



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

OS NO. 9 OF 2015 (FORMERLY CIVIL SUIT NO. 66 OF 2014)

LO (alias AO).....PLAINTIFF

VERSUS

OJ (alias SJM)DEFENDANT

JUDGMENT

1. By a **Plaint** dated 15.5.14, **LO alias AO**, the Plaintiff seeks the following declarations and orders:

- a) A declaration that Land Reference No. xxx/Section III/Mainland North (the property) is the Plaintiff's property held in trust by the Defendant for and on behalf of the Plaintiff;
- b) A declaration that the Plaintiff is entitled to the full proceeds of sale in respect of the property;
- c) An order to direct the Defendant to provide a full statement of account of the proceeds of sale in respect of the property and full details of the bank accounts where the said proceeds are deposited;
- d) An order for payment by the Defendant to the Plaintiff of all sums found to be due from the Defendant to the Plaintiff on the taking account in (c) above;
- e) Costs of and incidental to this suit;
- f) Interest (to be assessed), on (d) above at Court rates from the date of filing suit until payment in full.
- g) Any other or further relief, including all further necessary or appropriate accounts, inquiries and directions that this Honourable Court may deem fit to grant.

2. The undisputed facts are that the Plaintiff is an American citizen while the Defendant is a Kenyan citizen. The parties herein were married on 10.7.98 at the Registrar's Office in Mombasa. On 14.7.98, the Plaintiff converted to Islam and the parties contracted an Islamic marriage on even date. On the same date, the parties underwent another marriage ceremony at the [Particulars Withheld] Village Church in Gloucester, Massachusetts, USA.

3. The Plaintiff avers that in the year 2000, she expressed her wish to purchase a property in Mombasa and settled on the property. The Defendant misrepresented to the Plaintiff that as a foreigner she could not own property in her name. The Plaintiff provided the entire purchase price of Kshs. 3,500,000/= and the property was registered in the Defendant's name. The Plaintiff further avers that she provided monies for the construction of 2 residential buildings on the property. The property was purchased during their marriage which is still subsisting. Thereafter the parties separated due to irreconcilable differences and the Defendant went ahead and married another woman. The Plaintiff averred that the Defendant without her knowledge and consent subdivided the property into 47 plots and sold all of them. The Defendant has withheld the sale proceeds and has refused and/or neglected to account or pay any part thereof to the Plaintiff.

4. In his Defence dated 21.8.14, the Defendant stated that the parties legally divorced on 27.12.05 in the Commonwealth of Massachusetts Trial Court in the United States of America and a decree absolute issued. The parties have since lived separate lives. He averred that he is the lawful owner of the property and denied that he held the same in trust for the Plaintiff. He stated that he worked as a bus driver in America and made payment for the property from his income through his own bank account. He had made the Plaintiff a signatory of the account upon his marriage to her. He stated that the Plaintiff could not have made payment of Kshs. 3,500,000/= for the property as she did not have a

stable job. He denied misrepresenting to the Plaintiff that she had no capacity to purchase land in Kenya. The Defendant alleges that the Plaintiff's suit is time barred as it has been brought after the expiry of 12 years. He denied receiving a demand or notice to sue before action from the Plaintiff. According to the Defendant, the plaintiff does not have any right to the property. The issue of the property was never raised during the divorce proceedings. He urged that the suit herein be dismissed.

5. The Plaintiff filed a Reply to Defence dated 27.11.14 in which she denied the allegations of the Defendant in his Defence and reiterated the averments in her Plaint. She averred that she was at all material times employed by [Particulars Withheld], Commonwealth Avenue, Boston, MA xxxxx. The transfer she made to the Defendant of Kshs. 3,500,000/= is evidenced by several wire transfer agreements and statements of account. The Plaintiff further stated that the Defendant was served with written demands before the suit herein was instituted.

6. No oral evidence was tendered in the suit before me, the Court having allowed affidavit evidence. Parties filed written submissions as directed by the Court. I have considered the pleadings, the rival affidavits, exhibited documents as well as the parties' submissions. The issues that fall for determination are:

- i) Whether the marriage between the parties is still subsisting.
- ii) Whether the Plaintiff solely provided the funds for the purchase of the property.
- iii) What is the entitlement of the Plaintiff to the property?
- iv)
- v) Whether the property is held by the Defendant in trust for and on behalf of the Plaintiff.
- vi) Whether the Defendant should provide statement of account in respect of the sale of the property.
- vii) Whether the suit is time barred.

Whether the marriage between the parties is still subsisting

7. The Plaintiff claims that her marriage between her and the Defendant is still subsisting and denies the Defendant's allegation of dissolution of the marriage. The Plaintiff exhibited 3 marriage certificates in respect of the following 3 marriages that the parties underwent:

- i) Marriage on xx.7.98 at the Registrar of Marriages in Mombasa.
- ii) Marriage on xx.7.98 before the Kadhi in Mombasa.
- iii) Marriage on xx.11.98 at The Annisquam Village Church.

8. The question that begs is, which of these 3 marriages contracted by the parties was valid? The first marriage contracted by the parties was at the Registrar's Office in Mombasa on 10.7.98. It was a civil marriage under the repealed Marriage Act. The parties then purported to contract subsequent Islamic and Christian marriages. The law does not provide for spouses to move from one system of marriage to another. This is because each system of marriage is governed by its own peculiar requirements and provisions. Similarly, dissolution of marriage under each system of marriage is also governed by its own rules. Having contracted the marriage at the Registrar's Office, on 10.7.98, the subsequent Islamic and Christian Marriages that were contracted without dissolving the former, are therefore not valid.

9. The Defendant claims that his marriage to the Plaintiff was dissolved on 27.12.05. He exhibited a certificate of absolute divorce issued on 27.12.05 by the Commonwealth of Massachusetts trial Court. This is denied by the Plaintiff who insists that their marriage is still subsisting. There is no indication in the said certificate as to which marriage was dissolved. It is more probable than not that the marriage dissolved by the Court in Massachusetts is the marriage contracted on xx.11.98 at The Annisquam Village Church in Gloucester, Massachusetts, USA. This however is neither here nor there. For the Defendant to persuade this Court, it was incumbent upon him to produce evidence by way of proceedings, to show which marriage the certificate of absolute divorce relates to. More so because the Plaintiff denies knowledge of any dissolution of their marriage. The Court cannot fill the gaps. In the absence of such evidence, this Court has drawn the conclusion that the marriage contracted by the parties on 10.7.98 at the Registrar of Marriages Officer in Mombasa is still subsisting. This is further buttressed by the evidence that funds were transferred by the Plaintiff to the Defendant severally after the alleged divorce and up to 8 years after, in 2013.

Whether the Plaintiff solely provided the funds for the purchase of the property

10. The gravamen of the Plaintiff's complaint is that she solely provided the purchase price for the property which the Defendant has disposed of without her consent and involvement. The Plaintiff claims that she contributed to the purchase of the property through several wire transfers to the Defendant. The Plaintiff stated that at the time, she worked for [particulars withheld]. The Defendant however denies this and avers that he purchased the property through his earnings as a bus driver.

11. The Plaintiff submitted that the amounts wired to the Defendant amounted to the purchase price of Kshs. 3,500,000/=. The documents exhibited in relation to the property include an agreement for sale between the vendors and the Defendant dated 30.1.01. The Agreement provided that the purchase price would be paid as follows:

Kshs. 1,200,000/= on execution of the agreement

Kshs. 800,000/= within 30 days from date of agreement

Kshs. 1,500,000/= on or before 28.2.02.

12. Also exhibited is a letter of consent for the sale dated 2.12.01 from the Bahari Land Control Board. There is also a transfer dated 10.7.02 which was duly registered on 8.8.02. The documents on record contain an acknowledgment by the vendors, of receipt from the Defendant of Kshs. 920,000/= on 21.1.02 and the final payment of Kshs. 580,000/= on 20.9.02.

13. The banks documents exhibited by the Plaintiff show that she wired funds to the Defendant on diverse dates. A careful look at the documents indicates that the earliest wires were of 19.8.02 for US\$ 500 and 12.9.02 for US\$ 8,500. Other payments were made on diverse dates from October 2002 to around January 2013. Given that the last instalment for the purchase price for the property was paid on 20.9.02, it is not clear what the funds wired by the Plaintiff to the Defendant were for. What is evident is that the funds could not have been applied towards the purchase of the property, for which payment had been made in full. The only amount that could, on a balance of probabilities, be said to have gone towards the purchase of the property, was the US\$ 8,500 sent on 12.9.02 which was just before the last instalment was paid.

14. The documents exhibited by the Defendant show that he did indeed work as a driver with [Particulars Withheld], CATOC. Although he stated that he paid for the purchase price of the property from his income as a bus driver, he resigned from employment by his letter dated 25.11.00. The other documents include what appears to be a payslip from The [particulars withheld] for the period 2.5.03-15.5.03 and a 2 week notice to terminate his employment on 8.7.03, earnings statements from [particulars withheld] Lines Inc for April – June 2010.

15. It is a well settled principle of law that he who alleges must prove. This is firmly embedded in Section 107 of the **Evidence Act** which stipulates:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

16. The onus of proving that the Plaintiff paid the total purchase price for the property lies on the Plaintiff. The finding of the Court, based on the available evidence, is that save for aforesaid sum of Kshs. 580,000/=, the Plaintiff did not contribute towards the purchase of the property. The money sent by the Plaintiff to the Defendant could not have been for the purchase of the property. The case of F.S v E.Z [2016] eKLR relied on by the Plaintiff is not helpful. In that case unlike in the present case, it was the respondent therein who made the financial payments for the properties, a fact conceded by the applicant therein. That case also relates to matrimonial property which as shown above, is not the case herein.

17. What is the entitlement of the Plaintiff to the property?

Before venturing into the issue of the parties' entitlement to the property, it is necessary to determine whether the same is matrimonial property. Section 6 of the Matrimonial Property Act defines matrimonial property as:

(1) For the purposes of this Act, matrimonial property means—

(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 property to be declared matrimonial property, it must constitute the matrimonial home or household goods and effects in the matrimonial home or homes of the parties. Any other property jointly owned and acquired during the subsistence of the marriage also constitutes matrimonial property. Acquisition of a property during the subsistence of a marriage does not necessarily make it matrimonial property. Likewise, a property acquired before marriage is not necessarily excluded from constituting matrimonial property. In the present case, it was not pleaded that the property is the matrimonial home of the parties. Further, although the property was acquired during the marriage of the parties herein, it is not jointly owned. The conclusion I therefore draw is that the property, though acquired during the marriage of the parties, not being the matrimonial home or jointly owned by the parties, is not matrimonial property within the meaning of Section 6 of the Matrimonial Property Act.

19. The Plaintiff submitted, and correctly so, that the law is clear that the sharing of matrimonial property depends on the contribution made by each party toward the acquisition or development of the same. Her contention is that she had proved that she contributed the entire purchase price for the property. The Plaintiff further submitted that the Defendant made neither financial nor non-monetary contribution towards the acquisition of the property. He even neglected his own biological minor son who was diagnosed with post-traumatic stress disorder and left the Plaintiff to be his sole caregiver. The Defendant also never gave her companionship as he deserted her and married his own cousin. He has also mismanaged the family property by subdividing the same into 47 plots and selling the same without the Plaintiff's knowledge. He has further failed to produce a full statement of account of the proceeds of sale.

20. For the Defendant, it was submitted that he acquired the property without any contribution from the Plaintiff. And further, that

the Plaintiff is estopped from claiming non-monetary contribution as she did not raise the same in her pleadings. She is bound by her pleadings. He further argued that the marriage between the parties was Islamic and therefore potentially polygamous. As such, the sale of the property was lawful and the Plaintiff is not entitled to the proceeds thereof.

21. It is a fact that there will be situations in a marriage where property acquired by one spouse does not constitute matrimonial property. The law recognizing this fact has made provision as to how the other spouse may acquire an interest in such property. Acquisition of interest in such property may only be by contribution. This is the tenure of Section 9 of the Act which provides:

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.

22. In PWK v JKG [2015] eKLR the Court of Appeal stated:

We are of the respectful view that the principles restated by ECHARIA–VS- ECHARIA are good law and contribution as the basis for distribution of matrimonial property remains valid.

23. In the present case, the Court has found that the Plaintiff did in fact send the moneys to the Defendant. Notably, the Defendant did not deny that funds were sent to him by the Plaintiff. He only stated that he had invited the Plaintiff to be a signatory to his account after his marriage to her. The documents however show that the account from which the funds were sent is a joint account of both parties and not the Defendant's account. Given that there is no evidence that the Defendant deposited any funds in the said account, there is sufficient basis to accept the evidence that the funds sent by the Plaintiff to the Defendant belonged to her. The Court has also found that only Kshs. 580,000/= of the amount sent could, on a balance of probabilities have been applied to the purchase of the property. This represents 16.57% of the purchase price. It follows therefore that the Plaintiff acquired a 16.57% beneficial interest in the property based on her contribution.

Whether the property is held by the Defendant in trust for and on behalf of the Plaintiff

24. Whether property is purchased in the name of one spouse but both contributed to the purchase price, a resulting trust arises in favour of the other party on a *pro rata* basis. This principle is captured in Halsbury's Laws of England, Fifth Edition, Volume 72 para 280 as follows:

“Subject to any express declaration of trust, where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price, or alternatively may make a claim under a constructive trust.

25. The Court of Appeal in Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR cited Lord Ujohn in Pettitt v Pettitt [1969] 2 WLR 966 where he stated:

“But where both spouses contributed to the acquisition of property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners, that is so whether the purchase be in the joint names or in the name of one. This is a result of an application of resulting trust”.

26. The evidence is clear that although the property was registered in the name of the Defendant, the Plaintiff made a financial contribution towards its acquisition. A resulting trust therefore arose in favour of the Plaintiff, proportionate to her contribution. It follows therefore that the Defendant held 16.57% of the property in trust for the Plaintiff.

Whether the Defendant should provide statement of account in respect of the sale of the property.

27. The Court has found that the Plaintiff acquired a beneficial interest in the property, based on her contribution. The property was sold without her involvement and the proceeds of sale were not shared with her. The Plaintiff has a right to know the benefit derived by the Defendant from the sale of the property, in which she has a beneficial interest. As such the Defendant should provide a statement of account of the sale of the property, as prayed by the Plaintiff. The Plaintiff's rights to the accounts and indeed to the proceeds of sale of the property, are guaranteed by Article 45(3) of the Constitution of Kenya, 2010 which provides:

Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.

Whether the suit is time barred

28. It was submitted for the Defendant that the suit is time barred, having brought after the expiry of 12 years. Section 7 of the Limitation of Actions Act provides:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

29. The exhibited title shows that the subdivision of the property was done in 2013 and a certificate of subdivision duly registered on 3.7.13. The subplots were also transferred to the various purchasers on 3.7.13. This suit was filed on 27.5.14 less than 1 year after. The contention that the suit is time barred is therefore without basis.

30. The Court has found that the parties herein are still married. The law does not envisage division of property belonging to spouses during unbroken coverture. Indeed, the Court has no jurisdiction to entertain an application for division of such property. This was the holding in Peter NdunguNjenga v Sophia WatiriNdungu [2000]eKLR where the Court of Appeal stated:

In the exercise of those powers we find and hold that the learned Judge had no jurisdiction to alienate suit lands between spouses during their life-time or unbroken coverture and he ought to have dismissed the suit.

31. While this Court lacks jurisdiction to divide property between the parties herein while their marriage subsists, it may make a declaration as to the rights of the Plaintiff in the property pursuant to Section 17 of the Act which provides:

A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

32. In the end, after considering all the evidence and the relevant law, the Court makes the following declarations and orders:

- a) The Plaintiff is entitled to 16.57% of Land Reference No. xxx/Section xxx/Mainland North.
- b) The Defendant holds 16.57% of Land Reference No. xxx/Section xxx/Mainland North in trust for the Plaintiff.
- c) The Defendant shall within 60 days of the date hereof provide a full statement of account of the proceeds of sale in respect of the subplots of Land Reference No. xxx/Section III/Mainland North.
- d) Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 5th day of May, 2020

M. THANDE

JUDGE

In the presence of: -

.....**for the Plaintiff**

.....**for the Defendant**

.....**Court Assistant**