



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 40 OF 2017 (OS)

IN THE MATTER OF THE DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT 2014

BETWEEN

S.K.K.....APPLICANT

VERSUS

S.K.K.....RESPONDENT

JUDGMENT

1. It is common ground that the law governing the division of matrimonial property is the **Matrimonial Property Act No. 49 of 2013**. In **section 6** of the **Act**, matrimonial property means the matrimonial home or homes; household goods and effects in the matrimonial home or homes; and any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. Under **section 7** of the **Act**, the 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 under **section 2** of the **Act** to mean monetary and non-monetary contribution, and includes domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work.

2. **Section 14** of the **Act** provides that where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. Where the property is acquired during the marriage in the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interest in the matrimonial property is equal. In the case of **P.W.K. –v- J.K.G. [2015] eKLR** the Court of Appeal held as follows:-

“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 is equity” while heeding the caution of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788.”

3. In other words, the division of matrimonial property is not a precise mathematical exercise, but a task performed while taking into consideration the peculiar facts of each case (**P.N.N. –v- Z.W.N. [2017]eKLR**).

4. The applicant S.K.K. and the respondent S.K.K. formalized their marriage on 24th June 2005 at the Nairobi Baptist Church. The marriage was dissolved on 25th May 2017. The respondent stated that prior to the formalization of the marriage the parties were living as wife and husband under Kikuyu customary law. His evidence was that their first child, a daughter, was born to them in 2000 and was named after his mother in accordance with Kikuyu tradition. Their second child, a son, was also born before the formal marriage and was named after his father again in accordance with Kikuyu tradition. In all the couple got three children.

5. The applicant denied that there was any marriage before the formal ceremony. She, however, did not challenge the evidence regarding the birth of their first two children, and how they were named. Further she stated in paragraph 8 of her supporting affidavit that between 2003

and 2005 the couple was staying in her employer's [particulars withheld] staff quarters. I will accept the evidence of the respondent that the couple lived together as wife and husband since 1999, and only formalized the relationship on 24th June 2005.

6. This cause was brought by the applicant for the division of matrimonial property. Specifically the applicant sought:-

(a) the declaration that the house in South B on LR No. Nairobi/Block 93/[particulars withheld], and two plots at Kitengela (LR No. Kajiado/Kitengela/[particulars withheld] and Kajiado/Kitengela/[particulars withheld]) were matrimonial property jointly owned; and

(b) a declaration that LR No. 12715/[particulars withheld] at Syokimau; LR No. Ngong/Ngong/[particulars withheld] at Ongata Rongai; and motor vehicle KBP **** belong to her exclusively.

She sought that the property in (a) be valued and the respondent buys it off, or it be sold and the proceeds be shared according to contribution. In respect of Syokimau property, her case was that she bought it before marriage and therefore it should go to her. She stated that she solely bought the Ongata Rongai property. She should be given it but she is ready to refund the respondent Kshs.2,000,000/= he spent on developing it. As for the Kitengela plots her case was that they were jointly acquired, and therefore each of them should get a plot. Lastly, her case was that she bought the vehicle, although the respondent helped in the import logistics. She claimed the vehicle absolutely.

7. The respondent admitted that the applicant bought the vehicle; that he allowed this to happen as he was attending to the other family obligations. It was registered in his name. He accepted that it should go to the applicant.

8. The respondent also admitted that Kitengela plots were jointly acquired, and that they are of same value. He agreed that each party can take one of the plots.

9. Regarding the South B House, it is common ground that it was bought beginning 2005 through a mortgage facility enjoyed by the applicant. She stated that she paid the deposit, valuation, and legal fees alone. She thereafter serviced the mortgage alone, after which she transferred the house into the joint names. She swore that before she took the loan the respondent was giving her Kshs.40,000/= monthly to take care of the household bills, school fees, and rent costs. When she took the loan he increased the monthly stipend to Kshs.55,000/= Still, she stated that she paid $\frac{3}{4}$ of the loan alone. Even assuming that her version is true, the respondent allowed her to repay the loan by taking off her hands her joint obligation to cater for household bills, school fees and rent. In other words, the respondent indirectly contributed to the purchase of the house. What is the respondent's version? He stated that the house was registered in her name because she was the owner of the mortgage. Repayments were Kshs.34,095/= monthly for 15 years, to be recovered from her account. He paid Kshs.55,000/= monthly towards the mortgage. He took a loan of Kshs.1 million to improve the house. In all, they were able to repay the mortgage in four (4) years, and put the house to rent which the applicant has always drawn.

10. I have considered the evidence of the parties, the respective documents filed, which include bank statements. I have come to the conclusion that the house is matrimonial property that was jointly and equally acquired. The joint and equal acquisition was acknowledged by the applicant, a lawyer, when she agreed to have the house registered in their joint names.

11. Both the applicant and the respondent agreed that the Syokimau property was bought in 2002. I have found in the foregoing that they were married at the time. The property was bought in the name of the applicant. She stated that she solely paid for the plot. In 2011 they began to develop it. She stated that each gave Kshs.1 million as initial contribution to develop. They got the money from a property they had sold at Athi River. He gave another Kshs.1 million. She raised the balance of Kshs.3 million from a loan she took. The total costs of the development were therefore Kshs.7 million. According to the respondent he contributed to the purchase. After the repayment of the Sought B House, they decided to develop it. This was in 2011. They sold their Athi River property, which they jointly owned, for Kshs.2,500,000/=. They put the money into the development. Thereafter, in 2014 he lost his job and the applicant abandoned him. If the house was built for Kshs.7 million in total I accept the evidence of the applicant who had to take a loan of Kshs.3 million to complete the same. By then the respondent was not in employment. On the facts I declare that the Syokimau property is matrimonial property, but that the value of the contribution of the respondent is 40% and that of the applicant is 60%.

12. As for the Ongata Rongai property, the parties stated that they agreed to take a joint loan to buy it. The applicant, however, stated that she singlehandedly paid the deposit and later paid the balance through a staff mortgage scheme offered by her then employer East African Portland Cement Company and, later, through a lumpsum of Kshs.3 million she got when she ceased to work for the company. According to the respondent, although the applicant maintained the house repayment account, he paid Kshs.55,500/= monthly (which increased to Kshs.70,000/= monthly), after he had contributed Kshs.181,000/= and Kshs.600,000/= towards the deposit. The Kshs.600,000/= went to purchase a vehicle for the applicant's mother who begun to stay in the house. She does up to now. After the purchase of the house, the same was transferred from the name of the applicant to the joint names of the parties. This property was worth Kshs.3,600,000/=. In my considered view, the joint registration supports the evidence by the respondent that this was a matrimonial property whose purchase the parties equally contributed towards.

13. In conclusion, I declare that:-

(a) LR No. Nairobi/Block 93/[particulars withheld]; Kajiado/Kitengela/[particulars withheld]; Kajiado/Kitengela [particulars withheld]; Syokimau LR No. 12715/[particulars withheld]; Ongata Rongai LR No. Ngong/Ngong/[particulars withheld]; and motor vehicle registration number KBP **** are all matrimonial property jointly owned by the applicant and the respondent;

(b) house South B on LR No. Nairobi/Block 93/[particulars withheld] was contributed to equally by the applicant and the respondent;

(c) Kajiado/Kitengela/[particulars withheld] and Kajiado/Kitengela/[particulars withheld] were equally contributed to by the

applicant and the respondent;

(d) Ongata Rongai property on LR No. Ngong/Ngong/[particulars withheld] was equally contributed to by the applicant and the respondent;

(e) Syokimau LR No. 12717/[particulars withheld] was contributed by the applicant and the respondent at the ratio of 60% and 40%, respectively;

(f) the property in (b), (d), an (e) shall be valued by a valuer to be agreed on by the parties within 14 days, or appointed by the court, and the valuation be within 30 days from the date of appointment and the report filed in court;

(g) Kajiado/Kitengela/[particulars withheld] shall go to the applicant absolutely;

(h) Kajiado/Kitengela/[particulars withheld] shall go to the respondent absolutely; and

(i) motor vehicle registration number KBP **** shall go to the applicant absolutely.

14. This matter shall be mentioned on **20th June 2019** for further orders.

DATED and DELIVERED at Nairobi this **16th day of MAY 2019**

A.O. MUCHELULE

JUDGE