



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL CASE NO. 55 OF 2015 (OS)
JMO.....APPLICANT
VERSUS
CLO.....RESPONDENT
JUDGMENT

1. Matrimonial property is property that was acquired and/or developed by persons who are married to one another which, upon application to a court by one of the spouses, is subject to division between them.

2. Under **section 6(1)** of the **Matrimonial Property Act, No. 49 of 2013**, such 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.”

3. Under **section 7 of the Act** –

“Subject to 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.”

4. Contribution under **section 2** of the **Act** 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.”

5. In **section 14** of the **Act**, where matrimonial property is acquired during the marriage –

“(a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the 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.”

6. 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 or equity” while heeding the caution of Lord Pearson in Gissing –vs- Gissing [1970] 2 All ER 780] at page 788.”

7. Where there is joint registration, a spouse is entitled to lead evidence to show that, in fact, the beneficial interest is not equal: that his/her contribution is such that, although the property was registered jointly, he/she was the owner of the property, or the contribution was much more than that of the other spouse. In other words, in the division of matrimonial property, contribution of either spouse is the key consideration. The court, in each case, has to properly evaluate the evidence and determine the level of contribution of each spouse towards the acquisition and development of the matrimonial property in question.

8. The applicant JMO and the respondent CLO got married on 6th September 1980 at [Particulars withheld] Church in Nairobi under the **Marriage Act (Cap 150)**. The marriage was blessed with three children, born on 25th October 1982, 18th November 1985 and 22nd March 1989, respectively. The marriage was dissolved on 13th September 2016. The parties were married for 36 years which is a long time.

9. On 17th September 2015 the applicant filed this originating summons seeking a declaration that all the following properties registered solely in the name of the respondent and/or on his behalf and/or jointly with the applicant are matrimonial property:

- a. matrimonial home situate in Karen in Nairobi on LR No. [xxxx];
- b. apartment in Sapphire Park situate on LR No. [xxxx] in Kileleshwa;
- c. Isukha/Lubao/[xxxx] measuring 2.05Ha;
- d. vehicle Volkswagen Polo Classic registration number KBP [xxxx];
- e. vehicle Honda CRV registration number KAS [xxxx];
- f. Lubao Enterprises Limited (registration number [xxxx]);
- g. a parcel of land at Majengo in Vihiga; and
- h. joint account number [xxxx] at Commercial Bank of Africa, Upper Hill Branch.

An order was sought that these properties be sold and/or disposed of and the proceeds therefrom divided between the parties on 50:50% basis or as the court may order. The respondent had sold the land at Majengo. The applicant pleaded that this was done without her consent. She sought that the proceeds be shared on 50:50% basis. Her case was that all these properties were acquired during the marriage with the contribution of both parties. She stated that her contribution was monetary and non-monetary. Her non-monetary contribution included child care, companionship, management of the matrimonial home and the management of the family properties. There is no dispute that Lubao Enterprises Limited ceased to exist many years ago and left no assets capable of division.

10. The respondent filed a replying affidavit on 22nd October 2015 to deny the claim. He denied that the applicant had contributed to the acquisition of these properties. He stated that he had solely acquired the Karen home, the apartment, the two vehicles, Lubao land, and the Majengo land (S/Maragoli/Buyonga/[xxxx]). In respect of the joint account, his case was that he is the one who made deposits into the account which money the applicant secretly moved elsewhere, and part of the it was used to buy treasury bills at Central Bank in her name where she has Kshs.148,157,456/50. The applicant made no deposits to the account, he stated.

11. It is material to indicate that the applicant is a Professor of Public Health at [particulars withheld] where she has worked since 1980. She rose from a junior research fellow to her present position. Her salary is about Kshs.175,000/= per month after deductions. She also does consultancies. She was represented by Mr. Keyonzo.

12. The respondent retired from employment in 2011 and does consultancies. Between 1980/1981 and 1985, he was on contract at [particulars withheld]. In 1985 he was permanently employed by [particulars withheld]. When he left he was earning Ksh.240,000/= a month. From 1st December 2005 to 3rd December 2011 he was based in Botswana where he was working with [particulars withheld]. He was represented by Mr. Ambala.

13. The applicant stays at the apartment at Kileleshwa while the respondent stays at the Karen property. This Karen property was the couple’s matrimonial home between 2004 and 2015.

14. There is no dispute that the Karen property, the apartment, the Lubao land, the Majengo land, and the vehicles were all acquired during the existence of the marriage between the applicant and the respondent. The joint account number [xxxx] was opened and operated during

the pendency of the marriage. These properties therefore constituted matrimonial property. How they were acquired and developed, and the contribution of either party, is what the court has to establish.

15. It is common ground that the Lubao land was on 5th August 2015 transferred by the respondent (in whose name it had been registered) to his son BKO who was born out of wedlock. At the time of the transfer, this case was on-going. The applicant stated that at the time of this transfer there were injunctive orders issued against the respondent who had been restrained from interfering with the properties in the case. According to the valuation commissioned by the applicant the property was worth KShs.5,000,000/= as of 22nd February 2018.

16. The applicant's evidence was that they wanted a rural home, and this was why the Lubao land was bought. She testified that in 1996 she had a short-term consultancy and had KShs.270,000/= in her account at Standard Chartered Bank which was used to pay for the land which they registered in the name of the respondent. She withdrew KShs.250,000/= from her account to pay the purchase price, KShs.20,000/= deposit having been paid. She did not meet the seller, but that her brother Alfred witnessed the sale agreement. She could not produce the evidence of the bank withdrawal because, she said, the bank could not avail the documents owing to the time the transaction was done. On his part, the respondent stated that he was the one who had financed the purchase and produced documents to show that he took a cooperative loan of KShs.400,000/= from his employer for the purpose. The land, it was admitted, was to be used to rear pigs. A pig shed was put, as were other rooms. A water tank was erected and bananas planted. The pig farming did not last for long. Each side claimed to have undertaken the development. The respondent claimed that the applicant went to the land only once which she denied. The home had a worker. She did not know how much he was being paid, she admitted. On balance, I find that the financial contribution to buy and develop the land came from the respondent.

17. There is the Majengo land which the respondent unilaterally sold for KShs.225,000/= which he said he used to service a loan from HFCK. His case was that he solely bought the land in 1986 using funds from a loan from his Sacco (UNSACCO) whose documents he produced. He told the court that he fenced it, planted blue gum and erected a hardware structure. On her part, the applicant stated that they bought the land jointly. She did not say how much it cost, or how much she contributed towards the purchase. I accept the respondent's evidence that he bought it alone in 1986 and carried out the developments thereon. The proceeds from the sale of the land went towards the HFCK loan which had been used to develop the Karen home and house.

18. According to the applicant's valuation, the Karen house is worth KShs.82,000,000/= and the household goods are worth KShs.330,000/=. The apartment in Kileleshwa is worth KShs.19,500,000/=.

19. It was the applicant's evidence that when they wanted to buy Karen plot she gave the respondent KShs.1,000,000/= in 1999 for him to clear the loan he had with his cooperative and to increase his shares. This enabled him to qualify for a loan of KShs.3,000,000/= that enabled him to buy the land. As to how much she raised the money she stated that she had done several consultancies. She showed the several consultancies she had engaged in 1997 to 1998. She stated that she received her payments in 1999. She could not produce bank records to show the transfer of the money to the respondent. She stated that this was because the bank had destroyed the documents because of its policy regarding storage of old documents. When they were entering the house it was incomplete, she said. It required fencing, interior furnishing, car garage, water tanks and detached servants quarters. The respondent had moved to Botswana. She undertook these works, she stated. The property had been registered in the joint names because the respondent had demanded her contribution.

20. On his part, the respondent testified that in 1998 he identified the property whose value was KShs.3,050,000/=. He instructed Munikah & Co. Advocates who drew the agreement. He paid a deposit of KShs.305,000/= on 20th August 1999 (exhibit CO1 – page 85). He paid the balance but the transaction was frustrated by a Government caveat on the property. The purchase price was refunded. The caveat was removed in 1999. The person they were buying the property with bolted. This is when the applicant asked to be included in the transaction. He asked her to contribute to the purchase. He had an outstanding loan with his cooperative. He repaid the loan from the refund he had received. He applied for another loan of KShs.2,000,000/=. It was advanced in May 1999 (Exhibit CO11 – page 102). He had savings of KShs.410,800/=. He put together the money and paid the advocates (Exhibit CO12 – page 105). An agreement was done which he signed. The applicant did not pay anything towards the purchase. There was a balance of KShs.334,200/=. She refused to give the money. He went to HFCK for a loan to complete the purchase. This is the loan whose repayment forced him to sell the Majengo land. He fenced the property, planted the garden and dug a water dam. He wanted to build a house on it. He got consultants to do architectural, structural, mechanical and electrical plans, etc for which he paid. In March 2001 he applied for a loan of KShs.2,000,000/= (CO1 – page 16) and used the money to begin construction. In December 2003 he sold their Fair Acres property on LR No. [xxxx] and used the money to complete the building. He built a water tank, concrete and steel-reinforced stand for an overhead water tank and installed a water purification system.

21. As to how the house on Fair Acres had been got, his case was that in 1986 he single handedly bought the plot and between 1989 and 1995 he, again, single-handedly took loans which he added to his savings to build the house. He settled his family here. He had sold Fair Acres for KShs.7,800,000/= (Exhibit CO15). Out of the money he gave the applicant 4,500,000/= million to carry out furnishings and internal finishings for the Karen house but she banked it in her account (exhibit CO 16). He denied that the applicant gave any cent towards the purchase and development of the Karen property.

22. As for the apartment, the applicant stated that the same was bought using money from their joint account into which either party had been making deposits. She gave evidence that she was the one who had identified the apartment, and had run around to make sure it had been bought. When it was bought she collected rent between 2005 and 2013 and used part of it to maintain it. She was granted possession by the order of the court on 29th October 2015. On his part, the respondent stated that he solely bought this property. He stated that the KShs.6,500,000/= came from the joint account. As to how the money came to be in the account, he gave the applicant KShs.1,600,000/= from his KCB KICC Branch account No. [xxxx] and cheque No. [xxxx] for KShs.4,500,000/= from the account which she deposited into the joint account (exhibit CO 2). He then deposited KShs.670,000/= into the joint account (exhibit CO 3). This made a total of KShs.6,770,000/= that was used to buy the apartment (exhibit – CO 3). The applicant did not bank any money into the joint account, instead she made withdrawals from there. He gave copies of the bank statements (exhibit – CO 4) to prove this. He calculated that the rent from the apartment (at KShs.60,000/= a month and later KShs.70,000/=) totaled KShs.6,500,000/= from March 2006 and December 2013 (exhibit – CO 5), money he never shared with the respondent.

23. As for the money in the joint account, there is no dispute that the applicant was the one who had opened this Dollar account. Towards the end of 2004 the respondent was expecting money from his previous employment at the UN. He was required to open a Dollar account. She converted the account into a joint account. She had operated her account from 1998. It was from the account that they bought the apartment. Money from her consultancies was being deposited here, she said. The respondent stated that he deposited USD 90,735/10 (Exhibit CO 23). He asked the applicant to invest USD 90,500 for his future use. The applicant unilaterally transferred USD25,000 to their joint shillings account and invested the money in treasury bills. He instructed the use of USD 16,800 for fees for their child in South Africa. He asked for USD 20,000 which was sent to her to Botswana that she used to buy the Volkswagen Classic vehicle. He expected a balance of USD 51,430 which she could not explain where she took it. Between March 2005 and 2014 he deposited USD 303,535/50 which was his pension. The applicant made no deposits into the account during the period, but made withdrawals. When he asked for the money he found it had been invested in treasury bills at the Central Bank. The certificates showed she had Kshs.148,157,456/50.

24. The respondent has indicated how he bought the Volkswagen vehicle. As for the Honda CRV there is no dispute that the applicant bought it for Kshs.1,600,000/= on 3rd August 2004. The respondent stated that she had on 3rd August 2004 withdraw the money from the joint account (Exhibit CO2). The applicant testified that she got the Kshs.1,600,000/= from a loan she got from China Sacco money from her consultancy.

25. The other relevant information was the education of the children. The respondent testified he single-handedly paid their fees, both locally and abroad. These children went to very good schools. He also stated that he was responsible for the upkeep of the family. He had documents to show these expenses.

26. The Volkswagen is in the name of the respondent and the CRV is in the name of the applicant.

27. Counsel filed comprehensive submissions on the evidence above. On the material available to me, it is clear, and I find, that the respondent was responsible for the financial contribution that purchased the Karen house, the apartment and the vehicles. I also find that the respondent deposited large amounts into the joint account, and the applicant made large withdrawals from there which she has failed to account and/or has invested elsewhere in her name.

28. I consider that contribution can be non-monetary. This includes companionship, child care, domestic work, management of the home and overseeing development of matrimonial property. I consider that the respondent stayed in Botswana for a long time, when the applicant remained at home to take care of things. She was, for instance, the one operating the joint account and making payments towards the developments. There were many times, when the children were young, that the applicant was abroad for further studies or for consultancies and during that time the respondent was taking care of the family. The applicant, throughout this case, was not candid about her financial affairs, although she had a good salary and income. Even then, I still find that she used some of the income on the family and on the developments. But her main contribution, I find, was non-financial. It was indirect contribution.

29. Considering all the evidence that was placed at my disposal, I estimate that the total contribution by the applicant towards the acquisition and development of the matrimonial property was 30%, and the respondent's contribution was 70%. In reaching this determination I have considered the length of time the couple was married. I have also considered the rent the applicant received from the Kileleshwa apartment for many years and which she did not account.

30. The matrimonial property, I find, is the Karen home worth Kshs.82,330,000/=; Kileleshwa apartment worth Kshs.19,500,000/=; Lubao land worth Kshs.5,000,000/= and vehicle KAS [xxxx] worth Kshs.590,000/=. I estimate the Volkswagen vehicle to be worth Kshs.600,000/=. Lastly, I determine that the Kshs.148,157,456/50 in treasury bills at the Central Bank in the name of the applicant is matrimonial property. This is money the applicant got from the deposits made by the respondent into the joint account.

31. I find that, in respect of the Karen home and the Kileleshwa apartment which are in joint names, the respondent has sufficiently rebutted the presumption that the applicant has an equal beneficial interest in each of them.

32. The total value of the matrimonial property between the applicant and the respondent is Kshs.251,177,456/=. 30% of that is Kshs.75,353,236/80. 70% is Kshs.175,824,219/=.

33. I order that the applicant shall have Kileleshwa apartment, the vehicle KAS [xxxx] and Kshs.55,263,236/= worth of the treasury bills at the Central Bank in her name. The respondent shall have the Karen home, the Volkswagen vehicle and Kshs.92,894,200/= of the treasury bills at the Central Bank in the name of the applicant.

34. I direct that the Deputy Registrar to sign all the necessary papers to enable the transfer of the Karen house (L.R. No. [xxxx]) to the respondent and the Kileleshwa apartment (apartment B6 in Sapphire Park situate on LR No. [xxxx]) to the applicant.

35. This was a family dispute. Each party shall bear own costs.

DATED and DELIVERED at NAIROBI this 11TH day of JULY 2019.

A.O. MUCHELULE

JUDGE