



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 2 OF 2018

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

T N K.....APPLICANT

VERSUS

J K N.....RESPONDENT

RULING

1. The applicant T N K. and the respondent J K N began to cohabit as wife and husband in 1990. On 4th May 1991 their union was formalized at [particulars withheld] Church, Nairobi and a certificate of marriage issued. The marriage was blessed with four children who are aged 27, 25, 17 and 15 respectively. The applicant is a teacher and the respondent is a researcher. In 2009 the couple separated. In 2017 the respondent filed a petition for the dissolution of the marriage. The applicant filed an answer and a cross-petition. The cause (**CM Divorce Cause No. 28 of 2017 at Thika**) is pending.

2. On 17th January 2018 the applicant filed an originating summons seeking the determination that the following immovable properties, although registered in the names of the respondent, were acquired, developed and improved during the subsistence of the marriage of the spouses and with their joint efforts, and were therefore jointly owned and held in trust by the respondent for the applicant in the ratio of 50:50 :-

- a) L.R No. [particulars withheld] Ngong Township and the developments thereon;
- b) Ngong/Ngong/[particulars withheld] and the developments thereon;
- c) Ngong/Ngong/[particulars withheld] and the developments thereon;
- d) plot No. [particulars withheld] Kahawa Sukari and the developments thereon;
- e) land at Gichugu in Kirinyaga; and
- f) land at South Ngariama in Mwea.

There were other prayers which included the separation of the applicant's interest in each parcel and the transfer of that interest (50% in each) to the applicant.

3. With the originating summons was filed the present notice of motion which sought an injunction restraining the respondent, either by himself, his servant and or agent from selling, alienating, transferring, subdividing, encumbering, or in any other way, from disposing off the parcel pending the hearing and determination of the summons.

4. The respondent filed a replying affidavit to oppose both the summons and the motion. In respect of the alleged parcels at Gichugu in

Kirinyaga and South Ngariama in Mwea, the respondent denied that he owned them and put the applicant to strict proof. At this stage of the case, I find that no particulars of the said parcels or their ownership were given by the applicant and therefore I will make no further reference to them. Regarding the rest of the parcels, the respondent admitted that they were registered in his name. He, however, stated that he alone acquired and improved them; that the applicant did not in any way contribute to their acquisition, development or improvement.

5. The applicant claimed that during the marriage she worked as a teacher and that her income took care of all their family expenses, including food, shelter, clothing, medical expenses and entertainment and that this freed up the respondent's income which was used to purchase and develop the named properties. She further claimed that she contributed both directly and indirectly to the improvement and maintenance of the properties through borrowings. She stated that non-financial contribution included engaging in domestic work and the management of the matrimonial home, taking care of the home and the children, maintaining the home, ensuring workers were paid on time, and so on. The respondent denied all these, and stated that the applicant did not take care of the children, or the home. He swore that he was the sole breadwinner, whose income took care of the household. The applicant swore a supplementary affidavit to deny the averments by the respondent.

6. The applicant was represented by Mr. Gachuhi and the respondent by Mr. Nyoike. Counsel filed written submissions which I have considered alongside the sworn affidavits of the respective parties.

7. The originating summons will determine whether the properties in dispute were matrimonial properties whose ownership and improvement were jointly contributed to by the parties. The levels of contribution will be decided upon. Under **section 6 of the Matrimonial Property Act (No. 49 of 2013)**, matrimonial property means:

“(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.”

Under **section 7 of the Act**, ownership of matrimonial property vests in the spouses according to contribution of either spouse towards its acquisition.

8. The applicant will have to prove that she contributed towards the acquisition and improvement of the properties in the suit. Under **section 2 of the Act** contribution 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 properties; and

(e) farm work.”

9. For the purpose of the present application it is material to note that under **section 12(1) and (2) of the Act** –

“(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form whether by way of sale, gift, lease, mortgage or otherwise.

(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection of caveat, caution or otherwise under any law for the time being in force relating to the registration of the title to land or of deeds.”

10. Further, under **section 14(a) of the Act** where matrimonial property is acquired during the marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.

11. Lastly, **section 28(a) of the Land Registration Act (No. 3 of 2012)** provides that spousal rights over matrimonial property constitute an overriding interest that may subsist and affect registered land. In **section 93(2) of the Land Registration Act**:

“(2) If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered.”

12. The respondent claimed that he bought LR No. [particulars withheld] Ngong Township in 1988 and erected a house thereon in 1989 before he married the applicant in 1990. On the other hand, the applicant claimed that the plot was acquired in 1990 on her advice and that the development was subsequent to that. It is not disputed that Ngong/Ngong/[particulars withheld] and Plot No. [particulars withheld]

Kahawa Sukari were bought during the subsistence of the marriage. In respect of LR Ngong/Ngong/[particulars withheld], the respondent stated that he bought it after the applicant had deserted the matrimonial home. The applicant stated that she contributed to its acquisition.

13. I note that the applicant's sworn evidence that the respondent has advertised the house on LR No. [particulars withheld] Ngong Township for sale was not rebutted. On the material made available through the affidavits, and the law referred to in the foregoing, the applicant has demonstrated that she has an interest in the matrimonial properties. The extent of the interest will finally be determined during the hearing of the originating summons. I find that the applicant has shown a *prima facie* case. Her interest in the properties ought to be protected by injunction.

14. Consequently, I order that, pending the hearing and determination of the originating summons, there shall be an injunction restraining the respondent, or any person acting under him, from selling, subdividing, transferring, leasing or in any other way alienating LR No. [particulars withheld] Ngong township, LR No. Ngong/Ngong/[particulars withheld], LR Ngong/Ngong/[particulars withheld] and plot No. [particulars withheld] Kahawa Sukari. Costs shall follow the event.

DATED and DELIVERED at NAIROBI this 17TH day of MAY 2018

A.O. MUCHELULE

JUDGE