



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.3 OF 2017 (O.S)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013

ENN.....APPLICANT

VERSUS

PTK.....RESPONDENT

JUDGMENT

1. The applicant and respondent in this matter started cohabiting as husband and wife in the year 1995 at Thika Town. On 17th May 2003 they solemnized their marriage under the African Christian Marriage and divorce Act (repealed) on 17th May 2003. The said marriage was blessed with 2 children; WN born 19th March 1996 and MW born on 21st November 1997. At the time when she got married to the respondent, she was working at Barclays Bank, while the respondent was working as a soldier in the Kenya armed forces. Parties fell out and the marriage was dissolved on 27th February 2012 at Thika Law courts.

2. The applicant is a former wife to the respondent and prays for the following orders;

i. A declaration that the following properties (immovable) that were acquired during the subsistence of the marriage are matrimonial property L.R. No. Thika Municipality Block XX/XXXX-Kiganjo plot, X Stalls at Moi Markert –Kang’oki opposite St. Patrick Catholic’s Church. L.R. No. Thika Municipality Block XX/XXXX-Ngoigwa Plot together with buildings and developments thereon and that the properties aforesaid are held by the respondent in trust and for the beneficial interest of the applicant.

ii. A declaration that the applicant is entitled to 80% or such higher proportion of the following properties (immoveable); L.R. No. Thika Municipality Block XX/XXXX-Kiganjo plot, 2 Stalls at Moi Markert –Kang’oki opposite St. Patrick Catholic’s Church. L.R.No. Thika Municipality Block XX/XXXX-Ngoigwa Plot together with the buildings and development s thereon acquired and developed by the funds and efforts of the applicant during the marriage and registered in the name of the respondent, except the Ngoigwa plot which is jointly registered in the names of the applicant and the respondent in like proportions.

iii. That the Deputy Registrar do sign any documents that the respondent may refuse to sign.

iv. That the respondent do pay costs of this summons.

3. The applicant alleged to having contributed almost 100% in the acquisition and development of the properties acquired during the subsistence of the marriage.

4. In her affidavit in support of the application, she averred that during the subsistence of the marriage she used to earn much more than the respondent and that she used her income to buy food, clothing, and household furniture, pay school fees and meet all the other family needs with the respondent contributing a small percentage sporadically. That on 21st July 2003 she took out a loan to purchase household items.

5. She further averred that she bought L.R. No. Thika Municipality Block XX/XXXX - (Kiganjo plot) through a loan and paid Kshs. 37,000 for the processing of the title deed. That due to pressure of time at her place of work, she sent the respondent whose work was flexible to do the registration and was shocked when he registered the title solely in his name. That later, she bought the 2 stalls at Moi Market through a study and personal loan of Kshs. 5,130,000/- evidenced by the letter of offer dated 19th March 2009 and a further loan of Kshs. 1,000,000 for development of the same. She alleged that the respondent had not accounted to her the rental income collected from the said property since it was purchased. Further, she claimed that the respondent was bent on depriving her of her interest in the said property. She urged the court to issue appropriate orders to protect and preserve the subject matter. She claimed that under the law, she is entitled to a share of the matrimonial property in respect of the said properties.

6. The respondent opposed the application via his replying affidavit dated 10th March 2017. He averred that the summons are instigated by ill will, greed, revenge and meant to cause him mental anguish. He listed the properties acquired during the subsistence of the marriage as follows.

- i. Gatumaiyu/Nyanduma/XXXX
- ii. Ngong/Ngong/XXXXX
- iii. Motor vehicle [particulars withheld]
- iv. Motor vehicle [particulars withheld]
- v. Motor vehicle [particulars withheld]
- vi. Toyota Vanguard [particulars withheld]
- vii. Thika Municipality Block XX/XXXX
- viii. Thika municipality Block XX/XXXX
- ix. Stall No.L.XXX Kangoki market
- x. Stall No. L.XX Kangoki market

7. He averred that while cohabiting, the parties opened a joint bank account with Barclays Bank of Kenya account no. [particulars withheld] and his salary was paid through the said account. That he is also a tea farmer and money realized was deposited in the said joint account. That in January 2000 he was paid general damages for a traffic accident of Kshs.187,000 which was used to pay the balance of the purchase price for Gatumaiyu property which the parties later sold in 2016 for Kshs 2 million. That 1.5 million which was to go to towards the children's school fees was deposited in Barclays account no. [particulars withheld] where the applicant is the sole signatory. He alleged that the applicant had not accounted for the amounts to-date.

8. He averred that in 2005, they acquired **L.R. Ngong/Ngong/XXXX** and built their matrimonial home. That later, the parties moved into a rental house in Thika and rented it out. That in 2003, he purchased two stalls at Kang'oki market, which he developed. He claimed that in 2006 he purchased Plot no. Thika Municipality Block XX/XXXX which he also developed. Further, he stated that in 2009 they purchased plot No. Thika Municipality Block XX/XXXX which he developed and that this is where he currently resides. That they purchased a Nissan matatu [particulars withheld]K which used to supplement their income but they sold the same. He went further to state that on 18th August 2008 he purchased motor vehicle KAV but later sold it and deposited the money in the joint account. He alleged that it was from the said monies that the applicant purchased motor vehicle [particulars withheld] which was later involved in a road accident and was written off. He alleged that the applicant was compensated and used the funds to purchase a Toyota vanguard [particulars withheld] .

9. It was the respondent's case that cumulatively their sources of income were salaries, tea proceeds, transport business, loans and his allowances from foreign trips. That they lived together for 18 years, 10 of which the applicant was on and off hospital and he single handedly managed the family affairs including investments. Further, that they used loan surplus to offset medical bill that exceeded the insurance cover. That he has been paying school fees and other related costs for the children alone.

10. He contended that the application was premature as there was a pending appeal against a ruling delivered by the lower court regarding their divorce case which proceeded ex-parte. Further, he averred that the applicant should render an account of how the alleged loan of over Kshs. 5,000,000 was utilized.

11. He proposed that the assets of the parties be shared as follows;

The respondent to get -

- i. Thika municipality block X/XXXX
- ii. Thika Municipality Block XX/XXXX 2 stalls

The applicant to get -

- i. Ngong/Ngong/XXXXX
- ii. Gatamaiyu/Nyanduma/XXXX
- iii. All motor vehicles [particulars withheld] and [particulars withheld]

He averred that 90% of the assets are in Kiambu County and this matter should be transferred to the High Court at Kiambu.

Submissions

Applicant's Submissions

12. The applicant in her submissions filed on 23rd July 2018 reiterated the averments contained in her affidavit. She pointed out that some of the properties listed by the respondent did not form part of the matrimonial property. That motor vehicles [particulars withheld] and [particulars withheld] were purchased and disposed off during the course of the marriage. That [particulars withheld] was wholly financed by the applicant's employer and was declared a write-off on 30th May 2012. Further, that [particulars withheld] was purchased on June 2015 which was after the marriage had been dissolved on and therefore does not form part of matrimonial property.

13. It was submitted that **L.R. Gatamaiyu/Nyanduma/XXXX** was bought through the financing extended to the applicant by her employer and was sold by consent of both parties for Kshs. 2 million with each party getting Kshs.250,000/- and the balance going to the eldest child's account for purposes of paying school fees. That L.R. Ngong/Ngong/XXXXX was purchased and developed by her through a mortgage facility by her employer in the year 2005 at the time the respondent was away and he only supervised a little bit.

14. In her submissions, she listed the following properties as being the ones available for distribution; L.R. No. Thika Municipality Block XX/XXXX Kiganjo Plot registered in the joint names of the respondent and one SG. It was submitted that on 18th March 2009 the applicant was granted a loan facility of Kshs.5,130,000 to develop the said property. That the said property was later subdivided and the portion in the name of the respondent became Thika Municipality block XX/XXXX. That she sent the respondent to register the property in their joint names but he only registered it solely in his name.

15. She claimed that L.R. Number Thika Municipality Block XX/XXXX (Ngoigwa plot) registered in both the parties names was purchased through a loan facility from her employer. That out of the Kshs.5,130,000 loan she had taken to develop the Kiganjo property and later developed the same through a top up loan of Kshs. 1,000,000. That at the time she left the respondent the house was almost complete.

16. Regarding the 2 stalls at Moi Market – Kang'oki opposite St. Patrick Catholic Church, Thika with monthly rent of Kshs. 20,000/-, it was submitted that the applicant contributed 95%.

Respondent's Submissions

17. The respondent in his submissions filed on 24th July 2018 gave a background of the matter and reiterated the averments of his pleadings. Further, he submitted that he offered non-monetary contribution as a husband, companion and father for over 18 years. That he managed and supervised the family transport business, searched and bargained for matrimonial properties, sourced for funds and building materials and offered guidance on the same. He took issue with the applicant for not submitting her bank statements to the court to show how the loans she took were channeled.

18. It was submitted that the marriage having been dissolved in 2012 and matter filed in 2017 the Constitution of Kenya 2010, Matrimonial Property Act 2013 and Land Registration Act No. 3 of 2012 applies. That Article 45(3) provides that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage. He relied on the case of **PNN v/s ZWN (2017) eKLR**, where the court of appeal held, *"a combination of the above provisions of the constitution and the Matrimonial Property Act has settled the law on Matrimonial property and chartered a clear vision for the future"*. He referred the court to section 7 which provides, "subject to section6(3), ownership of matrimonial property rests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or marriage is otherwise dissolved.

19. He further relied on Section 2 which defines contribution as monetary and non-monetary contribution including:

- child care;
- companionship;
- management of family business or property; and
- farm work;

He relied on the case of **UMM vs JMM (2014) eKLR**, where the court stated *"in the course of his testimonies the defendant said this about the developments on the subplots. The plaintiff was my supervisor at the time of the development but all the funding was from me."* **The court however held that, "the statements by I is that U made some non-monetary contribution towards the development of the subdivided plots. The contribution made towards the improvement of the property would entitle her the beneficial interest equal to the contribution made."**

16. Further reference was made by quoting the case of **PNN v ZNN (2017) eKLR**, where it was held that *"it is always a process of determination, not redistribution of property and each case must ultimately depend on its own peculiar circumstances, arriving at appropriate percentages."*

17. The respondent argued that based on the evidence adduced before the court the case call for a 50:50 sharing ratio. He proposed the matrimonial property be shared as follows;

- i. Applicant to retain matrimonial home in Ngong/Ngong/XXXXX or the proceeds**
- ii. Respondent to retain matrimonial home in Thika Municipality Block XX/XXXX (Ngoigwa)**
- iii. The parties share commercial properties Thika Municipality Block XX/XXXX(Kiganjo) in the ration 50:50**
- iv. Each party to take one stall at Kang'oki Markert**
- v. Motor vehicle registration [particulars withheld] be sold and proceeds be shared equally.**
- vi. Applicant to account to the Kshs.1,500,000 deposited in the Barclays Account No. [particulars withheld].**

Determination

18. I have considered the pleadings of both parties, their submissions and documentary evidence adduced thereof. In my view, issues that crystallize for determination are:

- (i) Was the property in question acquired during the subsistence of their marriage?**
- (ii) What is the contribution of each party?**
- (iii) What should each party get?**

19. There is no dispute that the couple started cohabiting as husband and wife since 1995, solemnized their marriage on the 17th May 2003 and divorced on 27th February 2012. Equally, there is no dispute that all the properties as listed by the applicant and respondent were acquired during coverture.

20. According to the applicant, the properties in question consist of:

- (a) L.R. No. Thika Municipality Block XX/XXXX – Kiganjo Plot**
- (b) 2 Stalls at Moi Market – Kang'oki opposite St. Patrick's Catholic Church**
- (c) L.R. No. Thika Municipality Block XX/XXXX Ngoingwa Market**

21. On the other hand, the respondent listed the properties acquired during the subsistence of the marriage as:

- (a) Gatamaiyu/Nyanduma/XXXX**
- (b) Ngong/Ngong/XXXXX**
- (c) Motor Vehicle [particulars withheld]**
- (d) Motor Vehicle [particulars withheld]**
- (e) Motor Vehicle [particulars withheld]**
- (f) Toyota Vanguard [particulars withheld]**
- (g) Thika municipality block XX/XXXX**
- (h) Thika Municipality Block XX/XXXX**
- (i) Stall No. CXXX Kang'oki Market**
- (j) Stall No. LXX Kang'oki Market**

22. Before I endeavour to determine the salient issues which forms the subject of the proceedings herein, it is imperative to understand some key legal principles governing division of matrimonial property under the current legal regime.

23. The principal Act governing division of matrimonial property is the Matrimonial Property Act No. 49 of 2013. Section 6 (1) of said Act defines matrimonial property to mean:

- (a) Matrimonial home or homes.**

(b) Household goods and effects in the matrimonial home or homes or

(c) Any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.

24. Section 7 goes further to provide that:

“subject to Section 6(3), ownership of matrimonial property vest in the spouses according to the contribution of either spouse towards acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved”.

25. Both parties are in agreement that the properties listed by each one of them whether currently available for distribution or not were acquired during the subsistence of their marriage. I will now turn to determining the status and each party's contribution towards acquisition of the properties listed by the respondent as it encompasses those listed by the applicant.

(a) L.R. Gatamaiyu/Nyanduma/XXXX

26. Regarding this joint property, both parties were in agreement according to their respective affidavits that it was sold at 2 million sometime the year 2005. According to the respondent, the whole amount was deposited in Barclays Bank Account No. [particulars withheld] held in the applicant's name and that the applicant did not account for the same. However, the applicant at paragraph 5 of her supplementary affidavit claimed that the said property was bought out of a credit facility (mortgage) which she had taken from her employer with her father-in-law as guarantor and that part of the sale proceeds was used to clear the outstanding loan at Kshs.400,000/= with Kshs.500,000/= shared out equally between her and the respondent. She attached copies of the banker's cheques in favour of each (EXH. ENN.11). The balance was allegedly used to pay school for the children. That due to inflation she used part of the said money to buy two plots at Kshs.600,000/= each for their children. She attached 2 title deeds in the names of their children (EXH. ENN-13).

27. Unfortunately, the respondent did not challenge the applicant's explanation. He did not comment on why he received a cheque worth Kshs.250,000/= out of the sale price of 2 million. The applicant attached school fees receipts worth Kshs.310,000/= (EXH. ENN 14) to show her contribution. I am persuaded by the respondent's explanation. The property having been sold by the two as joint proprietors, while they were still married, the same is not available for distribution. In any event, the expenditure of the money realized from the sale has reasonably been explained by the applicant on how the same was spent.

(b) Motor Vehicle Registration. No.[particulars withheld]

28. It was the applicant's claim that this motor vehicle was single handedly bought by the respondent who sold it the year 2008 and kept the proceeds. The respondent at Paragraph 18 of his replying affidavit admitted the motor vehicle was sold but fell short of explanation as to who received the sale proceeds and how the same was spent. I will buy the uncontroverted explanation of the applicant hence find that the said property is not available for distribution.

(c) Motor Vehicle Reg. No. [particulars withheld]

29. Touching on this property, the applicant alleged that the same was sold by the respondent who kept the sale proceeds. The respondent equally admitted that he sold the property and deposited the money in their joint account. He did not tender any proof of the alleged deposit and who spend the money. On that note the property is not available for distribution

(d) Motor VehicleReg. No. [particulars withheld]

30. The applicant stated that she solely bought the said motor vehicle through a bank loan from her employer on 8th August 2008. She attached copies of the offer letter, sale agreement and banker's cheque marked Annexure ENN-17 as evidence. She further stated that the said motor vehicle was involved in a road accident on 8th August 2008 whereof it was written off. That the insurance paid her Kshs 1,092,000/= as compensation which money she used to clear the outstanding loan which was used to buy the said motor vehicle.

31. On the other hand, the applicant claimed that the year 2001 he bought motor vehicle registration No. [Particulars withheld] which he later sold and deposited money in their joint account. That it was the said amount which the applicant used to buy motor vehicle [particulars withheld] which was involved in a road accident. He however did not tender any proof that there was such sale of motor vehicle [particulars withheld] and that the money was deposited in their joint account and later used to buy motor vehicle [particulars withheld]. The explanation given by the applicant that [particulars withheld] was bought out of a loan facility is logical, convincing and tenable. To that extent that property is not available for distribution as it does not exist.

(e) Toyota Vanguard Reg. No. [particulars withheld]M

32. The applicant told the court that this motor vehicle was bought the year 2015 long after their divorce using a loan facility from her employer. She attached a sale agreement dated 24th June 2015 for a sum of Kshs.1,980,000/= marked ENN-18 of her supplementary affidavit. The respondent argued that the money used to buy the said motor vehicle was out of proceeds realized from selling motor vehicle registration [particulars withheld] . He did not tender any proof to connect the sale proceeds from [particulars withheld] which was written off the year 2012 and KCD motor vehicle bought the year 2015 after their divorce. I am persuaded by the applicant that the said property was bought without the respondent's contribution and much later after their divorce.

(f) Ngong/Ngong/XXXXXX

33. Concerning this property, the applicant contended that she single handedly bought the same using a loan facility from her employer amounting to Kshs.6,500,000/=. That due to a huge outstanding loan which could not be repaid adequately using monthly rent from the constructed home, she sold the same 2015 to enable her clear the 4.5 million outstanding loan. She attached a sale agreement and loan repayment bank statement marked ENN-15 and EE16 respectively. During cross examination, the respondent argued that that property was jointly acquired. He however did not give any evidence as to how much he contributed. Further, when being cross examined, he admitted that that property was bought by the applicant after taking a loan. It is trite law that he who alleges existence of a fact must prove that fact if the court is to believe him or her. For the above reasons stated, it is my finding that the respondent did not make any contribution towards acquisition and development of that property which is no longer in existence after it was sold to offset a loan used to acquire it. Accordingly, I have nothing to distribute or declare as jointly acquired during the marriage.

(g) L.R. Thika Municipality Block XX/XXXX (Kiganjo)

34. According to the applicant this property was bought using a mortgage given by her employer. She attached a letter offer dated 16th October 2017 for a sum of Kshs.550,000/= (See annexure ENN.5 of the affidavit in support of the (OS). That after sending the respondent to go and do search for sub-division of the original property to get their portion, the respondent decided to insert his name hence the title deed came out in his name. However, the respondent claimed to have spent 1.5 million to develop that property using money paid from foreign missions where he was serving as a military officer in foreign countries. The property is registered in his name although the applicant claim 100% shareholding. He attached several receipts showing purchase of construction materials as proof of his contribution.

35. It is not in dispute that the property was acquired during coverture. Each party claims contribution. The law governing division of matrimonial property (Matrimonial Property Act) at Section 14 provides as follows:

“where matrimonial property is acquired during marriage –

(a) in the name of the 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 a rebuttable presumption that their beneficial interests in the matrimonial property are equal.

36. In the case of **NN vs NK (2008) 1KLR 2018** it was held that the fact that property is acquired during coverture in the name of one spouse does not automatically disentitle the other spouse his or her beneficial interest.

37. From the testimony of both parties it is apparent that the applicant did make contribution in processing the land title deed. The property having been developed, the same must have been out of funds spent by the respondent hence his contribution. This is also evident from receipts for purchase of materials. Contribution towards acquisition of matrimonial property cannot be determined with mathematical precision. It is about prima facie proof that a couple made a substantial amount of contribution towards acquisition or development of such property (**See Burns vs Burns (1984) 1 ALL ER 244**). Accordingly, it is my finding that both parties made contribution towards the acquisition and development of the property in question. The fact that the respondent is the sole registered property owner does not disentitle the applicant her beneficial interest. To that extent that property shall be divided equally at the ratio of 50:50.

(h) Thika Municipality X/XXXX (Ngoigwa)

38. This property is registered in the joint names of the parties. The respondent claimed to have bought and developed the property. That he is currently staying there as his matrimonial home. He claimed that for a period of 10 years his wife was critically ill that she could not do anything hence he took full responsibility in developing the property besides paying school fees for the children. He attached several school fees receipts (See Annexure D-16). He attached a letter of offer from Family Bank of Kshs.1,000,000/= which he claimed he used to develop the property. He also stated that his money from Eritrea Peace keeping mission amounts to Kshs.3.5 million, and that proceeds from farming were all spent in developing that property. On the other hand, the applicant stated that she contributed 95% of the proceeds from loan facilities to develop the property after using Ngong/Ngong plot as collateral.

39. As stated the title deed is in their joint names. Although there is no proof of actual amount each spent in acquiring the said property, the same is presumed to be their joint property acquired out of joint effort.

40. In **Kivuitu vs Kivuit in 1999 e KLR 248** the court had this to say:

“the fact that the property is registered in the joint names means that each party owns an undivided equal share therein. Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the interest of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the whole ownership”.

Similarly, in the case of **Kamore vs Kamore (2000) EA – 81**, it was held that:

“where property is acquired during the course of coverture and is registered in the joint names of both parties, the court in normal circumstances must take it that such property as being a family asset is acquired in equal shares”.

41. Guided by the above stated case law, the property herein which is registered in joint names is presumed to be held for the benefit of both of them hence share them equally at the ratio of 50:50.

(i) Two stalls at Kang'oki Moi Market

42. The applicant claimed absolute ownership of the two stalls claiming that she bought them single handedly. She attached an offer letter of a loan facility she took to purchase the two stalls (ENN-6 of the affidavit in support). The respondent also claimed to have contributed towards the purchase and development of the stalls. Unfortunately none of them produced even a sale agreement to show who bought the two stalls at what price. There is no proof that the letter of offer of loan to the applicant realized the loan itself and that the same amount was spent entirely in buying the stalls.

43. It is therefore my finding that both parties played a both direct and indirect role in one way or the other as the respondent contributed in paying school fees for children and other domestic expenses when applicant was sick. I will therefore share these properties equally at the ratio of 50:50.

44. Accordingly, I am satisfied that the applicant has proved her case on a balance of probability and therefore enter judgment in her favour with orders as follows:

(a) That the immovable properties known as LR Thika Municipality XX/XXXX – Kiganjo Plot, Thika Municipality Block XX/XXXX – Ngoingwa together with the developments therein and two stalls at Kang'oki Moi Market opposite St. Patrick's Catholic Church acquired during the subsistence of the marriage be and are hereby shared out equally in the ratio of 50:50.

(b) That the same properties shall be shared out based on a valuation report to be undertaken by mutually and jointly agreed reliable valuer.

(c) That the property can be sold and the proceeds shared out equally.

(d) That in the alternative, either party shall be at liberty to buy out the beneficial interest of the other in the said properties in monetary terms.

(e) That this being a family matter each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MAY, 2019.

J.N. ONYIEGO

(JUDGE)