



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL SUIT NO.3 OF 2019

LMB.....APPLICANT

VERSUS

CMM.....RESPONDENT

J U D G M E N T

[1] The applicant, **LMB**, vide the originating summons filed herein on 30th December 2019, seeks against the respondent, **CMM**, the following declaratory Orders:-

- (1) That the matrimonial property being land parcel No.Isukha/Lukosa[...] being their first matrimonial home “inherited” by the respondent and developed by their joint efforts during the subsistence of their marriage and registered in the name of the respondent do remain registered in the sole name of the respondent.
- (2) That the matrimonial property being m/v Reg No.KBU [...] Range Rover and m/v Reg No.KBU [...] Lorry, acquired by their joint effort during the subsistence of their marriage with the latter being registered in both their names and currently in the custody of the respondent be both registered in the name of the respondent and be wholly owned by him.
- (3) That the matrimonial property being m/v Reg No.KBK [...] Toyota Mark II and m/v Reg No.KCF [...] Lorry acquired by their joint effort during the subsistence of their marriage be registered in the sole name of the applicant and be wholly owned by herself for her maintenance.
- (4) That the matrimonial property being land parcel No.South Teso/[...] and subsequent development thereof acquired by their joint effort during the subsistence of their marriage and registered in both their names be registered in the sole name of the applicant for her maintenance and that of the two issues of the marriage namely GAM and JWM.
- (5) That the matrimonial property on plots numbers [...], [...] and [...] Busia Municipality and subsequent developments thereon acquired by their joint efforts during the subsistence of their marriage and registered in both their names be registered in the sole name of the applicant for her usage and maintenance and the maintenance of the two issues of their marriage namely GAMand JWM.
- (6) That the matrimonial property under land parcels Nos [...], [...], [...],[...] and [...] South Teso/Angoromo, being their second matrimonial home together with the developments, thereon acquired by their joint efforts during the subsistence of their marriage and registered in both their names save for land parcel South Teso/Angoromo/[...], all be registered in the sole name of the applicant.
- (7) That the matrimonial property being land parcel No.Bukhayo/Bugengi/[...] acquired by their joint effort during the subsistence of their marriage and registered in both their names be registered in the sole name of the applicant to hold in trust for the two issues of their marriage namely GAM and JWM for their maintenance.
- (8) That the purchase price balance for land parcel No.Bukhayo/Bugengi/[...] of about ksh.three (3) million be paid using the proceeds from the commercial property on plots No.[...], [...] and [...] Busia Municipality and on land parcel No.South Teso/Angoromo/[...] until payment in full.
- (9) That the matrimonial property [Particulars withheld] Hotel Ltd being a Company established jointly by themselves whose shares are distributed at a ratio of 200 to 800 respectively be wholly relinquished to the applicant.

(10) That the matrimonial property [Particulars withheld] Ltd being a company established jointly and run by themselves be dissolved and the proceeds be shared in accordance with the shareholding ratio.

[2] The grounds in support of the application are set out in the applicant's supporting affidavit dated 30th December 2019, and are opposed by the respondent on the basis of the grounds and averments contained in his replying affidavit dated 20th January 2020, which were responded to by the applicant in her supplementary affidavit dated 28th February 2020, and who subsequently filed an application vide the notice of motion dated 29th May 2020 seeking interlocutory orders to the effect that the applicant and the second issue of the marriage do occupy the matrimonial home situated in Busia jointly owned by her and the respondent pending the hearing and determination of this cause.

[3] This was followed by another application by the respondent vide the notice of motion dated 24th September 2020, for production by the applicant all title documents and registration certificates respecting the suit parcels of land and the suit m/vehicles and the deposit of the same in court pending hearing and determination of the suit. A second application was filed by the applicant vide the notice of motion dated 17th November 2020, seeking orders for occupation of the matrimonial home in Busia by the applicant and the second issue of the marriage pending hearing and determination of this cause and for renting out three houses within the said matrimonial home by the applicant to meet her day to day expenses and for the maintenance of the two issues of the marriage.

[4] This latest application was heard and allowed by the court on 26th January 2021, but the respondent filed a notice of motion dated 27th January 2021, for stay of execution and review of the court order. The respondent also filed a notice of appeal dated 27th January 2021, against the court order.

Yet, a third application vide a notice of motion dated 1st February 2021, was filed by the applicant for police protection in the execution of the court order made on 26th January 2021.

[5] These interlocutory applications only served to delay the expeditious disposal of the originating summons and were clearly a pointer to the acrimony existing between a former wife and a former husband sparked off by a divorce which has turned out to be too messy and costly.

Be that as it may, on the 11th March 2021, directions were given by this court that all the pending applications be held in abeyance pending the hearing and determination of the originating summons.

[6] On 20th April, further directions were given that the hearing of the suit proceed by way of affidavit evidence, written witness statements and written submissions in keeping with the Ministry of Health Covid 19 prevention protocols on social distance.

The applicant complied by filing a witness statement dated 2nd June 2021 and an undated supplementary affidavit filed on 13th July 2021. The respondent on the other hand filed further affidavits dated 7th June 2021 deponed by himself and one Bernard Abuka Masambu.

[7] All the affidavits filed herein by the parties respectively, together with the annexures thereon and written statements that may have been filed formed the pleadings and evidence in this case and it is from them that the issues for determination by this court arose. Such issues are **firstly**, whether the specified movable and immovable property are matrimonial property available for dissolution between the parties on account of the legal distribution of their marriage and **secondly**, whether the mode of distribution of the specified property as proposed by the applicant meets the legal and equitable threshold required in the distribution of matrimonial property.

[8] No dispute arose with regard to the existence of a marriage relationship between the applicant and the respondent. This appears to have commenced informally in the year 1995 but was customarily formalized in the year 1997 and statutorily formalized in the year 2006. A long the way, the first "bundle of joy" (**issue**) came in the year 2001 while the second issue came allegedly in the year 2016 by vitro fertilization. Those were indeed happy and joyful times based on love and respect such that the thoughts of difficulties, disputes and unhappiness did not feature in the minds of the couple.

[9] But, as it is often said, "you never can tell about tomorrow". The couple's bliss or "seventin heaven" came to an abrupt end in the year 2020 by way of formal and legal dissolution of the marriage. Their previous "raha (**happiness**) turned into "karaha" as the waswahili (Swahili people would say. All due to material and/or financial wealth accumulated by the couple during their coverture or subsistence of their marriage. Now that the marriage is over, each one of them is entitled to a share of the wealth in whatever form and degree since they did not sign a pre-nuptial agreement which is a norm among the super rich in the western world but is yet to gain momentum in the developing countries and/or the "third world".

[10] This explains why a very personal disagreement or dispute between erstwhile couples end up in family courts rather than being resolved amicably outside the courts, where the criteria for determination of disputes relating to matrimonial property is set by the applicable law and the evidence availed by the parties to the dispute which essentially revolves around the distribution of the property among themselves.

[11] In this country, for a very long period of time, the law guiding distribution of matrimonial property was **S.17 of the English Married Women Property Act, 1882**. This was a statute of general application which allowed a party to apply by summons or otherwise in a summary way to a judge of the High Court of Justice for determination of any question between husband and wife as to the title to or possession of property. The court would then make such orders as may be necessary with respect to the property in dispute.

[12] It was thus held in **Hine Vs. Hine (1962) 1 WLR 1124**, that the jurisdiction of the court over family assets under **S.17 of the Act** was entirely discretionary and that the discretion transcended all rights, legal or equitable and enabled the court to make such order as it thinks fit and was entitled to make such order as appears to be fair and just in all the circumstances of the case.

[13] In the Kenyan case of **Kivuitu Vs Kivuitu (1999) 2 KAR 241**, brought under **S.17 of the Married Women Property Act, 1882**, the

Court of Appeal held that parties in a marriage relationship were entitled to matrimonial property in equal shares and that if the property was registered in the name of the husband alone, that the wife would be perfectly entitled to apply to the court under S.17 of the Act for the court to determine her interest in the property and in that case the court would have to assess the value to put in the wife's non-monetary contribution.

[14] In **Kamore Vs. Kamore (2000) 1EA 80**, the court held that actual contribution has to be proved and in **Essa Vs. Essa Civil Appeal No.101 of 1995**, the court observed that the law with regard to the disposal of matrimonial property upon dissolution of a marriage is fairly well settled. Where property is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares. There is of course no presumption and there could not have been any, that any property acquired during the subsistence of the marriage must be treated as being jointly owned by the parties.

[15] In **Karanja Vs. Karanja (1976-80) 1KLR**, it was stated that the contribution of the wife need not be direct payment towards purchase of matrimonial property, but may be indirect such as meeting household and other expenses which the husband would otherwise have had to pay and in **Njoroge Vs. Ngari (1985) KLR 480**, the court held that in matrimonial property dispute, if the property is held in the name of one person, even if that property is registered in the name of one person but another contributed towards acquisition of the property, then both persons have proprietary interest in that property.

[16] In **Nderitu Vs. Nderitu Civil Appeal No.203 of 1997**, the court is holding that the wife's non-monetary contribution should be taken into account stated that:-

“A wife's contribution and more particularly of a Kenyan African wife will more often, than not take the form of a backup service on the domestic front rather than a direct financial contribution. It is incumbent therefore upon a trial judge hearing an application under S.17 of the Act to take into account this form of contribution in determining the wife's interest in the assets under consideration.”

[17] A five judge bench of the Court of Appeal in **Echaria Vs. Echaria (2007) 2EA 139**, stated that, where the disputed property is not registered in the joint names of the spouses but it is registered in the name of one spouse, the beneficial share of each spouse would, ultimately depend on their proven respective proportions of financial contribution either directly or indirectly towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution it may be equitable to apply the maxim **“Equality is equity”**

[18] All the foregoing decisions related to matters bought under S.17 of the **English 1882 Act**, which was rendered unnecessary on enactment of the **English Matrimonial Proceedings and Property Act, 1970**. This Act empowered the court to make property adjustment orders and in doing so, consider the contribution made by each of the spouses to the Welfare of the Family including any contributions made by looking after the home or caring for the family.

In this book **“The Due Process of Law (1980)”**, Lord Denning, observed that until the enactment of the aforementioned **English Matrimonial Proceedings and Property Act**, a wife who had made other important non-financial contributions such as staying in the house, keeping it clean, bringing up children etc was left without a remedy.

[19] In **Kamore Vs. Kamore (supra)**, the court opined that such laws should be enacted to cater for the conditions and circumstances in Kenya as in England. Later, in **Echaria V. Echara (supra)**, the court observed that there was no sign so far that parliament had any intention of enacting the necessary legislation on matrimonial property. That, it was a sad commentary on our own Law reform agenda to keep the country shackled to a 125 year old foreign legislation which the mother country found wanting more than 30 years ago.

[20] The court went further to state that in enacting the 1967, 1970 and 1973 Acts, Britain bought justice to the shattered matrimonial home.

What about Kenya, our motherland???. It may safely be stated that justice was brought to our shattered matrimonial home by the promulgation of the new Constitution in the year 2010, in the sense that under **Article 27 (1)**, every person is equal before the Law and has the right to equal protection and equal benefit of the Law. And, under **Article 40 (1)**, every person has the right either individually or in association with others to acquire and own property.

[21] **Article 45 (3)**, provides that 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. Under **Article 68 (c) (iii)** parliament was mandated to enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and/or the termination of marriage.

Pursuant to the said provision of the Constitution, our parliament enacted the **Matrimonial Property Act, 2013**.

[22] The Act commenced on the 16th January 2014 and is the current statutory Law for the purposes of this and related suits. Indeed, this originating summons dated and filed herein on 30th December 2019, is brought under the provisions of the Act and with regard to the **first issue** for determination, S.6(1) of the Act defines matrimonial property to mean:-

- (a) The matrimonial home or homes
- (b) Household goods and effects in the matrimonial home or homes or
- (c) Any other movable and immovable property jointly owned and acquired during the subsistence of the marriage.

[23] The fact that the marriage between the applicant/plaintiff and the respondent/defendant was formalized under statutory Law in the year 2006 and not 2016 as shown in the exhibited decree absolute is not disputed and so too is the fact that prior to that year the parties had cohabited as husband and wife from the year 1995. However, the actual formalization of the union under the customary norms applicable to the parties occurred in the year 1997, which should be treated as the year that the parties actually entered into a marriage relationship.

[24] Thus, the marriage lasted for a period of approximately twenty-three (23) years within which period the parties acquired both movable and immovable property which therefore falls within the meaning and classification of matrimonial property, as indicated in prayers one (1) and six (6) of the originating summons together with other property mentioned in prayers two (2), three (3), four (4), five (5), seven (7) and eight (8). Prayers (1) and (6) relate to the couple's two matrimonial homes and any improvements and/or developments thereon.

[25] The property mentioned in prayers (9) and ten (10) would not in the opinion of this court fall under the definition of matrimonial property for purposes of distribution. These are the entities operating as Chef West Hotel Ltd and Shieywe General Contractors Ltd which cannot be treated as matrimonial property on account that they are business entities owned and operated by limited companies under the same names and whose directors are the applicant/plaintiff and the respondent/defendant.

[26] A company enjoys a separate and distinct legal entity from that of its director and has power to sue and be sued. Any dispute relating to ownership and operations of a company fall within the realm of the Companies Act and Commercial Courts. This court would therefore divest itself of the jurisdiction to deal with matters of share capital and dissolution of the companies aforementioned.

[27] With regard to the second issue for determination, prayers (1) to (8) of the originating summons are proposals made by the applicant on the distribution of the specified matrimonial property. No doubt, the proposals are largely skewed against the respondent despite the fact that the evidence in its totality establishes on a balance of probabilities that both the applicant and the respondent made substantial contributions either directly and/or indirectly towards the acquisition and/or development of the entire matrimonial property. It would therefore not be far fetched for this court to opine that the contributions made by either party were equal respecting all the property save the first matrimonial home which stands on ancestral land gifted to the respondent by his family but developed with substantial contribution from the applicant. Although both parties appear to have been on salaried employment within part or most of the period. They remained married, it is evident that the accumulation of their wealth cannot be attributed to their salary which was rather meagre for both but to the business they set up and operated through companies created by themselves. These were very profitable and successful businesses for which they devoted their time and energy to enable them acquire both movable and immovable property and discharge the bank loans which were secured by the immovable property acquired by their joint efforts.

[28] Under S.7 of the **Matrimonial Property Act**, 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.

As noted hereinabove, the contribution made by the parties towards acquisition of matrimonial property was equal save the first matrimonial home.

[29] S.9 of the **Act** provides that:-

“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.”.

This provision would apply to the first matrimonial home for which the applicants beneficial interest would be placed at 30% against the respondent's 70% by dint of the fact that the property stands on land “inherited” or gifted to the respondent by his kin.

[30] Where property is registered in the joint names of the spouses, the Law presumes that such property is held by the parties in equal shares. Herein, the presumption holds as it was not rebutted by any cogent evidence from either party. Indeed, S.14 (b) of the **Act**, clearly indicates that where matrimonial property is acquired during marriage in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

[31] This principle of equality is actually reflected in most of the prayers contained in the originating summons, particularly prayers 2,4,5,6 and 7 which show that the properties mentioned therein are registered in the joint names of the parties. However, the mode of distribution proposed by the applicant goes against the principle inasmuch as she claims the property wholesome yet the entire matrimonial property was acquired and/or developed by their joint efforts. In the circumstances, this court deems it necessary to vary or adjust the proposed mode of distribution.

[32] In that regard, the immovable property subject of prayers (4), (5), (6) and (7) shall be shared equally between the parties at the ratio of 50:50% and the property subject of prayer (1) shall be shared between the parties at the ratio of 70:30% in favour of the respondent.

The movable property subject of prayers (2) and (3) shall be registered in the joint names of the parties unless they are owned by the limited companies aforementioned and/or be sold and the proceeds thereof be shared equally between the parties.

[33] With regard to prayer (8), the balance of the purchase price respecting the immovable property mentioned therein in the sum of ksh.3 million be liquidated equally between the parties at the rate or in the sum of ksh.1.5 million each.

For prayers (9) and (10) the entities mentioned therein are not available for distribution for reasons aforementioned. Therefore, these prayers are dismissed.

With regard to the costs of the suit, each party shall bear their own costs.

As regards the pending interlocutory application which were held in abeyance to pave way for the hearing and final determination of this suit the same are now effectively rendered obsolete.

Accordingly, it is so declared and ordered.

J.R. KARANJAH

J U D G E

[Dated and Delivered this 22ND day of JULY 2021]