



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.34 OF 2008

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

R G G.....APPLICANT

VERSUS

M K G.....RESPONDENT

JUDGMENT

PLEADINGS

The Originating Summons dated 4th August 2008, was amended by filing an amended Originating Summons dated 31st July 2008. The prayers sought in the amended Originating Summons were:

1. That it be declared that the following properties :

a. Nairobi/Block [particulars withheld] approximately 0.0372 hectares;

b. Mavoko Town Block [particulars withheld] approximately 1.941 hectares;

c. Mavoko Town Block [particulars withheld] approximately 1.941 hectares;

d. Mavoko Town Block [particulars withheld] approximately 1.943 hectares;

e. Nyandarua/Njabini/ [particulars withheld] approximately 1.902 hectares; and

f. Nyandarua/Njabini/[particulars withheld] approximately 1.538 hectares, with all buildings and developments thereon acquired and developed by the joint funds and efforts of the Applicant and Respondent during their marriage and registered in the name of the Respondent, are or were owned jointly by the Applicant and the Respondent.

g. That an order issues declaring that 50% or such other or higher proportion of the properties or proceeds thereof, is or was held by the Respondent in trust and for the beneficial interest of the Applicant

h. That this Honourable Court be pleased to declare that the beneficial interests of the parties are equal in respect of **L.R** [particulars withheld] **Karen/Langata**.

The parties herein have lived as husband and wife since 1974 up until September 2008 when the Applicant vacated from the matrimonial home as she feared for her life. They have 3 issues of marriage who are all adults, namely W G, M G and M G.

The Applicant's case as deponed in the Supporting Affidavit sworn on 31st July, 2008 is that she had found a document signifying that the Respondent was in the process of alienating one of the matrimonial properties without her consent. This made her register a caution against all their matrimonial properties. Despite the registered caution, the Respondent sold Nairobi Block [particulars withheld] for Kshs. 4.5 million and has failed to account for the same. The properties were however registered under the Respondent's name but she alleges that she contributed to the purchase of the properties and her interests will therefore be adversely affected.

The Respondent, M K G, filed a Replying Affidavit on the 17th of September 2008 opposing the application. He deponed that the listed properties were not acquired through joint effort and funds as alleged by the Applicant. He also states that throughout the subsistence of their marriage, both of them were employed but he does not know where the Applicant expended all the monies she earned as she had never

helped him acquire any assets and further he took care of all expenses incurred and still managed to save so as to purchase the properties in question. The only expenditure incurred by the Applicant was Kshs. 971,840 for a period of over 35 years inclusive of payment of fees of one D K who is not their child. In relation to Nairobi/block [particulars withheld], he submitted that he solely took out a mortgage to purchase the property and he agreed with the Applicant that they would open a joint account where they would deposit their salaries so as to service the mortgage. The Applicant failed to deposit her salary, forcing him to utilize his earnings from East African Development Bank (E.A.D.B) so as to clear the mortgage. Later in 2005, he left employment and as a result of financial demands, he decided to sell Nairobi/block [particulars withheld] for Kshs. 4,500,000.

The Applicant also submitted that he bought land at Karen for Kshs.740,000 and built their matrimonial home for Kshs.10,000,000 and registered it under both their names out of his own courtesy despite her not contributing financially and refusing to co-operate. He averred that the matrimonial home should therefore be divided in accordance to the contribution in its acquisition and development.

With respect to **Mavoko** [particulars withheld], **Mavoko** [particulars withheld], **Mavoko** [particulars withheld], **Nyandarua/Njabini**/[particulars withheld] and **Nyandarua/Njabini**/[particulars withheld], the Respondent deponed that he proposed to the Applicant to purchase the properties and she refused which led him to buy them alone and further built a house in the Nyandarua plot. Mavoko Town Block [particulars withheld] was however sold for family and personal upkeep.

The Applicant filed a further affidavit dated 4th September, 2009 in response to the Respondent's Replying Affidavit. She reiterated that the properties listed in the Originating Summons was acquired through joint efforts and funds and that her salary was used to purchase the same as well as catering for the needs of the family. She deponed that the receipts totaling to Kshs. 971,840 were a small fraction of the expenses she incurred / contributions made towards the purchase of the properties and some of her contributions have not been tabulated. The Applicant further submitted that she contributed to the acquisition and development of the matrimonial home as well as bought most of the household items in their matrimonial home. She also helped service the mortgage through their joint account which she deposited her salary in.

With respect to the sale of Block 93/883, she submitted that the proceeds of the sale were not to cater for the school fees for the children as none of them was still in university at the time and she had paid the school fees for their daughter who graduated in the same year. She also submitted that the said D K is their grandson and that they supported him financially as his mother(their daughter) is unable to do so.

In relation to **Mavoko Town Block** [particulars withheld], [particulars withheld] and [particulars withheld], she deponed that they were underdeveloped and the Respondent had bought the properties while he was in Uganda. She is also familiar with the properties and the children have had picnics on the land. However, she stated that Mavoko [particulars withheld] was sold without her consent despite her contribution to the acquisition of the property

SUBMISSIONS

Parties agreed to file written submissions. Counsel for the applicant maintained that the properties in question were acquired during the marriage and the Applicant made monetary and non-monetary (giving birth to the children, domestic work, companionship) towards the acquisition of the property. Further, she submitted that the Applicant should be compensated from the Respondent's share as some of the properties were sold without her consent and the Respondent refused to account for the same even after registering cautions against them. Counsel relied on the case of *E.N.K vs. J.N.K(2015)eKLR*.

Counsel for the Respondent submitted that since both parties were employed and they had the funds to hire domestic workers, none of them could claim that the contributions made were non-monetary since there were people to take care of such services. Therefore, they should each prove that they financially contributed to the acquisition and/or development of the properties and general upkeep during the subsistence of their marriage. He also stated that during the hearing, the Applicant did not know the seller's names and the place where the purchases were undertaken.

Counsel contends that the Applicant did not contribute towards the mortgage in relation to Nairobi/Block [particulars withheld] South B Nairobi as she was not part of the ownership. In relation to LR No. [particulars withheld] Karen/Langata, the Applicant's contribution was nil. In conclusion, Counsel submitted that the purchase and development of the properties was done solely by the Respondent and both parties while the contribution to other family needs was done by both parties and therefore the applicant has failed to prove contribution towards the purchase and development of the properties. Counsel relied on the following cases:

Karanja v Karanja (1970-80)eKLR, Echaria v Echaria (2007) eKLR, Lord Blackburn v Lady Blackburn (2009)eKLR and Peter N. Njoroge (PNN) v Zipporah W. Njuguna (ZWN) (2017) eKLR

ISSUES

- 1. Were /Are the suit properties acquired during the marriage of the applicant and Respondent?**
- 2. Did the Applicant contribute to the acquisition and development of the suit properties?**
- 3. Is the Applicant entitled to declaration of rights to the matrimonial properties pending division of the said properties after dissolution of the marriage?**
- 4. Who is to settle the costs of the suit?**

DETERMINATION:

LAW:

The relevant law in division of matrimonial property is as follows;

1) **Article 45 (3) Constitution of Kenya as followed in AGNES NANJALA WILLIAM VS JACOB PETRUS NICOLAS VANDER GOES CIVIL APPEAL 127 OF 2011** as a constitutional statement that marital property is shared at 50%/50%. At the time **Article 68 of COK2010** had not been complied with; the **Matrimonial Property Act (MPA)** was not passed until 2013.

2) **Section 2 of MPA** defines monetary and non- monetary contribution to include:

- 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;**

3 **Section 6 (3) of MPA provides as follows:**

Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

4 **Section 7 of MPA provides 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.

5 **Section 9 of MPA stipulates as follows:**

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.

6 **Section 14 of MPA stipulates as follows:**

Where matrimonial property is acquired during marriage-

- (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and*
- (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.*

In the case of **P.N.N. VS Z.W.J CIVIL APPEAL 128 OF 2014 (JJA WAKI, AZANGALALA & KIAGE)** delved into great detail the ongoing debate on division of matrimonial property.

In the cited case the parties were married under African Christian Marriage and Divorce Act now repealed in 1961. They were formally employed, had 7 children and worked until retirement in 1990. The wife filed Originating Summons in 2004 and sought declaration under Section 17 of Married Women Property Act that the suit properties registered in the name of her husband were registered under trust which ought to be terminated and the properties apportioned as the Court deemed fit. The Trial Court considered if the properties were acquired during coverture and ascertained each party's monetary and non-monetary contribution to the acquisition of suit properties.

On appeal that the Trial Court did not evaluate all evidence the Appellate Court Waki JJA observed thus;

a) The provisions of **Section 2, 6 & 7 of MPA 2013** breathe life into **Article 45(3) of COK 2010** and recognizes that both monetary and non-monetary contribution should be taken into account in determining contribution. (refer **V.M.N. vs F.N. [2014]eKLR**)

b) *Where the disputed property is not 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.* (refer **P.W.K. vs J. K.G [2015] eKLR**)

c) In **P.M.Echaria vs. P.N. Echaria [2007] eKLR**; The Court analyzed local decisions namely; **Essa vs Essa; Nderitu vs Nderitu; Kamore vs Kamore; Muthembwa vs Muthembwa; Mereka vs Mereka** and in each case; the Court appreciated that for a wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards 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.

On evaluation of the evidence; the Court upheld the Trial Court's judgment that the suit properties were matrimonial properties acquired during the parties' marriage and the wife contributed to their acquisition both directly and indirectly and dismissed the appeal save with regard to 2 properties.

Kiage JJA concurring with Waki JJA stated as follows;

Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards acquisition, preservation or improvement of family property, the process of determining entitlement may lead to 50%/50% or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on basis of fairness and conscience, not a romantic clutching on to 50%/50% mantra....

Thus the Constitution, thankfully does not say equal rights including half the property. And it is no accident that when Parliament enacted the MPA, 2013, it knew better than to simply declare the property shall be shared on a 50%/50% basis. Rather, it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.

The above provisions and case were relied on in ;

a) HCCC 11 OF 2007 E.N.K.vs J.N.K.

b) PETITION 164B of 2016

Federation of Women Lawyers (FIDA) vs Attorney General (AG) & Initiative for Strategic Litigation in Africa (ISLA)

The main thrust from the above provisions and case-law is that **Article 45(3) COK 2010** is read conjunctively with **Section 7 of MPA 2013** and determination of direct or indirect contribution of each spouse to acquisition, development and preservation of properties acquired during subsistence of spouses' marriage is condition precedent to declaration of rights and /or division of matrimonial property.

ANALYSIS:

APPLICANT'S CASE:

On 17th March 2011, before Maraga J as he then was; PW1 R K G testified and relied on her affidavit in support of the OS filed on 4th Sept. 2009 and was cross examined;

PW1 and DW1 lived together as man and wife since 1974 and PW1 moved out in September 2008 when she felt her life was in danger. PW1 was in gainful employment since marriage. She was employed as nurse. In 1976 she accompanied her husband DW1 to Canada for further studies. DW1 paid part of her fees but she did odd jobs and supported the family. She contributed to the family budget but most of the funds came from the Respondent DW1. They came back in December 1980.

Upon return PW1 was employed by University of Nairobi where she worked up to 1997. She left earning Ksh 35,000/- a month. She was subsequently employed by Nairobi Hospital as Director of [particulars withheld] and was paid Ksh 250,000/- a month. She worked for 10 years and left in 2006. She joined Kenya Methodist University in 2008 and was paid Ksh 200,000/- a month. Therefore she contributed to the acquisition of the properties.

a) **Nairobi Block** [particulars withheld] **house in Plainsview South B** registered in DW1's name. It was bought in 1983 from Kenya Reinsurance at slightly over Ksh 400,000/=. They jointly paid the loan to HFCK from a joint account. She had owner-occupier allowance of Ksh. 3,750/= from UON which went to loan repayment. They had 2 joint accounts. The Respondent's salary went to National bank of Kenya Account and her salary to Barclays bank of Kenya and she remitted the loan repayments to the NBK account. DW1 sold the said property without her knowledge and she discovered in 2005.

b) DW1 worked for UON 1986-1991 and then left and joined East Africa Development Bank (EADB) where he worked until 2005 when he sold the above cited property. He did not pay school fees for children in USIU, the 1st daughter left studies after 1 year in 1996 and she paid the 2nd daughter's school fees upto 2005. Between 1994-1996 she was studying in USIU and paid her school fees.

c) **Mavoko Properties**; they bought them together in 1989 as a block of 20 acres at a cost of Ksh 400,000/=. She did not confirm how much came from her and how much from DW1.

d) **Mavoko** [particulars withheld] **was sold by the bank and Mavoko** [particulars withheld] **was sold in 2006 but she was not sure if Block** [particulars withheld] **was sold or not.** PW1 stated that the investments were for the family and not DW1's survival.

e) **Njabini properties** were acquired in 2001 and 2002 and are registered in the husband's name. She did not know who sold the Plots to DW1 and how much they were bought for. The funds were from their joint account but she could not confirm withdrawal of funds. She filed cautions against the Plots to prevent their sale or disposal but Plot 2363 was sold by DW1 and later Plot 3046 was sold in 2008 despite the caution.

f) **The Karen/Langata home** was acquired in 1996/1997 and they bought it for Ksh 960,000/= She signed the agreement. Although she did not contribute directly funds for the purchase of the home; She contributed indirectly and DW1 did bring money from Uganda where he worked. The construction of the home cost Ksh 10 million and she injected funds in construction of their home. She did not keep receipts but transferred funds totalling to Ksh 2 million into their joint account. She also purchased materials directly.

g) **PW1 paid Ksh 800,000/- at USIU** for their children's education. She sent their son Canadian 9,000 dollars for upkeep as he studied in Canada and DW1 spent Canadian 30,000 dollars towards their son's education.

h) Both PW1 and PW2 were employed since their marriage until retirement or end of contracts. DW1 paid land rents and rates of the properties while she bought insurance and maintained the home and purchased furniture and curtains. She contributed half of property acquisition and family expenses

i) PW1 paid school fees and expenses of bringing up their grandson.

DW1 M K G testified on 2nd March 2017, that he was an [particulars withheld], Lecturer at University of Nairobi and later Director of [particulars withheld] based in Uganda and now retired.

He married PW1 R G G in 1974 had 3 children and later she ran away from home.

He stated with regard to the properties as follows;

a) Nairobi/Block [particulars withheld] South B registered in his name; he bought with a loan from Kenya Reinsurance Company and sold it in 1991.

b) Mavoko Town/Block [particulars withheld] he sold it in 1990

c) Mavoko Town/Block [particulars withheld] he sold it in 1990

d) Mavoko Town/Block [particulars withheld], he gave title deed to his brother to obtain a loan in Cooperative Bank. He acquired the properties from his savings and PW1 did not contribute anything towards purchase of these properties.

e) Nyandarua/Njabini/[particulars withheld]

f) Nyandarua/njabini/[particulars withheld] he also bought with his own funds and PW1 did not contribute. They were blocked by caution filed by PW1

g) LR [particulars withheld] Karen/Langata is registered in joint names of PW1 and DW1. He paid for the property through an International job that he was paid 8,000 dollars and he purchased the property. He rented it out and is paid Ksh 99,000/= a month as rent.

h) He also paid for construction of their home.

All this time PW1 was in gainful employment in UON, Nairobi Hospital

and Methodist University. They had a joint account and PW1 withdrew money and played golf. He claimed that PW1 did not pay school fees for their children or upkeep of the family.

This Court considered the evidence on record;

The parties were married in 1974 and lived together in South B, Canada and Karen/Langata until September 2008 when PW1 left the matrimonial home.

All the properties cited above were acquired, developed, maintained or preserved during the subsistence of the marriage. They are matrimonial properties as defined in **Section 6 MPA 2013**.

As to contribution, DW1 identified and initiated the purchases of these suit properties. He stated he bought them directly by cash and others by loan. He claimed that PW1 worked all those years and did not want or was not interested in buying properties. PW1 stated that she trusted her husband and she spent money on development of their matrimonial home in Karen Langata, contributed money to construction of the home, bought materials, curtains and furnished the home and did landscaping and flowers.

PW1 confirmed that she contributed to loan repayments of their South B home through owner occupier she was paid while she worked at

UON and later house allowance while they were in Canada for further studies, she did odd jobs e.g. baby sitting and helped with family expenses.

While in Kenya, she helped pay school fees for their children in USIU and living expenses for their son in Canada on studies. She attached some receipts of shopping at Uchumi and Nakumatt supermarkets.

PW1 made huge transfer of funds from her account to the joint account between 1998-2001 totaling 4.6 million.

She paid funds at Red Hill Place treatment Centre for DW1's alcoholism treatment.

From the above evidence I find that the Applicant PW1 made direct and indirect contribution to the acquisition of the matrimonial properties.

There is documentary evidence of funds on family expenses, school fees, house rent, deposits into their joint account.

There is indirect contribution in form of children nurturing and support especially when DW1 was in employment in Uganda away from home. PW1 provided companionship before the state of the marriage deteriorated, domestic work and management of the home, whether directly or hiring help supervising the work and paying for such labour as she would go to work as she was gainfully employed. She stated in Court and it was not controverted, that although DW1 purchased the Karen property directly through payment of cash; she contributed by depositing close to 2 million for construction of the home and bought materials, she helped to furnish the home and also manicured the garden; hence she managed the family property.

The assertion by DW1 that PW1 did not contribute at all to any of the purchases of the matrimonial property is not borne out by the facts;

When parties enter into the marriage none of the parties envision dissolution of the union, they commit to mutual trust and cooperate in matters of mutual interest and benefit. Therefore it is difficult to compile and store documents of proof of contribution in anticipation of dissolution of marriage. Invariably the wife is engaged in child bearing, nurturing and child support activities, maintenance and improvement of the home, purchases with regard to family expenses; groceries, clothing, furnishings, transport, school expenses entertainment payment of household workers etc all these expenses are not documented and compiled.

On the other hand the law recognizes more; titled properties and monetary contribution; where, title deeds, log books, share certificates and bank statements are readily available. So in essence; a husband invests in family properties as the wife augments acquisition of family properties by taking up untitled family expenses, properties, furniture, carpets, flower landscape, painting, etc.

In a nutshell, whereas, DW1 made purchases of the matrimonial properties, he only was able to do so because his wife PW1 who was gainfully employed took up and settled family expenses and left DW1 sufficient funds for acquisition of family investments. Therefore both PW1 and DW1 contributed equally in acquisition of family/matrimonial property.

DISPOSITION

- 1. LR No [particulars withheld] Karen – Matrimonial home registered in both PW1 and DW1 under Section 14 of MPA, the property belongs to both parties jointly and in equal shares.**
- 2. Nairobi/Block [particulars withheld] – DW1 sold**
- 3. Mavoko Town Block [particulars withheld] – DW1 sold**
- 4. Mavoko Town Block [particulars withheld] - DW1 sold**
- 5. Mavoko Town Block [particulars withheld] - Title document given to brother of DW1**
- 6. Nyandarua/Njabini/[particulars withheld] - belongs to PW1 absolutely**
- 7. Nyandarua/Njabini/[particulars withheld]- DW1 sold**
- 8. During the pendency of this matter, this Court was engaged in Election Petition 6/2017 and Election Petition Appeal 8 of 2018 and thus delayed delivery of judgment.**
- 9. In the intervening period, vide application filed on 16th Jan 2018 the Purchaser of Mavoko Town Block [particulars withheld] sought to stop delivery of judgment so as to ventilate his case and interest in the suit property.**
- 10. This is a division of matrimonial property case between the spouses and therefore, the issue of vendor/Purchaser should appropriately be canvassed before ELC Court.**
- 11. During the Court vacation, it was brought to the Court's attention sad news of the demise of one of the parties DW1 vide letter dated 31st July, 2018. The matter regarding his estate can only be dealt with in a succession Cause.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 17TH SEPTEMBER 2018.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MS THONGORI FOR APPLICANT

MR NAMADA FOR RESPONDENT