



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

ORIGINATING SUMMONS NO. 1 OF 2010

TJFAPPLICANT

VERSUS

AWF.....RESPONDENT

JUDGMENT

1. TJF, the Applicant herein, by his Originating Summons (the OS) dated 21.9.10 filed against the Respondent AWF, seeks the following declarations and orders:

i. That the matrimonial home in Mtwapa on Plots Nos. xxxx and xxxx, Section 3, Mainland North and the developments thereon be sold and the proceeds therefrom be divided equally between the parties.

ii. That Plot No. xxxx. Section I, Mainland North known as [particulars withheld] Village and Flat No. xxxx Dove St., Bristol, United Kingdom, which are registered in the parties' joint names, is the sole property of the Applicant and that the same be transferred to his name.

2. The undisputed facts are that parties herein got married in Bristol on 5.3.93. They were not blessed with any children. During the subsistence of the marriage, the parties cohabited in various places including Thailand, Malaysia, Venezuela and the United Kingdom. In 2000, the parties settled in Mtwapa, Kenya, and their matrimonial home was on Plot Nos. Plots Nos. xxxx and xxxx, Section x, Mainland North (the Mtwapa property). At the time of filing the OS the parties were separated and Divorce Cause No. 9 of 2009, filed by the Applicant against the Respondent was pending in Court. The marriage has since been dissolved.

3. According to the Applicant, the properties were acquired during the subsistence of their marriage through his sole efforts. He purchased the Flat in the UK in September 1997 and the Mtwapa in January 2001. In July 2002, he purchased Plot xxxx, Section I, Mainland North on which he developed Gecko Village (Gecko Village). It is the Applicant's case that the Respondent made no contribution towards the acquisition and development of the properties. All the Respondent has been doing is collecting rent and enjoying the proceeds of the restaurant and office premises at Gecko Village. In addition to the properties, motor vehicles KAV 259T and KAK 014R are registered to the Respondent while KSM 992 is registered to the Applicant. The Respondent

4. In her replying sworn on 22.3.13, the Respondent stated that when he married the Applicant, he was jobless and broke as he had been ordered to pay his ex-wife whom he had just divorced. At the time, the Respondent was working in Bristol as a nurse and for 2 years took care of the rent, food, clothes and generally catered for the needs of her jobless husband. Thereafter the Applicant got a job with a phone company and with their joint earnings, bought the UK property. She travelled to several countries with the Applicant upon his transfer. Finally when they settled in Kenya, she purchased 3 *matatus* for business. She also set up [particulars withheld] band. The proceeds of the *matatu* business and of [particulars withheld] band's live performances and sale of music were all banked in their joint account. These funds together with the Applicant's salary enabled them buy the Gecko Village property in 2002. At the Applicant's request, the Respondent sold the *matatus* for Kshs. 3,600,000/= which was used for putting up a *makuti* bar known as [particulars withheld] Village. The bar was opened in 2003 and was run as a family business. After 3 years of hard work, the Applicant left for Nairobi ostensibly to look for work but in actual fact he left because he had a girlfriend there. The Respondent claims that the Applicant had without her knowledge withdrawn Kshs. 16,000,000/= from their joint account. He became violent when confronted and proceeded to file for divorce. The Respondent stated that they have been sharing the rent proceeds from the bar. Further the Applicant has for the last 12 years been receiving rent from the property in the UK to her exclusion. The Respondent claims that she has spent a lot of money repairing and maintaining [particulars withheld] Village. She contends that she is entitled to 50% of the properties.

5. In a rejoinder by way of a further affidavit sworn on 11.10.13, the Applicant denied the allegations by the Respondent and reiterated the

contents of his supporting affidavit. He further averred that during the 5 months he was unemployed, the parties depended on his savings and not the Respondent's salary. He purchased the property in the UK through his earnings in Thailand. The Mtwapa property was purchased from his on earnings at Vodafon Kenya/Safaricom. He denied that the Respondent ever purchased any *matatus*. The [particulars withheld] Village property was purchased and developed through his earnings at Safaricom Limited as a consultant engineer. In 2005, he left Mombasa and went to Bangladesh to work for their upkeep as the [particulars withheld] Village business had become a loss making venture. He further stated that between 2004-2009, he transferred GBP 171,300 funds from his account in to their joint account in the UK and between August 2005 and January 2009 Kshs. 7,000,000/= from his personal account to their joint account. The Respondent has been solely collecting all the rent from all the properties including the matrimonial home and it took the intervention of the Court by its order of 5.5.11 that the same be shared equally between them.

6. Directions were given that the matter be heard by affidavit evidence. Parties then filed their written submissions which I have duly considered. It is noted that this suit was filed under the Married Women Property Act. However, on 24.12.13 that Act by dint of Section 19 of the Matrimonial Property Act, ceased to extend to or apply in Kenya. The Applicable law is therefore the Matrimonial Property Act, which is an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.

7. It is common ground that all the suit properties were acquired during the subsistence of the parties' marriage. Are they 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

8. For a property to qualify as matrimonial property, it must constitute the matrimonial home or household goods and effects in the matrimonial home or homes of spouses. Any other property acquired during the subsistence of the marriage and jointly owned by spouses, also constitutes matrimonial property.

9. According to the Applicant, the Mtwapa property is the matrimonial home of the parties herein. This property therefore, by dint of Section 6(1)(a) of the Act, constitutes matrimonial property. [particulars withheld] Village and the UK Flat also fall within the definition of matrimonial property as they were acquired during the subsistence of the marriage and are jointly owned by the parties.

10. The Applicant's prayer is that the Mtwapa property be sold and the proceeds divided equally between the parties. The Respondent appears to be in agreement, as she seeks 50% of the properties. The contested properties are therefore, [particulars withheld] Village and the UK Flat. The Applicant's prayer in respect of these 2 properties is that, though registered in their joint names, the same be declared to be his, solely, with no share to the Respondent. Her position is that she contributed to the acquisition and development of the same and insists that she is entitled to 50% of the same.

11. The 2 properties are in the joint names of the parties and were acquired during the subsistence of the parties' marriage. The beneficial interests of the parties in the said properties is therefore presumed to be equal in accordance with Section 14(b) of the Act which provides:

Where matrimonial property is acquired during marriage—

a. ...

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

12. This presumption is however rebuttable. Parties are required under Section 7 of the Act to demonstrate their contribution towards the acquisition and development of the same. Section 7 of the Act makes provision as to how matrimonial property is vested in spouses. The section provides:

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.

13. It is evident from the foregoing that joint ownership of matrimonial property by spouses and acquisition of the same during the subsistence of marriage does not mean that ownership vests in them in equal shares. Ownership of matrimonial property by each spouse is proportionate to the contribution made to the acquisition of the same. Where it is established through evidence, that any party's contribution is greater than that of the other, then the presumption in Section 14 of the Act shall be rebutted.

14. The Applicant's case is that he solely acquired the properties without any contribution from the Respondent. He was in continuous employment throughout the duration of the marriage and during the time the properties were acquired. The UK property was purchased in 1997. Between 1993 and 2000, the Respondent worked with Norconsult Telematics Limited in various countries. Between 2000-2003, he purchased and developed [particulars withheld] Village while he worked with Safaricom as an engineer, earning £483 per day. Between 2004 and 2011, he earned at least USD 9,090 per month working in various parts of the world for Grameenphone Company, Ericsson, Bushmax Ltd. During this entire period, the Respondent was in employment for only 24 months in the UK where she earned a USD 500 per month.

The Applicant argues that based on their earnings, his contribution towards the acquisition and development of the properties is 99% while that of the Respondent is 1%.

15. The Applicant further submitted that the Respondent did not adduce any evidence of the alleged *matatu* business nor of the earnings of the band. Further, since the marriage had no children and there was no family business or farm, the Respondent's indirect contribution towards the acquisition and development of the properties was minimal. Reliance was placed on the case of P A W-M v C M A W M [2018] eKLR. The Applicant further urged the Court to be guided by the decision in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR and award costs to him.

16. The Respondent on the other hand contended that when she married the Applicant in 1993, he was jobless and a recent divorce had left him broke. The Respondent submitted that she was a clinical care giver in Bristol and for 2 years took care of all household requirements needs including the Applicant's personal needs and apparel. The Respondent further submitted that when the Applicant finally got a job, they both saved money with which they purchased the UK property. After settling in Kenya, they purchased the Mtwapa property and [particulars withheld] Village property and jointly constructed the makuti bar. The Respondent submitted that her contribution towards the construction of the makuti bar came from her *matatu* business and performances by her band as well as sales from recorded music. The Respondent contended that she managed the bar and banked the earnings as well as income from live performances in their joint account from which the Applicant unilaterally withdrew Kshs. 16 million.

17. It was the Respondent's further submission that she solely managed and repaired [particulars withheld] Village. She fought litigation in respect of [particulars withheld] Village thereby saving the property from parties who wanted to grab the same. The Respondent contended that in spite of the UK property being matrimonial property, the Applicant has since 1997 been receiving rent therefrom amounting to Kshs. 34,184,464/=, which he has never shared with the Respondent. He also continues to receive half the rent from [particulars withheld] Village.

18. The Respondent argued that she should be treated equally as she put in effort to save money and repair the properties while the Applicant was spending money all over the country. Her contribution is immense and she ought to be treated equally notwithstanding that the same is unquantifiable. She relied on the case of Kivuitu v Kivuitu 1991 2 KAR 241, and DV v PB [2019] eKLR, to support her submissions.

19. I have looked at the documents exhibited by the parties in support of their respective positions. There is evidence that between 1993 to 2000 the Applicant was in continuous employment with Norconsult Telematics in various countries including Thailand, Malaysia and Venezuela. The parties thereafter settled in Nairobi Kenya.

20. Whereas it is not disputed that the Respondent worked for 24 months, I am not persuaded that she supported a jobless Applicant for 2 years from the time they got married. The evidence exhibited shows that the Applicant began to work for Norconsult Telematics Ltd from July 1993. From that point on he has worked for several entities in various countries including Thailand, Malaysia, Venezuela, Pakistan, UAE, Bangladesh, the United Kingdom and Kenya. On the other hand, there is no evidence of the *matatu* business the Respondent was allegedly engaged in. No copies of logbooks were exhibited to show that she did indeed purchase the 3 *matatus*. It is also not indicated where the money for the purchase of the *matatus* came from. She has also not stated how much she earned from the said *matatus* nor from her band performances and sale of recorded music. All she said was that she deposited the income in the parties' joint account. No evidence of such deposits was placed before the Court. Indeed, all the deposits made into the joint account as per the exhibited statements came from the Applicant. No evidence of sale of the 3 *matatus* by way of agreements for the sale was availed. In the premises, I am persuaded that on a balance of probabilities, the funds for the purchase of and development of the 2 properties came from the Applicant without any financial contribution from the Respondent.

21. The law recognizes non-financial contribution by a spouse in the acquisition of matrimonial properties. Section 2 of the Act defines contribution as follows:

“contribution” means monetary and 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;**

22. The parties herein have no children. The Respondent did not therefore undertake any child care nor did she engage in any farming. She however managed the *makuti* bar which is a family business, although the Applicant alleged that she mismanaged the business.

23. In the OS, the Applicant stated that upon marriage to the Respondent, they cohabited overseas in Thailand, Malaysia, Venezuela, United Kingdom and Kenya. During the time of their cohabitation, the Respondent gave the Applicant companionship as his wife. The fact that the Respondent accompanied the Applicant and was there for him during his tour of duty in the various foreign countries, must have been especially critical for his wellbeing and gave him peace of mind. This social support no doubt enabled him work stress-free thus enabling him acquire and develop the properties herein. Additionally, by keeping house, the Respondent also saved the Applicant the expense of employing someone to take care of the home.

24. In the case of Kivuitu v Kivuitu [1991] KLR 248, Omollo Ag JA (as he then was) while expressing the position that it is not only monetary contribution that should be taken into account, stated:

For my part I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of property even though that contribution cannot be quantified in monetary terms. In the case of the urban housewife, if she were not there to assist in the running of the house, the husband would be compelled to employ someone to do the house chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even bigger contribution to the family welfare by tilling the family land and producing either cash or food crops. Both of them, however, make a contribution to the family welfare and assets. So that where such a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the courts must take it that such property, being family asset, is owned in equal shares.

25. It is important to note that the Kivuitu case was decided before the enactment of the Act. While Omollo, Ag. JA's position accords with the definition of contribution in the Act, his conclusion that matrimonial property registered in the parties' joint names is owned in equal shares is contrary to the provisions of Section 7 of the Act which provides that such property vests in the spouses according to their contribution towards its acquisition.

26. As stated earlier, the definition of contribution in Section 2 of the Act has been expanded to include non-monetary contribution. In the P N N v Z W N [2017] eKLR, Kiaga JA had this to say about non-monetary contribution:

What has changed, from my point of view, is the narrow conception of contribution espoused by ECHARIA in that it went as far only as recognizing indirect contribution which had essentially to be viewed in money or monetary equivalent leaving out such unquantifiable as child care and companionship which fall under non-monetary contribution which is now expressly recognized under the Matrimonial Property Act.

27. While it is difficult to quantify non-monetary contribution, the same cannot be disregarded. 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.

28. To disregard the unquantifiable non-monetary contribution by the Respondent would clearly negate the equality principle and result in injustice.

29. I find no evidence that the Applicant has received rent from the UK Flat amounting to Kshs. 34,184,464/= or that the matrimonial home, that is the Mtwapa property, has been rented out. I also find no evidence that the Applicant withdrew Kshs. 16,000,000/= from their joint bank account. Similarly, no evidence of repair and maintenance of the properties by the Respondent was availed.

30. After considering all the evidence and the law, I draw the conclusion that the 2 properties were acquired and developed through the financial contribution of the Applicant and the non-monetary contribution of the Respondent. The 2 properties should therefore be divided according to each party's contribution. I estimate the Applicant's contribution to be 60% while that of the Respondent is 40%.

31. I now turn to the issue of costs. It is trite law that costs follow the event. The award of costs is however a matter of judicial discretion. In the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR, the Supreme Court held that this principle of law is not invariable. The Court said:

Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.

32. The parties herein were married for over 10 years. They are only recently divorced. In the circumstances, awarding costs to either of them will further aggravate their relationship.

33. In the end, I make the following declarations and orders:

i. The matrimonial home in Mtwapa on Plots Nos. xxxx and xxxx, Section III, Mainland North and the developments thereon be sold and the proceeds therefrom be divided equally between the parties as prayed.

ii. Plot No. 3088 Section I, Mainland North known as Gecko Village and Flat No. 82C Dove St., Bristol, United Kingdom, which are registered in the parties' joint names, are hereby declared to be matrimonial property. The Applicant and the Respondent hold beneficial interest in these properties in the proportion of 60% and 40% respectively, and the same are hereby distributed to the parties in accordance to the said proportion.

iii. The circumstances of this case do not call for an award of costs.

DATED, SIGNED and DELIVERED in MOMBASA this 22nd day of May 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**