



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION MILIMANI

HCC NO. 40 OF 2012

BIA.....PLAINTIFF

VERSUS

JMA.....RESPONDENT

SOA.....INTERESTED PARTY

JUDGMENT

1. Through an Originating Summons dated and filed on 9th July 2012 pursuant to Order 37, Rule 11 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, rule 2 of the trustee rules and Section 57 of the Trustee Act, the plaintiff herein sought determination of various questions and distribution of matrimonial property as hereunder.

- (1)The parties' joint tenancy in L.R. Number [xxxx] in Nairobi be severed and each party accorded an independent 50% share of the same.**
- (2)The value of L.R. Number [xxxx] be established by an independent valuer to be agreed by the parties within 7 days of this order.**
- (3)The plaintiff is entitled to 60% share in the parties' home located in [Particulars withheld], Lurambi Location, Kakamega.**
- (4)The value of the [Particulars withheld] house be established by an independent valuer to be agreed by the parties within 7 days of this order.**
- (5)L.R. Number [xxxx] be distributed within 6 months of this order in one of the following ways:
 - a)L.R Number [xxxx] be transferred solely to the plaintiff in consideration of 50% of the value established under Paragraph 2 to be paid by the plaintiff to the defendant; or in the alternative;**
 - b)L.R. Number [xxxx] be transferred solely to the Defendant in consideration of 50% of the value established under Paragraph 2 to be paid by the defendant to the plaintiff.****
- (6) In default of agreement and transfer as ordered in Paragraph 5, the property L.R. Number [xxxx] be sold and each party to receive a 50% share of the proceeds.**
- (7)The matrimonial property in [Particulars withheld] be distributed within 6 months of this order as follows: the plaintiff's contribution and interest in the house in [Particulars withheld] be transferred solely to the defendant and the defendant do pay the plaintiff 60% of the value established under paragraph 4.**
- (8)Each party to bear 50% of the cost of the transfer and/or sale above, associated taxes and charges.**
- (9)The parties do present agreements for sale and transfer documents to the court by chamber summons for approval within 30 days of this order.**
- (10)The parties do execute such documents and effect such actions as are necessary to expedite the orders for distribution**

and, in default thereof, the Deputy Registrar be authorized to do the same on their behalf.

(11)The honourable court be pleased to issue such further or other relief as may be just in the circumstances.

(12)Costs of this application be borne by the defendant.

2. The application is premised upon grounds set out on the face of it and an affidavit sworn by the plaintiff on 6th July 2012. On 10th August 2012, the defendant and interested party entered appearance. Subsequently on 11th April 2013, the defendant filed a replying affidavit sworn on 10th April 2013 opposing the summons. Consequently, directions to hear the summons were made on 5th February 2013.

3. Briefly, the plaintiff and defendant contracted a statutory marriage at St. Mark's Church Westlands on 19th August 1995. However, their marriage irretrievably broke down culminating to their separation the year 2009 vide Chief Magistrate's Court Divorce Cause No. 362/2009.

4. The couple was blessed with three children namely:

(a)SS born 24th February 1997

(b)JL born on 15th August 1999

(c)AA born on 23rd November 2002

The interested party in this suit is a father to the defendant hence father-in-law to the plaintiff.

Plaintiff's Case

5. The plaintiff a Human Resource officer currently working with UNDP as head of Human Resource is seeking 50% of the two properties allegedly acquired jointly with the defendant from the interested party as a gift during the subsistence of their marriage.

6. According to her affidavit in support of the application, she averred that sometime 1998, the interested party allocated her and the defendant a portion of his family land at Ingotse in Kakamega as a gift for purposes of building a matrimonial home. That she took a loan of Kshs.750,000/= from her sacco (UN Sacco) for purposes of constructing their matrimonial home. She attached a loan application form (BIA.4) and her loan repayment receipts (BIA.5). That in August 2000, she again took another loan of Kshs.1,075,000/= to assist finish the Ingotse house. She further attached loan application forms (BIA.7) and loan repayment receipts (BIA.7).

7. That about the year 2006, her father-in-law (interested party) identified and decided to buy her and the defendant a Nairobi matrimonial house LR No. 209/8874/17. She stated that the said house was eventually bought and registered in her name and that of the defendant as joint tenants. She attached a copy of the title (BIA.10) as proof of registration.

8. It was her case that, the said house was valued at Kshs. 8million out of which the interested party paid initial payment of Kshs. 5million while she paid the balance of Kshs. 3 million using her loan proceeds of 6 million secured from her UN Sacco. That the balance of Kshs.3million from the six million she was advanced was used to renovate the Ingotse house as well as the Kileleshwa house .

9. She claimed that, the 3 million she used to pay for the house was to be repaid jointly with her paying Kshs.30,000/= and the defendant Kshs.108,000/= per month. That due to her differences with the defendant who misused about 1.5 million she had given him for renovation of **[Particulars withheld]** house, she defaulted in repaying the loan thus the interested party stepped in and cleared the loan. In total, she repaid the loan by Kshs.138,125/= and stamp duty of Kshs.320,005/=.

10. She therefore claimed 50% of the value of the property at the current value. She further claimed that, besides contributing towards the purchase and construction of the two properties, she did pay school fees for the children, medical expenses, entertainment, education related expenses, holiday for the children and clothing.

11. During the hearing, the applicant/plaintiff reiterated the averments contained in her affidavit in support of the summons and her witness statement filed in court on 4th February 2006 which is a replica of the content contained in the said affidavit. In her evidence in chief, the applicant sought division of L.R. No. [xxxx] in equal share as it was obtained jointly being a gift from the interested party. Regarding **[Particulars withheld]** property in Kakamega which was given by her father-in-law (interested party), she stated that she did not need it.

12. She maintained that she contributed Kshs.3 million towards the acquisition of the property and that her husband who was depending on a stipend of Kshs 60,0000 monthly from his father did not contribute anything.

13. On cross examination by Esonga, she stated that she had dropped her claim over **[Particulars withheld]** property. On further cross examination, she admitted that the whole amount of Kshs. 8 million being the value of the house was paid in full by the father-in-law. She further confirmed that she took the Sacco loan on behalf of the husband which loan was fully repaid by the defendant's father.

Defendant's and Interested Party's Case

14. The defendant's case as outlined in his replying affidavit aforesaid is in total disagreement with the plaintiff's claim. According to him,

the property known as LR No. [xxxx] was bought by him alone through his father using part of the proceeds from his salary to which he was entitled as his monthly pay for rendering his Engineering Professional expertise to the family business as well his professional fees from private contracts.

15. He denied that the property which is registered in his name and the plaintiff jointly was gifted to them by the interested party. Regarding **[Particulars withheld]** matrimonial property, he stated that the same was ancestral land still registered in his father's name hence does not own the same. He claimed that he solely built the house erected on **[Particulars withheld]** land.

16. Regarding the most contested property (LR [xxxx]) Kileleshwa, the defendant gave a chronology of events touching on their differences in their marital relationship leading to their separation the year 2009.

17. Concerning the Kileleshwa property, it was the defendant's case that he and his father identified the house which was being sold by a couple at 8 million. That his father paid Kshs.5 million initial deposit and the balance of 3 million was to be paid by him and the plaintiff. That to finance the 3 million, they agreed for the plaintiff to take a loan of 6 million from her UN Sacco out of which 3 million was to be used in paying the 3 million balance of the purchase price for the home and the remaining 3 million to be used to renovate the house. That they further agreed to share in repaying the loan with him contributing Kshs.108,000/= through his father using his salary and the plaintiff Kshs.30,000/= through check off system using her salary with the title to the house as security to secure the loan.

18. The defendant deponed that despite the said agreement, the plaintiff released 3 million to clear the purchase price in respect of the house but failed to account for the balance of 3 million. He however deponed that it was the plaintiff who paid a stamp duty of Kshs.188,633 while he paid part of it at Kshs.40,000/=.

19. That in fulfilment of their agreement, he met part of his bargain through his father who paid by way of issuing cheques. He contended that the plaintiff did not pay her contribution thus exposing the house to being put on auction. He attached a statement of accounts (Annexure JMA attached to his replying affidavit) showing the loan default occasioned by the failure by the plaintiff in having her salary deducted for purposes of clearing the loan.

20. That to avoid the house being auctioned, his father paid the outstanding arrears on his behalf thus clearing the loan without the contribution of the plaintiff. To prove this assertion, he attached a copy of a letter dated 14th November 2008 in which he wrote to the General Manager of UN Sacco (Annexure JMA11) expressing his shock that the house was due for auction and that he had been able to raise Kshs.1,695,000/= and the balance be repaid in instalments for a period of 30 months.

21. That in total, he repaid the whole loan at Kshs.6,626,860/=. As proof of the said repayment, he attached a bank statement of the interested party's account No. [xxxx] Queensway Barclays Bank and UN Sacco to show that the plaintiff did not contribute anything towards repayment of the loan (See annexure JMA-12 in support of the replying affidavit). He attached some payslips belonging to the plaintiff for the material period (annexure JMA.13) to show that her payslip did not reflect any amount deducted towards the loan repayment.

22. The respondent went further to state that he solely undertook the burden of paying school fees for their three children, various insurances, domestic house utility bills, clothing, school related expenses, school transport, fuel for the family car, maintenance and service, entertainment and holiday expenses. In addition, he claimed to have paid the plaintiff's school fees while undertaking further studies in the UK.

23. During the hearing, the defendant adopted the contents contained in his replying affidavit and his witness statement filed in court on 6th October 2016 and a list of documents filed on 27th July 2016 and 6th October 2016 which is a clear reflection of the averments contained in the replying affidavit. He was categorical that the loan taken to the tune of Kshs.6 million was fully paid by him through his father using his salary.

24. On his part, the interested party relied on the contents contained in the replying affidavit sworn by the defendant. He recorded a witness statement filed on 6th October 2016. He literally reiterated the averments contained in the said affidavit and evidence of the defendant.

25. During the hearing, he told the court that he bought the house in question for his son although it was registered jointly with the plaintiff. However, he claimed that he was the one who paid the full amount for the house. He also stated that he used to pay his son a salary of Kshs.45,000/= per month and later increased it to Kshs.195,000/=. On cross examination, he stated that he bought the house for his son and the plaintiff and had it registered in their joint names.

26. He further confirmed on cross examination that the two were to own the house and that he was not meant to take the house back. He reaffirmed that he gave his children a home. In re-examination, he stated that the house was given to the two unconditionally as joint property as long as they lived.

Plaintiff's Submissions

27. The plaintiff through the firm of Wandabwa advocates filed two sets of submissions. The first set was filed on 6th December 2018 and the second set was supplementary submissions filed on 6th May 2019.

28. Mr. Wandabwa set out the facts of the case and came up with three issues for determination as follows:

(a) Whether the interested party's act of buying the house for the plaintiff and defendant as a family property with no intention of taking it from their possession and ownership amounted to a gift.

(b)Whether the interested party can revoke the gift he gave the plaintiff and defendant.

(c)Whether the plaintiff proved contribution.

29. It was Mr. Wandabwa's submission that the house was bought for the plaintiff and defendant as a gift which was voluntarily given, accepted and that there was no intention of revoking or repossessing the gift. In support of this proposition, counsel referred the court to the decision in the case of the estate of Ruth Nyakanini Rukwaro (deceased) Succession Cause No. 52/2010 (2016) eKLR where the court held that for a gift *intervivos* to be valid, there must be proof that the person making the transfer actively intends to make a gift, that the donee accepts and that there is delivery of the property by transfer by the drawer to the drawee.

30. Learned counsel further referred the court to Halsbury Laws of England, 3rd Edition Vol 18 where a gift was defined as voluntary transfer from the true possessor to another person with the full intention that the gift shall not return to the donor and with the full intention on the part of the receiver to retain the thing entirely as his own without returning it to the giver.

31. As to whether the interested party can revoke the gift he gave to the plaintiff and defendant, counsel opined that it was not applicable as the transfer was unconditional. Learned counsel relied on the decision in the case of Registered trustees Anglican Church of Kenya of Mbeere Diocese v David Waweru Njoroge (2007) e KLR where the court stated that a gift becomes effective upon execution and delivery of transfer and cannot be revoked thereafter.

32. As regards the default by the plaintiff in repaying the loan, counsel submitted that it was necessitated by the interested party's letter dated 1st September 2006 authored by the interested party in which he offered to repay the loan. He further submitted that there was no proof anywhere stating that the house was solely bought for the defendant by his father. That the interested party has not shown any good reason to warrant revocation of the gift.

The Respondent's and Interested Party's Submissions

33. In their submissions, the firm of Oronga Esonga appearing for the defendant and interested party reiterated the averments contained in the defendant's replying affidavit and the witness statements written by both the defendant and interested party. Learned counsel listed 6 issues for determination as follows:

(1)Who purchased the disputed property known as LR Number [xxxx].

(2)Whether the interested party made any gift to the plaintiff and defendant.

(3)What does the law require about gifts *intervivos*

(4)Whether the suit property is held in trust for the plaintiff

(5)Whether the plaintiff made any contribution towards acquisition of the disputed property LR Number [xxxx] Kileleshwa

(6)What is the applicable law with respect to the plaintiff's claim

34. It was counsel's submission that the house in contention was not a gift as it was bought by the interested party for his son using the son's salary and that it was not a gift. M/s Esonga argued that the plaintiff has not discharged the burden of proof that the two were gifted. She contended that he who alleges must prove. To support this proposition learned counsel referred the court to the decision in the case of Mary Njoki Karuga vs Charles Nairobi High Court No. 3953/1989 (OS) and in the matter of the estate of Benjamin Kihuto Ngure No. 1942/2005.

35. Concerning the issue as to who bought the property, counsel submitted that the house was bought by the interested party and his son and as a result a resulting trust was created in their favour. To support this position, counsel referred to the holding in the case of Charles K. Kandie v Mary Kimoi Sang CA 141/2012 (Nakuru).

36. As to whether the property was given as a gift to the plaintiff and defendant, Mrs. Esonga maintained that the same was not. Counsel justified this position by arguing that the plaintiff could not have been asked to contribute a share towards the gift which in the strict sense of a gift should be given freely. She further submitted that the conditions precedent to giving a gift *intervivos* have not been satisfied. Counsel referred the court to the decision in the matter of the estate of Waitathu Kagwai alias Waitathu Kugwu HC 475/2013 (Nyeri) where Justice Mativo reiterated 3 conditions for fulfilment in awarding a gift as stated in Halsbury Laws of England as firstly; the person making the transfer actually intends to make a gift by transferring the same, secondly, the donee must accept the gift and agree to have the gift transferred to him and lastly, there has to be delivery of the gift.

37. Further reliance was placed on the case of In the matter of the estate of the late Gedion Manthi Nzioka HCSC No. 122/2010 (2015)eKLR where the court relied on Halsbury's laws of England 4th edition Vol. 20 (1) Para 32/51 with respect to incomplete gifts where it states that:

“if a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do”.

38. According to the learned counsel, an incomplete gift can be revoked at any time. It was counsel's argument that the property is not a subject of a resulting trust and that whenever a legal equitable title to property is in one party's name but that party because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original owner or to the person who did give value for it. Counsel further contended that, there was no resulting trust acted in favour of the plaintiff. That there was no proof of presumption of advancement as the same has been rebutted. To buttress her position, counsel referred the court to the decision in case of **NWK v JKM and WJ ELC No. 422/200 (OS).(2013) eKLR**

39. Concerning the issue of contribution M/s Esonga submitted that the plaintiff did not make any contribution. Counsel asserted that marriage per se does not entitle a couple in a marriage to acquire possession of a property to which he or she did not contribute and that marriage is not a panacea to richness or wealth creation. To fortify this point, she made reference to the case of **PNN v ZWN (2017) eKLR**. Counsel further went on to refer the court to provisions in the Matrimonial Property Act 2013 regarding what constitutes matrimonial property.

40. In her rejoinder, counsel for the plaintiff filed supplementary submissions stating that the plaintiff did not plead the issue of resulting trust nor lead any evidence to that effect. It was therefore submitted that parties are bound by their pleadings and nothing else. To support this argument counsel quoted the decision in the case of **Gandy v Caspair (1956) EACA 139 and Galaxy Paints Co. Ltd v Falcon guards Ltd (2000) 2 EA 385**.

41. Counsel further submitted that there was no element of resulting trust as the interested party stated that he did not intend to claim the property back as the same was given unconditionally. That a resulting trust can arise by the property going back to the purchaser (interested party) and not defendant. As concerns revocation of a gift, counsel submitted that it was irreversible as the transfer is complete.

Analysis and Determination

42. I have considered the pleadings herein and rival submissions by both counsel. The subject before me relate to division of matrimonial property alleged to have been acquired during the subsistence of marriage.

43. The Originating Summons herein was filed on 9th July 2012 under the Civil Procedure Act, Trustee rules and Trust Act. The plaintiff did not state the specific law governing division of matrimonial property. However, pursuant to the application of Section 1A, 1B and Section 3A and Article 159(2) (d) which underpins expeditious delivery of justice without undue regard to technicalities, I will hold and presume that the applicable law is the then common law under the Married Women's Property Act 1882. The Matrimonial Property Act 2013 having been enacted the year 2013, the same cannot apply retrospectively.

44. To that extent, the relevant provision is Section 17 of the Married Women's Property Act 1882 which provides –

“In any question between husband and wife as to the title to or possession of property, either party,... may apply by summons or otherwise in a summary way to any Judge of the High court of Justice and the Judge of the High Court may make such order with respect to the property in dispute, and as to the costs of and all consequent on the application as he thinks fit...”

45. In addition, this court will also place reliance on Article 45 (3) of the Constitution which provides:

“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”.

Unfortunately, none of the parties or advocates ever addressed this issue as to the applicable law governing division of matrimonial property in this case.

46. There is no dispute that the couple got married sometime in 1995 and parted ways in 2009. From the pleadings, evidence of both parties and rival submissions filed, the issues that crystallize for determination are:

- (1) Whether the properties in question were acquired during the subsistence of the marriage as gifts.**
- (2) Whether the properties qualify to be matrimonial property for purposes of division**
- (3) What was each party's contribution and the sharable beneficial interest if any**
- (4) Whether the property was held in trust for the defendant/interested party.**

Whether the properties in question were acquired during the subsistence of the marriage as gifts.

47. At the institution of the suit, the plaintiff cited two properties for division namely; **[Particulars withheld]** ancestral land in Kakamega and LR [xxxx] Kileleshwa. However, during the hearing, she dropped her interest in the **[Particulars withheld]** property at Kakamega. On that ground, I will not delve into making any finding touching on the **[Particulars withheld]** property.

48. The only property remaining and which is the elephant in the room is LR [xxxx]. According to the plaintiff, this property was given to her and the defendant by the interested party (her father in law) as a gift. She supported this position relying on a joint sale agreement executed by her and the defendant as purchasers and subsequent transfer of the said property and issuance of the title deed in their joint names.

49. It was submitted by both parties that the property which was valued at Kshs.8million during that time was bought using funds from the interested party.

50. It was admitted by both parties that it was the interested party who paid the initial sum of Kshs.5million and that the balance of 3 million was to be paid by the plaintiff and the defendant using a loan secured from UN Sacco by the plaintiff with the plaintiff contributing Kshs.30,000/= and the defendant Kshs.108,000/=as his share in repayment of the loan.

51. According to the defendant, he made his part of the bargain through cheques raised by the interested party by deducting part of his (defendant) salary. That the plaintiff failed to pay her monthly contribution of Kshs.30,000/= through check off system using her payslip thus occasioning loan arrears of 2.7 million thereby subjecting the house to the risk of being auctioned a fact that caused the interested party to clear the whole amount.

52. The plaintiff admitted that she defaulted in repaying the loan because of a letter the interested party wrote to the Manager UN Sacco that he was ready to clear the whole amount which he did.

53. In a nutshell, neither the plaintiff nor the defendant directly paid for the house save for stamp duty which is not disputed in which the plaintiff paid Kshs.320,0000/= and the defendant Kshs.40,000/=.

54. Despite the claim by the defendant that his father paid on his behalf, there was no proof that he ever received over Kshs.60,000/= monthly salary from his father. There was no proof documentary or otherwise that he had independent sources of income to be able to make a contribution in the sum of Kshs.180,000/= loan repayment per month. If his claim was to be trusted, his father then had no business giving him and his wife jointly what belonged to him.

55. For those reasons, I am not convinced that the amount used to buy the house was out of salary due and payable to the defendant by his father. Having held as such, it is my finding that the amount used to purchase the house was purely raised by the interested party.

56. It is not in dispute that the plaintiff took a loan of Kshs.6million out of which 3 million was used to clear the purchase price. However, she did not meet her undertaking in repaying part of the loan. Technically, she did not contribute anything as the loan in full was repaid by the interested party. Taking a loan is one thing and repaying the same is another. The actual person who then paid the 3 million balance is the person who serviced the loan and not the one who took the loan which attracted arrears thus exposing the house to auction.

57. I am therefore satisfied that neither the plaintiff nor the defendant ever made contribution towards the acquisition of the impugned property. However, did they acquire ownership of the property during the subsistence of the marriage.

58. In the plaintiff's view, the house was gifted to them by the interested party. The interested party gave a contradictory testimony. At one point he stated that he had bought the house for his son but fell short of explaining why he had transferred it to the names of his son and daughter-in-law jointly. He later admitted in his cross examination and re-examination that he had given the house to his children (defendant and plaintiff) unconditionally and that the same was theirs as long as they lived.

59. It is apparent that the interested party had good intentions for his children (defendant and plaintiff) and least expected separation or divorce. However, it is a reality now that they are separated. Can he withdraw the property from both or against the daughter-in-law alone? That will then beg for the question as to whether the house was a gift and if true, whether the gift can be revoked or withdrawn. If the court finds that it was a gift and that the same is not revocable, it will then find that it was joint property acquired by the plaintiff and defendant during coverture by way of a gift.

60. What is a gift? According to the Black Law Dictionary (Edition 10th), a gift is defined as the voluntary transfer of property to another without compensation.

According to Halsbury's law of England 3rd Edition volume 18, a gift is defined as:

“the transfer of any property from one person to another it is an act where something is voluntarily transferred from the true possessor to another person with the full intention that they shall not return to the donor and with the full intention on the part of the receiver to retain the thing entirely as his own without returning it to the giver”.

61. From the above description, three elements arise as conditions precedent before a gift can be said to have effectively passed. Firstly, the person making the transfer (donor) must willingly make the transfer; secondly, the recipient (donee) must accept the gift made to him or her and thirdly, the gift is transferred and accepted directly without returning it back to the giver.

62. This position was further espoused succinctly by J. Nyamweya in the matter of the **estate of the late Gideon Manthi Nzioka (deceased)** (**supra**) where she held that:

“where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce on the promise. A promise made by deed is however binding even though it is made without consideration. If a gift is to be valid, the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do”.

63. In this case, the interested party has stood firm stating that he bought the house for the son and daughter-in-law without any conditions attached and that it was to last as long as they lived. It then follows that, the interested party as the donor voluntarily passed the transfer of the title to the defendant and plaintiff jointly who then accepted the same unconditionally.

64. It is my finding that the property was passed over to the two as a gift. The fact that the two have divorced does not form a ground to justify revocation of the gift as there was no condition attached to the gift save for some contribution which was overlooked by the interested party who finally made full payment of the purchase price. As painful as it may sound to be to the defendant and interested party, the house was gifted to the two thus it forms part of their matrimonial property acquired during coverture.

65. During submission, the defendant raised the issue of trust claiming that the plaintiff was holding the property in trust for the defendant and interested party. As stated by Wandabwa, the plaintiff did not plead that she was holding the property in the context of a resulting trust. I am in agreement that there was no prayer nor counter claim that the property was held by the plaintiff in trust. The claim of resulting trust arose during submissions which will amount to evidence from the bar.

66. Although extensively submitted on by the defendant, I do not find it necessary to delve on this issue as nobody pleaded constructive trust nor resulting trust. Parties are bound by their pleadings (see Galaxy paints co. Ltd vs Falcon Guards Ltd (2000)2EA385).

What is the beneficial interest or share of each party?

67. As stated in the case of Francis Njoroge v Virginia Wanjiku Njoroge Nairobi Civil Appeal No. 79/2009,

“division of matrimonial property must be decided after weighing the peculiar circumstances of each case”.

68. The **Court of Appeal in M V M Civil Appeal No. 74/2002 (2008) IKAR 247** recognized the fact that a person who is gifted should be allowed to own the gift. The court specifically had this to say:

“.....property inherited and gifted to one spouse before marriage, and where property exists in the same condition as it was inherited or gifted, no problem arises. The spouse to whom it was gifted should be allowed to retain it. Problems however arise where improvements are made using matrimonial resources and then the property ceases to be in its original form and increases in value”.

69. Similar position was held in PAW – M VS CMAW – M (2016) eKLR where the court held that:

“the plaintiff cannot claim exclusive possession of property. She came to property by virtue of her marriage and her rights to the property are tied with the marriage status. She cannot claim to be the owner of the property as exclusive possession is reservation of a property owner”.

70. Guided by the above authorities, I find and hold that the property was given to the two by virtue of their marriage status. Now that they are no longer together, their beneficial interest can be severed by each taking equal share i.e. in the ratio of 50% by 50%.

71. Accordingly, it is my finding that the plaintiff has proved her case on a balance of probability and do enter judgment in her favour with a declaration and order that:

(a) The property known as LR [xxxx] Kileleshwa be and is hereby declared as matrimonial property acquired by the plaintiff and defendant during the subsistence of their marriage by way of a gift.

(b) That the said property shall be shared into the ratio of 50% to 50%.

(c) That the property shall be sold after valuation with a mutually agreed valuer and the proceeds shared out equally.

(d) That either party shall be at liberty to buy out the other party's beneficial interest with the defendant having priority considering that he is staying with the children who might benefit from the same in the future.

(e) That the plaintiff shall cause release of the original title deed currently held at UN Sacco office as security to the Deputy Registrar Family Division within 45 days from the date of this judgment for safe custody pending valuation and sale of the said property.

(f) This being a family matter each party to bear own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF NOVEMBER, 2019

J. N. ONYIEGO

JUDGE