



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MATRIMONIAL CAUSE NO. 31 OF 2017

JNM.....APPLICANT

VERSUS

MM.....RESPONDENT

JUDGMENT

1. The Plaintiff in this case JNM (hereafter referred to as the Plaintiff) filed this suit seeking the following orders against the Defendant MM (hereafter referred to as the Defendant):

(i) A Declaration that the following properties are matrimonial properties hence jointly owned by the parties.

a) Kileleshwa Bellway Court House No. [...].

b) Household goods in Kileleshwa Bellway Court

c) Plot at Kahawa Sukari namely Plot No. [...]

d) Acres of land at Pipeline Estate Title No. Kajiado/Ololoitikoshi/Kitengela/[...] situate in Kajiado County.

e) Motor vehicle Registration Number KAS [...]

(ii) A Declaration that the Plaintiff herein is entitled to an equal share of the properties of the marriage between herself and the Defendant.

(iii) A Permanent Injunction restraining the Defendant either by himself or through his agents from disposing of and/or alienating any of the matrimonial property.

(iv) An Order compelling the defendant to surrender half of the proceeds from sale of motor vehicle registration number KAS [...] to the Plaintiff.

(v) An order compelling the Defendant to vacate the Kileleshwa Bellway Court House No. [...].

(vi) An order compelling the Defendant to pay service charge on Kileleshwa Bellway Court House No. [...] amounting to Kenya Shillings Three Hundred Thousand (Kshs.300,000.00)

(vii) That the Defendant to pay the costs of the suit herein.

2. The Plaintiff and the Defendant started cohabiting in the year 1989 and solemnized their union on 7.12.1991 at St. Peters Church Muongoiya in Kiambu under the African Marriage & Divorce Act.

3. The marriage was dissolved through Divorce Cause No. 276 of 2009 after 27 years of Marriage.

4. The two were blessed with four issues namely TM, NW, JM, and JW two of whom are still minors of School going age.

5. During the subsistence of the marriage, the parties acquired the following properties.

- a) Kileleshwa Bellway Court House No. [...].**
- b) Household goods in the Matrimonial home**
- c) Plot No. [...] at Kahawa Sukari.**
- d) Title No.Kajiado/Ololoitikoshi/Kitengela/[...] in Kajiado.**
- e) Motor vehicle Registration Number KAS [...]**

6. The Defendant filed a Defence dated 25.8.2017 in which he avers that he acquired the Matrimonial Property using his own funds.

7. The Defendant also stated in the Defence that he contributed to the purchase of the Household goods at the Matrimonial home such as the furniture, equipment, Kitchen items, fridges and he requested the plaintiff to name what she bought so that he could release the items to her.

8. The Defendant also stated that he purchased Kahawa Sukari and the Kajiado property before the marriage using his own funds.

9. Concerning Motor Vehicle Reg. No. KAS [...], the defendant stated in the Defence that he bought it and disposed of it before the divorce and he added that the Plaintiff also disposed of her car Honda Reg. No. KBN [...] and he is not making a claim to it.

10. The Parties gave viva voce evidence and they also relied on their pleadings, affidavits and witness statements.

11. The Plaintiff's evidence in summary is that during the subsistence of her marriage to the defendant, they acquired the matrimonial home and it was registered in their names.

12. The Plaintiff said she was working in the NGO world and she was able to contribute to the purchase of the Matrimonial home.

13. She said the Defendant was working with [Particulars Withheld] and was in a position to secure a loan for the purchase of the property and she said her contribution was indirect such as looking for the house and taking care of the children and she has to done everything that needs to be done to make the home beautiful.

14. The Plaintiff said she made payments of Ksh.265,000 and a further 80,000 went to the Lawyers. She said she used to buy food and run the home when the Defendant was away such as the time he was working with Mombasa the Water Company for the five years. she said the matrimonial home is registered in both their names because of her contribution.

15. The Plaintiff said she had invested psychologically and emotionally to the Matrimonial home and she still lives in it with the Children and she asked Court not to order selling of the house until the children are 18 years.

16. In Cross examination, the Plaintiff said she contributed to the purchase of the matrimonial property but she did not keep the receipts as she did not anticipate this case.

17. The Defendant said in his testimony before this Court that he is the one who provides for the children by paying school fees, upkeep and also taking them to school and attending school meetings.

18. The Defendant said he is the one who bought the matrimonial home through his employer. He said he bought the Kajiado Property before the Marriage.

19. He said he bought the Matrimonial Property through a Mortgage from [particulars withheld] which is now called [particulars withheld] and the deductions were made through his salary account.

20. The Defendant said when he left [particulars withheld] Bank he mobilized his personal savings and took severance pay and he paid off the mortgage on the family home and he is still paying the house bills and service charge.

21. The Defendant said the Plaintiff only contributed Ksh.80,000/- towards the purchase of the house and he took care of the rest of the deposit and mortgage repayments which he finished in 2005.

22. The Defendant also said the Children's Court gave them joint custody of the children and he asked the Court to order sale of the property and to award the Plaintiff 30% but first to have the Property valued.

23. The Parties filed written submissions which I have duly considered. I find that it is not in dispute that the parties were married for 27 years and that they divorced in the year 2016.

24. It is also not in dispute that during the course of the marriage, they were blessed with four (4) children two of whom are adults and two still minors.

25. The issues for determination in this suit are as follows:

- (i) **Whether the Suit properties constitute Matrimonial Property.**
- (ii) **Whether the Plaintiff contributed to the purchase of the matrimonial properties.**
- (iii) **How the Matrimonial Properties should be distributed.**
- (iv) **Who pays the costs of this suit.**

26. The suit properties in this case are as follows:

- a) **Kileleshwa Bellway Court House No. [...]. (hereafter referred to as the Matrimonial Home)**
- b) **Household goods in the Matrimonial home**
- c) **Plot No. [...] at Kahawa Sukari.**
- d) **Title No.Kajiado/Ololoitikoshi/Kitengela/[...] in Kajiado.**
- e) **Motor vehicle Registration Number KAS [...]**

27. I find that there is evidence that the Matrimonial Property was purchased during the pendency of the Marriage. Matrimonial Property is defined as property acquired during the subsistence of the Marriage. It is not in dispute that the Matrimonial Property was so acquired.

28. The Matrimonial Properties Act provides that each party is entitled to the contribution they made towards the purchase of the Matrimonial property.

29. **Section 7** of the Matrimonial Properties 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”.

30. The Court of Appeal relied on **Francis Njoroge –v-s Virginia Wanjiku Njoroge (Nairobi Civil Appeal No. 179 of 2009)** where it was held as follows:-

“... A division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the court of appeal of Singapore in Lock Yeng Fun –v- Chua Hock Chye 92007) SGCA 33,

“It is axiomatic that the division of matrimonial property under section 112 of the Act is not and by its very nature cannot be a precise mathematical exercise.”

31. Registration of property in both spouses names is essentially regarded that the property is held by both spouses in equal right. However, this clause does not negate the fact that spouses receive from the marriage in accordance with their contribution whether monetary or in kind

32. On the household goods, I also find that the said items were acquired during the subsistence of the marriage and they also constitute Matrimonial Property.

33. Concerning Plot No. [...] Kahawa Sukari, I find that the said property was sold by the parties and they already shared the proceeds and therefore it constituted Matrimonial Property. This Court will not determine what each party contributed or how it will be shared as the same has now been overtaken by events.

34. Concerning Kajiado/Ololoitikoshi/Kitengela/[...] in Kajiado, the Defendant said he bought it before the marriage. The Plaintiff was not able to show that she contributed to its acquisition or development and I find that the same belongs to the Defendant. For that reason, I hold that Kajiado/Ololoitikoshi/Kitengela does not constitute Matrimonial Property.

35. I also find that there is no evidence that Motor Vehicle Reg No. KAS [...] does not constitute Matrimonial Property as the Plaintiff was not able to establish that it was purchased during the subsistence of the marriage.

36. On the issue as to whether the plaintiff contributed towards the purchase of the matrimonial properties, I find that the Kahawa Property has already been shared during the pendency of this suit and therefore there is no need to determine the Plaintiff's Contribution or her entitlement.

37. The Court has also found that Kajiado/Ololoitikoshi/Kitengela and Motor Vehicle Reg. No. KAS [...] do not constitute Matrimonial Properties.

38. The Properties which are available for distribution are the Matrimonial home and the household goods in the Matrimonial home.
39. There is evidence that it is the Defendant who purchase the matrimonial home through a Mortgage financed by [particulars withheld] (now [particulars withheld]) where the Defendant was working.
40. The Plaintiff said she made direct contributions of Ksh.265, 000/- and another Ksh.80, 000/- towards the deposit. She also said she is the one who searched for the property and bought the household goods and has been taking care of the matrimonial home where she still resides with the Children. She said the Defendant also stays in the Matrimonial home where he occupies the master bedroom while the Plaintiff stays in one of the Children's bedrooms.
41. The Defendant said he is the one who bought the Matrimonial home and the household goods. However, he did not produce receipts for the purchase of the household goods. He said the Plaintiff only contributed 80,000 shillings towards the purchase of the matrimonial home.
42. I find that the Defendant had agreed to have the Matrimonial property apportioned at 35:65 during the mediation process which collapsed. In his oral evidence in Court the Defendant said he was willing to give the Plaintiff 30% contribution.
43. I find that although the direct contribution by the Plaintiff was minimal, the plaintiff contributed indirectly by searching for the home and taking care of it and also taking care of the children of the marriage and the family business.
44. The Matrimonial Causes Act recognizes both direct and indirect contributions.
45. There is evidence that the Applicant made both monetary and non-monetary contribution as envisaged in the matrimonial properties Act. **Section 2** of the matrimonial property Act defines what constitutes "contribution" to mean monetary and non-monetary contributions 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.

46. As regards non-financial contribution I wish to rely on The House of Lords decision in **White vs White (2001)UKHL 54** in which the Court cited the greater awareness of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills, a position that was reiterated in subsequent decisions of the House of Lords in **Miller vs Miller & McFarlane {2006}UKHL 24** with courts endorsing the jurisprudence of equality. She argued that any law that advocates for the division of matrimonial property on the basis of proved contributions alone, runs counter to the spirit embodied in the Maputo Protocol and that the division of matrimonial property must be effected having due regard to the principle of equality.

47. After analyzing English authorities, this Court in **Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR** stated in part as follows:

"It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in Pettit are those of English law of trusts. The House of Lords specifically decided so in Gissing vs. Gissing. According to the English law of trusts it is only through the wife's financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property."

48. The Court also examined local decisions and came to the following conclusion:

"In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see Essa vs. Essa (supra); Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported), Kamore vs. Kamore (supra); Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported)). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband."

49. In view of the above findings and especially the fact that the Defendant conceded 30:70% contribution in favour of the Plaintiff. I apportion her 40% contribution in light of her indirect contribution.

50. In respect of the household goods, I find that the parties admitted that they were awarded joint custody of the children.

51. The evidence on record is that the Plaintiff has always stayed with the children. It is not in the interest of the children to divide household goods.

52. I direct that the Plaintiff retains the household goods and she continues staying with the children.

53. Since the Plaintiff has expressed a desire to buy off the defendant, I direct that the house be valued within 45 days of this date and the Plaintiff is given the 1st option to pay off the defendant his 60% share.

54. If the Plaintiff is unable to pay off the Defendant within 45 days after the valuation, the defendant will be at liberty to pay the Plaintiff her 40% share within a further 45 days and the plaintiff to move out of the matrimonial home upon being paid her 40% contribution.

55. Finally, if the Defendant is unable to pay the Plaintiff her 40% contribution within the stipulated time, the house to be sold within a further 45 days and the purchase price shared at the apportioned ratio of 40:60% between the Plaintiff and defendant.

56. The time for buying off each other to start running after the valuation Report is obtained. The defendant to meet the cost of the valuation since he is the one who asked for valuation of the property in his evidence in court.

57. This being a family matter, I direct that each party bears its own costs of this suit.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 8TH DAY OF NOVEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.