REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION MILIMANI LAW COURTS

CIVIL SUIT NO. 36 OF 2014 (OS)

DV.....APPLICANT

VERSUS

PB.....RESPONDENT

JUDGMENT

1. DV and PB, the applicant and respondent herein, respectively, were lawfully married on 13th October 2004. The said marriage ran into headwinds, resulting in divorce proceedings in Nairobi HCDC No. 39 of 2014, which culminated in dissolution of the said marriage in a judgment delivered thereon on 5th February 2016.

2. The applicant herein filed a suit by way of Originating Summons on 10th June 2014, dated 5th June 2014, seeking orders that a declaration be made that she owns 50% of Plot No. 48 located at Lucky Summer Ruaraka, Nairobi, and all rental property therein and motor vehicle registration mark and number [particulars withheld]D Toyota saloon. She anchored her application on various grounds including that the said properties were jointly acquired by her and the respondent during coverture and thus they constituted matrimonial property, even though some properties were registered in the name of one spouse. She added that the respondent had refused to amicably share the matrimonial property, leaving her unable to provide basic needs for the issues in the marriage who were in her custody. She stated that she incurred debts towards the acquisition of the suit motor vehicle and it would only be fair that the same be divided equally between them to enable her offset her debts. She added that the suit motor vehicle was in the custody of the respondent. In her supporting affidavit sworn on 5th June 2014 she deposed that the rental properties on Plot No. XX brought in Kshs. 70,000.00 per month in rental income. She stated that the suit motor vehicle was bought at Kshs. 980,000.00, saying that she contributed Kshs. 730,000.00 of the purchase money, while the respondent contributed the balance of Kshs. 250,000.00.

3. The respondent swore an affidavit in reply on 6th May 2016, filed on 9th May 2016. He stated that he had saved up money from his salary for buying Plot No. XXX in Ruaraka, Lucky Summer Estate, which he subsequently developed. He stated that he had initially flown to Germany to further his studies and that after returning to Kenya, he was never employed and relied on the income from the said property, which also housed their matrimonial home. He stated that Nairobi HCDC No. 39 of 2014 had since been determined with a judgment delivered on 5th February 2016. He stated that the orders made in that cause gave him responsibility of paying school fees and other school related needs, and said that he relied on the rental income to do so. He added that the applicant worked at Ukulima Sacco where she earned a salary and did not have the responsibility of the paying school fees. He further deposed that he used to send the applicant money while he was still in Germany, and gave her instructions on purchase plots in Chokaa and Ongata Rongai, which he claimed the applicant failed to disclose to the court as being part of their joint investments. He added that these plots were in the name of the applicant but were purchased using his income. He deposed that the suit motor vehicle was purchased with money from his income which was paid from his bank account to the dealers, Lincolns Motor Limited, but that the suit motor vehicle was registered in the name of the applicant. He added that the applicant married another man and that had caused mental disturbance to their children who have since gone back to live with him.

4. The applicant swore a supplementary affidavit on 9th June 2016 in response to the respondent's reply, in which she stated that she took out a loan to cover the respondent's expenses when he went for further studies in Germany. She deposed that the only money ever sent to her by the respondent while he was still in Germany was for their eldest son's school fees and that he has never sent any money for maintenance or upkeep. She added that she had to take up another loan of Kshs. 1,200,000.00 in 2010 for construction of the rental houses and to meet the basic needs of both the children and those of the respondent. She stated that she took out another loan of Kshs. 160,000.00 in 2006 for purposes of purchasing the Plot XX. She stated that she did not own the plots alleged by the respondent, saying that the only property she had was Plot XX, whose title was the names of both herself and the respondent. She further stated that the respondent was not paying all of the children's school fees for she was the one who provided for their eldest son's college fees and related expenses at the University of Nairobi. She added that the respondent paid fees for only two of the children. She said that the suit motor vehicle's purchase price was Kshs. 980,000.00 and not Kshs. 1,010,000.00. She said that she rechanneled Kshs. 1,200,000.00, the loan amount aforementioned, to purchase the said suit motor vehicle at the insistence of the respondent, and she subsequently deposited Kshs. 730,000.00 in the respondent's bank account. She stated that after their separation on 10th February 2014, and after moving out of their matrimonial home, she began paying rent and maintenance for herself and the three children without the help of the respondent. She stated that the rental properties had an income of

Kshs. 75,000.00 after deduction of expenses and that the respondent only paid Kshs. 24,000.00 per month for the two children as school fees. She claimed that the respondent had a well-paying job, but he had refused to disclose of its particulars.

5. The respondent filed a reply to the supplementary affidavit on 26th January 2017 where he denied that the applicant funded his studies in Germany, saying that he used to pay school fees and upkeep of the family from money he used to send while in Germany. He denied knowing of the Kshs. 1,200,000.00 loan that the applicant took out. He added that the applicant took out a further loan of Kshs. 1,700,000.00 after leaving the matrimonial home, which he claimed she used to further her own studies. The respondent further stated that the plots he had earlier indicated in his reply as being owned by the applicant were shown to him by their children. He reiterated that he had been paying school fees for the children all along without any help from the applicant. he denied receiving any money from the applicant in his National Bank account which he said was dormant after his retrenchment and his departure to Germany. He stated that the applicant was not paying rent as she was housed by her new partner, who had even given her the car that she was using.

6. Directions were given for disposal of the matter on the basis of affidavit and oral evidence. The matter proceeded by way of oral and affidavit evidence, together with written submissions being filed by both parties. During the oral hearing the parties breathed life to their respective filings and were cross-examined extensively.

7. I have perused through the pleadings and affidavits, the recorded oral testimony and written submissions, and I have identified the following issues from the same, namely whether the suit properties constituted matrimonial property, whether the applicant contributed towards the acquisition and the development of Plot XX Lucky Summer Estate and the purchase of suit motor vehicle [particulars withheld]D, and how the suit properties ought to be distributed between the applicant and the respondent

8. The Matrimonial Property Act, 2013, defines matrimonial property in section 6. The provision states that: -

> *'6. Meaning of Matrimonial Property*
>
> *(1) For the 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.*
>
> *(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.*
>
> *(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.*
>
> *(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.'*

9. For property to be classified as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties, unless otherwise agreed between them that such property would not form part of matrimonial property. (see *TMW vs. FMC* [2018] eKLR,)

10. In the instant case, the parties solemnized their marriage on 13th October 2004 according to the marriage certificate on record. The applicant submitted that both she and the respondent jointly invested in the purchase of property known as Plot XX at Lucky Summer Ruaraka and that the title to the property was registered in both their names. In her supplementary affidavit, she claims to have taken out a loan of Kshs. 160,000.00 in the year 1996 for purposes of purchasing the land. Both the applicant and the respondent stated that they used to cohabit in the property which had their matrimonial home during the subsistence of their marriage. The respondent further stated that the property was developed while he was studying in Germany which was between the year 2004 and 2012, during the subsistence of the marriage. That, no doubt, makes the property Plot XX, which also housed their matrimonial home and was developed during the subsistence of their marriage, matrimonial property. The suit motor vehicle, registration mark and number [particulars withheld] D was purchased in the year 2010, which was during the subsistence of the marriage, and therefore it was also matrimonial property. It is thus my finding that both suit assets form party of matrimonial property for the purposes of this suit.

11. "Contribution" and "Family Business" is defined under Section 2 of the Matrimonial Property Act, 2013 as follows:

> *'"contribution" means monetary and non-monetary contribution 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;

"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.'

12. Section 7 of the Matrimonial Property Act, 2013 provides 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.'

13. Section 14 of the Matrimonial Property Act provides as follows:

'14. Presumptions as to property acquired during marriage

Where matrimonial property is acquired during marriage —

(a)in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

(b)in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.'

14. The Court of Appeal in *OKN vs. MPN* [2017] eKLR expounded on the presumption of property acquired during marriage, and especially where the property is registered in the joint names of the parties, by stating as follows -

'Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See Kivuitu vs. Kivuitu, [1991] KLR 248.) The presumption is however, rebuttable by either party showing that their contributions were not equal. '

15. The court in *TMW vs. FMC* [2018] eKLR (supra) cited *Njoroge vs. Ngari* [1985] KLR, 480, where the court had held that -

' ... if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property. Thus, it is important to mention that the Act takes into account non-monetary contribution and provides that a party may acquire beneficial interest in property by contribution towards the improvement of the property equal to the contribution.'

16. In *NWM vs. KNM* (2014) eKLR, it was stated that: -

"...the court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.'

17. On non-monetary contributions, it was said in *TMW vs. FMC* (supra)that: -

'As regards non-financial contribution I wish to rely on The House of Lords decision in White vs White (200}UKHL 54 in which the Court cited the greater awareness of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills, a position that was reiterated in subsequent decisions of the House of Lords in Miller vs Miller & McFarlane {2006}UKHL 24 with courts endorsing the jurisprudence of equality. She argued that any law that advocates for the division of matrimonial property on the basis of proved contributions alone, runs counter to the spirit embodied in the Maputo Protocol and that the division of matrimonial property must be effected having due regard to the principle of equality.'

18. In *JAO vs. NA* [2013] eKLR it was held that: -

'When it comes to distribution of matrimonial property, there are a number of decisions which have laid down principles which are used to determine contribution of a spouse towards matrimonial property. It has been held that a spouse's contribution need not only be financial. It can even be in form of giving the other peaceful time as he acquires the property e.g. by taking care of the children of the marriage, taking care of the home or even improvement of the property.

In Kenya, under the Constitution of Kenya 2010 Article 2 (5) provides that the general rules of international law shall form part of

the Law of Kenya. Article 2 (b) further provides that any treaty or convention ratified by Kenya shall form part of the Law of Kenya.

Article 6(1) (h) of the International Convention on the Elimination of All Forms of Discrimination against Women enjoins state parties:

"To ensure on the basis of equality the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration."

Article 16(1) of the Universal Declaration of Human Rights provides as follows:

"Married women of full age without limitation due to race, nationality or religion have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."

Article 7(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa provides as follows: -

"In cases of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the property deriving from the marriage."'

19. On suit property Plot XX, the applicant claimed she monetarily contributed to its acquisition claiming that she took out a loan to purchase the land. There is no evidence of this money being paid out to the previous owner of the land for its acquisition by the applicant. There is also no evidence that it was money from the respondent that was utilized to purchase the property. There is no evidence on record indicating under whose name the property is registered in. The applicant's claim of monetary contribution cannot hold because no evidence was tendered to that effect, neither do I find any evidence that the respondent contributed monetarily to its acquisition and development, other than his allegation that he used to send money to the applicant. However, I find that the applicant made non-monetary contributions to the development of the property because by the respondent's own admission, based on his allegation that he used to send the applicant money for the development of the suit property. The applicant solely supervised the development and management of the suit property Plot XX while the respondent was abroad. There is evidence that the respondent made remittances from Germany, and there is also evidence that the applicant took out loans from her cooperative society over time.

20. On the motor vehicle, [particulars withheld] D, the applicant provided evidence that she actually deposited the sum of Kshs. 730,000.00 to the account of the respondent for the purchase of the suit motor vehicle. The respondent's claim that he was the one who sent money to the applicant for her to deposit the same into his account cannot hold water because the money transfer remittance copies the respondent annexed relate to the year 2012 whereas the sale and purchase of the suit motor vehicle happened in 2010. On a balance of probabilities, the Kshs. 730,000.00 was money from the applicant. I find that the applicant indeed monetarily contributed to the purchase of the suit motor vehicle. On what is the correct purchase price of the suit motor vehicle, I find that the sale agreement marked *'DV7'* holds more evidentiary weight on the sale and purchase of the suit motor vehicle compared to the letter from the motor vehicle dealership marked 'PB7'. The total purchase price for the suit motor vehicle was thus Kshs. 980,000.00.

21. Article 45(3) of the Constitution of Kenya provides that:

"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."

22. The Court of Appeal, in the case of *PNN vs. ZWN* [2017] eKLR, Waki JA observed the following in respect of Article 45(3) of the Constitution of Kenya:

'One of the earliest opportunities to interpret the provisions of Article 45 (3) came one year after the promulgation in the case of Agnes Nanjala William vs. Jacob Petrus Nicolas Vander Goes, (Civil Appeal No. 127 of 2011), where this Court stated as follows: -

"Article 45 (3) of the Constitution provides that 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 article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day."'

23. On the other hand, and still in the *PNN vs. ZWN* [2017] (supra), Kiage JA held a different opinion in respect of the equality ethos of Article 45(3), and he stated as follows:

'First, while I take cognizance of the marital equality ethos captured in Article 45 (3) of the Constitution, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage…To my mind, all that the Constitution declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words all forms of gender superiority-whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place.

They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage cowered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest-all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law.

Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in Francis Njoroge vs. Virginia Wanjiku Njoroge, Nairobi Civil Appeal No. 179 of 2009;

"… 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 vs. Chua Hock Chye [2007] 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 – e precise mathematical exercise'."

I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent.

Thus it is that the Constitution, thankfully, does not say equal rights "including half of the property." And it is no accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better than to simply declare that property shall be shared on a 50:50 basis. if set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.'

24. The Court of Appeal, in the case of *VWN vs. FN* [2014] eKLR held 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.'

25. The Court of Appeal in *PNN vs. ZWN* [2017] cited *PWK vs. JKG [2015] eKLR* where it had been stated as follows:

'We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five-judge bench of this Court in Echaria vs.- Echaria (supra) -

"Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim "Equality or equity" while heading the caution of Lord Pearson in Gissing vs. Gissing [1970] 2 All ER 780] at page 788 paragraph c that:

"No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions otherwise than by way of advancement, by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one quarter, I do not think it is helpful or right for the court to feel obliged to award either one half-or nothing?"

We are of the respectful view that the principles restated by Echaria vs.- Echaria are good law and contribution as the basis for distribution of matrimonial property remains valid.'

26. In *FS vs. EZ* [2016] eKLR expressed the opinion that -

'The task of distributing matrimonial property is based on judicial discretion and what the trial court would consider to be just in each particular case. Unlike disputes involving award of damages where there are precedents to guide the court, disputes relating

to distribution of matrimonial properties are unique in the sense that at times it is difficult to determine the level of contribution of each party. Spouses would usually not keep records of individual contribution wherever acquiring properties during their happy lives…My interpretation of Article 45 of the Constitution is that it does not call for 50:50 sharing of matrimonial properties after a marriage is dissolved. If that were to be the case, then marriages would be converted to economic traps whereby an individual would lure a rich man or woman, get married to them and soon thereafter seek divorce. Such a person can repeat the same process with another spouse and enrich himself or herself without making any monetary contribution … It is important to note that there are certain past decisions which are of the view that matrimonial properties should be shared equally. Most of those decisions were made before the coming into force of the Matrimonial Property Act, 2013. In the case of MK vs. SK [2008] 1 KLR 204 where the Court of Appeal held that where a property is registered in the joint names of husband and wife, it means that each party owns an individual equal share in the property: Such decisions may not represent the current Kenyan status under Section 14 of the Matrimonial Property Act, there is a rebuttable presumption that there is an equal beneficial interest. This means that evidence can be adduced to rebut and defeat the presumption that the interest on the property is equal. It is not a fixed presumption. One spouse can buy a property and have it registered in the names of the other spouse. Whenever an issue of distribution arises, what would count will be the level of contribution by each party, whether monetary or non-monetary contribution.'

27. The Court of Appeal in *PAWM vs. CMAWM* [2018] eKLR, held that:

'… a woman's direct and indirect contribution was taken into consideration and every case was determined in its own merit while bearing in mind the principles of fairness and human dignity. See the case of Muthembwa Vs. Muthembwa (supra)

"In assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.

The jurisdiction of the court is to determine a question or questions between husband and wife principally as to title to or possession of property.

In the instant case, where matrimonial property is intertwined with company property the court cannot decline jurisdiction under Section 17 to deal with the whole property as this would be unjust. In application under section 17 the court has wide and unfettered discretion to make such order or orders as justice may demand including sale and distribution of property subject of the application."

…we appreciate no case is like another and each must be considered on its own merit while bearing in mind the peculiarities, circumstances and the principles of fairness and human worth in each case. Just like the old saying goes, 'no one should reap where they did not plant and none should reap more than they planted'. That is a basic tenet of equity which follows the law.'

28. I am persuaded that the spirit of the Constitution and the international instruments to which Kenya has subscribed are in favour of equal distribution of matrimonial property as between spouses in the event of dissolution of their marital union.

29. Having gone through the pleadings and evidence on record, together with the various sections of the Constitution, national and international legislation and case law aforementioned, it is my conclusion that the suit properties Plot XX, Lucky Summer Estate and motor vehicle registration mark and number [particulars withheld] D form part of matrimonial property as they were acquired and developed during the subsistence of the marriage between the parties herein. I also find that the applicant contributed indirectly or non-monetarily to the acquisition, development and maintenance of the suit property Plot XXX, Lucky Summer Estate while the respondent was away. There is uncertainty as what each one the parties contributed directly or monetarily to the acquisition and development of the landed property, but I do find that both parties contributed to the acquisition of the motor vehicle, with the applicant contributing Kshs. 730,000.00 and the respondent contributing Kshs. 250,000.00.

30. In the end I shall dispose of the suit before me in the following terms: -

(a) That I hereby declare that the parties hereto own the suit property, that is to say Plot No. XX located at Lucky Summer Ruaraka and motor vehicle registration mark and number [particulars withheld] D, at a ratio of 50:50;

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

(c) That any party aggrieved by the decision herein has a right of appeal to the Court of Appeal within twenty-eight (28) days.

DATED AND SIGNED AT KAKAMEGA THIS 24th DAY OF April, 2019

W MUSYOKA

JUDGE

DELEIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 10th DAY OF May 2019

A ONGERI

JUDGE