



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 47 OF 2014 (OS)

R G M.....PLAINTIFF

VERSUS

S K L.....DEFENDANT

JUDGMENT

1. The Originating Summons herein is dated 24th July 2014 and was filed at this registry on even date, and seeks:-

- (a) A declaration that Kajiado/Kaputiei North/[.....] and [.....]and KBN [...]X were acquired by the parties hereto jointly and that the same were held by the defendant beneficially and in trust for the plaintiff;
- (b) A declaration that the plaintiff was entitled to 50% of the said property or the proceeds of sale of the same or such other proportion that the court may deem fit;
- (c) An order to restrain the defendant or his servants or agents from alienating the same; and
- (d) Costs of the suit.

2. The facts upon which the suit is founded are set out in the affidavit sworn on 24th July 2014 by the plaintiff. She deposes that the defendant is her husband, having married him in 2004 at a civil ceremony. She avers that there are pending divorce proceedings. They have two children together and that the property set out in paragraph 1 here above was acquired during coverture. She avers that Kajiado/Kaputiei North/[.....] is where the matrimonial home stands. The said house was put up with the joint efforts of both parties, but at a time when the defendant was away on military service, for the defendant is a military officer, and it fell on her to singlehandedly supervise the construction. She states that she was forced to borrow heavily from her friends, employer and relatives to be able to complete the same. She says that the defendant evicted her and the children from the matrimonial home and they were forced to live in rented premises. She has attached copies of a marriage certificate and certificates of birth of her children; to support her case. She also filed a bundle of documents on 9th June 2016.

3. The defendant swore an affidavit on 7th August 2014, and filed it herein on 12th August 2014, in response to the suit. He concedes to the marriage and the pending divorce proceedings. He accuses the plaintiff of leaving the matrimonial home on her own volition. He avers that the subject property was acquired for his own benefit and that of his children and posterity. He states that the house standing on Kajiado/Kaputiei North/[.....] was solely built with income generated from his service in the military in foreign missions in the Congo and from loans that he had taken from his bankers. He says that he engaged a firm, known as Rimunge Construction Company Limited, to prepare the bill of quantities. He also states that he also acquired some construction materials from a company known as Gifan Enterprises Limited and others from other supplies. He says that he acquired Kajiado/Kaputiei North/[.....]from a Peter Nyaga Muvake, without any assistance from the plaintiff. He says that he and the plaintiff acquired two plots together in the Kisaju area and accuses the plaintiff of concealing that property from the court, and also of concealing other assets that she has acquired in her own name. He says that the plaintiff was a housewife at the time they got married, but she later got a job at a law firm. He has attached several documents to his affidavit to support his assertions. There are also two affidavits sworn by officers from Rimunge Construction Company Limited and Gifan Enterprises Limited to lend support to the defendant's contention.

4. Directions were given on 5th November 2015, for disposal of the matter by way of affidavit and oral evidence.

5. The oral hearing commenced on 31st March 2016, with the plaintiff on the witness box. Regarding Kajiado/Kaputiei North/[.....] she stated that the same was acquired in 2008 for a sum of Kshs 450, 000.00. She claimed that she paid the purchase price in installments, from her bank account. She stated that the defendant identified the property, but she was the one who purchased it. She claimed to be the one who obtained the relevant consents and did the registration thereof in the name of the defendant. Construction started in 2009. According to her,

she was the one on the ground, while the defendant was serving in the Congo. She said it was her brother, Frankline Munene, who supervised the works. She stated that she made a financial input into the construction from money she got from her businesses and employment. She also said that she used to pay the workers. She said that the defendant used to send her money through Western Union, which she would use for subsistence and to support members of his extended family. She asserted that none of his money was used in the construction. She stated that she was the one who paid for the electricity, as a result of which the account was in her name and the bills came in her name. She mentioned that she used to obtain materials from Gifan Enterprises Limited, where an account was maintained in the name of the defendant, but she said that she was the one who placed orders and made payments in cash and through MPesa. She claimed that she was the one who bought the internal fixtures, furnishings and fittings from divers shops at Kijabe Street, Biashara Street and Industrial Area. She said that she did most of the work as the defendant was mostly away on duty. She claimed that she contributed to the acquisition of the vehicle KBN [...]X which was registered in the name of the name of the defendant and was in his possession. She said that Kajiado/Kaputiei North/[...] was registered in their joint names, adding that she contributed to its acquisition through funds she paid by bankers cheque. She said all the money came from her account. She claimed to have had contributed Kshs. 1, 212, 000.00 out of a purchase price of Kshs. 2, 500, 000.00. She also did the registration of the property. She also said that she made indirect contribution through taking care of the children, doing shopping and paying school fees. She said that the money the defendant sent was spent on the domestic budget, and on herself, the children and the extended family. During cross-examination, she stated that the defendant used to send money by Western Union, some of which was spent on construction and the rest on the domestic budget. She claimed to have spent Kshs. 4, 000, 000.00 on the house. She said that there was no specific contractor, and that the work was overseen by a supervisor and a foreman, who was the defendant's relative. She said that she did not take a loan nor borrow from anyone. She said that she was the one who bought the Kisaju plots alone, but during coverture. She said KBN 405X was bought with joint efforts, for she contributed Kshs. 300, 000.00 out of a purchase price of Kshs 500, 000.00, but it was registered in the defendant's name. She said that KBL 893B was paid for with her money and it was registered in her name. She testified that she had an accident in it, it was written off and she sold it and bought another car.

6. The case for the defendant opened on 24th November 2016, when the defendant took the stand. He stated that Kajiado/Kaputiei North/[...] was the matrimonial home bought in 2008. He said he bought it from a Joseph Kinuthia Njoroge, through a gentleman's agreement and there was therefore no sale agreement executed. He said his contribution to the purchase price was 100% as the plaintiff did not have any means, and therefore the property was registered in his name. The development of the plot began when he was just about to leave for the Congo. While at the Congo he would send money to the plaintiff for the construction. He stated that he contracted a company to build the house, and paid for the development with his allowances from the Congo and also from loans he took from the Cooperative Bank and the Harambee Sacco. He said that he obtained materials from various sources, which included AFCO, ESL, among other places. He said that he often visited Kenya on leave, offs and compassionate time off, and therefore he was able to supervise the construction. He conceded that the plaintiff would oversee the construction on those times that he was not able to be present. The family then moved in towards the end of 2009 upon completion of the construction. He put the direct financial contribution of the plaintiff to the property at Kshs. 500, 000.00, insisting that his contribution was 99%. He testified that he contributed 100% for the acquisition of Kajiado/Kaputiei North/[...] although the property was registered in their joint names. He also stated that he was the one who provided the money for the purchase of the two plots at Kisaju, although the receipts were in their joint names, although the intent was that each of them was to get a plot. He said that each of them had a car for their own use, although he did not state how the two were bought. He said that he had possession of KBN [...]X. He said the plaintiff was a mere law clerk in a law firm and her income was not sufficient to acquire the assets that she alleged she acquired. During cross-examination, he stated that their marriage was dissolved in 2015 by court decree. He stated that the matrimonial property was acquired jointly. He said that the house on the land was for the family. He said that he had engaged a contractor to do the development, and he settled him in cash, and he had receipts and petty cash vouchers to support that. He said that the contractor was sometimes paid by the foreman. Although he conceded that the plaintiff did contribute to the construction of the house, he stated that the same could not amount to what she was claiming, saying that she did not contribute much to the house. He stated that he took a loan to put up the house. He testified that the plaintiff partially furnished the house with curtains bought from a Chinese firm, tiles, cutlery and a set of sofa seats. On the Kisaju plots, he said that he paid the deposit and the plaintiff was to clear the balance. He said that he never signed the transfer documents and did not thereafter get to know what happened with respect to them. He said that the plaintiff must have cleared the balance. He put his contribution to the Kisaju plots at 30%, while the plaintiff contributed 70%. He stated that he would be happy with the liquidation of everything once the court finds the percentages.

7. The defendant called one witness, Frederick Gicheru of Gifan Enterprises Limited. His testimony largely mirrored the averments made in his affidavit of 20th May 2016. Cross-examination did not elicit much else from him.

8. At the end of the oral hearing, I directed the parties to file and exchange written submissions. There has been compliance therewith. I have read through the submissions filed and noted the arguments made therein.

9. The law on distribution of matrimonial property upon divorce or separation is the Matrimonial Property Act, No. 49 of 2013. The relevant provisions are sections 6, 7, 13, 14 and 15 of the said Act. Section 6 defines matrimonial property to mean the matrimonial home or homes, household goods and effects in the matrimonial home or homes, or any other immovable and movable property jointly owned or acquired during the subsistence of the marriage. Section 7 defines ownership of matrimonial property by stating that the same vests in the spouses according to the contribution of either spouse towards its acquisition. Section 14 states that where matrimonial property is acquired during marriage certain rebuttable presumptions arise. Where the property is registered in the name of one spouse, it shall be presumed that the property is held in trust for the other spouse, while where it is in the joint names of the spouses it shall be presumed that their beneficial interest are equal.

10. There is also the Constitution. Article 45 thereof is on the family. Article 45(3) states that parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of marriage. This has been interpreted to mean the parties go into the marriage as individuals, but bond to form one unit, where they enjoy equal rights, and upon dissolution of the marriage they would be entitled to equal rights. Section 3(2) of the Matrimonial Property Act echoes the provision in Article 45(3) of the Constitution.

11. In *ENK vs. JNK* (2015) eKLR, I stated that when parties enter into marriage, they do so on the understanding that their union would be permanent, until death. They never contemplate dissolution thereof, and they build their lives around that notion. They then have children and begin to acquire property believing that they would be together for life. The property is acquired for the benefit and betterment of the family. It is generally regarded as family property. It is into this union then that the notion of equality is implanted by the Constitution and the Matrimonial Property Act. It is then reinforced by the Christian notion that upon marriage husband and wife become one flesh. By

extension, it would mean that whatever property one spouse acquires during marriage is intended to be shared with the other spouse. Upon dissolution of the marriage, it would follow, by virtue of the equality principle stated in Article 45(3) of the Constitution, that the estate would be shared equally between them.

12. The matter herein should be determined with the above in mind.

13. The plaintiff seeks division of three assets, two landed properties and one car. It is common ground that Kajiado/Kaputiei North/[...] is registered in the both names of the plaintiff and the defendant herein. There should be no dispute as to the respective rights of the parties regarding Kajiado/Kaputiei North/[...]. The express intention was that the same be shared equally between the two of them. Regarding the car, KBN [...]X, there is common ground that the family had two cars, one for the use of the plaintiff and the other for the use of the defendant. The defendant still has possession of the one meant for him, that is to say KBN [...] X; while the plaintiff crashed hers, sold the wreck and bought another car. I do not think, in the circumstances, that the car claimed in the Originating Summons, KBN [...] X, is available for division.

14. The contest is mainly on, Kajiado/Kaputiei North/[...], and the two plots at Kisaju.

15. Regarding Kajiado/Kaputiei North/[...], there is unanimity that the same is matrimonial property as the matrimonial home stands here. After the plot was acquired a house was developed on it. The defendant testified that the house was meant for the family, for his benefit, his children and posterity. From the material before me, it would appear that the defendant provided the bulk of the purchase price, and that he also provided the bulk of the money for the development of the house. He can be said to be the main contributor to the acquisition and development. I note that the development mainly happened when the defendant was serving abroad, suggesting that the plaintiff played a significant role in getting things moving in his absence. She was also the one taking care of the home and the children. She must have therefore contributed substantially indirectly to the development. Taking everything into account in the circumstances I would put the contribution by both parties at 50%.

16. The plaintiff has not listed the Kisaju plots in her suit, but the defendant has placed it on the table. The plaintiff acknowledges the existence of these plots and the transactions. She says she acquired them alone with her own money. There is evidence that the receipts issued by the sellers were in the names of the two parties. That would suggest that they were acquired by both jointly, or it was intended that the two would belong to both. I shall accordingly find that the two plots ought to have been listed in the suit, and should have been held at 50%. As the titles have not been availed, I shall hold that the plaintiff's interest in Kajiado/Kaputiei North/[...]be reduced by 20%, so that the same shall be shared out at the ratio of 70:30.

17. The final orders that I feel compelled to make in the circumstances are –

(a) that I declare that Kajiado/Kaputiei North/[...] is held by the parties hereto at the ratio of 50:50;

(b) that I declare that Kajiado/Kaputiei North/[...] is held by the defendant in trust for the plaintiff, and further that the same shall be shared out as between the plaintiff and the defendant at the ratio of 30:70;

(c) that KBN [...] X belongs to the defendant 100%;

(d) that the property the subject of (a) and (b) above shall be sold and the proceeds thereof shared in the stated ratios as between the plaintiff and the defendant;

(e) that each party shall bear their own costs; and

(f) that any party aggrieved by the orders that I have made hereinabove has the liberty to challenge the same at the Court of Appeal within twenty-eight (28) days of the date hereto.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH DAY OF OCTOBER, 2018.

W. MUSYOKA

JUDGE