



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MATRIMONIAL PROPERTY CAUSE NO. 8 OF 2019 (OS)

IN THE MATTER OF SECTIONS 2, 7, 12 AND 17 OF

THE MATRIMONIAL PROPERTY ACT, NO. 49 OF 2013

FAW.....APPLICANT

AND

RWG.....RESPONDENT

JUDGMENT

1. The applicant FAW and the respondent RWG got married on 1st August 1992 under the **African Christian Marriage and Divorce Act**, and cohabited in Kenya before moving to the United State of America in 2002. The marriage was blessed with two issues who are both adults.
2. Following a petition filed by the applicant in Milimani Commercial Courts **Divorce Cause No. 566 of 2018**, the marriage was dissolved on 29th August 2019.
3. On 24th February 2020 the applicant filed this originating summons seeking a declaration that LR No. Ruiru Kiu Block 3/xxxx comprising 15 unit apartments and business container on Plot xx all situate within Kahawa Estate, and monies held in Family Bank Mkenya Diaspora Savings Account No. 044xxxx were matrimonial properties between her and the respondent to which she was equally entitled. She sought that the respondent be ordered to submit all income/rent proceeds and bank statements pertaining to the suit properties for accounting, clarification and transparency, and, finally, that the respondent be ordered to refund to her all the monies unlawfully diverted and due. Then costs of the originating summons be paid to her.
4. In the supporting affidavit dated 13th February 2020, the applicant deponed that in the cause of their marriage, and out of their joint fund and effort, they acquired 15 units apartments comprising 3 and 1 bedrooms and 12 bedsitters units on Ruiru Kiu Block 3/xxxx Kahawa Sukari, Nairobi, and one container rented out for business on Plot No. xx Kahawa West, Nairobi. Ruiru Kiu Block 3/xxxx has a certificate of lease registered on 5th September 2005 in the joint names of the respondent and the applicant. She also annexed photographs of the business container. She stated that the couple entered into an agreement dated 13th July 2016 (“FAW5”) to acknowledge that they jointly owned Ruiru Kiu Block 3/xxxx; they had completed the construction of 15 units on the ground floor; had agreed to get a loan to facilitate the development of the first and second floor; that the rental income would be used to repay the loan; that the rental income would be going into their joint account in Family Bank – Mkenya Daima Diaspora Savings Account No. 044xxxx; that to withdraw money from the account each party would have to sign; that no money from the development would go into any other account; that once the loan was repaid each party would be entitled to equal rent; that the parties had equally contributed to the 40 foot container which would be converted to rental stores; and that rent from the stores would be equally shared.
5. The applicant further produced an agreement dated 27th November 2010 (“FAW3”) signed between her and the respondent saying that she was going to contribute Kshs.800,000/= in addition to the USD 52,000 she had contributed towards the development of Ruiru Kiu Block 3/xxxx project.
6. The respondent filed a replying affidavit sworn on 4th September 2020 in which he denied that the container on Kahawa West Plot xx was matrimonial property. This was because they had never lived in the container as a family. Further, that the Plot xx was now the subject of **ELC Proceedings No. 411 of 2018** at Milimani following its demolition by the Kenya Urban Roads Authority to pave way for a road construction. Further, that the exhibits annexed to the applicant’s supporting affidavit were not admissible because they were neither sealed

nor commissioned. The respondent made reference to the properties they acquired in the USA, and the property the applicant had allegedly clandestinely acquired in Kenya and in the USA. Regarding Ruiru/Kiu Block 3/xxxx, he stated that he bought the plot and fenced it alone. He, however, in good faith registered it in their joint names. He got an architect through his brother. He paid for the plans, and developed the property without any assistance from the applicant. Regarding the account at Family Bank he stated that they jointly opened it for the purposes of taking joint commercial loan to construct the apartments on first and second floor. This is how they ended up signing the agreement dated 13th July 2016. He travelled to Kenya to pursue the loan. He was told he would only get Kshs. 4 million. He found that too little. He abandoned the idea of the loan altogether. He was satisfied with the ground floor apartments that he had put up. Rent from there went into the joint account. No funds from the agreement of 13th July 2016 went into the account. He continued to pay money into the project. The Kshs. 800,000/- the applicant had promised to put into the project was not forthcoming.

7. The applicant filed a further affidavit to state that the issues relating to the properties in the USA were resolved by the court in the USA in **Civil Action File No. 19CV00920** between them in Douglas County State of Georgia Court. She availed the documents. She reiterated that the container on Plot xx Kahawa West was acquired during their marriage and therefore it was matrimonial property. She further reiterated that although she had contributed to the acquisition of the two properties the respondent continued to alone enjoy the rent proceeds.

8. Mr. Millimo for the applicant and Mr. Githinji for the respondent filed written submissions on the originating summons and on the notice of preliminary objection that the respondent took on the originating summons.

9. The preliminary objection had two grounds:-

(a) The court had no jurisdiction to adjudicate the applicant's rights in respect of the business container on Kahawa West Plot xx in so far as the same was not matrimonial property within the provisions of section 6 of the Matrimonial Property Act, 2013; and

(b) Exhibits FAW 1(a), (b), 2(a), 2(b), 3, 4, 5, and 6 annexed to the applicant's supporting affidavit were not admissible as the same had not been commissioned and sealed as required by rule 9 of the Oath and Statutory Declaration Rules.

10. In the replying affidavit, the respondent deposed that the Plot xx was not matrimonial property because the family had at no time lived therein.

11. The question that the originating summons raises is whether or not Ruiru Kiu Block 3/xxxx and the developments thereon and the business container on Plot xx Kahawa West were matrimonial properties in the sense that they were acquired and developed by the applicant and the respondent during the period that they were married. Matrimonial property has been defined under **section 6(1)** of the **Matrimonial Property Act** 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.”

Under **section 2** of the **Act**, matrimonial property includes family business that is run by both spouses for the benefit of the family.

12. Reading through the originating summons and the response, there was no indication that the couple lived in either Plot xx or on Ruiru Kiu Block 3/xxxx. These were business establishments that the couple set up to benefit the family. In other words, matrimonial property does not just mean matrimonial house. It means a lot more than that.

13. Regarding the annexures to the applicant's supporting affidavit, each of them has been commissioned by a commissioner for oaths whose seal is evident. The complaint that they have not been sealed is not a legitimate one. But even if there was no commission or seal, the respondent in his replying affidavit acknowledged that Ruiru Kiu Block 3/xxxx had a certificate of lease in the joint names. He also acknowledged that they entered into the agreement of 13th July 2016. These are two of the contentious annexures. The other annexure is the agreement signed between them on 27th November 2010. It made reference to Kshs.800,000/= that the applicant stated she was giving to develop Ruiru Kiu Block 3/xxxx. In the replying affidavit the respondent acknowledged the agreement but denied that the applicant gave the money eventually. In other words, the respondent cannot be allowed to be admitting the existence of those documents as between them and at the same time be saying that they should be expunged from the record on account of a technicality. This court is interested in determining the substance of the dispute between the parties.

14. I determine that the preliminary objection is not merited and dismiss it with costs.

15. **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.”

There is no dispute that Ruiru Kiu/Block 3/xxxx was registered in the joint names of the applicant and the respondent. There is the presumption in favour of the applicant that the beneficial interest of the parties was equal. It was the respondent who made the registration. He, however, stated that the applicant made no contribution to the acquisition and development of the property.

16. The commercial container on Plot xx was in the name of the respondent. The applicant's evidence was that it was being held in trust for the two. Then there is the joint account at Family Bank. It was to receive the rental income. The applicant's evidence was that the two properties which she helped acquire and develop had rental income which was agreed to go into the joint account. The respondent stated that the intention was that the loan and rental income was to go into the account but that never materialized. The loan never came and the applicant never made any contribution.

17. The applicant made reference to the proceedings in **Divorce Cause No. 566 of 2018** in which the respondent was cross examined to admit that the couple had bought property jointly. In paragraph 16 of the judgment it is indicated as follows:-

“16. In cross-examination the Respondent stated that the couple jointly bought property in Kahawa Sukari and the property was registered jointly. The property has flats. The rent from the property was deposited in the joint account and the property is managed by an agent.”

The respondent cannot be allowed to resile from that evidence.

18. It is evident that the couple lived by contract. This is why on 13th July 2016 they signed an agreement regarding Ruiru Kiu/Block 3/xxxx and the commercial container on Plot xx. They signed that they were being jointly developed and that each party had a 50% stake in each, and that the proceeds would go into the joint account. In the agreement of 27th November 2010 the applicant was going to bring in Kshs.800,000/= to complete Ruiru Kiu/Block 3/xxxx, but had so far put in USD52,000.

19. In conclusion, I find and declare that Ruiru Kiu Block 3/xxxx and its developments, commercial container on Plot xx and its stores and the joint account No. 044xxxx held in Family Bank Mkenya Daispora Savings were matrimonial property between the applicant and the respondent and that each of them had 50% stake in each property.

20. I have seen the prayers that the applicant sought: the prayers of accounts, clarification and transparency. I have decided that the most effective way to deal with the dispute is to order, which I hereby do, that Ruiru Kiu/ Block 3/xxxx and container on Plot xx shall each be valued within 30 days by a valuer agreed on, or determined by the court, and thereafter sold so that each party gets half of the proceeds.

21. Either party shall be at liberty to buy out the other.

22. The respondent has alone benefitted from rent from those deployments. He will pay the costs of the originating summons.

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

A.O. MUCHELULE

JUDGE