A declaration that R and R properties are both matrimonial properties jointly and equally owned by the Applicant and the Respondent.**
- b. The rent that accrued from time to time on the R property be calculated and shared equally between the parties.**
- c. Both properties be valued to ascertain the value of each by a valuer to be jointly appointed and remunerated by the parties. Should one party fail, the court be at liberty to appoint a reputable firm of valuers and have the ½ share of cost recovered from the party who fails to pay.**
- d. One party may with the agreement of the other buy of the other party’s share, if parties fail to agree to this arrangement both properties be sold at market value and proceeds shared equally.**
- e. Rent as ordered in (b) above may be recovered from the Respondent’s share.**
- f. Costs to the applicant.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 10TH DAY OF FEBRUARY, 2022

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ALI-ARONI

JUDGE