



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL SUIT NO. 26 OF 2015 (O.S)**  
**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**  
**AND**  
**IN THE MATTER OF A DECLARATION OF THE RIGHTS**  
**OF A SPOUSE IN MATRIMONIAL PROPERTY**  
**AND**  
**IN THE MATTER OF THE MATRIMONIAL PROPERTY NO. 49 OF 2013**  
**BETWEEN**  
**MNM.....PLAINTIFF**  
**AND**  
**RMM.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff/Applicant filed this suit seeking division of Matrimonial Property acquired during the subsistence of her marriage to the Defendant/Respondent.
2. The parties entered into a consent which partially compromised the suit in the following terms;
  - (i) THAT the Defendant takes Thika Municipality Plot No. [xxxx].
  - (ii) THAT the Plaintiff takes Plot No. [xxxx] Housing Thika.
3. The Defendant's Counsel reported to the Court that the Defendant had sold Property No. [xxx] without the knowledge of the learned counsel. The defendant was directed as follows on 1.3.2018;
  - (a) THAT the Defendant to file in Court an Affidavit setting out the following;
    - (i) When and to whom he sold property [particulars withheld] (LR NO. [xxxx] Thika)
    - (ii) The purchase price he received,
    - (iii) Date of the sale Agreement,
    - (iv) Date of transfer.
  - (b) THAT the Affidavit shall exhibit a true copy of

(i) Sale Agreement and transfer

(ii) Full Search of the said property from 2002 to date

(iii) Any receipts issued

(iv) Proof of receipt of funds

(c) THAT the matter be mentioned on 12.4.2018 to ensure compliance

(d) THAT costs to be in the cause.

4. The defendant never come back to court from that date and his advocate sought leave to cease acting for him. The Court directed that the hearing notice be served upon the defendant personally and further that the defendant's Advocate to serve him with their Application seeking leave to cease acting for him.

5. The Plaintiff served the defendant with a hearing notice and filed an affidavit of service. The hearing proceeded ex parte since the defendant did not appear in court despite having been served with the hearing Notice.

6. The Plaintiff asked the Court to give her half of the proceeds which the defendant sold LR No. [xxxx] (Property [particulars withheld]). However she did not produce any documents to show the existence of the said property or any evidence of sale of the same.

7. It is trite law that a party is duty bound to proof his or her case to the required standard. The law is very clear that he who alleges a fact is duty bound to prove the same. The parties in this case agreed to share part of the property and it is upon the plaintiff to prove that the property in dispute is matrimonial property and that it exists. The plaintiff has failed to prove the same and I find that her claim on property Nos. [(LR No. [xxxx])] must fail for want of evidence.

8. However, I find that the parties reached a settlement on the other two properties and I adopt the Consent as the Judgment of this Court in the following terms;

**(i) THAT the Defendant/Respondent takes Plot No. [xxxx] Municipality/Block [xxxx] Estate Investment absolutely.**

**(ii) THAT the Plaintiff/Applicant takes Plot No. [xxxx] Housing Co-operative Society Ltd Thika Municipality/Block [xxxx] absolutely.**

**(iii) THAT the Deputy Registrar of this Court to sign the transfer documents of the Plot No. [xxxx] Housing Co-operative Society Ltd Municipality/Block for the same to be transferred to the name of Plaintiff/Applicant.**

**(iv) The Defendant/Respondent to pay the costs of this suit.**

**Orders accordingly.**

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI**