



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO 328 OF 2013
JNM.....PLAINTIFF
VERSUS
ENM.....DEFENDANT
JUDGMENT

INTRODUCTION

1. In his Originating Summons dated 13th August 2013 and filed on 14th August 2013, the Plaintiff sought the following orders:-

- 1. THAT the partnership and joint ownership between the Plaintiff and the Defendant with respect to the suit property be dissolved.**
- 2. THAT upon dissolution of the said joint ownership, accounts with respect to the purchase of the suit property be taken and orders as to the disposal and sharing of the property and/or its proceeds be made.**
- 3. THAT such other or further orders and directions be made as to the giving effect to dissolution of the joint ownership of the suit property between the Plaintiff and the Defendant.**
- 4. THAT the costs of these summons and proceedings be paid for by the Defendant.**

2. His Written Submissions and List of Authorities were both dated 11th

February 2018 and filed on 12th February 2018 while those of the Defendant were dated 6th March 2019 and filed on 11th March 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

4. The Plaintiff averred that both he and the Defendant herein were indicated in the records of National Social Security Fund (NSSF) as having been joint owners of House No xxxxxxxxx Embakasi Estate (hereinafter referred to as "the subject property"). However, he was emphatic that he solely raised the initial funds for the purchase of the said subject premises and was the one repaying the loan without any contribution from the Defendant.

5. He pointed out that the Defendant's name only appeared in the aforesaid records by virtue of having been his girlfriend but that she had taken to harassing tenants and damaging property in the said subject property making it difficult for him to service the loan.

THE DEFENDANT'S CASE

6. On her part, the Defendant contended that she was more than a girlfriend as she and the Plaintiff had cohabited in the subject property and the Plaintiff's house in Kitengela since 1998 as husband and wife before their relationship irretrievably broke down.

7. Her case was that they jointly owned the subject property and that the same could not be transferred without the consent of National Social Security Fund (NSSF).

8. It was her averment that the mortgage was in huge arrears because the Plaintiff was not remitting the monthly installments of Kshs 46,000/= per month to reduce the balance of the loan.

9. She therefore took the view that the joint ownership should be dissolved, the property sold and proceeds shared between her and the Plaintiff herein.

LEGAL ANALYSIS

10. The Plaintiff relied on the provisions of Section 3A of the Civil Procedure Act Cap 21 (Laws of Kenya), Order 37 Rule 10 of the Civil

Procedure Rules, 2010 and Section 91 of the Land Registration Act, 2012 as the basis of his case.

11. He also relied on the cases of **Peter Mburu Echaria vs Priscilla Mburu Echaria [2017] eKLR** and **HKW vs NII [2017] eKLR** where the common thread was that for an applicant to derive any benefit in a property, he or she had to prove his and/or her contribution in acquisition of the property.

12. He therefore submitted that he ought to be registered as the sole proprietor of the subject property to the exclusion of the Defendant.

13. On her part, the Defendant argued that the joint ownership was consented to by both her and the Plaintiff and that the court had no capacity to invalidate the unwritten agreement between them but that it could only order equal distribution of the value of the subject property.

14. She added that no breach of either mutual or written agreement between her and the Plaintiff was proven and that the same should either be a gain or loss between them.

15. It was her averment that the copy of the bankers cheque came to the Plaintiff's custody by virtue of him having been a party to the suit and that if she had wanted a copy, she could still have done so (**sic**) but that such need never arose.

16. She also relied on the case of **Peter Mburu Echaria vs Priscilla Njeri Echaria** (Supra), **D.E.N. vs P.N.N. [2015] eKLR** and **O.K.N. vs M.P.M. [2017] eKLR** where the common thread was that in joint ownership, parties have equal and undivided shares and that each is entitled to a shared value or proceeds of the same as enshrined in the Constitution of Kenya, 2010.

LEGAL ANALYSIS

17. This court noted that all the cases the parties herein related to division of matrimonial property between husbands and wives. The common holdings were that for a wife to benefit from a property jointly owned with her husband, she had to prove financial contribution because no one should harvest where they had not sown.

18. The converse is also true. No husband should expect share from a property he owns with his wife if he cannot show the contribution he has made towards the purchase of the property he jointly owns with her.

19. The law on distribution between married persons is well settled. The question that arises is whether or not the said cases were applicable in the circumstances of this case.

20. This question was pertinent because while the Defendant testified that she cohabited with the Plaintiff in his houses at Kitengela and Embakasi, the Plaintiff was emphatic that he was in a boyfriend-girlfriend relationship with her for about ten (10) years and not as a husband and wife.

21. There was no evidence that the Plaintiff and Defendant were married under any of the laws recognised in Kenya. There was also no document or any evidence to show that there was a presumption of marriage between them. In the absence of such evidence, this court came to the conclusion that for the purposes of these proceedings, the Plaintiff and Defendant were in a love relationship and not a marriage. The aforesaid cases that they both relied upon were thus not applicable in the circumstances of the case herein.

22. It was apparent from the evidence that was adduced in this case that there was no dispute that the subject property was registered in the names of the Plaintiff and the Defendant. The relevant question herein was **“under what circumstances did the joint ownership come about?”**

23. In his evidence, the Plaintiff testified that in the year 2007, he applied for a house from NSSF under the Tenant Purchase Scheme at Embakasi Estate and he was allocated House No LR xxxxxxxxxx (hereinafter referred to as “the subject property”). He paid a sum of Kshs 350,000/= vide a bankers cheque No 196466 dated 19th July 2007 that was drawn by Commercial Bank of Africa.

24. He averred that the Defendant used her influence at NSSF and had her name added as an owner of the subject property. It was his testimony that her name remained as joint owner but she never made payments towards payment of the loan.

25. He testified that to ease his burdens, he got a tenant to occupy the house and when the tenant moved out, the Defendant gained entry to the house, changed the locks and denied him access to the subject property.

26. He therefore prayed for the dissolution of the joint ownership and accounts taken to determine the contribution made by the Defendant.

27. During his Cross-examination, he stated that he did not have any document to show where the money he paid as the deposit came from. He

equally said that the Defendant had not adduced any documentation to show that she had paid the deposit of Kshs 350,000/=.

28. He was adamant that the application form that he signed did not bear the Defendant's signature and that he was therefore surprised when he saw her name in the NSSF documents.

29. He admitted that he entered into a joint investment with the Defendant but that she did not meet her part of the bargain which caused a strain in their relationship and eventual break up. He contended that the tenant paid part of the monthly instalment of Kshs 46,886/= but that he would top up the balance.

30. In her evidence, the Defendant stated that jointly with the Plaintiff, they acquired several properties. She stated that she had previously acquired a NSSF Flat in Nyayo Embakasi and because of her good credit standing with them, she applied for a second flat on 8th June 2007 and she was allocated the subject property which she put in her name and that of the Plaintiff upon payment of a deposit of Kshs 350,000/=.

31. She explained that they got a tenant to occupy the subject property and that the tenant would write the cheque in the Plaintiff's name and they would top up the balance to enable them pay the mortgage amount in the sum of Kshs 44,088/=. She told this court that she contributed to the top up until sometime in March 2012 when the Plaintiff forcefully evicted her from their house at Kitengela.

32. When she was Cross-examined, she stated that whereas the requirement for the Tenant Purchase Scheme was that priority was to be given to applicants who had not benefited from any allocation, she said that nonetheless was given priority in acquiring a second flat at Nyayo Embakasi. She was emphatic that she and the Plaintiff, jointly applied for the subject property and they were allocated the same.

33. It was her further evidence that she would give the Plaintiff her contribution of Kshs 10,000/= in cash because she trusted him as her husband. She admitted that she had not paid any instalment since 2012 and that her name did not appear in the handover chit or the documents for installation of water and electricity.

34. Her testimony was that her contribution to the purchase of the property was in the deposit of Kshs 350,000/= and monthly instalments until March 2012.

35. On being Re-examined, the Defendant averred that the agreement between her and the Plaintiff relating to the ownership of the subject property was verbal. She denied of ever having tampered with the documentation at NSSF.

36. Her prayer was that the subject property should be sold and the monies be shared between her and the Defendant equally.

37. The court carefully analysed the documents that were submitted by both the Plaintiff and the Defendant and noted that the Plaintiff adduced in evidence page one (1) of the Application Form for Tenant Purchase Scheme. It bore Form Serial No xxxx and Receipt No xxxxx.

38. The Defendant adduced a copy of the said application form. Her copy had two (2) pages. Page one (1) was the same as page one (1) that was tendered in evidence by the Plaintiff but with an alteration of the code of the postal address from xxxx to xxxxx. In addition, it bore the Defendant's name, postal address, email and telephone number. It also bore details of her place of work.

39. The second page of the application form that she produced in evidence showed JM, JCO and EOM as the Plaintiff's next of kin. There was no indication of her income as a joint applicant as was required.

40. Notably, the two (2) forms were not dated. However, the letter dated 4th April 2008 was addressed to both the Plaintiff and the Defendant informing them of the conditions of being allocated a house under the Tenant Purchase Scheme.

41. The Plaintiff adduced in evidence a bankers cheque in the sum of Kshs 350,000/=. However, there was no indication whether the funds came from his bank. According to the application form, this was intended for the initial deposit.

42. On 14th April 2008, the Plaintiff was handed over the keys. The letter handing over the keys read as follows:-

“Managing Agent

Nyayo Estate Embakasi

Attn: Kiragu & Mwangi

RE: HANDOVER OF KEYS

This is to inform you that Joseph Matere has met all the requirements of the Tenant Purchase Scheme towards purchase of LR. No.xxxxxxx

Please arrange to hand over the keys to him/her/them and send us a copy of this handover for record purposes.”

43. On the same date, NSSF also wrote to Kenya Power & Lighting Co and Nairobi Water and Sewerage Co Ltd informing them that the Plaintiff had been allocated the subject property and that would appreciate any assistance that would be accorded to him.

44. The statements from NSSF tendered in evidence by the Plaintiff showed that monies were received from him. The Defendant also produced statements bearing the Plaintiff's name. She did also adduce other receipts showing that monies were received from both her and the Plaintiff. The payments were made on diverse dates on 4th August 2009, 4th December 2010 and 5th November 2010.

45. Having carefully analysed the oral and documentary evidence that was adduced by the parties, it did appear to this court that:-

- 1. The Plaintiff and Defendant jointly applied to be allocated the subject property. That is why NSSF in their letter of 14th April 2008 addressed them jointly.**
- 2. The Plaintiff alone was thereafter allocated the property. Indeed, the Lease Agreement was in his name and he signed the same. The Reservation chit, letter for the handover of the keys, letters to Kenya Power & Lighting Co, Nairobi City Water and Sewerage Co Ltd made reference to the Plaintiff only.**
- 3. The initial deposit of Kshs 350,000/= was paid.**
- 4. The Plaintiff and the Defendant made certain payments and receipts were issued in acknowledgment thereof.**
- 5. There was no indication that the subject property was registered in the names of the Plaintiff and the Defendant. Indeed in the letter date 29th August 2013, NSSF wrote to the Defendant's advocates informing them that they would endeavor to transfer the property**

in the names of both the Defendant and Plaintiff if both of them fulfilled their obligations under the Tenant Purchase Agreement or until otherwise advised. There was no indication of what these obligations were.

46. This court was baffled why the Tenant Purchase Agreement in the name of the Plaintiff and Defendant that was produced by the Defendant was dated 23rd April 2009 yet by 14th April 2008, NSSF had already allocated the Plaintiff the subject property. The Plaintiff denied having seen this document.

47. Notably, the Plaintiff adduced in evidence a bankers cheque in the sum of Kshs 350,000/=. If he had really not have paid the same, he would not have been given the Lease Agreement or handed the keys to the house.

48. The source of the funds was therefore irrelevant. The statements showed that he made several payments while the Defendant made a few payments. She did not adduce any evidence to show that save for the few payments, she had made other payments. The fact that the name appeared in the application form or receipts did not give her any shareholding in the subject property.

49. Her investment with the Plaintiff did not materialise. Their relationship had irretrievably broken down. They had to be set free from their partnership. This court did not see any joint ownership that was held between them. However, as they were both adamant that they jointly owned the subject property, for the avoidance of doubt, it was best that the joint ownership be dissolved.

DISPOSITION

50. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Originating Summons dated 13th August 2013 and filed on 14th August 2013 was merited and the same is hereby allowed in the following terms:-

1. THAT the partnership and joint ownership between the Plaintiff and the Defendant with respect to the suit property be and is hereby dissolved.

2. THAT accounts with respect to the purchase of the suit property be taken and the Plaintiff do reimburse the Defendant for the contribution that she had made towards the purchase of the suit

property and/or payment of the monthly instalments to liquidate the loan.

3. THAT in the alternative to paragraph 50 (2) hereinabove, the suit property be disposed of and the proceeds be shared according to the contribution that each will have made and which contribution will be determined by taking accounts with respect of the suit property.

4. In view of the relationship that existed between the parties that has now ended acrimoniously, each party will bear its costs of this suit.

51. It is so ordered.

DATED and DELIVERED at NAIROBI this 15th day of October 2019

J. KAMAU

JUDGE