



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ORIGINATING SUMMONS NO. 62 OF 2019
IN THE MATTER OF MATRIMONIAL PROPERTY ACT NO. 49 2013
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

THE CONSTITUTION OF KENYA 2010

BETWEEN

GJ OAPPLICANT

VERSUS

RSA RESPONDENT

JUDGMENT

1. By his Originating Summons dated 12.9.19, the Applicant GJO filed application for orders that's eeks that the following properties be declared to be matrimonial property and that the same are jointly owned by both him and the Respondent RSA and that the same be divided equally between them:

- a) Lukenya Ranch Plot xxx (Lukenya property)
- b) Kajiado Olekasasi/xxx, Ongata Rongai (Rongai property)
- c) Nairobi/Block xxx/xxx Komarock Estate (Nairobi property)

2. The Applicant also seeks that an order that the Respondent holds the Title Nos. Lukenya Ranch Plot xxx and Kajiado/Olekasasi/xxx in trust for herself and the Applicant. That in the alternative, that Kajiado/Olekasasi/xxx be divided between them according to their contribution. The Applicant further sought that the Respondent deposits the original titles in Court for safekeeping.

3. The OS is opposed by the Respondent by her replying affidavit sworn on 21.2.2020.

4. The record shows that the parties herein were in a common law union and were blessed with 3 children born in 1990, 1991 and 1997 respectively. In a judgment of 15.6.17 in Divorce Cause No. xx of 2008, the Court presumed a marriage between the parties and proceeded to dissolve the same.

5. It is the Applicant's case that the suit properties were acquired during the subsistence of the marriage; that the Lukenya property was purchased in 1994, the Nairobi house, their matrimonial home was purchased in 1995 through a mortgage from Housing Finance, while the Rongai property was purchased in 2002 and construction commenced immediately; that he initially worked for [Particulars Withheld] and later in 1986 was employed by [Particulars Withheld] while the Respondent was in 1989 employed by [Particulars Withheld]. He later went to work in the United Kingdom and while there, he periodically sent money to the Respondent; that in 1998, he extended the Nairobi property by building an extra bedroom, reading room and doubled the size of the sitting room; that from 2002, he sent money for development of the Rongai property with a 6 bedroomed house; that upon return from the UK, the Respondent took off with a lover and planned to move into the Rongai property with him; that since his return, he has lived in the said property; he placed a caution on the Rongai property to prevent the Respondent from selling the same; that he is entitled to an equal share of all the properties acquired during pendency of the marriage.

6. The Respondent denied that the allegations by the Applicant in her replying affidavit sworn on 21.2.2020. Her case is that she purchased

the properties through her own means including loans from her employer and family and without any contribution from the Applicant.

7. Parties filed their submissions which I have duly considered and I having done so, I find that the following issues fall for determination:

- i) Whether the suit properties are matrimonial property.
- ii) Whether the Applicant is entitled to a 50% share in the suit properties.

Whether the properties are matrimonial property

8. Section 6 of the Matrimonial Property Act defines matrimonial property as follows:

For the 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**

9. It is clear from the definition that what constitutes matrimonial property is very limited in scope. Matrimonial property is only that property which is the matrimonial home or homes of the parties and household goods and effects in such home or homes. Matrimonial property is also that property jointly owned by the parties and acquired during the subsistence of their marriage. It must be noted that fact of acquisition of a property during the subsistence of a marriage does not necessarily make it matrimonial property.

10. The evidence on record shows that the Nairobi property is registered in the name of both parties while the Lukenya and Rongai properties are in the name of the Respondent alone. The evidence further shows that both the Nairobi and Rongai properties were the parties' matrimonial home. In the divorce cause, the Respondent averred that the parties cohabited in the Rongai and Rongai properties. Accordingly, the Lukenya and Rongai properties, having been the matrimonial homes of the parties prior to the divorce are by definition, matrimonial property.

Whether the Applicant is entitled to a 50% share in the suit properties.

11. The Applicant has asked the Court to make a declaration that he is entitled to 50% of the suit properties.

12. The law governing division of matrimonial property is contained in Constitution of Kenya, 2010 and the Matrimonial Property Act. Article 45(3) of the Constitution provides:

Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

13. The Matrimonial Property Act was enacted to give effect to the principle in Article 45(3) of the Constitution. Section 7 of the Act makes provision relating to ownership of matrimonial property as follows:

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

14. The Court has made a finding that the Nairobi and Rongai properties are matrimonial property. Under Section 7 of the Act, the Court may, on the basis of evidence before it, vest this property in the parties, according to their contribution and divide the same between them, upon dissolution of the marriage.

15. Additionally, there are certain presumptions that may be made as to property acquired during marriage. Section 14 of the Act provides:

Where matrimonial property is acquired during marriage—

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

16. It is with these provisions in mind that the Court will consider the Applicant's prayer for division in equal shares of the matrimonial properties herein.

17. It is common ground that the Nairobi property is in the parties' names. The Applicant claims that they got a loan from housing Finance to purchase the property. The Respondent denied these claims and contended that she purchased the Nairobi property through her employer's mortgage program with Housing Finance to help staff acquire houses. Although they are both on the title on the Applicant's insistence, payments were deducted from her pay slip. She exhibited pay slips indicating monthly deductions of Kshs. 13,000/= for the Housing Finance

loan. The Respondent stated that in 1992, the Applicant was dismissed from his employment and the Respondent assisted him to go to the United Kingdom so that he could support the family. He however became promiscuous and did not support the family leaving the Applicant to raise the children alone. She had to take loans to sustain the family. The Applicant has not demonstrated that he made any financial contribution to the purchase of the house. He did not provide any bank statements or pay slip to support his contention. Accordingly, I am satisfied from the available evidence that the loan for the purchase of the Nairobi property was serviced solely by the Respondent deductions from her salary.

18. The Applicant has further stated that in 1998, he immensely developed the Nairobi property by building an extra bedroom, reading room and doubled the size of the sitting room. Again, no evidence was placed before this Court on the sums utilized for the renovations or the source of the funds.

19. The Court is however alive to the fact that non-monetary contribution can be taken into account to determine division of matrimonial property. Section 2 of the Act which stipulates that non-monetary contribution includes:

(a) domestic work and management of the matrimonial home;

(b) child care;

(c) companionship;

(d) management of family business or property; and

(e) farm work;

20. Prior to the breakdown of the marriage, there were no doubt periods in which the Respondent gave the Applicant companionship. Indeed, the parties during their marriage were blessed with 3 children. While it is difficult to quantify this companionship accorded to the Respondent by the Applicant, the same though not pleaded ought to be taken into account in determining the Applicant's entitlement to this property. To disregard this unquantifiable non-monetary contribution by the Applicant would clearly negate the equality principle in Article 45(3) of the Constitution and result in injustice. Accordingly, the Court makes a finding that based on this non-monetary contribution, the Applicant is entitled to a beneficial interest in the Nairobi property.

21. As regards the Rongai property, the Applicant claims that he and the Respondent acquired the same in 2002 and commenced construction in 2004. He further stated that while in the UK between 1994 and 2004, he solely sent all the money for the purchase and development of the Rongai property. He did so through western union and his account in Barclays Bank UK. He exhibited an email from Wester Union indicating that he had sent to the Respondent the sum of Kshs. 14,056.08 on 2.6.04 and Kshs. 28,137.49 on 4.6.04. He also exhibited a bank statement of his Barclays from which the Respondent withdrew Kshs. 20,000/= on 29.12.04. He also exhibited 2 letters dated 10.1.02 from Abuodha & Omino Advocates make no reference to him. The first letter is addressed to the Respondent acknowledging receipt from her of bankers cheques for Kshs. 18,000/= and Kshs, 100,000/= and cash of Kshs. 7,000/=. The second letter is addressed to Mwaura advocate forwarding the said sums in furtherance of the purchase by the Respondent of the property. The 2 letters make no reference to the Respondent.

22. To buttress his claim, the Applicant filed an affidavit sworn on 23.8.12 by Franklin Omino, advocate. Omino averred that on instructions of the Applicant he drafted the agreement for sale in the joint names of the parties. He further averred that the Applicant's absence from Kenya was delaying the transaction as he had to be physically present in Kenya to execute the agreement and transfer. In view of this, the Applicant instructed the Advocate to revise the Agreement in the name of the Respondent alone, which he did. The Court has considered that averments of the Advocate and finds the same is laughable. The absence from the country is not and can never be a hindrance for a party to execute documents. Nothing would have been easier than sending the documents by any one of the many courier companies, for execution by the Applicant in the presence of a notary. Further, from a close look at the advocate's witness statement, I note that the signature is different from that in the 2 letters dated 10.1.02. The Court also notes a discrepancy in that while the advocate averred that the vendor worked for Supa Loaf in Kangundo Road in the letter, it is indicated that the vendor was Laghos Limited. The Court has therefore formed the opinion that the witness statement may not have been authored by F. I Omono advocate of Abuodha & Omino Advocates.

23. The Respondent's evidence is that while in the UK, the Applicant neglected his responsibilities and left the Respondent to cater for their children alone. He sent her money just twice through Western Union. It is her case that she purchased the Rongai property through loans from her mother, Barclays Bank and compensation for an injury sustained at work. After she lost her job with Kenya Airways she worked with Jetlink and later got a job in Dubai where she works to date. She stated that in order to make ends meet, she and the children moved into the incomplete Rongai property and got a tenant for the Nairobi house to supplement her income. She completed construction of the Rongai house in 2006 and has been paying water and electricity bills on the properties.

24. The Respondent's further evidence is that upon return from the UK with nothing, the Applicant moved into the Rongai property and kicked out their children and her brother with whom they were staying. The Court in the divorce cause issued orders barring the Applicant from accessing the said house. She contended that that the Applicant lives rent free in her house since 2008 and continues to collect rent from the Nairobi house since 2008. To the Respondent therefore, the Applicant has approached the Court with unclean hands and seeks to unjustly enrich himself. The Respondent prayed that the Applicant accounts for the rent collected from the Nairobi house and reimburse her for legal costs. She also prayed that he be evicted from the Rongai house as the same was sold to a third party. Her final prayer is that the Court determines that the 3 properties belong to her to the exclusion of the Applicant.

25. In an increasing line of authorities, Courts have held that the equality of parties in Article 45(3) does not translate to equal proprietary entitlement. In the oft cited case of P N N v Z W N [2017] eKLR, Kiage, JA succinctly stated:

First, while I take cognizance of the marital equality ethos captured in Article 45 (3) of the Constitution, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough;

The learned Judge went on to state:

Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra.

26. And in EGM v BMM [2020] eKLR the Court of Appeal faulted Musyoka, J. for finding that equality of parties in Article 45(3) means that the fact of marriage gives spouses an automatic 50% share of the matrimonial property. The Court opined:

We think it was erroneous for the learned judge to assume and hold that the Constitution gives spouses an automatic 50% share of the matrimonial property simply by being married.

27. The Court of Appeal in the EGM v BMM case (supra), went on to state:

The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed.

28. It is clear from the foregoing that dividing property between spouses on a 50-50 basis simply because of their marriage would result in injustice in the sense that one spouse would be unfairly denied their due share and the other would be enriched beyond their contribution, thereby infringing on one party's rights. The equality of spouses in relation to property means that their entitlement thereto must be commensurate to their respective contribution. Accordingly, contribution is key to making a determination of ownership or interest of each spouse in property, whether matrimonial or otherwise.

29. In the present case, the Applicant has not availed any evidence demonstrating that he contributed to the acquisition and development of the Rongai property or indeed any of the properties. While he was in the UK, he did not send any money to the Applicant other than the 2 remittances shown. It is evident that he did not support the family and the responsibility fell on the Respondent. The Applicant upon his return, then moved into the Rongai property purchased and developed by the Respondent and is now claiming a share thereof. The beacon certificate dated 15.3.02 he exhibited by the Applicant for the Rongai property which he signed, does not indicate the particulars of the property to which it relates. In any event, the same cannot be proof of contribution towards the purchase and development of the property. My finding therefore is that the Rongai property was solely purchased and developed by the Respondent without any contribution by the Applicant.

30. When enacting the Matrimonial Property Act, Parliament recognized that there will be property acquired by one spouse during the subsistence of marriage, that does not constitute matrimonial property. Provision was therefore made in the Act, as to how the other spouse may acquire an interest in such property. Section 9 of the Act 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.

31. The Lukenya property falls under the category contemplated in Section 9 of the Act. The property was acquired by the Respondent during the subsistence of the marriage. The Respondent stated that she purchased this property in 1994 for Kshs. 10,000/=. The Plot certificate dated 27.5.94 indicates that the Respondent is the owner of the plot and had fully paid the agreed sum of Kshs. 10,000/=. The Applicant claims a 50% beneficial interest in the property. Nothing was however placed before the Court to demonstrate the contribution by the Applicant towards the purchase or improvement of this property. Accordingly, my finding is that the Applicant has not acquired any beneficial interest in the Lukenya property. The Respondent cannot, for this reason, be said to be holding the property in trust for the Applicant.

32. It is trite law that he who asserts must prove. Section 107 of The Evidence Act stipulates:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

33. In order for the Court to grant the orders sought by the Applicant, the onus was upon him to prove contribution towards the acquisition and development of the suit properties. Notably, other than the Nairobi property, he did not tell the Court the price which he paid for the properties. He did not state the source of funds nor did he show any evidence of payment from his bank accounts or receipts issued to him for

the purchase of the properties. His claims are fraught with generalities. On the other hand, the Applicant exhibited her pay slips, statements from Wandeghe Sacco for the loans she took. The Applicant did not lay any material before Court to demonstrate his contribution or rebut the claims by the Respondent that the properties belong to her. He has therefore failed to discharge the burden of proof placed upon him in law. The Court has also considered that the Respondent alone bore the responsibility of raising the children without any assistance from the Applicant.

34. In the end, I make the following declarations and orders:

- a) A declaration is hereby made that Nairobi/Block xxx/xxx Komarock Estate is matrimonial property.
- b) A declaration is hereby made that the Applicant is entitled to a 25% share in Nairobi/Block xxx/xxx Komarock Estate while the Respondent is entitled to 75%.
- c) The property shall be sold and the proceeds shared between the parties in the proportions stated.
- d) The Applicant shall account for all the rent he has collected from the said property and 75% thereof shall be deducted from the Applicant's share of the proceeds of sale of the property.
- e) A declaration is hereby made that the Respondent is entitled to 100% of Lukenya Ranch Plot xxx and Kajiado Olekasasi/xxx.
- f) This being a family matter, each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF JUNE, 2021

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**