



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NUMBER 20 OF 2016

(FORMERLY HCC 246 OF 2011)

MW.....PLAINTIFF

VERSUS

AN.....RESPONDENT

J U D G M E N T

1. The parties herein were married in a church wedding on 1st September, 1990.
2. Their marriage was dissolved via court proceedings in 2011.
3. According to the plaintiff during the marriage they acquired property, a parcel of land and constructed a house, Nakuru Municipality Block xxx at Teachers, in Nakuru.
4. The Plaintiff's case is that she was an employee of [Particulars Withheld] and took a loan of Kshs. 63,000/= which she contributed to the purchase of the plot which was bought at Kshs. 135,000/= . The loan forms she produced as evidence are dated 5th September, 1994. She clarified that of the Kshs.63,000/=, Kshs.50,000/= was to be part of the purchase price, and Kshs.13,000/= to be used to keep broilers.
5. She said she took out two (2) other loans, one of Kshs. 300,000/= and another of Kshs. 126,000/= towards the construction of a permanent house. She was to take another loan of Kshs. 600,000/ but apparently did not do so and the house was never completed. As at the time she took the 1st loan the defendant was working with [Particulars Withheld]. In 1997 he was dismissed summarily and for the next eight (8) years they lived in hardship as he was unemployed. She testified that they had three (3) children born in 1991, 1993 and 1997. She testified that she struggled to pay fees for the children and fend for them because the defendant never got another job. She sold the plots she had in Kiamunyi and bought a house in Milimani. She now wants this sole matrimonial property to be sold and the proceeds be shared.
6. She said she left in 2003. That she left her things in the house, which explains the ballots for plots the defendant had produced, that she had bought those plots and when she went to ballot for them, she took him along. That she paid for them from her salary through check off, and sold them without his consent.
7. On cross examination, she told the court that she owned three plots she had bought through check off, that her husband sent money for upkeep on her account at Barclays, and it was not true that she had used that money to buy the plots, because by that time the plots were already purchased. She said the broiler business never took off because despite getting the money from her, he never put up the house for the broilers. She said that she paid for the plots through check off but did not have the pay slips in court.
8. Cross examined further she conceded that the house was home and could have sentimental value for the defendant, however, she had been forced to lodge a caution against the title because the defendant had tried several times to sell it. It was her case that it was better the property be sold so that she would get her share. She said for her it was an investment, and it had no sentimental value. In any event the defendant had never completed the house. She said she sold other properties to pay fees for the children, and in particular when her daughter was called to Alliance Girls High School, she sold one of the properties to educate her.
9. The plaintiff closed her case.
10. On his part the defendant testified and made reference to three (3) parcels of land which he cited as number xxx, xxx and xxx. He told the court that these plots were purchased during the marriage and he was not aware that she had sold them until he heard her mention it in the court room

11. With regard to plot xxx he testified that he bought it by himself without any contribution from her. His testimony was that he started construction in 1995 and moved in in 1997, that that is the year the property was valued. He said he had evidence that they were already in the house in 1999, and by 2001 they were already living there. He testified further that he constructed the house for his wife and family. That she was the one who moved out, that now that he was about to retire, it would not be right for him to be reduced to a vagabond. He stated that for three years he remitted money to her account through a standing order to refund the money she had spent.
12. On cross examination he said that he purchased the Nakuru Block xxx in 1994 when his wife was an employee of [Particulars Withheld]. That he was not aware that she took a loan. That he began putting up the house in 1995 and that he had receipts which he had not attached to his affidavit. He conceded that the date 1995 was not in his affidavit. He conceded that he acknowledged in his affidavit in reply that the plaintiff took loans and purchased properties in Kiamunyi and Piave Njoro through her shares in [Particulars Withheld]Workers Housing Co-operative Society Limited. He annexed copies of the balloting cards for the said plots.
13. In the same affidavit he annexed the sale agreement and asserted that he had bought the Nakuru xxx on his own and that the plaintiff benefitted because although she never contributed anything, she drew out occupier allowance which was not discontinued even after she left the home.
14. He deponed in the same affidavit that they (he and the plaintiff) had mutually agreed that he would repay the whole or part of the loans and would later develop the plots as matrimonial proprieties. He said that it was a verbal agreement. He said he made various deposits in the plaintiff's bank account and annexed bundle of bank deposit slips.
15. He said they began living apart in 2004, and that whatever she had contributed to the purchase, and construction of the house he was living in he had repaid every single cent. Referred to the bank slips marked as number 13 - 68 in his documents, he confirmed that the purpose of the deposits was not stated. He denied that the money he sent to plaintiff was for the upkeep of their children and insisted it was meant for refund of the loans she had taken. He argued that, she was in formal employment. He was in business, that the agreement was for her to take the loans and he would service them because it was easier that way. That he kept his part of the bargain until the business he was running collapsed. He confirmed that the ballot papers were in the name of the plaintiff.
16. On re-examination he told the court that he was also relying on the valuation report for owner occupier allowance that was done by the plaintiff's employer.
17. He closed his case.
18. Counsel agreed to file written submissions.
19. On 31st March, 2015 parties filed a list of thirteen (13) agreed issues for determination.
 - i. *Whether the applicant contributed towards the acquisition of parcel title L.R. NAKURU MUNICIPALITY BLOCK xxx (KITI ESTATE)?*
 - ii. *Whether the applicant financially contributed towards building and construction of the matrimonial property of parcel title L.R. NAKURU MUNICIPALITY BLOCK xxx (KITI ESTATE).*
 - iii. *Whether the applicant borrowed loans and or credit facilities form [Particulars Withheld]Sacco towards purchase of parcel title L.R. NAKURU MUNICIPALITY BLOCK xxx (KITI ESTATE)?*
 - iv. *Whether the applicant borrowed loans and or credit facilities form [Particulars Withheld] Sacco for purposes of purchasing building and construction materials for the house on parcel title L.R. NAKURU MUNICIPALITY BLOCK xxx (KITI ESTATE)?*
 - v. *Whether the applicant deserted the matrimonial home?*
 - vi. *Whether the applicant and the respondent jointly contributed towards acquisition of alleged Kiamunyi and piave properties and if so what were the party's respective contribution?*
 - vii. *Whether the applicant made financial contributions towards the domestic expenses and upbringing of the issues of the marriage?*
 - viii. *Whether the alleged Kiamunyi and Piave properties are in existence?*
 - ix. *Whether he respondent has ever deposited any money in the applicant's bank account with a view to clearing any outstanding loan balance?*
 - x. *Whether the applicant's suit raises a reasonable cause of action against the Respondent?*
 - xi. *Whether the applicant is entitled to the orders sought in her originating summons?*
 - xii. *Whether the applicant's suit discloses a reasonable cause of action against the respondent?*

xiii. Who should bear the costs of the suit?

20. In summary the issues for determination are:

i. Whether the property LR NAKURU MUNICIPALITY BLOCK xxx (KITI ESTATE) is matrimonial property.

ii. Whether the parties herein contributed to the purchase of the plot and the construction of the house.

iii. Whether the two properties in Kiamunyi and Piave were matrimonial properties.

iv. Whether the parties contributed to the purchase of the said properties.

v. Whether the defendant made any deposits into the plaintiffs account in refund of the loans the plaintiff took with a view to clearing the outstanding loan balances.

vi. What orders should issue.

vii. Who should bear costs.

21. The plaintiff's submissions dated 11th May, 2021 addressed the issue of contributions towards the purchase of the properties named herein above. It is the plaintiff's position that the plot number xxx was purchased vide a Sale Agreement dated 8th November, 1994 for Kshs. 135,000/=. Her 1st loan was applied for on 5th September, 1994, for Kshs. 63,000/=. where Kshs. 50,000/= was towards the purchase of the said plot. As at the time of the Sale Agreement Kshs. 100,000/= had been paid and a balance of Kshs. 35,000/= was to be paid on or before 31st January, 1995.

22. It is noteworthy that in his submissions the defendant submitted that he bought the property solely on 8th November, 1994. That he produced receipts from the Ministry of Lands to demonstrate the same.

23. It is evident that the defendant has not produced any evidence to controvert the plaintiffs evidence that indeed in September, 1994 she took out a loan to contribute towards the purchase of the property. This loan was taken in 1994, the same year the property was purchased. The defendant has conceded that there was a mutual agreement that he would refund every cent that the plaintiff had expended in the purchase of the said plot. He however did not produce any evidence to support his claim that there was indeed an agreement whereby he would refund and or service the loans the plaintiff took, or an evidence that indeed he had done so.

24. The defendant produced bank deposit slips running from 22nd January, 2001 to 4th September, 2003. There is no evidence that these deposits have any bearing to the loan taken out by the plaintiff in 1994, seven (7) years before the 1st deposit by the defendant. The defendant did produce the ballots for the plots the plaintiff purchased through [Particulars Withheld]Workers Housing Cooperative Society Limited, these are ballots he produced as **exhibits AKN 2,3,4**. These ballots are dated 10th April, 1999 and 27th January, 1996. It is the defendant's case that the loans taken by the plaintiff were for the purchase of these plots. It is however noteworthy that the first loan was taken in 1994, the second one in 1998, and no relationship has been established between these loans and the plots named in the ballots. In any event the defendant has not demonstrated that he made any contribution to the purchase of those plots, and by his own evidence it is the plaintiff who took out the loans. He has not demonstrated that the loans were used to buy the other plots and not for construction as he alleges. He has not demonstrated that in the years before 2001, he sent any money to the plaintiff or that he expended any money for the construction of the house. He said he did, but he did not annex any single document to support his claim that he single handedly bore the cost of both the purchase and the construction. Hence I am not persuaded by his testimony and submissions that the plaintiff took out loans to pay for the plots indicated by the said ballots. The evidence available on record is that the plaintiff indeed took out a loan in 1998 for construction, the same year the house was valued, and it was clear from the report produced by the defendant that it was incomplete. There is no reason to doubt that the plaintiff took out the loan and the money was expended in the construction of the house.

25. There is no reason to doubt that the plaintiff indeed contributed Kshs. 50,000/= to the purchase of plot xxx.

26. Did the plaintiff contribute to the construction of the house on plot xxx? She produced evidence that she took the second loan of Kshs. 126,000/= in 1998. The purpose for that loan is building, and the security was her salary, pension and shares. According to the valuation report produced by the defendant the house was valued in May 1998 for purposes of owner /occupier allowance for the plaintiff. As at that time, there were areas that were pending construction, because, only the substructure and walling, roofing, internal décor and ceiling blending had been done. The ceiling lining, part wall plastering and painting, sanitary fittings, external, finishes, part internal fittings and finishes had not been done. The defendant submits that the plaintiff did not produce any evidence to prove that she had paid any contractors, and vendors with respect to development, maintenance of the house, but that the defendant had provided the receipts showing that there was payment to the Ministry of Lands for various items. However the defendant in his testimony stated that the plaintiff took loans which he undertook to refund, and that is the purpose of his **exhibits 13 to 68**. The submissions by counsel cannot override his own and testimony and the evidence in his affidavit.

27. To determine whether the property herein can be distributed or shared by the parties it is important to lay out the definition of matrimonial property. **Section 6 of the Matrimonial Property Act number 49 of 2013** refers to matrimonial property to mean.

a) Matrimonial home or homes

b) household goods and effects in the matrimonial homes or home.

c) Any other immovable or movable property jointly owned and acquired during the substance of the marriage.

26. When and how is matrimonial property to be shared? Section 6(7) states:-

“... ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its question, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

27. From the evidence this property is registered in the name of the defendant. That however does not mean that property belongs to him. If the plaintiff can establish contribution then she can claim a share. On this she relied on Peter Mburu Echria vs Priscilla Njeri Echaria [2001] eKLR where the Court of Appeal held;

“... where the disputed property is not registered in the names of the spouses but is registered in the name of one of the spouses, the beneficial share of each spouse would ultimately depend on the proven respective proportions of financial contribution either indirect or direct towards acquisition of the property. However in cases where each spouse has made substantial but unascertainable contribution it may be equitable to apply the maxim equality is equity”

28. It is the plaintiff's position that she has demonstrated that she made the largest contribution towards the construction of the said house, showing that in addition to the Kshs. 50,000/= and Kshs. 126, 000/=, in 2001, she took out a further loan of Kshs.300,000/= towards the completion of the house. In her view, the defendant continued to enjoy the house where she struggled single handedly to raise and educate the children while at the same time paying rent.

29. To this end she seeks that this court finds that her contribution was 80% and his 20%. She relies on the case of FN vs VWN Civil Appeal 179 of 2009 where the Court of Appeal reiterated the position that sharing out of matrimonial property after dissolution of marriage will be guided by the contribution of each spouse. She also cited PNN vs ZWN [2017] eKLR, where the matrimonial property was share in the ratio of 70:30 in favour of the wife, the court stating ;

“there is no reason why the math may not be in favour of the wife if that is what the evidence turns up... and each case must depend on its own peculiar circumstances.”

30. On his part the defendant submitted that he had repaid the loans taken by the plaintiff, as evidenced by the bank slips he filed. He drew the courts attention to the fact that the bank slips indicated that the money was deposited into the plaintiffs account. He also submitted that she failed to disclose the existence of three (3) parcels of land parcels named as xxx Phase III Kiamunyi A, xxx Phase III Kiamunyi A, xxx Phase II which were purchased jointly with the respondent during the pendency of the marriage. That she testified to having sold the three(3) parcels of land, and using the money for her own benefit. That her claim to the matrimonial property had been vitiated by her foregoing actions and her Originating Summons ought to be dismissed.

31. The defendant relied on In the matter of the Estate of Sophia Watare Gachigua (deceased)[2016] eKLR, for his proposition that the plaintiff had not presented before this court the requisite the quantum of evidence to prove her alleged contribution towards the purchase of the property and construction of the said house. He relied further on Britestone Pte Limited vs Smith Associates Far East Limited [2007] 4 SLR (R) 855 at 59 where *Rajah JA* stated;

“the court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”

32. I have carefully considered the foregoing submissions and evidence on record.

33. There is one matrimonial home, the one situated on plot number Nakuru Municipality Block xxx at Teachers Kiti. This is the home where the parties lived with their children before the plaintiff left in 2003 and before the Divorce in 2011.

34. It is my finding that the plaintiff has demonstrated that she did take out loans in 1994 and 1998 towards the purchase of the plot and for the construction of the house. I however did not see relationship between the house and the loan taken in 2001, hence I am unable to connect it to the house on the plot. The defendant has not demonstrated that these funds were expended on the so called Piave and Kiamunyi plots. He has not established any relationship between the loans and the plaintiff's purchase of the said plots. What is clear is that a parcel of land was bought and a house was put up. The plaintiff took two loans totaling Kshs. 176,000/= to support this project. It is therefore not true that the defendant solely bought the plot and put up the house single handedly.

35. The defendant did not demonstrate that he contributed anything to the purchase of the Piave and Kiamunyi plots. In fact except for the ballot papers he did not produce any evidence to show how they were bought, how much they were bought for, and any relationship between the three plots and any of the loans. Section 6 of the Matrimonial Property Act differentiates the matrimonial home and any other property the couple may have bought or acquired jointly. There is no evidence at all that the three properties were acquired jointly despite the fact that they were acquired during the marriage. If as the defendant alleges the properties were acquired jointly he would have been aware of their registration numbers, he would have kept up with their progress. In his affidavit of 30th November, 2011, he simply refers to them as Kiamuyi and Piave plots. No registration particulars unlike for the Kiti plot.

36. It is from his own conduct that he demonstrates that he had nothing to do with these properties. They were acquired in the 90's, he testified that he had heard from the 1st time in 2021 that properties had been sold. This matter has been in court for ten (10) years. There is no point where he even sought to have the plaintiff produce evidence in respect of the same or their status, yet he claims that he had intended to develop them as matrimonial properties. It is noteworthy that the only thing he struggled to obtain were the bank slips of the moneys he

deposited in her account but no evidence of any pursuit of the status of the three plots.

37. Hence it is my finding that the only available property for distribution is the matrimonial property comprising of LR Nakuru Municipality Block xxx.

38. What would be the shares of each party? The plaintiff was not a house wife, she was employed. The parties had young children, the defendant was a business man, and for eight (8) years of their marriage he was unemployed. In the years 2001 – 2002 he sent money to the plaintiff, he was working away from home, so how was he supporting his family? Clearly unless otherwise demonstrated that is how he supported his family. Even if he was assisting to service the loans as he alleged. That was his contribution to the upkeep of the family as the plaintiff was home taking care of the children. This other part of mothering, housekeeping and taking care of the family is more often than not not given any value when it comes to sharing matrimonial property. It is easy for the spouse working away from home and sending money to lay claim to the whole property purchased and developed with that money by the spouse staying at home and taking care of the children and the family. That spouse will be heard to say that the other one was not employed so they contributed nothing. That can no longer be a tenable argument as it is a fact that stay at home parents and in particular women because of our cultural connotations do much more work (house wives) due to the nature of the job. For instance society has now placed monetary value to carrying a baby in the womb. This is seen on the unregulated surrogacy agreements that people are getting into. Raising of children is a full time job that families pay a person to do. Cooking and cleaning as well. Hence for a woman in employment who has to balance child bearing and rearing this contribution must be considered. How do we put monetary value to that process where a woman bears the pregnancy, gives birth, and takes care of the babies and where after divorce or separation she takes care of the children single handedly without any help from the father of the children? Should this court take this into consideration when distributing matrimonial property where the husband as in this case is left in the matrimonial home where the wife rents a house to provide shelter for herself and the children, I think it should count, especially where the husband has not supported the raising of the children, has not borne his share of parental responsibility.

39. It should also count if the man also does the same thing. It should count when division of the property is being discussed. This is because at the end of the day, a monetary value will be put on the property, and each party will be showing how much they put in. It is time that parties took time to give evidence, sufficient enough to support the value to be placed on the less obvious contribution. It is unfair and unjust for one party to be busy just making their money (the 'seen' income) while the other is doing two or three other jobs in the family whose income is 'unseen' and then claim this other one did nothing. This attitude is so entrenched we still hear women especially who are housewives say: *sifanyi kazi* (literally I do not do any work) simply because they do not leave the home to go earn money elsewhere.

40. That said, in the fact that the plaintiff took loans towards the purchase of the land and construction of the matrimonial home is not controverted. The defendant's claim of repaying the same has not been proved. The defendant did send financial support to the plaintiff for some time. However the fact that post separation she took up the burden of taking care of the children while the defendant enjoyed the property has also not been controverted.

41. Be that as it may it, I must take into account that this purchase and construction was taking place in the early years of the marriage and the possibility that the two had agreed to put up a family home is not farfetched. Neither would it be farfetched to hold the view that it is possible that each party at first did their best to bring this to fruition. Hence I would hold that I cannot with any certainty say that the plaintiff contributed more. Going by the authorities cited, the fair way would be to apply the maxim equality is equity.

42. In the final analysis I find that the parties herein contributed to the purchase of the plot number Nakuru Municipality Block xxx, and that they also contributed to the construction of the matrimonial home. The available option is that the property be valued, sold and each party have ½ share of the proceeds of the sale. The following orders issue:

a. LR Nakuru Municipality Block xxx be valued, sold and the parties to share the proceeds of the sale equally.

b. Parties to share the cost of valuation equally.

c. In the alternative, and by consent of parties, any party wishing to keep the property can buy the other party out by paying that party half (½) the value of the property.

d. The plaintiff to have half (½) the costs of this suit.

Orders Accordingly.

Dated signed and delivered via email this 14th day of September 2021.

Mumbua T Matheka

Judge

Nancy Njoroge & Kairu advocates for Plaintiff

Kiplenge & Kurgat Advocates for Defendant