



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 63 OF 2014

DIS.....APPLICANT

Versus

JMRESPONDENT

JUDGMENT

1. The Plaintiff/Applicant herein DIS (hereafter referred to as the Applicant) filed this Originating Summons against the Defendant/Respondent JM (hereafter referred to as the Respondent seeking the following orders;

(i) THAT this Court decrees and declares that the Property described as LR No. [xxxx] situated in Embakasi, Nairobi and registered in the joint names of the Applicant and the Respondent is wholly owned by the Applicant.

(ii) THAT the said property be sold and proceeds from the sale be apportioned in accordance with each party's contribution towards the purchase, maintenance and improvement of the said property.

(iii) THAT Respondent becondemned to pay Costs of this Suit.

2. The Applicant and the Respondent got married on 18th February 2003 at the Registrar of Marriages Office Nairobi.

3. The marriage was dissolved on 6.11.2015 and a decree Nisi absolute issued on 14th March, 2016.

4. During the Pendency of the said marriage, the couple acquired LR NO. [xxxx] situated at Embakasi Nairobi (hereafter referred to as the matrimonial property)

5. When the case came for hearing on 31.1.2019, the applicant who gave viva voce evidence testified that she bought the house under a tenant purchase scheme with NSSF.

6. The Applicant said she serviced the loan single- handedly although the property is registered in both the names of the Applicant and the Respondent.

7. The hearing of this case proceeded ex parte as the Respondent was served with the Originating Summons and the Hearing Notice but he never filed any reply to the Original Summons and neither did he come to Court for the hearing of this case.

8. The Applicant said that the Respondent only made advance payments of Ksh.30,000/- for only 4 months amounting to Ksh.120,000 and he never paid anything else towards the mortgage repayment or maintenance and repair of the house.

9. The Applicant said she also used to pay monthly service charge which she continues to pay to date. The applicant produced receipts and other documents including banker's cheques which shows she paid for the purchase of the house.

10. I have considered the evidence adduced by the Applicant. I find that the said evidence is not controverted since the Respondent did not file any documents herein. I find that the Applicant has proved to the required standard that she solely financed the purchase of the matrimonial home.

11. I rely on this case of **PNN –v- ZWN [2017]eKLR**. In that case, the Court of Appeal relied on **Francis Njoroge –v-s Virginia Wanjiku Njoroge (Nairobi Civil Appeal No. 179 of 2009)** where it was held as follows:-

“... A division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the court of appeal of Singapore in Lock Yeng Fun –v- Chua Hock Chye 92007) SGCA 33,

“it is axiomatic that the division of matrimonial property under section 112 of the Act is not and by its very nature cannot be a precise mathematical exercise.”

12. Section 7 of the Matrimonial Property Act is also very clear with regards to division of matrimonial property. Matrimonial property division occurs in accordance with contribution of each spouse.

13. In the case of **PAWN vs CAWM [2018]eKLR**, the Court held as follows;

"..... the Constitution and the statute law, herein before referred to as the Matrimonial Properties Act of 2013, protects family property and underpins the principles of fairness and non-discrimination of a spouse who has made contribution in the manner provided in the Act. Article 45 (1) (3) of the Constitution makes provisions regarding the rights of parties during marriage and upon dissolution and anchors the principle of “equal rights” as thus:-

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

[21] The aforesaid Matrimonial Property Act defines with clarity what constitutes “contribution” to mean “monetary and non-monetary contributions 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.”

Ownership of matrimonial property is described under Section 7 of the Matrimonial Property Act as;-

“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.””

14. This therefore means that at the dissolution of a marriage, a party should leave with what he or she contributed towards the acquisition of the matrimonial property.

15. In this case the Applicant paid all of the mortgage amount of the matrimonial home and the Respondent basically contributed Ksh 120,000 only which is 4.8% of the purchase price.

16. The Applicant said that the matrimonial property currently has a market value of ksh 7Million. This therefore means that the Respondent should only receive 4.8% of the 7Million which is Ksh 336,000.

17. Registration of property in both spouses names is essentially regarded that the property is held by both spouses in equal right. However, this clause does not negate the fact that spouses receive from the marriage in accordance with their contribution whether monetary or in kind.

18. The respondent is legally entitled to Ksh 336,000 which is 4.8% of the amount contributed whilst purchasing it.

19. There is no evidence that the Respondent made any non monetary contribution as envisaged in the matrimonial properties Act. The matrimonial property Act defines what constitutes “contribution” to mean monetary and non-monetary contributions 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.

20. In the Current Case, other than the four month's contribution made towards the payment of the Mortgage amounting to ksh 120,000, there is no evidence that the Respondent made any other monetary or non-monetary contributions towards the purchase of the matrimonial property.

21. Section 7 of the Matrimonial Properties Act states as follows;

“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”.

22. In the current case, I find that the Applicant entirely financed the purchase of the Matrimonial Property through a tenant purchase scheme with NSSF. The contribution by the Respondent has been assessed as 4.8%.

23. I accordingly decree and declare that the matrimonial property herein described as LR [XXXX] situated in Embakasi Nairobi is totally owned by the Applicant. The Respondent is entitled to compensation for the four months he paid for the house. I accordingly order as follows;

(i) THAT the Matrimonial Property LR NO. [XXXX] be transferred to the Applicant wholly.

(ii) THAT the Applicant to refund the Respondent Ksh.336,000 as fair compensation for his contribution towards the purchase of the house.

(iii) THAT this is a case between parties who are now divorced and I direct that each party bears its own costs of this suit.

Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 8TH DAY OF FEBRUARY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI