



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL SUIT NO.7 OF 2018 (OS)**

**IN THE MATTER OF SECTION 2, 6, 7 & 17 OF THE MATRIMONIAL PROPERTY ACT (2013)**

**LAN.....APPLICANT**

**VERSUS**

**POA.....RESPONDENT**

**RULING**

[1] By dint of the originating summons dated 8<sup>th</sup> November 2018, made under O.37 of the Civil Procedure Rules and premised on the provisions of the **Matrimonial Property act, 2013**, the applicant/plaintiff, **LAN**, seeks against the respondent, **POA**, a declaratory order that property described as **L.R. No. C.Kasipul/Kamuma/[xxxx]** and the developments thereon situated within Homa Bay County at Oyugis registered in the name of the respondent is jointly owned by both the applicant and the respondent/defendant having been acquired jointly by themselves during the subsistence of their marriage which has since been legally dissolved.

[2] The grounds in support of the application are basically that the suit property was acquired by joint funds and efforts of both the applicant and the respondent during the existence of their marriage and that the applicant contributed towards the development of the property and is therefore entitled to her share of the same, being matrimonial property.

These grounds are enhanced and fortified by the applicant's averments in her supporting affidavit dated 8<sup>th</sup> November 2018.

The respondent opposes the application on the basis of the grounds contained in his replying affidavit dated 7<sup>th</sup> August 2019.

In addition to the respective affidavits, both parties led oral evidence in support of and opposition to the application.

The applicant called **Collins Otieno Odhiambo (PW2)** and **Joseph Otieno Olal (PW3)** as her witnesses. The respondent (**DW1**) did call **Titus Oluoch Okal (DW2)**, as his witness.

[3] Briefly, the applicant's case was that in the year 1993, she underwent a customary marriage with the respondent. This was converted into a statutory marriage in the year 2010. At the beginning of the union both herself (applicant) and the respondent were "persons of straw". They had to "hustle" for survival until the year 2005, when the applicant secured employment with the civil service and became the sole breadwinner of the family.

Their lifestyle "metamorphosed", from a single roomed house to a bigger house for which she paid the monthly rent. However, the bliss in their marriage developed cracks in the year 2006, when the applicant had to obtain a loan from her employers' savings and credit co-operative union (i.e. Sacco) for purposes of bailing out the defendant/respondent from his personal loan obligations.

[4] The cracks in the marriage grew bigger and bigger such that the marriage partially collapsed in the year 2012, when the couple separated. Absolute collapse of the marriage came in the year 2018 with a formal dissolution of marriage (divorce). It was in that year that the present suit was filed.

The applicant contended that the suit property was purchased by herself in the year 2007, with funds obtained from her personal savings and a development loan obtained from her Sacco. Thereafter, she commenced the process of developing the property by erecting thereon a residential house. This was completed in the year 2012, when she had separated from the respondent in whose name the title of the property was registered as at the time of the purchase of the property, the vendor was not in possession of any title document.

[5] The applicant also contended that the property was under threats of being sold in the year 2014, when strange people made several calls to her threatening to sell the property if she failed to off-set or pay money advanced to the respondent. Her attempts to settle the matter were

thwarted by the respondent's unwillingness to cooperate in light of their divorce.

It was then that she discovered that the suit property was actually registered in the sole name of the respondent. She felt cheated and sought legal help which led to her registering a caveat over the property and filing this suit.

**[6]** The respondent's case was that he married the applicant in 1993 and lived peacefully with her as husband and wife until the year 2005 when she was employed and ceased to be a housewife. She eventually left the matrimonial home in the year 2012, after accusing him of failure to sire children with her and boasting of being of a higher cadre than his lower cadre. Before then, in the year 2007, he purchased the suit property which was a subdivision of a larger portion known as **Central Kasipul/Kamuma/[xxxx]**. The purchase price was Kshs.85,000/= which he fully paid in the presence of the applicant who signed the sale agreement as a witness.

The original portion was subject of a succession cause in which it was subsequently subdivided into three portions with him (respondent) being allocated the suit property (i.e. plot No.6010). He thereafter obtained the necessary title deed in his name without objection from the applicant. He then took possession of the property and commenced construction of the matrimonial home. This was completed in the year 2009, after which they occupied and lived in the matrimonial house until the year 2012, when the applicant deserted the home and later obtained a divorce. He married a second wife and continued living on the suit property with his new family.

**[7]** It is the respondent's contention that the applicant made no contribution towards the purchase of the suit property as she was only a housewife and he was employed and/or carried out business.

That, if at all the applicant contributed to the acquisition of the property, then the contribution would not warrant her to take away their matrimonial home.

The respondent contended further that the present claim by the applicant is made in bad faith occasioned by her jealousy against his second wife. He maintained that the applicant was still his legal wife as they are yet to divorce. He however, agreed that he was served with the necessary court order dissolving their marriage. He also agreed that the suit property was their matrimonial home from where the applicant "disappeared" and went to court after seven years to obtain the divorce and thereafter frustrate him yet she remarried and moved on. He prayed for the dismissal of this case while contending that the applicant with whom he stayed for a period of thirteen years while she was jobless caused a lot of marital wrangles and eventually disappeared from home oblivious of the fact that he secured employment for her in the year 2005.

**[8]** In their respective submissions, both the applicant and the respondent more or less reiterated what they had each stated in their affidavit and oral evidence in support of their respective case.

It is apparent from the evidence and the submissions that there is no dispute or substantial dispute with regard to the fact that the applicant and the respondent were in a marriage relationship which commenced in the year 1993 and effectually ended in the year 2018, courtesy of a formal divorce order.

It however, seems that the respondent is living in denial by insisting that there is no divorce between him and the applicant and that she is still his wife.

The marriage certificate exhibited in the respondent's replying affidavit and the divorce order (Decree Absolute) exhibited in the applicant's supporting affidavit established that there existed a valid and lawful marriage between the applicant and the respondent and that it was lawfully dissolved by an order issued by the Magistrate's Court at Oyugis in November 2018. Therefore, the respondent's denial of the true state of affairs does not change the facts relating to his marriage to the applicant and the divorce which ensued.

**[9]** Also not disputed herein is the fact that the matrimonial home and indeed, the suit property were acquired during the existence of the marriage between the applicant and the respondent. Their brief separation in the course of their marriage did not amount to a dissolution of the marriage. The two may have lived apart from each other for a period of time, but they were still legally marriage.

The separation gave them an opportunity to work through and resolve their personal problems which were endangering their marriage.

It gave them time to reflect on their marriage with a view to saving it as they had taken the vow to live together in happiness and/or sorrow or in sickness and health, for better or worse, for richer or poorer etc, till death did them apart.

Unfortunately, what did them permanently apart was their respective ego, pride and probably machismo.

**[10]** Be that as it may, the big question here is what course should the property acquired by them during the existence of their marriage really take after the dissolution of the marriage??. Indeed, the basic issue presenting itself for determination is whether the applicant is entitled to a proprietary interest in the suit property and the developments thereon even though the property is registered in the name of the respondent.

The legality or otherwise of the process of the registration and its culmination is not an issue falling within the ambit of this court, neither is the validity and/or invalidity of the sale agreement entered between the applicant or the respondent or both and the original beneficial owner or owners (Vendors) of the property.

**[11]** In this case, the suit property is the only matrimonial property identified by the parties. However, the evidence suggested that there could be additional property elsewhere that may also have been acquired by them during the existence of their marriage.

The fact that the additional property was excluded herein was an indication that the parties have no dispute with regard to the course the

property took after dissolution of the marriage.

Perhaps, the suit property is subject of this dispute due to its value and sentimentality which is not always linked with goodness and warmth as it can at times be dangerous to health and well-being. It is therefore no wonder for the respondent to contend and affirm that the suit property is the only matrimonial home where he lives with his new family and which the applicant deserted as being useless. That, the applicant's claim is merely driven by jealousy against his second wife with an intention to render them homeless while she goes about enjoying her life.

[12] Sentimentality aside, it is not uncommon for married couples to acquire property in their own individual right without any intention of treating it as matrimonial property jointly owned.

Since nothing in this world, not even marriage, is perfect, when one spouse acquires property in his or her own right with no intention of owning it jointly with the other spouse, it may be said that she or he is simply saving for a rainy day which is a trait of the wise and an ingenious reflection of wisdom.

Coming to the issue at hand, the guiding principles may be found in the Constitution and the applicable statutory law i.e. **the Matrimonial Property Act, 2013**.

[13] Under **Article 27 (1)** of the **Constitution**, every person is equal before the law and has the right to equal protection and equal benefit of the law and under **Article 40 (1)**, every person has the right either individually or in association with others to acquire and own property.

Prior to the advent of the Matrimonial Property Act, 2013 i.e. Act No.49 of 2013, the law applicable to matrimonial property was the English **Married Women's Property Act, 1882**, which applied in this country as an Act of general application. **Section 17** of the **Act** was most important. It partly provided that:-

**“In any question between husband and wife as to the title to or possession of property either party ----- may apply by summons or otherwise in a summary way to any judge of the High Court of justice ----- and the judge of the High Court may make such orders with respect to the property in disputes, and to the costs of and consequent on the application as he thinks fit”.**

[14] In the English decision **Hine –vs- Hine (1962) 1 WLR 1124**, it was stated that the jurisdiction of the court over family assets under section 17 was entirely discretionary. The discretion transcended all rights, legal or equitable and enabled the court to make such order as it thinks fit. The court was entitled to make such order as appears to be fair and just in all the circumstances of the case.

In the Kenyan case of **Kivuitu –vs-Kivuitu [1991] 2 KAR 241**, which was brought under Section 17 of the aforementioned Married Women Property Act, 1882, the Court of Appeal found that parties in the marriage relationship were entitled to matrimonial property in equal shares.

The court also found that if the property was registered in the name of the husband alone then the wife would be perfectly entitled to apply to court under Section 17 of the Married Women's Property Act, 1882, so that the court can determine her interest in the property and in that case the court would have to assess the value to put in the wife's non-monetary contribution.

[15] However, in **Kamore –vs-Kamore [2000] 1 EA 80**, the court held that: actual contribution has to be proved.

In an earlier decision coming after the Kivuitu case (supra) i.e. **Essa -vs- Essa Civil Appeal No.101 of 1995**, the court stated that the law with regard to the disposal of Matrimonial property upon the dissolution of a marriage is fairly well settled. Where property is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares.

There is of course no presumption and there could not have been any, that any or all property acquired during the subsistence of the marriage must be treated as being jointly owned by the parties.

In **Echaria –vs-Echaria Civil Appeal nO.75 of 2001**, a five judge bench of the Court of Appeal said that, where the disputed property is not registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would, ultimately depend on their proven respective proportions of financial contribution either directly or indirectly towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim **“Equality is equity”**.

[16] Most of the cases coming after Kivuitu case (supra), such as **Kamore –vs- Kamore** (supra), **Essa –vs- Essa** (supra), **Nderitu –vs- Nderitu Civil Appeal No.203 of 1997**, invariably gave the wife an equal share of matrimonial property but appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property.

In **Nderitu –vs- Nderitu (Supra)**, the court held that the wife's non-monetary contribution should be taken into account. The court said:-

**“A wife's contribution and more particularly a Kenya African wife will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution. It is incumbent therefore upon a trial judge hearing an application under Section 17 of the Act to take into account this form of contribution in determining the wife's interest in the assets under consideration”.**

[17] In 1970, **The English Matrimonial Proceedings and Property Act, 1970**, was enacted. Its effect was to render applications under Section 17 of the 1882 Act unnecessary.

In his book “**The Due Process of Law**” (1980), Lord Denning, MR observed that a wife who had made other important non-financial contributions such as staying in the house, keeping it clean, bringing up the children etc was left without a remedy until the enactment of the aforementioned English Matrimonial Proceedings and Property Act, 1970.

The Act empowered the court to make property adjustment orders and in doing so, consider the contributions made by each of the parties to the welfare of the family including any contributions made by looking after the home or caring for the family.

[18] In *Kamore –vs- Kamore* (Supra), the court in clarifying the law applicable in disputes relating to Matrimonial Property observed that until such time as some law is enacted in this country, as indeed it was enacted in England to give proprietary rights to spouses as distinct from registered title rights, Section 17 of the 1882 Act must be given the same interpretation as was done in **Pettitt –vs- Pettitt [1969] 2 KLR 960** and **Gissing –vs- Gissing [1970] 2 All ER 780**.

The court further observed that such laws should be enacted to cater for the conditions and circumstances in Kenya as in England, the

**Matrimonial Homes Act of 1967** was enacted which was later replaced by the **Matrimonial Proceedings and Property Act of 1970** both of which made a difference along with **The Matrimonial Causes Act of 1973**.

[19] Later, in *Echaria –vs- Echaria* (Supra) the Court of Appeal further observed that there was no sign, so far, that parliament had any intention of enacting the necessary legislation on matrimonial property. That, it was a sad commentary on our law reform agenda to keep the country shackled to a 125 year old foreign legislation which the mother country found wanting more than 30 years ago. In enacting the 1967, 1970 and 1973 Acts, Britain brought justice to the shattered matrimonial home.

Thanks God, this prayer was heard approximately five or six years later when our parliament suddenly saw the light and enacted **The Matrimonial Property Act, 2013**.

This is the actual law applicable in the present circumstances. As it were, it brought justice to Kenya’s shattered matrimonial home. It is an Act of parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.

[20] **Section 2** of the **Act** defines “**Matrimonial home**” to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

**Matrimonial Property** is defined in **Section 6** of the **Act** to mean the matrimonial home or homes, household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

Herein, the suit property and the development thereon qualifies for the description “Matrimonial property”.

Under **Section 7** of the **Act**, ownerships 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.

[21] **Section 2** of the **Act** defines “**Contribution**” to mean monetary and non-monetary contribution and includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.

The above provisions of the law clearly identifies the course the matrimonial property herein should take upon dissolution of the marriage between the applicant and the respondent. Undoubtedly, the applicant is entitled to a proprietary interest in the suit property and developments thereon even though it is registered in the name of the respondent.

The ownership of the entire matrimonial property vests in both the applicant and the respondent and the share thereof among them depends on the contribution of either one of them to its acquisition now that they are divorced. There is no room for sympathy or sentiments in the division of the matrimonial property upon dissolution of marriage.

[22] Evidence led by either party would invariably determine the extent of the division of the property.

Herein, the evidence, both oral and documentary, did establish on a balance of probabilities that the engine behind the acquisition of the suit property and development thereon in the form of a residential house which became the sole matrimonial home was the applicant. Her evidence in that regard was convincing and was credibly corroborated by that of her witnesses, Collins (**PW2**) and Joseph (**PW3**) as well as the respondent’s witness, Titus (**DW2**).

These witnesses confirmed that the suit property was jointly acquired by the applicant and the respondent. They purchased it together as a couple meaning that they jointly raised the seed capital.

The contribution made by the applicant in the construction of the matrimonial home within the suit property was enormous in the form of funds and materials. Her documentary evidence in that regard was neither invalidated nor disproved.

**[23]** The evidence by the respondent that there was none or minimal contribution by the applicant in the acquisition of the suit property and erecting the matrimonial home thereon was rather weak and was in any event, disproved by that offered by the applicant. At most, the respondent's documentary evidence established that he was at one time in gainful employment as a security officer and may have provided financial support for the applicant to undergo studies in sales management and marketing prior to her employment with the civil service.

From the evidence in its totality, this court holds the opinion that the contribution of the applicant and that of the respondent towards the acquisition of the suit property and developments thereon was equal notwithstanding the fact that the property was registered in the sole name of the respondent.

Each one of them is entitled to ownership of the property in equal portions now that they are divorced.

**[24]** In sum, the application is hereby granted in terms of prayer (1) of the Originating Summons dated 8<sup>th</sup> November 2018 with each party bearing their own costs.

The ball is now in their court to craft modalities for equal sharing of the suit property. If they cannot peacefully share the property or cannot even see eye to eye, the best option would be to dispose of the property by sale and equally share the proceeds or one party may buy off the other's share and keep the entire property for himself or herself.

**J.R. KARANJAH**

**JUDGE**

**02.07.2020**

**[Delivered and dated this 2<sup>nd</sup> day of July, 2020**