



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 16B OF 2016 (OS)

JAO.....PLAINTIFF

VERSUS

MOOM.....DEFENDANT

JUDGMENT

1. The Plaintiff took out an Originating Summons dated 5th September, 2016 and filed on 9th September, 2016 seeking the following declarations and reliefs based, primarily, on the Matrimonial Property Act.

1) A declaration that properties listed here below are matrimonial property:

a) **LR No. Kisumu/Manyatta 'A' [...]**

b) **Kisumu/ Migosi Plot No.1 [...]**

c) **Kisumu/Kasule [...]**

d) **Motor Vehicle KBP [...] Toyota Station Wagon**

e) **Motor Vehicle KBA [...] Toyota Station Wagon**

2) That various business/shops located within Kisumu County trading under the names of **[particulars withheld]**

3) That the said properties are currently held by the Defendant in trust for the Plaintiff

4) That the properties be settled for the benefit of the Plaintiff in such proportion that is equal to that of the Defendant

5) That the Defendant be condemned to pay the costs of this application and the incidentals thereto

2. The Respondent responded by way of a replying affidavit sworn on 6th February, 2016 and filed on even date substantively denying that the Subject Property is matrimonial property.

3. Following the directions of this Court, the suit was canvassed by way of viva voce evidence with each party presenting themselves as the only witnesses.

4. The Plaintiff testified that she married the Respondent in 1999 but that they divorced in 2016.

5. The Plaintiff testified that during the subsistence of the marriage, she was in business while the defendant was and is still a civil servant and that they jointly acquired **LR No. Kisumu/Manyatta 'A' [...]; Kisumu/ Migosi Plot No. [...]; Kisumu/Kasule [...]; Motor Vehicle KBP [...]; Motor Vehicle KBA [...]** and various businesses trading under the names **[particulars withheld; [particulars withheld; [particulars withheld]** and **[particulars withheld]**.

6. The Plaintiff told court that LR No. **Kisumu/Manyatta 'A' [...]** and the two motor vehicles **KBP [...]** and **KBA [...]** registered in the sole name of the defendant were acquired during the subsistence of the marriage and that she financially contributed to their acquisition and were therefore matrimonial property.

7. In his testimony, the defendant told court that he is a **[particulars withheld]** and a businessman. He stated that **LR No. Kisumu/Manyatta 'A' [...]** was not matrimonial property having been acquired before his marriage to the Plaintiff. He further stated that the property was charged to a bank as security for a loan. Defendant stated that the Plaintiff's contribution to the acquisition of **Kisumu/Migosi Plot No. [...]** was minimal and that she was entitled to 16% of that property which is valued at about Kshs. 1.2 to 1.5 million.

8. Defendant further stated that the Plaintiff contributed Kshs.100,000/- while he contributed Kshs. 400,000/- towards the acquisition of **Kisumu/Kasule/ [...]** which is in their joint names.

9. The defendant further told court that he acquired both motor vehicles on loan and that **Motor Vehicle KBP [...]** had been attached on account of unpaid loan while **Motor Vehicle KBA [...]** was grounded.

10. Regarding the issue of businesses, the Defendant testified they initially owned joint businesses for two years after marriage after which they opened separate businesses. It was his evidence that he has interest in only two businesses registered under the names **[particulars withheld] Limited** and **[particulars withheld] Limited** and that he was one of the three directors of the said companies.

SUBMISSIONS

Plaintiff's submissions

11. It was submitted for the plaintiff that the parties businesses prospered during their marriage and that she travelled far and wide to buy goods for the businesses and managed the businesses since the Defendant was formally employed and that her contribution cannot therefore be less than 50%.

12. The plaintiff proposes that **LR No. Kisumu/Manyatta 'A' [...]** that was acquired by the Defendant during the subsistence of the marriage and **Kisumu/Migosi Plot No. [...]** and **Kisumu/Kasule/ [...]** which are jointly owned be shared on a 50:50% basis. For avoidance of conflict however, she proposed that the Defendant retains **LR No. Kisumu/Manyatta 'A' [...]**, the businesses and the two motor vehicles **Motor Vehicle KBP [...]** and **Motor Vehicle KBA [...]** while she gets the whole of **Kisumu/Migosi Plot No. [...]** and **Kisumu/Kasule/ [...]**. The Plaintiff placed reliance on ***M G N K v A M G [2016] eKLR***.

Defendant's submissions

13. Defendant on the other hand proposes to retain **LR No. Kisumu/Manyatta 'A' [...]**, the businesses and the two motor vehicles **Motor Vehicle KBP [...]** and **Motor Vehicle KBA [...]** and 84% of **Kisumu/ Migosi Plot No. [...]** and 80% of **Kisumu/Kasule/ [...]**. The Defendant placed reliance on ***P N N v Z W N [2017] eKLR***.

Analysis and determination

14. I have considered the evidence, submissions on record and the applicable law.

15. The **Constitution** and the **Matrimonial Properties Act of 2013**, protects family property and underpins the principles of fairness and non-discrimination of a spouse who has made contribution in the manner provided in the Act. **Article 45 (1) (3)** of the Constitution makes provisions regarding the rights of parties during marriage and upon dissolution and anchors the principle of "equal rights" as thus:-

"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."

15. The aforesaid Matrimonial Property Act defines with clarity 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.**

16. Ownership of matrimonial property is described under **Section 7** of the Matrimonial Property Act as:-

"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."

17. Taking all the above factors that are born out of evidence into consideration, I have will address the issues of what constitutes matrimonial property; the respective parties' contribution and their entitlement.

18. In assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness. The jurisdiction of the court is to determine a question or questions between husband and wife principally as to title to or possession of property. (See *Muthembwa Vs. Muthembwa [2002] 1 KLR page 92*).

19. Where matrimonial property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See *Kivuitu -v- Kivuitu, [1991] KLR 248*. The presumption is however, rebuttable by either party.

20. Land parcel **LR No. Kisumu/Manyatta 'A' [...]** was acquired in 2000, about one year into the marriage. It is registered in the name of the defendant. The plaintiff did not prove her contribution to its acquisition and I therefore find that she does not have any proprietary interest in the property since it does not form part of the matrimonial property.

21. The Defendant demonstrated that he solely paid in instalments the purchase price for **Motor Vehicle KBP [...]** and acquired **Motor Vehicle KBA [...]** by way of a loan from Equity Bank. There is no evidence that the purchase was made and the loan repaid from a combination of proceeds from the joint businesses. The Defendant has therefore succeeded in rebutting the presumption that the two vehicles form part of matrimonial property.

22. The existing two businesses **[particulars withheld] Limited** and **[particulars withheld] Limited** as their names confirm were nurtured from the parties joint businesses. This has been demonstrated by the testimony of the parties and the joint registration permits and bank statements tendered in evidence. I therefore hold that the two businesses form part of matrimonial property except that the Plaintiff neither controls nor benefits from them since they have now been registered as limited liability companies thereby locking out the Plaintiff from their control and enjoyment of the proceeds therefrom. Consequently, the court finds that the Plaintiff is entitled to be compensated for the loss of the two businesses.

23. Land parcels **Kisumu/Migosi Plot No.[...]** and **Kisumu/Kasule/[...]** are registered in the joint names of the parties. In the absence of evidence that either of the parties contributed more than the other, the Defendant's proposal that he is entitled to 84% of **Kisumu/ Migosi Plot No.[...]** and 80% of **Kisumu/Kasule/[...]** lacks merit and it is rejected. This court therefore holds that the two properties are matrimonial properties and each party is entitled to an equal share.

DISPOSITION

24. Taking all the above factors that are born out of evidence into consideration, it is hereby declared that:

1. a) **Kisumu/Migosi Plot No.[...]**

b) **Kisumu/Kasule/[...]**

c) **[particulars withheld] Limited and**

d) **[particulars withheld] Limited are matrimonial property.**

2. **The Plaintiff is entitled to the whole beneficial interest in Land parcel Kisumu/Kasule/[...] and ½ of half share of beneficial interest in Land Parcel Kisumu/Migosi Plot No.[...]**

3. **The Defendant is entitled to the beneficial interest in Gramarjon Investment Limited and Our Joint General Supplied Limited and ½ of half share of beneficial interest in Land Parcel Kisumu/Migosi Plot No.[...].**

4. **With regard to costs, each party shall bear her/his own costs of the case given that they are former wife and husband respectively.**

DATED AND DATED IN KISUMU THIS...1st....DAY OF....November...2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For plaintiff - Mr Odombe / Mr Nyaga

For Defendant - Ms Keguya/Ms Opondo