



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 25 OF 2012 (O.S)**

**RWW.....APPLICANT**

**VERSUS**

**COL. EW.....RESPONDENT**

**JUDGMENT**

1. The applicant brought an application vide an Originating Summons dated 5<sup>th</sup> February 1997, filed on even date, seeking division of matrimonial property. The matrimonial properties are set out in paragraph 6(a-e) of the applicant's affidavit sworn on 4<sup>th</sup> February 1997. The applicant further filed a list of authorities dated 20<sup>th</sup> January 2000 and two lists of documents dated 3<sup>rd</sup> December 2014 and 15<sup>th</sup> February 1997, respectively.

2. In opposition to the application, the respondent filed grounds of opposition and a replying affidavit, both dated 18<sup>th</sup> April 1997 and filed on the same date. The respondent also filed a list of documents dated 28<sup>th</sup> April 2008, and supplementary lists of documents dated 23<sup>rd</sup> April 2013 and 24<sup>th</sup> April 2013, respectively.

3. The applicant gave sworn testimony during which she stated that she and the respondent married under Kikuyu Customary law in 1976 and later solemnized their marriage at [Particulars withheld] Church, Nairobi, in 1989. The parties separated on 25<sup>th</sup> July 1992 and a divorce was consequently granted in 1998. Their marriage brought forth three issues: EW born in 1981, JMW born in 1984 and LWW born in 1990. It was the applicant's testimony that at the time of the marriage, she worked as a Personal Secretary to the Chief Accountant at [Particulars withheld], earning a basic salary of Kshs. 3,800.00. The respondent was employed by [Particulars withheld] as a lieutenant earning a monthly salary of Kshs. 2,800.00. The applicant moved to [Particulars withheld] where she earned the same salary while working under a similar position. At the time of leaving [Particulars withheld], however, the applicant was earning a net salary of Kshs. 13,000.00. She contended that at the time of their separation in July 1992, the respondent was still working at [Particulars withheld] and was earning a monthly salary of Kshs. 11,000.00.

4. She asserted that upon her marriage to the respondent, they lived in a rental house in the Nairobi West area, and thereafter moved into a government house allocated to the respondent in Lavington, Nairobi. They later moved into Westlands, Ngong Road, and South C areas in Nairobi and lived in government allocated houses. The applicant stated that she and the respondent acquired various properties during their marriage as listed in paragraphs 6 and 7 of her affidavit sworn on 4<sup>th</sup> February 1997 and in paragraph 3 of her further affidavit sworn on 5<sup>th</sup> May 2004. She stated that the properties therefore qualify as matrimonial property and ought to be distributed amongst them. Paragraph 6 of the affidavit sets out the following properties:

- a) LR No. [xxxx] Mombasa Road
- b) LR No. [xxxx] Karen
- c) Ruguru/Gachika/[xxxx]
- d) Umoja 1 House No. [xxxx]
- e) LR NBI/Block [xxxxx] (Mugoya)
- f) Nairobi/Block/[xxxx] – Tena
- g) Nyayo Estate House
- h) Motor vehicles registration KXW [xxx], KAB [xxx] and KAG [xxxx].

5. She further stated that they also had three motor vehicles of registration numbers KAB [xxx] Toyota Saloon car, KXW [xxx] Isuzu Pick-up and KAG [xxx] Peugeot [xxx]. She urged that even though the motor vehicle registration number KAG [xxx] belonged to the respondent, it was not registered in the respondent's name. She produced a Power of Attorney in that regard.

6. The applicant presented loan forms as indication of loans she acquired from Unga Feeds Co-operative Sacco on different occasions for purposes of purchasing a parcel of land, school fees, and medical bills. Through the loans, she purchased a flat in Nyayo High Rise estate following an offer by the National Housing Corporation (NHC) dated 28<sup>th</sup> April, 1994. She paid back the loans through her salary and overtime.

7. The applicant testified that she was working as a secretary during the pendency of their marriage. She urged that she contributed financially towards the purchase of the properties whose division was the subject of the present suit, but that all the properties were registered in the respondent's name. She stated that she used her salary to purchase groceries and household goods while the respondent used his salary to purchase some of the properties. She urged that some of the properties were gifted to them during their wedding ceremony.

8. The respondent gave sworn testimony and stated that he married the applicant under customary law in 1981. Their marriage was solemnized in church six years later in 1987. They later separated in July 1992. They had lived together for a period of about eleven (11) years before the separation. The respondent asserted that he graduated from the [Particulars withheld] College in 1975 as a cadet officer. Between 1975 and 1979, he was promoted to first lieutenant which rank he held until 1982 when he rose to the position of Captain. In 1985, he was promoted to the position of a Major. He urged that when the marriage broke down, he was a Lieutenant Colonel, having been promoted to that rank in 1990 and which position he held until he retired in 1996. His retirement was, however, voluntary since he had not attained the mandatory age of retirement at the time.

9. He stated that when he married the petitioner, the military assigned him a furnished four (4) bedroom house in Langata in which they lived from 1982 to 1983. They moved to a furnished three (3) bedroom house in Westlands, then to Ngong and finally to Mugoya Estate. It was from the latter house that the petitioner departed when they separated in 1992. At the point of their separation, the respondent was granted custody of their two sons and the applicant that of their daughter. He said that their firstborn son worked as a pilot, while the second born son worked at CFC Bank. Their daughter, who was their last born child and born in 1990, two years before their divorce, was also in gainful employment. He stated that whereas the plaintiff was a working woman during the subsistence of their marriage, they handled their finances separately. He further stated that all their utility bills were catered for by the military and household items were obtained duty free at AFCO.

10. The respondent stated that he was an only child and therefore inherited some property from his parents who had since died, his father died in 1981 and his mother died in 1994. His father worked as a court clerk and retired in 1961, while his mother was a home economist who was employed in 1952 until 1983/1984. One such property he stated is Ruguru/Gachika/[xxxx] measuring about 12.5 acres in Kiganjo area in Nyeri. The title in respect of the said property was in the name of the respondent. That was where his parents had their marital home and where he grew up. It was the respondent's contention that he did not acquire the Umoja 1 House No. [xxxx] jointly with the applicant. He further stated that he bought the Mugoya house on Nairobi/Block/[xxxx] through a loan which he solely repaid through salary deductions and that the petitioner did not assist him in any way in repaying the loan. The respondent stated that the house on the property known as Ruguru/Gachika/[xxxx] was built by his parents who used it as their matrimonial home. The house was built on a stone foundation but the walls were made of timber. The title deed was in his late father's name and upon his death, the respondent obtained letters of administration and had the title transferred to his name. His late father was buried on that piece of land. He urged that the applicant did not contribute 50% of what they acquired during marriage as alleged. Further that they lived in a house fully furnished by the military and received subsidies and allowances for their utility bills, expenses and food.

11. At the close of the oral hearing, the parties filed written submissions. The applicant's written submissions were dated 13<sup>th</sup> April, 2018, and stated that the applicant had made out a case for equal division of the matrimonial property between the parties. She urged the court to find that the applicant was entitled to get half of all the assets acquired during her marriage to the respondent. She submitted on the matrimonial properties in dispute as set out in paragraph 6(a-e) of the affidavit dated 4<sup>th</sup> February, 1997. She urged that the respondent's allegations that his late mother assisted him in acquiring the Umoja house and the Tena house and finishing his mortgage are baseless since the documents presented in court painted a picture of a person with minimal income over a long period of time. Further that it was merely a ploy by the respondent which she urged the court to disregard.

12. The respondent filed written submissions dated 16<sup>th</sup> May, 2018, in which he submitted that the law applicable in the instant case is the Married Women Properties Act of 1882 which was in force when the marriage broke down in July 1992 and also when the present suit was filed via Originating Summons dated 5<sup>th</sup> February, 1997. Counsel cited the cases of *William Kamau Githua vs. J. W. Githua* Civil Appeal No. 10 of 2003 and *SN Kantaria and MR Kantaria* Civil Appeal No. 139 of 2010 to support his argument. He urged the court to dismiss the applicant's allegations for being uncorroborated, stating that all she did in her testimony was exaggerate her means and belittle those of the respondent. He submitted that the applicant lied about the properties acquired during marriage, whereas the applicant came out as a forthright and meticulous person. He further contended that properties inherited from the respondent's parents or gifts made to the respondent by friends or family cannot be treated as property acquired during marriage, and that the court lacked jurisdiction to distribute them. He stated that the properties known as Ruguru/Gachika/[xxxx] and Umoja I/House No. [xxxx] and the three motor vehicles fitted that description.

13. On LR No. [xxxx] Mombasa Road and LR No. [xxxx] Karen, the applicant submitted that both properties were grants from the government, given to the respondent during coverture, in the year 1985 through letters of allotment. The applicant made payments of Kshs. 68,268.00 towards LR No. [xxxx], through loans obtained from her office. The applicant also averred that she gave the respondent a sum of Kshs. 15,000.00 which he used to fence the said property. She urged that since the properties were acquired during marriage they constituted matrimonial property and should be treated as such. The respondent stated that both properties were grants from the state issued solely to him who solely paid for the purchase. He urged that the applicant did not make direct contributions towards their acquisition but only met household expenses such as purchase of food. On Ruguru/Gachika/[xxxx], the applicant submitted that that was the respondent's ancestral land on which they put up a modern five (5) bedroomed house. She urged that she also financed the fencing of the property. On Umoja 1 House No. [xxxx] the respondent alleged that the property was bought for him by his mother. That was denied by the applicant who contended that the property was acquired by the respondent in 1992 during the subsistence of their marriage, and that she assisted the respondent in paying for the house through a loan she obtained in 1991. LR NBI/BLOCK [xxxx] (Mugoya), was purchased by the

respondent in 1987 at a sum of Kshs. 795,000.00. Part of the purchase was financed through a loan of Kshs. 467,000.00 obtained from Housing Finance Company of Kenya Ltd. (HFCK). The respondent averred that the property was sold in 2008 to one Duncan Wachira, but did not produce any documents in this regard. The applicant contended that the alleged sale was a scheme by the respondent intended to defeat the applicant's claim to the suit. Both parties submitted valuation reports on the value of the property. The valuation report produced by the applicant showed the property was valued at Kshs. 4,250,000.00 whereas that of the respondent showed that it was valued at 3,935,000.00 as at April 1996. The applicant urged that it was therefore questionable for the respondent to claim that he sold the property in 2008 at Kshs. 900,000.00 and that his claims that he bought it back were also questionable. Nairobi/Block/[xxxx] (Tena) was bought by the respondent in 1991. The applicant stated that even though it was registered in the respondent's name, she obtained a loan to help purchase the property. At the time of separation, the property was undeveloped but the Respondent had since put up a block of 20 flats. Both parties agreed that the property was developed after the marriage broke down. The applicant submitted that she was entitled to part of the parcel of land since the ground on which the block of flats stand was matrimonial property. Regarding the Nyayo Estate house, the respondent averred that he had applied for a house at Nyayo Estate which the applicant went ahead and paid for solely. The applicant on the other hand contended that the respondent's application was for House No. D7-[xxxx] which was not successful, and that later in 1994, after their separation, she applied for a house in the same estate vide an application dated 28<sup>th</sup> April, 1994. The application was successful and the applicant was allocated house No. D8-[xxxx]. The applicant urged that that did not however mean that they bought assets separately during coverture. There were three motor vehicles in question, being KAB [xxx] registered in the respondent's name, KXW [xxx] Isuzu Pick-up registered in the respondent's name and KAG [xxx] in respect of which the respondent had a Power of Attorney from one Nyamu.

14. The applicant submitted that the evidence presented by both parties on earnings show that their earning were almost equal throughout their marriage. She urged that she made both monetary and non-monetary contributions towards the acquisition of the properties in issue, and that she obtained various loans which she used to pay school fees for their children, fencing and paying allotment dues of some of the properties. Further that she cared for their children and managed their home.

15. The respondent stated that whereas the difference between the monthly salary of the respondent and that of the applicant was about twenty (20) percent, that did not take into account free housing granted by the military and medical benefits. He stated that in the case of properties actually acquired during marriage, the applicant's contribution was about ten (10) percent. He asserted that the parties managed their finances independent of each other, and that the applicant both shared and had applied for houses in her maiden name despite still being married to the respondent at the time. He urged the court to dismiss the Originating Summons in that respect, stating that the parties did not pool their resources together. He cited the case of *Kimani vs. Kimani* (1995-1998) 1 EACA 134b to support his argument, that in the event the court held that the parties managed their finances jointly, the applicant was only entitled to five (5) percent of the undeveloped value of LR No. [xxxx], LR No. [xxxx] Karen and Nairobi Block/[xxxx] Tena Estate. He pointed out that he had no objection to sharing the household goods referred to in paragraph 7(d)-(k) of the affidavit sworn on 4<sup>th</sup> February 1997 in support of the Originating Summons. He further stated that the applicant had failed to indicate that the purpose of obtaining loans in her loan applications and that there was therefore nothing to link the loans with family life like buying property or paying school fees. He contended that the applicant's claims that the respondent's mother was incapable of lending him a sum of Kshs. 200,000.00 towards the purchase of the Umoja house was ill advised, since she practiced agriculture on her 12 acres of land and they had a joint account which had over Kshs. 700,000.00, and that she also used the money to modernize her home.

16. I have carefully analyzed the pleadings, witness testimonies and the written submissions filed by the parties herein in terms of their employment history, financial arrangements and earnings before and after their marriage in support of their respective arguments. There are various issues arising for determination namely:

- a) Whether the Constitution 2010 and the Matrimonial Property Act, No. 49 of 2013, apply to the present suit;
- b) Whether the properties listed hereto were acquired during marriage;
- c) Whether contribution of either party is a factor, and if so whether the applicant made such contribution; and
- d) How the property is to be distributed.

17. The present suit is predicated on section 17 of the Married Women's Property Act of 1882 which was a statute of general application applicable in Kenya but which has since been repealed by the Matrimonial Property Act which is now the law governing matrimonial property. The respondent argues that since the present suit was instituted in 1997 the applicable law is the Married Women's Property Act. Of importance however, is section 19 of the Matrimonial Property Act which explicitly states thus:

*'The Married Women Property Act shall cease to extend to or apply in Kenya.'*

18. The effect of section 19 is that upon its enactment, the repealed Act ceased to apply to situations involving distribution of matrimonial property. Additionally, the Matrimonial Property Act does not provide any transitional provisions, the absence of which mean that matters filed under the repealed Act but not determined at the time can only be regularized to conform to the existing valid law. Further the parties will not at all be prejudiced by the application of the current laws since their rights under the repealed Act are intact under the present law. In the instant case one cannot find refuge under the provisions of section 23(3) of the Interpretation and General Provisions Act. The provisions of both the Constitution and the Matrimonial Property Act are therefore applicable to this case since both were enacted before the conclusion of this matter.

19. Whereas the cause of action accrued before the promulgations of the Constitution, I note that the Constitution is not subject to the same principles against retroactivity as ordinary legislation as observed by the Supreme Court in the case of *Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR. Article 45 of the Constitution which provides that the family is the natural and fundamental unit of society and that parties to a marriage are entitled to equal rights is forward looking. In a bid to promote the provisions of the Constitution on equality, parliament enacted the Matrimonial Property Act, 2013, and both have now settled the law on matrimonial property.

20. Matrimonial property is defined under section 6(1) of the Matrimonial Property Act as:

- 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 marriage.

21. Section 14 of the Act provides that where matrimonial property is acquired in the name of one spouse, the presumption is that the property is held in trust for the other spouse. Where the property is registered in the joint names of the parties, the presumption is that their beneficial interests is equal and it is to be divided equally in the event of divorce. These presumptions are however rebuttable by evidence. The provisions of section 14 are subject to section 7 so that in determining how to distribute matrimonial property, the court will take into account the contribution of either spouse to its acquisition.

22. Section 7 stipulates thus:

*‘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.’*

23. Contribution is defined by section 2 of the Act to include both monetary and non-monetary contribution. According to the definition, non-monetary contribution includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work. The section defines family business as any business run for the benefit of the family by both spouses or either spouse and which generates income or other resources wholly or part of which are for the benefit of the family.

24. From the material presented by the parties herein, I note that it is the respondent who had a higher earning capacity even though the difference in their earnings was a small percentage. From the documents presented hereto, the properties claimed by the applicant were acquired during coverture or at least during the period the parties cohabited as man and wife. The presumption then kicks in that the properties which were registered in the name of the respondent are held in trust for the applicant. The presumption having arisen, it was upon the respondent to tender evidence in rebuttal to displace the presumption in line with sections 7 and 14(a) of the Matrimonial Property Act.

25. The respondent tendered evidence to demonstrate that the properties listed herein were acquired solely by him and that others were gifted to him by family and friends. He adduced evidence as to how he financed the various purchases including loan advances from various entities. He argued that he and the applicant managed their finances separately. That the applicant also solely acquired shares and a property using her maiden name even though the marriage was subsisting at the time.

26. The applicant on the other hand argued that the assets were acquired during coverture and further that she contributed both directly and indirectly towards their acquisition. That she obtained loans in this regard. She produced loan application forms to support her allegations. She also put up a case for indirect contribution arguing that she paid the school fees for their children and bought the clothes and groceries and took care of other household expenses. She further stated that she was in employment during the period they lived together as husband and wife earning slightly less than the respondent. She stated that she was therefore able to make both the direct and indirect contributions.

27. It is therefore common ground that both parties were in gainful employment during the period of cohabitation. The applicant may not have been earning as much as the respondent, but she was no doubt earning enough to meet the needs of the family and contribute towards various purchases.

28. The respondent argued that the property known as Ruguru/Gachika/[xxxx] cannot constitute matrimonial property since it was inherited from his late father’s estate. I wish to point out that the section 5 of the Act impliedly includes inherited property in the definition of matrimonial property. Under the section, a property would not form part of matrimonial property only where it was acquired or inherited before the marriage. The respondent inherited the said property vide a grant issued in Nyeri High Court Succession Cause No. 71 of 1980 and it was transferred to him in 1990. The parties herein separated in 1992. It is therefore not in doubt that the said property was inherited by the respondent during matrimony and therefore forms part of matrimonial property. Regarding the Nyayo Estate property, I find that the same does not constitute matrimonial property because it was acquired solely by the applicant two years after their separation. The applicant presented an application form for the said house which form is dated 18<sup>th</sup> August 1992, a few days shy of a month after her separation from the respondent.

29. On the movable properties, which are three motor vehicles of registration numbers KXW [xxx], KAB [xxx] and KAG [xxx]. It is not in doubt that the assets exist and that they are all registered in the respondent’s name. The respondent, however, tendered evidence which demonstrated that two of the vehicles were acquired solely by him after their separation with the exception of KXW [xxx] which was given to him by his close friend Major. Kamunge. He produced log books as evidence of the transfers. The respondent argued that the motor vehicles did not constitute matrimonial property. He relied on the case of *Muthembwa vs. Muthembwa* (2002) 1 EA in which it was held that property acquired after cohabitation ceased cannot be taken into account when determining spouses’ rights to property. Motor vehicles only constitute matrimonial property if they are acquired as family vehicles or for the use of the entire family. The applicant did not tender any evidence to demonstrate that the motor vehicles fell within the category of family cars. What the court gathers is that the cars were bought by the respondent for his exclusive use. Further, they were acquired after the parties herein were separated. As such they cannot be said to constitute matrimonial property.

30. When parties get into a marriage arrangement, they usually intend the arrangement to be for life. Divorce is not in their minds. This is the position regardless of the system of law under which the parties contract marriage. Indeed, that is the conception of marriage in section 2 of the now repealed Matrimonial Causes Act, which drew from the definition of marriage in *Hyde vs Hyde and Woodmense* (1866) 1LR1 P & D 1230. The parties to the marriage there live their lives according to that concept, the permanence of marriage. They beget children and

acquire property believing that they would be together for life. This then creates the presumption that whatever property is acquired by the parties during marriage must have been intended to be for the benefit of the family.

31. The parties herein contracted a Kikuyu Customary law in 1976 and which they later solemnized the same at [Particulars withheld] Church Nairobi in 1989. The Christian notion of marriage, is that upon celebration thereof the man and the woman become one unit, one flesh. Whatever the man does, he does for the woman; and vice versa. This would mean that whatever property he acquires during the marriage, he acquires for himself and for the woman, for the two are one. Therein too should lie the answer to the question of what should happen to property acquired by parties to a Christian marriage upon divorce. The Christian notion of marriage and matrimonial property envisages equality in ownership of property. This notion of equality is enshrined in the Constitution of Kenya whose Article 45(3) provides 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.'*

32. Having determined that the immovable properties herein constitute matrimonial property with the exception of the Nyayo Estate house, the next step is to determine how the said properties which are set out in paragraph 4 here above should be distributed.

33. Taking into account everything I have stated above, I am convinced that the immovable assets herein were held by the respondent in trust for the applicant. The evidence has shown without a doubt that the parties herein had an almost equal earning capacity during their matrimony, and they therefore both had the resources to contribute in one way or the other towards the acquisition of the said properties. The respondent who worked in the Kenya Air Force no doubt had a more demanding job and it is therefore most likely that it is the applicant who managed the matrimonial home and cared for the children of the marriage. Further, since the -parties' earnings were almost equal, it can be inferred that the respondent used his earnings to purchase the properties whereas the applicant used hers to maintain the home and the family in general.

34. In view of the foregoing, and in line with section 14(b) of the Matrimonial Property Act, I make the following orders: -

**(a) That I declare that the property known as LR No. [xxxx] Mombasa Road, LR No. [xxxx] Karen, Ruguru/Gachika/[xxxx], Umoja 1 House No. [xxxx], LR NBI/Block [xxxx] (Mugoya), Nairobi/Block/[xxxx] – Tena were acquired with the joint funds and by the joint efforts of the applicant and the respondent during marriage and although the same is registered in the name of the respondent the same is so held or registered in trust for the applicant;**

**(b) That I declare that the said assets are to be shared between the applicant and the respondent at a 50:50 percentile;**

**(c) That the parties are to agree and share the said assets in the proportions decreed above in the next six (6) months, in default of which the same shall be sold and the net proceeds of sale shared in the decreed ratios between the applicant and the respondent, with either party shall have the option of buying out the other party's share;**

**(d) That each party shall bear their own costs; and**

**(d) That any party aggrieved by the orders made herein shall be at liberty to challenge the same at the Court of Appeal within twenty-eight (28) days.**

**SIGNED AND SIGNED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2019**

**W MUSYOKA**

**JUDGE**

**DELEIVERED DATED AND SIGNED IN OPEN COURT AT NAIORBI THIS 15<sup>th</sup> DAY OF FEBRUARY 2019**

**ASENATH ONGERI**

**JUDGE**