



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL SUIT NO. 18 OF 2015 (OS)**

**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT, 1882**

**BETWEEN**

**EJN.....APPLICANT**

**VERSUS**

**PNN.....RESPONDENT**

**AND**

**KMN.....3<sup>RD</sup> PARTY**

**JUDGMENT**

1. The applicant EJN and the respondent PNN got married on 28<sup>th</sup> November 1998 at the District Commissioner's Office in Nandi. The marriage was blessed with three children:

- (a) DKN;
- (b) the Third Party KMN; and
- (c) DNN

They are adults. On 30<sup>th</sup> May 2014 the marriage was dissolved by the High Court in Nairobi in **Divorce Cause No. 92 of 2011**.

2. In the amended originating summons filed on 5<sup>th</sup> September 2019, the applicant stated that in the course of the marriage the couple jointly acquired the following properties which were registered in the name of the respondent in trust in equal shares:

- (a) Bahati/Bahati/Block xxxx – Nakuru;
- (b) LR No. xxxx North Njoro Town LR xxxx (original xxxx);
- (c) Langata LR No. xxxx (Plots Nos. xx and xx);
- (d) Ebony Bar (Title No. Block xxxx Kabachia Estate Nakuru);
- (e) Vehicle KAC xxxx;
- (f) Vehicle KBN xxxx;
- (g) All house hold goods, furniture and fittings in the matrimonial and residential houses; and

(h) Nairobi Hazina Estate House No. xxxx (Title LR No. xxxx);

She asked that the properties be valued and sold and the proceeds shared equally between them.

3. The summons were also brought against their son (Third Party) in whose name the respondent had allegedly registered some of the property. She asked that it be held that such properties were held by the Third Party in trust for her. She further asked that the Third Party renders a true and full account of the properties and a declaration does issue that the transfers and registration were in trust for her. Lastly, it was pleaded that there be an order directing the revocation of the title deeds and/or leases of the properties in the name of the Third Party so that the titles and/or leases do reflect her and the respondent as proprietors.

4. In the affidavit sworn to support the amended originating summons, the applicant stated that after their marriage, they moved to Nakuru town. At the birth of their first born she was unemployed. When they got their second born she got a job with Kenya Farmers Association and begun to directly contribute towards the family expenses and investments. In 1991 she used her employment benefits to acquire the business of Ebony Bar in Nakuru which she allowed the respondent to run, but after paying for the goodwill and stock. She never received a cent from the business. In 1997 the respondent begun to run the business solely. In 2000 the business changed ownership.

5. In 1997, she said, she got employed by Post Bank Limited. She worked here for one year, and got a visa to go to the U.S.A. to go and work there to secure herself and the family. In the U.S.A., she worked as a nurse. The respondent was working with the Ministry of Higher Education in Kenya. She annexed the respondent's payslips to show that she earned more than him. She was working for about 16 hours daily and made an average of 40,000 USD a year. She annexed her pay statements and tax returns. She stated that for the 13 years she worked in the U.S.A. she made regular remittances to the respondent and to the children to cover their school fees, food, clothing and medical bills. She annexed Western Union transfers and bank transfers. All this while, she said, the respondent never remitted a cent to her.

6. Regarding the acquisition of the property, she stated that on 18<sup>th</sup> October 1991 they jointly bought Bahati/Bahati xxxx using two loans, Kshs.100,000/= and Kshs.150,000/=, from Kenya Commercial bank Nakuru Branch. She annexed evidence of the two loans which they jointly applied for. A letter dated 20<sup>th</sup> October 1991 from the bank instructed their lawyers to transfer the property to their joint names. However, the property was registered in the sole name of the respondent. On 15<sup>th</sup> August 1997, she stated, the property was registered in the name of the Third Party who was only 7 years old, having been born on 10<sup>th</sup> January 1984. On 23<sup>rd</sup> August 2004 the said property was sold to Veronica Mburu for Kshs.2,200,000/=. She stated that the proceeds were used to buy LR No. xxxx (Original No. xxxx North Njoro) for Kshs.840, 000/=. The agreement shows the seller was James Tuitoek and the buyer was the Third Party. She stated that the balance was used to put up family house and other developments on the parcel.

7. Regarding House No. xxxx Hazina Estate, her case was that on 15<sup>th</sup> November 2000 while she was in U.S.A. the respondent was given notice to vacate the house and raise money for mortgage as the government was selling the house. The mortgage was to be repaid at Kshs.58,000/= per month. The respondent was earning Kshs.44,365/= per month and could not afford to pay. The respondent wrote to her. She subsequently wrote a letter to N.S.S.F. (the seller) saying she worked in U.S.A. and could raise the money. She did a banker's cheque to N.S.S.F. for 1,335 USD as down payment and sent to the respondent 1,000 USD. On 30<sup>th</sup> July 2001 their application for the house was successful with monthly mortgage being Kshs. 51,777/=. She helped pay the mortgage. On 12<sup>th</sup> September 2008 she was in Kenya and paid Kshs.237,000/= to Kiplagat and Co. Advocates to have the title processed. She was surprised to find that the respondent had transferred the house to the Third Party, after forging her signature to N.S.S.F. She annexed relevant documents.

8. The applicant stated that in 2006/2007 the respondent bought Langata LR No. xxxx made up of two plots, Nos. xx and xx. On them have been erected 11 complete apartments, ready for occupation once water was connected. Her case was that she supported the respondent in all the family projects by taking care of the family by paying fees, clothing, food and paying for their older son's aviation training in South Africa.

9. Lastly, the respondent requested her to return to Kenya so that they could stay together. She obliged and on 25<sup>th</sup> March 2011 arrived in Kenya. She shipped home all her household goods. She paid Kshs.450,000/= to clear them at the Port, 4,500 USD for container fee and spent 1,200 USD on her ticket. She lived with the respondent for two months before he kicked her out of the house, and changed locks. She had to move into an apartment. She recalled that in 2001 he visited her in the U.S.A. She gave him money to buy their daughter a car to use to go to college. The vehicle was KAC xxxx. The respondent later sold it. When the divorce proceedings were filed, she stated, he begun transferring, selling or otherwise alienating matrimonial property.

10. The respondent denied the evidence of the applicant. He stated that in 1998 the applicant deserted the respondent and in 2011 filed the **Divorce Cause No. 92 of 2011**. He denied that Bahati/Bahati Property Bloc xxxx Nakuru was matrimonial property. He stated that this was property belonged to their son (the Third Party). As for LR No. xxxx (LR No. xxxx – original No. xxxx), his case was that this was property he bought from one James Tuitoek –

**“while the applicant had deserted me and was in the United States of America and during the divorce proceedings.”**

He paid by instalments without the applicant's contribution. He produced the agreement dated 8<sup>th</sup> February 2007 and copy of title to show that he was the one dealing. Subsequently, he used the property to secure a loan at Jamii Bora Bank. As far as Langata LR No. xxxx (Plot No. xx) his case was that this was not his property but was bought by the Third Party who has developed it. Regarding Ebony Bar, he stated that he was the one who developed the place and set up the business. By the time the applicant deserted, he said, the business was not doing well. Later, the owner of the premises ran into financial difficulties. The bank the owner had taken money from auctioned it. He stated that the -

**“applicant never contributed to Ebony Bar Business but she had her own hair salon which she mismanaged and subsequently she was auctioned and evicted, while in my Ebony Bar, the lease was for 2 years which expired and was never**

**extended.”**

11. The respondent stated he had never owned KAC xxxx or KBN xxxx. He had, however, conducted a search to show the vehicles belonged to Davis Nathan Chelongoi and Mutasingwa Eustace, respectively.
12. The respondent swore that there was no time the applicant bought any household goods, furniture or fittings. He stated that he was the one who kept replenishing these items.
13. He denied that the applicant had contributed to any of his investments, or paid anything towards the children’s education or upkeep. He denied that she had sent to him any money while in the USA. She had, however, sent some money to their son DNN. on 2<sup>nd</sup> July 2011. He stated that there were times he sent money for the applicant’s upkeep in the U.S.A. He gave the example of 2000 USD on 23<sup>rd</sup> September 2009. 2000 USD on 8<sup>th</sup> March 2010 and Kshs.50,000 on 27<sup>th</sup> August 1997.
14. The respondent later admitted that they took a joint loan from KCB which they used to buy Bahati/Bahati Block xxxx, but stated that after the purchase the applicant asked that it be registered in the name of the Third Party. The Third Party later sold the property to train as a pilot, he said. He denied that the proceeds were used to buy LR No. xxxx. He denied that he was supported by the applicant to buy this later property. As for the Hazina property, he said, he was offered the property following which he sold a property he had in Nyamira for Kshs.1,000,000/= which he used to raise the deposit. He took a loan from his Sacco and monies he raised from per diem. He was able to pay for the house which cost Kshs.4,500,000/=.
15. Lastly, vehicle KAC xxxx was bought by their daughter with his assistance before she sold it to go to Canada.
16. Before I analyse the rival affidavits, let me deal with the law governing the determination and division of matrimonial property.
17. **Section 6 of the Matrimonial Property Act, No. 49 of 2013** 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 immovable and movable property jointly owned and acquired during the subsistence of the marriage.”**

18. For a spouse to lay a claim on property acquired during the subsistence of the marriage, she/he has to establish contribution towards its acquisition or development. **Section 2 of the Act** defines contribution to mean monetary or non-monetary contribution, and 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.”**

The **Act** defines family business to mean any business which –

**“(a) is run for the benefit of the family by both spouses or either spouse; and**

**(b) generates income or other resources wholly or part of which are for the benefit of the family.”**

19. Lastly, **section 14 of the Act** provides that:-

**“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**

**(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”**

20. Without following any order, the respondent stated that he alone bought Hazina Estate No. xxxx LR No. xxxx; that there was no contribution from the applicant. In an affidavit sworn on 7<sup>th</sup> February 2018 by the Third Party, he stated that the property was bought by the

respondent which he registered in his name and that of his brother DNN for them to hold in trust for their sister DKN. On her part, the applicant produced a letter dated 15<sup>th</sup> December 2020 showing that the Government gave the respondent notice to vacate the house. On 20<sup>th</sup> February 2001 the respondent wrote to the applicant pleading that, because he was threatened with eviction, she helps raise 10% (Kshs.450,000/=) deposit and arranges to pay Kshs. 58,000/= per month towards purchase. On 3<sup>rd</sup> July 2001 the applicant wrote to N.S.S.F. (the seller) indicating she had the means to pay. She asked that, ultimately, the house be put in her name and their daughter's name. She made remittances to N.S.S.F. N.S.S.F. wrote to the couple to say that their application for tenant purchase scheme was successful. They paid the deposit. It is clear that, subsequently, the applicant was cut off. On 15<sup>th</sup> April 2002, says the applicant, the respondent wrote to say the house be registered in the name of the Third Party, and forged her signature. What is of importance is that the applicant, after desperate plea from the respondent, substantially contributed to the acquisition of the house which the respondent transferred to his children.

21. Regarding Bahati/Bahati Block xxxx, the applicant's evidence was that they jointly took loans of Kshs.100,000/= and Kshs.150,000/= to buy it. After swearing that the applicant made no contribution to the acquisition or development of matrimonial property, he later on admitted that they jointly took a loan from KCB to buy it. The property was registered in the name of the respondent who transferred it into the name of their older son without consulting her. The son sold it. It was sold for Kshs.2,200,000/=. None of the money went to her. I determine that the applicant substantially contributed to the acquisition of the property. She, however, stated, without proof, that some of the proceeds from the sale bought LR No. xxxx (Original No. xxxx).

22. The first family business was Ebony Bar. At the time, both parties were working with an income. The applicant produced documents to show she was the one who paid goodwill and bought stock to begin the business. She allowed the respondent to run it. It went down. After the Kenya Farmers Association job, the applicant was employed by Post Bank Limited. They had started having children. Subsequently, she moved to the USA where she remained for 13 years. The evidence above that shows that the respondent was calling on her to help buy the Hazina House, which she obliged, indicates that there was no bad blood. Her passport shows she kept visiting the family. EJM – 7 are documents showing she kept sending remittances to the family. The respondent in his affidavit said he was also sending some money to her. That was evidence of a cordial relationship. It means either party was in the life of the other and the family, financially. Under those circumstances, it would be difficult to say that the applicant did not contribute to the family investments.

23. The applicant stated that the respondent bought Langata LR No. xxxx (Plots xx and xx). The respondent stated that he bought it vide agreement dated 8<sup>th</sup> February 2007. He stated that there was no contribution from the applicant. In his own statement, up to 23<sup>rd</sup> September 2009 he was sending money to the applicant. The applicant stated that she bought vehicle KAC xxxx for the daughter. This is as late as 2015. Lastly, the respondent bought LR No. xxxx (Original xxxx) Njoro in his name. The couple was dealing financially, and therefore whether or not the respondent bought the parcel there was contribution from the applicant.

24. There was no time that all these properties, all bought in the course of the marriage, were in the name of the applicant. They were all in the name of the respondent. Nearly all the property has since moved from the respondent to third parties. It was known this was matrimonial property. The transfers were never sanctioned by the applicant. The property was under **section 14** of the **Act** held in trust. The applicant had beneficial interest in them. She has since lost that benefit.

25. I consider that the applicant did not have to produce money for every purchase to prove contribution. She has shown that in a number of cases she made direct substantial contribution. In others, she has shown she was sending money to the respondent and to the children. In other instances, she was running family business. She took care of the family. She visited the respondent and family, and was in regular contact. All these were aspects of contribution to the acquisition and/or development of the matrimonial property.

26. None of the properties was valued. Whatever is the value, I put each spouse's contribution at 50%.

27. Now that most of the property is not in the respondent's name, and considering that this appeared to be strategic on his part, I put the total value of the matrimonial property at Kshs.50,00,000/= and therefore the applicant's share shall be Kshs.25,000,000/=. I will give the respondent six (6) months to pay Kshs.25,000,000/= to the respondent. At the expiry of six (6) months, there shall be interest at court rates on the amount or its balance, and execution shall follow. Costs shall follow the event.

**DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.**

**A.O. MUCHELULE**

**JUDGE**