



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CAUSE NO. 6 OF 2015

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013

RMW.....APPLICANT

AND

WBWRESPONDENT

JUDGEMENT

1. The Originating Summons filed by the Applicant is dated 20th February 2015. The parties solemnised their marriage on the 14th of June 2003 at St. Paul University Way Church. The said marriage failed and was subsequently dissolved on the 20th of January 2017 paving way for this application.

2. The Applicant's case is that during the subsistence of the marriage with the respondent the two jointly acquired assets, made savings and incurred liabilities jointly. That some of the properties and assets so acquired are currently registered in the name of the Respondent solely or in joint names and/or are under the control of the Respondent. Further that upon separation the applicant was solely left to shoulder liabilities amounting to Kshs 1,967,926.73 which they had jointly incurred.

3. Base on the above assertion the Applicant sought for; -

a) A declaration that all properties hereunder listed which are in the name of the Respondent solely or jointly and/or companies under his control are owned jointly by the Applicant and the Respondent and/or held beneficially and in trust for the Applicant; -

i. House No. xx L.R. No. 110/192/112/xx Nyayo Estate Embakasi.

ii. Vehicle registration No. KAX [xxx] Toyota Vitz

iii. Vehicle registration No KBL [xxx] Nissan X Trail

iv. Household items and 2 albums of wedding photos (ANNEXTURE RMW8').

b) An order compelling the Respondent to service in equal share a common loan taken from Commercial Bank of Africa under the Applicant's name to offset the couple's financial commitment during the subsistence of marriage whose balance stands at 1,967,926.73.

c) An order declaring that 50% or such other or higher proposition of the properties is held by the Respondent in trust and for the beneficial interest of the Applicant.

d) An order declaring that the Respondent is accountable to the Applicant in respect of all the income derived from the said properties

e) An order that the properties and income be settled equal proportions.

f) Cost.

4. Together with the application were filed a supporting affidavit and a statement dated 20th February 2018, a supplementary affidavit dated 29th November 2018 and a further supplementary affidavit dated 27th March, 2018.

5. Briefly, the Applicant's case is that during the subsistence of the marriage they jointly acquired; -

- a) House No. xx – Embakasi Nyayo Estate.**
- b) Motor vehicles KBL [xxx] and KAX [xxx].**
- c) Household items as specified in the schedule**
- d) A loan with Commercial Bank of Africa**
- d) Shares at Jumuiya ya Ulaya Sacco Society.**

6. The Applicant contended that; -

-House No. xx – Nyayo Embakasi was jointly acquired from one JKM whom they paid Kshs.200,000/- and a further sum was paid with a loan from Commercial Bank of Africa of Kshs.400,000/= to N.S.S.F. The said property has a monthly rental income of Kshs.27,500/= and the same is being managed by Crystal Valuers. The parties had agreed that the rent would go towards mortgage repayment, however, the Respondent has failed to remit the funds and they have fallen into arrears.

7. The Applicant further contended that Motor vehicles registration No KBZ [xxx] and KAX [xxx] were purchased with resources saved by both at the Jumuiya ya Ulaya Sacco. She annexed copies of cheques depicting her contribution amounting to Kshs.419,625/=. Further she stated that they pooled their resources together and saved 30,000/- a month with the said Sacco and shares therein are valued at Kshs.1,000,672 at the moment and she claims half the same.

8. The applicant further claimed house hold items in the schedule to the application namely; two photo albums, a carpet and a water dispenser.

9. As regards the Commercial Bank of Africa loan it is the Applicant's case that they agreed to borrow the money through her account in order to meet family obligations that included; -

- Barclays card credit cards to the tune of Kshs.471,780.**
- 50,000/= rent for matrimonial home**
- University fee for the Respondent at Strathmore Kshs.68,659/=.**
- Loan to the respondent of Kshs.151,000/=**

10. The Applicant denied owning L.R. No.140/532/xxxx as alleged by the Respondent and further stated that the assertion was unsupported by evidence.

11. In his response to the application vide a replying affidavit dated 8th November 2017 and a supplementary affidavit of 14th May 2018 the Respondent admitted that House No. xx Nyayo Estate is matrimonial property and jointly owned. Secondly, he admitted rent paid from the said property ought to go towards repayment the outstanding mortgage with NSSF. He also made an admission of the sum of Kshs 151,000 due and owing to the applicant in one of the annexures.

12. As regards the two motor vehicles, it is the respondent's case that he owned both and has since transferred vehicle registration number KAX [xxx] to the Applicant and that it is his wish to keep motor vehicles registration No KBZ [xxx] X-trail.

13. As regards the household items he stated that the same may be collected and copies of photographs made.

14. The respondent further admitted that the X trail and shares at Jumuiyya ya Ulaya Sacco Society were solely registered in his name though acquired during the subsistence of the marriage.

15. Notable though is that the respondent was silent on monies paid into the Sacco by the applicant, Kshs 400,000 paid to NSSF and the sum paid to Strathmore business school from the applicant's account.(loan)

16. Having considered the pleadings, evidence made available and submissions on behalf of the parties the court has formed the opinion that the issues for consideration are as follows; -

- i. Whether the properties listed in the application are matrimonial property?**
- ii. If so, are they to be shared, and in what proportions?**
- iii. Was the loan acquired from the Commercial bank of Africa by the applicant during the subsistence of the marriage a joint liability?**

iv. If (c) is to the affirmative how is the loan to be settled?

v. Costs

17. **Section 6** of the Matrimonial property Act, 2013 defines Matrimonial property as follows;

6(1) For 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.

Section 7 further provides as follows regarding contribution

“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.”

18. From the evidence on record there are properties acquired during the subsistence of the marriage between the parties. Both of them are said to have worked. The applicant was not a typical house wife who sat, waiting to be clothed and fed. And who at a time like this would rely on non-monetary contribution to assert her interest. The applicant worked and earned, and from her evidence, aggressively sourced for funds that were used for family investments. In fact, nothing much is said of the respondent's contribution towards purchase of properties, nor proof of evidence produced. Since this is not an issue an assumption is made that as the man of the house, he played a role. That notwithstanding, the evidence placed before court gives the impression that the applicant was the prime mover in the financial affairs of the family.

The court therefore finds that the applicant has proven on a balance of probabilities that she contributed to the acquisition of all the assets acquired by the family during the subsistence of the marriage and that any such property so acquired and was jointly owned and if any was registered in the name of the respondent the said properties are jointly owned and the respondent holds half of any such property in trust for the applicant.

19. **House No. xx L.R. No. 110/192/112/xx Nyayo Estate Embakasi** which both admit was bought jointly although in the records of NSSF the vendors name is still reflected with theirs. In my view this property is not in contention and since both names are reflected, I hold and find that the property is owned jointly subject to liabilities thereon at the ratio of 50:50.

20. **Motor vehicles KBL [xxx] and KAX [xxx]** are said to have been bought with funds from the Jumuiya ya Ulaya Sacco. The applicant stated that they pooled their salaries together and contributed 30,000 every month. Further she produced cheques for substantial amounts paid into the said account from the loan left for her to service. The respondent did not dispute this information.

I therefore find that though the Sacco account was in the name of the respondent both contributed to the said Sacco and the claim by the applicant cannot be wished away.

21. I also find that the two vehicles purchased by proceeds from the Sacco are matrimonial property and both own the same in equal shares.

The two vehicles are not of the same value and therefore the respondent's wish to keep the most expensive of the two cannot be sustained. The vehicle ought to be valued and should the respondent wish to keep the X-trail he should pay the applicant within 30 days half of the difference in terms of value of the two. If the respondent does not have the ability to pay off the applicant, the two vehicles be sold under the supervision of counsel on record for the parties and the proceeds shared equally between the parties.

22. The applicant made a claim on a few household items namely; a carpet, water dispenser, and two Photo Albums. There is evidence on record that the applicant was requested by the respondent to collect the same quite early but there was no follow up. Whether in use or not some items wear out, prices of the items being claimed are negligible and due laxity by the applicant to collect the same, I decline to make any orders on the same. However as regards the Parties wedding albums there should be no issue, the respondent ought to surrender 1 album to the applicant forthwith for whatever it is worth.

23. Next issue for consideration is the Loan liability. It is not clear how much the applicant borrowed however, it is notable that she expended a substantial amount to the benefit of the family and some monies directly to the benefit of the respondent. The obvious amounts are; -

i. Strathmore university Business school	Kshs 368,659
ii. Jumuiya ya Ulaya Sacco	Kshs 138,953
iii. Jumuiya ya Ulaya Sacco	Kshs 280,672

iv. NSSF	Kshs 400,000
v. Regent Management	Kshs 50,000
vi. Barclay card	<u>Kshs 471,780</u>
TOTAL	<u>Kshs 1,710,064</u>
Sum lent to the respondent & admitted	Kshs 151,000

24. Marriage is a partnership where parties get together for bliss, company and the other good things that come with the institution. As Christians put it the institution brings spouses together ‘for better or for worse...’ Parties should not only share in the good, they ought to share in their problems including liabilities incurred jointly. To condemn one party in the case of an eventual separation or divorce to bear a burden incurred for the benefit of both, would be completely unconscionable, unjustified and was never intended, either morally or legally.

Section 10(3) of the Matrimonial Causes Act, 2013 provides as follows;

“parties to a marriage shall share equally any-

(a) Liability incurred during the subsistence of the marriage for the benefit of the marriage; or

(b) Reasonable and justified expense for the benefit of the marriage”

25. In my considered opinion the sums utilised by the applicant for the benefit of the family from the loan she borrowed should be shared equally between them, whereas the sum expended for the direct benefit of the respondent should be paid directly by the respondent.

I find that Kshs 878,284 was spent on the family and the liability should be shares at the ratio of 50:50, so that each party will pay Kshs 439,142 towards the liability. And therefore, the respondent is directed to pay Kshs 439,142 to the CBA Loan account, failure of which the money be recovered from his share of the matrimonial property.

26. The sums paid directly to the benefit of the respondent and loaned to him as admitted being the sum of Kshs 519,659 will be refunded to the applicant by the respondent, failure of which, as stated above the sum be recovered from his share of the matrimonial properties.

27. As found earlier, the contribution to Jumuiya ya Ulaya was by joint efforts and therefore the shares held by the respondent at the time the parties separated will be shared equally. Again, if this is not done the sum be recovered from the respondent’s share of the properties.

28. For lack of evidence on the ownership and purchase of L.R. NO.140/532/xxx the court is unable to make a finding.

29. Parties to bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 7TH DAY OF MARCH, 2019.

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ALI-ARONI

JUDGE

In the presence of:

Plaintiff.....

Respondent.....