



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

HIGH COURT CIVIL CASE NO. 6 OF 2020 (O.S)

MAI.....APPLICANT

VERSUS

AKK.....RESPONDENT

RULING

A. SUMMARY OF PLEADINGS

1. The applicant herein filed the instant application dated 4.10.2019 and wherein she seeks a declaration that Land Reference No. Gaturi/Nembure/xxxx is jointly owned by the applicant and the respondent and is a matrimonial property; a declaration that the same is held in trust by the respondent; the suit land being a matrimonial property be sold and proceeds shared equally between the applicant and the respondent; and that the respondent be condemned to pay the costs of the application.
2. The summons is premised on the grounds on its face and further supported by the affidavit sworn by the applicant herein. In a nutshell, the applicant's case is that she was married to the respondent in 1998 but they have since divorced. That they jointly acquired Land Reference No. Gaturi/Nembure/xxxx during the subsistence of the said marriage and they established their matrimonial home and made other developments thereon. Further that she contributed both directly and indirectly to the acquisition of the land and construction of the matrimonial home from her salary and Sacco loans but the same was registered in the names of the respondent as the head of the family. That the respondent chased her away together with the children and never allowed them back as a result of which she filed the divorce being Divorce Cause No. 16 of 2018 and their marriage was dissolved. That since the suit land is narrow and incapable of sub-division, the option available is to have the same sold and the proceeds equally shared between them due to their equal contribution.
3. The summons is opposed by the respondent by way of a replying affidavit and wherein he denied the applicant's alleged 50% contribution to the matrimonial property. He deposed that after they acquired the land, he build a timber house at a cost of Kshs. 125,000/- and that he disposed the properties he had acquired before they got married such as LR. Kyeni/ Kigumo/xxxx and motor vehicle registration number Toyota AE96 Kxx xxxx to facilitate the construction of the matrimonial property. He proceeded to tabulate the contributions by each of them. He proposed that the suit property be disposed off and that he does get a higher percentage of 70% and the applicant 30%.
4. With the leave of the court, the parties herein filed supplementary affidavits wherein they reiterated their rival positions.

B. SUBMISSIONS BY THE PARTIES

5. The summons were disposed off by way of written submissions. The applicant essentially submitted that she equally contributed to the purchase and development of the suit land and as such the same should be sold and the proceeds shared equally. She relied on the definition of matrimonial property as defined in Section 6 of the Matrimonial Property Act and further on Section 7 of the said Act to the effect that ownership of a matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and should be divided between the spouses if they divorce or otherwise the marriage is dissolved. Further that, the suit property was registered in the respondent's name as the head of the family and thus he holds in trust for her. She placed reliance on Section 14 of the Act. Further reliance was made on Section 2 on definition of contribution and the applicant submitted that she contributed more to the acquisition of the land as she was also taking care of the children of the marriage. As such, the property ought to be shared equally.
6. The respondent on his part submitted that the main issue ought to be on the ratio of sharing the suit land and submitted that he contributed Kshs. 1,040,000/- and the applicant Kshs. 430,000/-. That the applicant did not prove contribution more so, monetary, and further that Section 7 of the Matrimonial Property Act infer 50-50 percentage sub-division. Reliance was made on Zipporah Wangui –vs- Peter Njuguna to the effect that sharing of matrimonial property must be on the basis of fairness and conscience and not 50:50 mantra. He further submitted that as to indirect contribution, he contributed more having been left with the children of the marriage as the applicant was residing in her official residence.

C. ISSUES FOR DETERMINATION

7. I have considered the pleadings herein together with the rival submissions filed by the parties. It is not in dispute that the parties were married and the said marriage was dissolved by an order of the court in Embu Chief Magistrate's Divorce Cause No. 16 of 2018. Further, it is not in dispute that the suit property herein was acquired during the subsistence of the marriage between the parties herein as the respondent has not disputed the same. Further, it is not in dispute that there stands a house on the said property and which was built during the subsistence of the marriage. **Section 2 of the Matrimonial Property Act 2013** defines matrimonial home to mean

“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.”

8. Further **Section 6(1)** defines matrimonial property to mean:-

a. Matrimonial home or homes

b. Household goods and the 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. The applicant's case is that she contributed both directly and indirectly in the acquisition of the suit land and in construction of the matrimonial house on the said land parcel and she annexed photographs of the said development and further that she took loans and used the said proceeds to buy the land and develop it but the same was registered in trust by the respondent.

10. It therefore means that the suit land herein together with the house built thereon is matrimonial property as it is not disputed that they lived on the said property and having established their home thereon. Further, section 14(a) of the Act provides that where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. In the instant case, the suit land being a matrimonial property as was acquired during the subsistence of the marriage and as was admitted, and being registered in the name of the respondent, it can only be said that the same was held in trust for the applicant. There was no evidence tendered by the respondent to rebut the said presumption. In fact, he admitted that the suit land is matrimonial property.

11. In opposition to these averments, the respondent deposed thus (paragraph 7 of the replying affidavit)

“..after we acquired the matrimonial property, I built a house made of timber at a cost of Kshs. 125,000/-.”

In paragraph 8 thereof he deposed that he disposed of the properties he had purchased before they got married being LR Kyeni/Kigumo/xxxx and motor vehicle registration number Kxx xxxx to facilitate the construction of the matrimonial property. At paragraph 9 he tabulated the respective contribution by each of the parties herein and wherein he indicated that the land parcel in issue was purchased after each of them contributed Kshs. 120,000/-.

12. From the reading of the pleadings and the submissions, it is not in dispute that the parties herein made equal contributions towards the building of the permanent house. The applicant deposed that she was employed by the Teachers' Service Commission and that she took loans which they used to construct the house and denied having contributed less money. The respondent on his part deposed and further submitted that he disposed his earlier owned properties so as to construct the said house. He indicated that he spent Kshs. 270,000/- in constructing the permanent house of which he deposed that he sold Kyeni/ Kigumo/ xxxx at Kshs. 110,000/- and motor vehicle registration Kxx xxxx at Kshs. 160,000/- both to finance the construction of the said house.

13. However, he stated that the applicant contributed Kshs. 270,000/- in the said construction and which is the same as what he contributed. In my view, it does not matter the source of each of the parties' contribution (money). What matters is what a party brought to the table. The respondent having disposed of his house and car to bring to the table Kshs. 270, 000/- is of equal value with the Kshs. 270,000/- which the respondent acknowledged as the applicant having contributed.

14. It is trite that where there is admission, evidence ought not to be tendered to prove the admitted fact. Further, admission can either be *express or implied either from the pleadings or otherwise, e.g. in correspondence.* (See decision (*Madan JA*)'s decision in **Choitram –vs- Nazari (1984) KLR 327**). **It is my view that in the instant case, the respondent in his replying affidavit indeed admitted as to the applicant having contributed half of the costs incurred** in acquiring the suit land and further in **putting up the matrimonial house.**

15. It is therefore my considered view that the applicant's half contribution to the purchase of the suit land and putting up the house was admitted by the respondent in his replying affidavit. As such, it is proper to hold (and I so hold) that the applicant contributed equally towards the purchase of the suit land herein and to the construction of the matrimonial home. As such, the parties herein ought to share the property in the ratio of 1:1 or rather 50:50.

16. I am alive to the provision of Section 7 of the Act which provides that:- “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”. As such, for a party to get a share of the matrimonial property upon dissolution of a marriage, the said share should be commensurate to the contribution by the said party. Prove of contribution is therefore paramount in suit such as the one before this court. However, in the instant case and as I have already held the issue as to the parties' contribution is not disputed. The contribution by the applicant was admitted by the respondent. The same being matrimonial property but being registered in the name of the respondent, he holds it in trust for the applicant.

17. In the end, I find that the application herein is merited and I do allow the same in terms of prayers 1, 2, 3 and 4.

18. Each party shall bear its own costs of the application.

19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JULY, 2021

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent