



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 66 OF 2014**

**ZAO.....PETITIONER**

**VERSUS**

**RWD.....RESPONDENT**

**JUDGMENT**

1. The matter before me is a matrimonial cause brought by way of Originating Summons dated 15<sup>th</sup> October 2014, in which the Petitioner is seeking the following prayers;

- a) That an order do issue declaring that the Petitioner is entitled to 70% or such other or higher proportion of the matrimonial property namely KJD/KAPUTEI NORTH/[...] registered in the names of the parties herein but in possession of the Respondent.
- b) That the joint ownership of the matrimonial property be severed and be divided in the ratio of 70:30 in favour of the Petitioner.
- c) That the said properties and income aforesaid be settled in proportions or as the Court may order.

2. It was the Petitioner's case that the parties herein were married under the Marriage Act Cap 150 Laws of Kenya on 25<sup>th</sup> January 2008 and were blessed with two issues. At the time they were contracting the marriage, the Respondent was a lieutenant in the [particulars withheld] while the Petitioner was a [particulars withheld] in an NGO with monthly earnings of Kshs. 30,000/= . She stated that the Respondent went on study leave in Germany from 2006 to 2011 and would only send between Kshs. 15,000/= and Kshs. 20,000/= per month to cater for rent while she would meet all other financial obligations for the family. She also worked as a part-time lecturer and later a tutorial fellow at Kenyatta University with her salary increasing to Kshs. 90,000/= per month. She also took up another job as a part time Lecturer at the Kenya Institute of Mass Communication.

3. According to the Petitioner, during the subsistence of their marriage she located the suit property, upon which the Respondent sent money for its acquisition. She stated that in 2011, the Respondent sent her money to begin the construction of their matrimonial home. She supervised the construction. The Petitioner states that due to the financial constraints experienced by the Respondent through the payment of loans acquired for the construction, he could not complete the project. She therefore contributed by financing the construction of the brick fence, land scaping, interior fixtures and furnishings.

4. During this period she also bore the burden of providing for the family, paying rent and meeting any other financial obligations not related to the construction before they moved into the matrimonial home. She stated that she secured another job as a part time lecturer at Multimedia University College to enable her meet this financial obligations.

5. The Petitioner claimed that when the Respondent completed his studies, he was deployed to Somalia after which he completely stopped supporting their family. Even after he finished his mission and was deployed to Mombasa, he did not provide for them. That happened even after they lost their first child. She took care of all medical and maternity expenses when she gave birth to their second child and when the child got sick. Subsequently, the lack of support, cruelty and other factors led to the breakdown of the marriage and the consequent divorce.

6. It was her claim that, she and her child had been denied access to the matrimonial property and the Respondent had opted to give the house to his niece and family who are the current residents. She estimated the value of the property to be Kshs. 17 Million and she was fearful that the Respondent intended to deny her any right or share in the property. She stated that the Respondent had made several investments other than the matrimonial property.

7. In opposition to the Originating Summons, the Respondent gave evidence through a replying affidavit dated 26<sup>th</sup> February, 2015 and oral testimony. It was his case that the parties had been married but the union had since been dissolved vide Divorce Cause No. 90 of 2013. He

asserted that the suit property had been solely acquired and developed by himself without any assistance, or contribution from the Petitioner or any joint efforts. He denied the claims by the Petitioner that she provided financial assistance to the family and insisted that he was the sole breadwinner and sent back Kshs. 30,000/= per month for house rent and family upkeep. He also denied claims that the Petitioner assisted financially or otherwise towards the development and improvement of the matrimonial home.

8. The Respondent stated that when he was away, he financed the purchase of three properties namely L.R. No. Kajiado/Kaputiei North/[...] at Kshs. 290,000/=, L.R. No. Kajiado/Kaputiei North/[...] at Kshs. 190,000/= and Kajiado/Kaputiei North/[...] at Kshs. 400,000/=. These properties were all registered in their joint names.

9. The respondent averred that upon dissolution of the marriage, the parties agreed in good faith that he would retain sole possession of the matrimonial property while the Petitioner would have vacant possession of two vacant plots namely L.R. No. Kajiado/Kaputiei North/[...] and L.R. No. Kajiado/Kaputiei North/[...]. He maintained that he had purchased the properties without any contribution from the Petitioner and that she had already sold one of the properties for her sole benefit.

10. The Respondent asserted that he always provided for his family and referred to a Parental Maintenance Agreement executed by the parties herein to indicate that he always maintained the family even after the divorce. He accused the Petitioner of willful non-disclosure, concealment and misrepresentation of material facts. He also denied claims that the property in issue is worth Kshs. 17 million. He prayed for the Petitioner's suit to be dismissed with costs and the subject property to revert back to his sole name wholly and absolutely.

11. On her part, the Petitioner indicated that the two properties namely L.R. No. Kajiado/Kaputiei North/[...] and L.R. No. Kajiado/Kaputiei North/[...] had been gifted to her by the Respondent after they had separated in an attempt to convince her to return home. That they were gifts one of which she had already sold in order to acquire a motor vehicle as the Respondent had denied her access to all motor vehicles previously used.

12. The Petitioner filed written submissions where she reiterated the contents of her supporting affidavit, further affidavit and testimony. She further submitted that she had demonstrated that she had contributed both directly and indirectly towards the acquisition of the property. She relied on the case of V.W.N v F.N [2014]EKLR and Tabitha Wangechi Nderitu vs Simon Nderitu Kariuki Civil Appeal No. 203 of 1997 in support of her case.

13. The Petitioner submitted that the properties gifted to her by the Respondent were not equivalent to the value of the suit property. That she sold one of the properties at Kshs. 1 million while the other had an estimated value of Kshs. 1,500,000. It was her submission that this was way less than the value of the Matrimonial property being Kshs. 6,700,000 and her contribution towards the acquisition and development. She prayed for a 70% share in the matrimonial property.

14. In rebuttal the Respondent submitted that the Petitioner had not disclosed any form of contribution towards the acquisition and development of the suit property. He quoted the case of WMM vs BML [2012]EKLR where the court stated that the criterion in determining the rights of spouses in a marriage must treat the husband and wife as equals with equal obligations in relation to maintenance. He submitted that even though the Petitioner was employed she did not bear any financial obligation for the family.

15. It was the Respondent's submission that the provisions of Section 14 of the Matrimonial Property Act did not give a fixed presumption that registration of property in the joint names of a spouse would entitle them to equal share. He relied on the cases of F.S v E.Z [2016] EKLR and Federation of Women Lawyers (FIDA) v A.G & Another [2018] EKLR in support of his case. He prayed for the suit to be dismissed with costs as the Petitioner was not entitled to the reliefs sought.

16. It is my view that the substantive issues for determination are:-

i. Whether the properties namely L.R. No. Kajiado/Kaputiei North/[...] and L.R. No. Kajiado/Kaputiei North/[...] were given to the Petitioner by the respondent as gifts.

ii. Whether the Petitioner contributed towards the acquisition and development of the property known as Kajiado/Kaputei North/[...], the suit property herein.

iii. Whether the Petitioner is entitled to a share of the suit property.

17. From the pleadings and evidence on record, it is established that the parties lived together as a couple for a period of about four (4) years. They had two children during the union. Unfortunately the marriage broke down irretrievably leading to divorce.

18. In addressing the first issue, the Respondent asserted that upon dissolution of the marriage, the parties agreed in good faith that he would retain possession of the suit property while the Petitioner would have vacant possession of two vacant plots namely L.R. No. Kajiado/Kaputiei North/[...] and L.R. No. Kajiado/Kaputiei North/[...]. He subsequently transferred the two properties into the Petitioner's name. On her part the Petitioner refuted this claim stating that the properties were transferred to her as gifts by the Respondent who was trying to lure her back to the matrimonial home.

19. Section 15 of the Matrimonial Property Act states as follows:-

**Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient.**

It is essential to note from the above provision that there is a "rebuttable" presumption. The black's law dictionary defines rebuttable

presumption as follows: -

**“An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.”**

The Black's law dictionary defines a gift as the voluntary transfer of property to another without compensation.

20. It has not been refuted that the two properties were transferred by the Respondent to the Petitioner voluntarily and were consequently registered in the Petitioner's name. The rebuttable presumption raised by the Respondent is that the transfer was meant to extinguish any claim held by the Petitioner on the matrimonial home and distribution of the matrimonial property.

21. Furthermore, it was the Petitioner's testimony that she sold one of the properties and the proceeds of the sale were not shared with the Respondent. Indeed the Respondent admits that he willingly transferred the property to the Petitioner, and it has not been claimed that the said transfer was in any way occasioned by fraud, misrepresentation or corrupt designs. It was his claim that the transfer of the two properties was mutually agreed and was intended to extinguish the Petitioner's claim to the suit property.

22. I am of the view that the timing of the transfer of the two properties to the Petitioner is a critical element in the determination of this matter. It was the Petitioner's and the Respondent's testimonies that the transfer took place after their separation but before the divorce was finalized. The presumption is that this was done in an attempt to distribute the matrimonial property amicably. This court therefore determines that the two properties are not gifts to be considered separately. They shall be considered as part of matrimonial property for the purpose of these proceedings.

23. The second issue for determination is whether the Petitioner contributed towards the acquisition and development of the matrimonial property. Section 6 of the Matrimonial Property Act, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes, or any other property jointly owned and acquired during the subsistence of the marriage. Basically for property to qualify 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.

24. In the instant case, the marriage between parties herein commenced in 2008. Three properties were acquired during the subsistence of the marriage, namely L.R. No. Kajiado/Kaputiei North/[...], L.R. No. Kajiado/Kaputiei North/[...] and L.R. No. Kajiado/Kaputiei North [...] all registered in the joint names of the parties upon purchase. The parties were in agreement that the properties were acquired for their joint benefit and their children. This was realized by the construction of a matrimonial home in 2011 on parcel number 27040. As a result, there is no doubt whatsoever that all three properties were matrimonial property as far as the parties herein were concerned.

25. Regarding ownership of matrimonial property, Section 7 of the Matrimonial Property Act states 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.”**

26. The effect of the foregoing provision of law is that ownership of matrimonial property vests in the husband and wife/wives according to their contributions towards the acquisition. It is therefore possible for spouses to own certain properties together but not in equal shares. In the event of a divorce, the court would look at what each party brought to the table for the purposes of the distribution of such properties.

27. In this case, the Petitioner concedes that it is the Respondent who made the financial payments towards the purchase of the three properties in issue. She however asserts that she supervised the development on the matrimonial home. She also stated that when the Respondent ran out of funds and could not complete the financing of the development even after taking a loan, she stepped in and financed the brick fencing, land scaping, interior fixtures and furnishings for the house. During this period, she was also left with the burden of providing for the family, paying rent and meeting any other financial obligation not related to the construction as the burden of servicing the loan was too much for the Respondent. She presented hospital records to show that she paid for the children's medical expenses.

28. On the other hand the respondent admitted that it was the Petitioner who engaged the vendor for the purchase of the parcel of land as he was out of the country. He however refuted claims that she supervised the construction stating that he directly engaged the Project Architect, Structural Engineer and On-site contractor all of whom he personally contracted and they supervised the construction. He also refuted claims of financial contributions made by the Petitioner insisting that she had only purchased a bedroom wardrobe.

29. He asserted that the Petitioner never made any purchases towards the development of the suit property. Section 2 of the Matrimonial Property Act defines contribution to be both monetary and non-monetary. It 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;**

30. In dealing with the principle of burden of proof, the Court cannot infer what is not tendered in evidence. As a general rule, a Court of Law will not rely on conjecture or assumptions. Neither can it be left to the Court to speculate on what contribution the Petitioner could have made. Direct evidence must be tendered in support of such contribution. It is the duty of Petitioner to lay persuasive evidence before the Court. She has however failed to provide evidence of any such financial contribution made towards the brick fencing, land scalping, interior fixtures and furnishing the house.

31. From the evidence, the Respondent was out of the country while the Petitioner took care of the properties. Nothing was wasted. The Petitioner was involved in the acquisition of the parcel of land and supervised contractors knowing that she had a recognisable stake in development of the property. The Respondent had faith in her and that is why he sent money directly to her for the construction materials. All documents tendered indicated that the contraction was for Mr. and Mrs. Wesonga, the parties herein.

32. In her testimony the Petitioner alleged to have financed the painting of the house, the plastering, the tiling, the roofing and purchase of the bath tubs. This was not backed by any evidence. On his part, the Respondent claimed to have financed the construction fully save for the bedroom wardrobe and purchase of utensils. He also did not provide documentary proof. It is evident that the parties have acknowledged that there was monetary contribution by both parties towards the development of the matrimonial home. However, apart from these admissions, the evidence adduced was not sufficient to show the exact contributions made by each party.

33. On whether there was non-monetary contribution by the Petitioner, this Court takes the view that her efforts and contribution in the family cannot go unnoticed. For most of their marriage, the Respondent was away from home, first in Germany, then Somalia and later in Mombasa. Despite the fact that the marriage between the parties was troubled, the Petitioner dutifully took care of the family. She was a working mother who held down several jobs. She oversaw the purchase of the matrimonial properties, execution of sale agreement, transfer and supervision of the construction of the matrimonial home. She also participated in the management of matrimonial home, and took care of the children of the marriage which in my view was an onerous contribution in the marriage. I therefore hold that there was both monetary and non-monetary contribution by the Petitioner.

34. The question to consider is what share of the Matrimonial property the Petitioner is entitled to. **Section 45 of the Constitution of Kenya 2010** 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.”**

35. The distribution herein is based on the party’s contributions towards the acquisition and development of the matrimonial property both monetary and non-monetary. 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 considering the evidence on record.

36. The Petitioner has solely benefited from the sale of L.R. No. Kajiado/Kaputiei North/[...] at Kshs. 1,000,000/= and is in possession of L.R. No. Kajiado/Kaputiei North/[...] with an estimated value of Kshs. 1,500,000/= all transferred to her upon separation. I also observe that the Petitioner has not been living in the matrimonial home since the parties separated back in December, 2012. The property is valued at Kshs. 6,700,000/=. It is my view that the Respondent ought to get a larger share of the matrimonial home owing to his contribution and the fact that the Petitioner has already benefited from two of the properties transferred to her.

37. Having taken into consideration the entirety of the evidence put forth in this case, as well as the applicable law, this Court makes the following determination regarding the division of the matrimonial property:-

- a) A declaration be and is hereby made that the Petitioner’s interest in the matrimonial property namely KAJIADO/KAPUTEI NORTH/[...] is 25% of the total value of the property which is Kshs. 6,700,000/=
- b) The Respondent is at liberty to buy out the Petitioner’s share entitlement of the matrimonial home.
- c) The Petitioner shall have full and unfettered interest in property title number L.R. No. Kajiado/Kaputiei North/[...].
- d) Each party shall bear their own costs.

**SIGNED DATED AND DELIVERED IN OPEN COURT THIS 22<sup>ND</sup> DAY OF MAY 2019.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Advocate for the Petitioner**

**In the presence of.....Advocate for the Respondent**