



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 26 OF 2016 (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

PKK..... DEFENDANT

JUDGMENT

1. The Applicant in the Originating Summons dated 13th July 2016, M. N. M. is seeking the following prayers:

(i) THAT it be declared that the following properties were acquired through the sole effort/contribution of the Plaintiff and hence are exclusively owned by her that is;

a) Land Reference No. [particulars withheld]

b) Land Title No. Nyandarua/Malewa/ [particulars withheld]

(ii) THAT it be declared that the following properties were acquired through the joint efforts of the parties and hence are jointly/equally owned by themselves.

a) Land Title No. Olenguruone/Keringeti [particulars withheld](MWAHE)

b) Land Title No. Olenguruone/Keringeti [particulars withheld](MWAHE)

c) Land Title No. Olenguruone/Keringeti [particulars withheld](MWAHE)

d) Land Title No. Olenguruone/Keringeti [particulars withheld](MWAHE)

(iii) THAT this Honourable Court be pleased to make such further orders as the interests of justice may require.

(iv) THAT the costs of the Summons are provided for.

2. The Applicant and the Respondent started cohabiting as husband and wife sometimes back in 1979 and later solemnized their marriage at the Registrar of Marriages office in Nairobi on 6.6.2006.

3. The Applicant and the Respondent divorced in 2016 after 37 years of marriage. They have four children who are all adults.

4. The parties initially lived in Nairobi and in 1993 the applicant relocated to Britain for greener pastures and she left the Respondent in Kenya with two children.

5. In the Course of the marriage, the parties acquired the following properties;

(i) Land Reference No. 23187/[particulars withheld] (Jacaranda)

(ii) Land Reference No. Nyandarua/Malewa/[particulars withheld]

(iii) Land Reference Ole Nguruene/Keringeti Block [particulars withheld].

(iv) Land Reference Ole Nguruene/Keringeti Block [particulars withheld].

(v) Land Reference Ole Nguruene/Keringeti Block [particulars withheld].

(vi) Land Reference Ole Nguruene/Keringeti Block [particulars withheld].

(vii) Land Reference No. [particulars withheld](Ruiru)

(viii) Plot No. Innercore Plot [particulars withheld] (Umoja)

(ix) Title No. Lari/Kirega/[particulars withheld]

(x) Title No. Gilgil/Gilgil/[particulars withheld]Kikopey

6. The Applicant who testified as PW 1 said she exclusively financed the purchase of the Jacaranda Property and Lari/Kirega/[particulars withheld].

7. The applicant said she took a loan while working in Britain which she wired to the defendant for the purchase of two properties.

8. The Applicant said the Respondent registered the Jacaranda house in his name since she was away and he promised to put the house in joint names when she returned but he did not do so.

9. The Plaintiff said when the jacaranda house was purchased, it did not have a gate and she sent Ksh.600,000/- for the gate and fence and Ksh.200,000 for legal fees. She also sent Ksh.400,000 for furniture.

10. The Applicant said while she was away, the Respondent sold the Ruiru and Umoja Properties. She said they agreed to give the Gilgil property to her sister and denied allegations that she gave out property without consent.

11. The applicant also said she paid school fees for all the children until they finished school.

12. The applicant is now asking the Court for the Jacaranda property where she is living which she financed fully. She is also asking for the Ole nguruone properties since the Respondent sold Ruiru and Umoja Properties.

13. The Applicant is also asking the Court to give the Nyandarua/Malewa property to the Respondent. She said he has land in his ancestral home in Murang'a.

14. The Respondent who opposed the Originating summons said the matrimonial properties were acquired jointly and he is asking for 50:50% apportionment.

15. The Respondent said in his testimony before this Court that when he started living with the Applicant in 1979, he was working at [particulars withheld] Hotel, [particulars withheld] Hotel and [particulars withheld] Hotel while the Applicant was a house wife.

16. The Respondent said he was also managing a fruit and vegetable business and he was catering for the needs of the family.

17. The Respondent said he sold his car and bought the Umoja property for Ksh.400,000/-.

18. He said when he sold the Umoja Property, he bought Lari for Ksh.600,000/-. He said he sold the Umoja property for Ksh.400,000 and the applicant gave him Ksh.200,000 and he purchased the Lari Property

19. The Respondent said he sold Lari for 1.2 million and bought Nyandarua for Ksh.600,000 and he built a house with the balance where he is now staying.

20. The Respondent also said he sold Ruiru to complete the Jacaranda property which was a shell when the Applicant took a mortgage of 2.9 million for its purchase.

21. The Respondent said he sold the Ruiru Property for Ksh.450,000/- and the entire amount went to finish the Jacaranda property where he put a perimeter wall, a gate, water tanks, a shop and a place at the back where people can sit.

22. The Respondent said he lived in the Jacaranda property for 10 years with the children since 2005 until the Applicant returned from Britain and refused to communicate with him. He said they had an altercation and she called Police and he was denied access into the house.

23. I have considered the evidence adduced by the parties in this case together with their affidavits and the written submissions filed herein, I find that it is not in dispute that the parties divorced in 2016 after a marriage of 37 years.

24. It is not in dispute that the following properties were acquired during the subsistence of the marriage;

- (i) **Land Reference No.** [particulars withheld](**Jacaranda**)
- (ii) **Land Reference No. Nyandarua/Malewa**/[particulars withheld]
- (iii) **Land Reference Ole Nguruone/Keringeti Block** [particulars withheld]
- (iv) **Land Reference Ole Nguruone/Keringeti Block** [particulars withheld]
- (v) **Land Reference Ole Nguruone/Keringeti Block** [particulars withheld]
- (vi) **Land Reference Ole Nguruone/Keringeti Block** [particulars withheld]
- (vii) **Land Reference No.** [particulars withheld](**Ruiru**)
- (viii) **Plot No. Innercore Plot No.**[particulars withheld](**Umoja**)
- (ix) **Title No. Lari/Kirega**/[particulars withheld]
- (x) **Title No. Gilgil/Gilgil**/[particulars withheld]**Kikopey**

25. There is also no dispute that the following properties no longer exist as they were disposed of;

- (i) **Land Reference No.** [particulars withheld](**Ruiru**)
- (ii) **Plot No. Innercore Plot No.** [particulars withheld](**Umoja**)
- (iii) **Title No. Lari/Kirega/1**[particulars withheld]
- (iv) **Title No. Gilgil/Gilgil/1**/[particulars withheld] **Kikopey**

26. The issues for determination before this Court are as follows;

(i) What was the Contribution of each party to the acquisition of the following matrimonial properties?

- (a) **Land Reference No. 23187**/[particulars withheld] (**Jacaranda**)
- (b) **Land Reference No. Nyandarua/Malewa**/[particulars withheld]
- (c) **Land Reference Ole Nguruone/Keringeti Block** [particulars withheld]
- (d) **Land Reference Ole Nguruone/Keringeti Block** [particulars withheld]
- (e) **Land Reference Ole Nguruone/Keringeti Block** [particulars withheld]
- (f) **Land Reference Ole Nguruone/Keringeti Block** [particulars withheld]

(ii) Were the following matrimonial properties disposed of by consent of both parties.?

- (i) **Land Reference No.** [particulars withheld](**Ruiru**)
- (ii) **Plot No. Innercore Plot No.** [particulars withheld](**Umoja**)
- (iii) **Title No. Lari/Kirega**/[particulars withheld]

(iv) Title No. Gilgil/Gilgil/[particulars withheld]Kikopey

(iii) What is the share of each party in the matrimonial property listed in (i) above? (what share is each party entitled to in the matrimonial properties?)

27. I find that the determination of what each party is entitled to will be determined by the share each party contributed to the acquisition of the matrimonial properties and also whether the properties which were disposed with the consent of both parties.

28. The Law provides in **Article 45 (3)** of the Constitution as follows:

“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.”

This means that each party is entitled to their share of contribution to the Property either directly or indirectly. **The Matrimonial Property Act, 2013** which received assent on 24th December, 2013, and commenced on 16th January, 2014. **Section 7** provides:

“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.”

Contribution is defined by **Section 2** to mean monetary and non-monetary contribution. Non-monetary contribution 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

“Family business” means any business which -

a. is run for the benefit of the family by both spouses or either spouse; and

b. generates income or other resources wholly or part of which are for the benefit of the family;”

29. In the case of **V W N v. F N [2014] eKLR** the court said that;

“The provisions of Sections 2, 6 and 7 of the Matrimonial Property Act, 2013 breathe life into the rights provided in Article 45 (3). The Matrimonial Property Act recognizes that both monetary and non monetary contribution should be taken into account in determining contribution. In light of Article 45 (3) and Section 2 of the Matrimonial Property Act which define contribution to mean monetary and non monetary contribution, Echaria [supra] is no longer good law.”

30. In the current case, there is uncontroverted evidence that it is the Applicant who acquired the Jacaranda and the Lari properties through mortgage facilities.

31. In the case of **P N N v Z W N [2017] eKLR** the court looked at local authorities and came up with the decision that each spouse has to prove the contribution made in acquiring the matrimonial property:

“In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see Essa vs. Essa (supra); Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported), Kamore vs. Kamore (supra); Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court 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. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband.”

32. In the current case, I find it is not in dispute that the Applicant purchased both the Jacaranda property and the Lari property through a mortgage facility she took while working in Britain.

33. There is evidence that the Respondent participated in supervision of the improvement of the Jacaranda property which included putting up a perimeter wall fence, shop, gate and he also moved into the premises in 2005 with two of the children and generally looked after the property for 10 years.

34. The Respondent said he sold the Ruiru property and used the proceeds to improve the Jacaranda property. However, he did not prove the said assertions. What he proved is that he oversaw the improvement of the Jacaranda property and he looked after their children and I find that his contribution was indirect.

35. I find that there is no dispute that the four Olenguruone properties were jointly acquired by both parties and they are jointly owned. The applicant asked the Court to allocate her the same since the Respondent disposed of the Lari and Umoja Properties without her consent.

36. On the issue as to whether the matrimonial properties in paragraph 26 were disposed of with the consent of the parties, I find that there is evidence that it was the Respondent who transferred the Kikohey Property to the sister of the Applicant. He cannot therefore turn round and say she disposed of it without his consent. He had a right to refuse to transfer the said property.

37. On the issue as to whether the Lari and Umoja properties were disposed of with the consent of both parties, I find that there is evidence that the applicant gave consent for sale of the Umoja property. Her complaint is that she does not know what the Respondent did with the money.

38. The Respondent's attempt to show that he bought the Lari property from the proceeds of Umoja failed miserably as the Lari property was acquired in 1998 while Umoja was sold in 1999.

39. I accordingly find that the Respondent did not account for the proceeds of the sale of the Umoja property. The Applicant said that she was responsible for school fees for the children and I find that the Respondent did not rebut that evidence.

40. I also find that there is no evidence that the parties agreed on the disposal of the Lari property. The evidence on record is that the sale of Lari by the Respondent without the consent of the Applicant contributed to the breakup of the marriage. However, there were other factors which led to the breakup which were not disclosed to this Court suffice to say that the marriage between the parties does not exist.

41. I find that the Respondent used the power of attorney granted by the Applicant to deal with Matrimonial properties without her consent and this aggravated to breakup of their marriage.

42. The Respondent said he used the proceeds of the Lari property to purchase Nyandarua/[particulars withheld] and to put up a house where he is now living. It is also apparent that he was not happy with the gifting of the Kikohey Property to the Applicant's sister by the Applicant.

43. Finally on the issue as to what portion each party is entitled to in the existing matrimonial properties, taking into account the circumstances of this case and the Applicable law, I direct as follows:

(i) This Court has made a finding that the Applicant solely purchased the Jacaranda Property. However, the Respondent made indirect contributions by supervising improvements on the said property.

(ii) The Applicant is staying in the Jacaranda property and I accordingly order that she takes the Jacaranda Property entirely.

(iii) The Respondent is also in occupation of the Nyandarua/[particulars withheld] Property which he acquired from the sale of Lari Property at the expense of their 37 year-old marriage. The Applicant proved that she financed the purchase of Lari by taking a refinancing of her mortgage while living in Britain.

(iv) I direct that the Respondent takes the Nyandarua/[particulars withheld] Property in lieu of his indirect contribution to the acquisition of the Jacaranda Property and taking into consideration the fact that the Respondent did not account for the proceeds of Umoja property.

(v) The remaining properties being Ole Nguruone [particulars withheld] were jointly acquired and I direct that the same be shared equally between the parties.

44. On the issue of costs, I direct that each party bears its own costs of this suit.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 5TH DAY OF APRIL, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI