



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MATRIMONIAL CAUSE NO 65 OF 2017

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2003

S G W.....APPLICANT

VERSUS

D M W.....RESPONDENT

RULING

1. The applicant and the respondent got married on 25th November 2007 in [Particulars withheld]. Riruta and have three children. They are not yet divorced but stopped living together sometimes in May 2017.

2. On 31st October 2017 the applicant filed originating summons seeking declaratory orders regarding various properties supposedly acquired during the subsistence of the marriage. Together with the originating summons she filed an application dated 30th October 2017 under **Article 45(3)** of the Constitution of Kenya 2010, **sections 6(1), 7, 12(3), 14 and 17** of the **Matrimonial Property Act, Order 40 Rules 1, 2 and 4, Order 51 rule 1** of the **Civil Procedure Rules** and **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya** seeking orders that:

(a) the respondent does grant her and their two minors vacant possession of their matrimonial homes in Mlolongo, Waybridge Apartments Flat No. [Particulars Withheld] erected on LR No. [Particulars Withheld] and in Nakuru erected on LR No. Miti Mingi/Mbaruk Block No.[Particulars Withheld];

(b) the respondent does return the household goods and personal belongings belonging to her and their children back to the above mentioned matrimonial homes respectively;

(c) the respondent does grant physical ownership of the motor vehicle registration number KCK [Particulars Withheld] Toyota Fielder to her;

(d) the Court be pleased to issue interim orders for injunction restraining the respondent from alienating, selling, leasing, mortgaging, charging, transferring the following properties pending the hearing and determination of this suit:

i. LR No. Dundori/Lanet Block 11/[Particulars Withheld];

ii. LR No. Dundori/Lanet Block 11/[Particulars Withheld];

iii. LR No. Miti Mingi/Mbaruk Block 5/[Particulars Withheld];

iv. house erected on LR No. Miti Mingi/Mbaruk Block 5/[Particulars Withheld];

v. motor vehicle Registration No. [Particulars Withheld] Nissan double cabin;

vi. motor vehicle Registration No. T[Particulars Withheld];

vii. motor vehicle Registration No. KCK [Particulars Withheld] Toyota fielder;

viii. motor vehicle Registration No. KTWA [Particulars Withheld] (Tuk-Tuk);

ix. flat No. [Particulars Withheld] Waybridge Apartment erected on LR No. [Particulars Withheld] and household goods therein; and

x. shares in Safaricom and Co-operative Bank of Kenya.

(e) the respondent does share copies of the titles for LR No. Dundori/Lanet Block 11/[Particulars Withheld], L.R. No. Dundori/Lanet Block 11/[Particulars Withheld], L.R. No. Miti Mingi/ Mbaruk Block 5/[Particulars Withheld], L.R. No. Miti Mingi/ Mbaruk Block 5/[Particulars Withheld], the jointly owned land parcels in Kitengela and share certificates in Safaricom and Co-operative Bank Kenya in his possession to enable her take necessary measures to safeguard her interest;

(f) the respondent reimburses Tshs.1,195,00/= to her being half the amount solely withdrawn by the respondent for his own personal ventures, from their joint account in Tanzania;

(g) the Court to direct that proceeds from the parties joint car hire business in Tanzania be shared equally between the applicant and the respondent; and

(h) the Court does direct that the respondent shares in half the proceeds received by himself from Zanzibar Insurance Corporation being compensation for motor vehicle registration number; T [Particulars Withheld] BTM-Nissan X[Particulars Withheld] pickup with her, which formed part of their joint car hire business in Tanzania.

The application was based on the grounds that said properties were jointly acquired by the applicant and the respondent during the subsistence of their marriage and are registered in the name of the respondent for the benefit of the family.

3. The application was supported by the affidavit of the applicant dated 30th October 2017. The summary of her case was that she directly made financial contribution to the acquisition of L.R. No. Dundori/Lanet Block 11/[Particulars Withheld], L.R. No. Dundori/Lanet Block 11/[Particulars Withheld], LR No. Miti Mingi/Mbaruk Block 5/[Particulars Withheld], L.R. No. Miti Mingi /Mbaruk 5/[Particulars Withheld] and two land parcels in Kitengela Kajiado County in respect of which the documentations are in custody of the respondent; that on diverse dates between August and October 2013 she secured a loan of USD 50,000 from Kenya Commercial Bank, Tanzania and further withdrew USD 10,000, USD 10,000, USD 10,000, USD 49,411.76 respectively and purchased flat number B Block B Waybridge apartments erected on L.R. No. 13302/[Particulars Withheld] in Mlolongo where they have set up their matrimonial home; that on the 18th of July the respondent was physically violent against her and threw her and their two minor children out of the house; that the actions of eviction forced her to rent out a house which has since been a financial constraint on her part and they risk eviction; that the respondent resides somewhere else and has denied her access and possession of their matrimonial home by changing the door locks; that the respondent solely received monies from Zanzibar Insurance Corporation being compensation for T[Particulars Withheld] BTM- Nissan X[Particulars Withheld] Pick-up and refused to share the monies with her; that sometimes on 11th July 2015 she withdrew USD 2,000 and USD 3,500 respectively from her account and purchased Motor vehicle registration number KCK [Particulars Withheld] X a brown Toyota Station Wagon registered in the name of the respondent; that sometime in March 2015 she further withdrew Kshs. 400,000/= from her personal Equity Bank Account No. [Particulars Withheld] and purchased a Tuk-Tuk registration No. KTWA [Particulars Withheld] registered in the respondent's name; that in January 2015 she withdrew USD 7,000 and USD 5,300 and purchased motor vehicle registration number [Particulars Withheld] BTN to be used for their car hire business in Tanzania; that in 2012 she withdrew USD 7,900 for the purchase and acquisition of Toyota Premio Registration number [Particulars Withheld] DGC; that the respondent after evicting her and the children travelled to Tanzania and solely withdrew Tshs. 2,390,000/= from their joint account in Tanzania; that the respondent has since moved their family belongings from their Nakuru matrimonial home erected on L.R. No. Miti Mingi/Mbaruk Block 5/[Particulars Withheld] and surrendered the occupancy without her consent to someone she did not know; and that the respondent has further given stern orders to their business contact in Tanzania that all sums from the joint car hire business be deposited into his new personal account.

4. The application was opposed by the respondent through his replying affidavit dated 30th November 2017. It was his case that their marriage has since broken down due to irreconcilable differences; that he personally purchased Miti Mingi Block 5/[Particulars Withheld], Dundori/Lanet Block II/[Particulars Withheld] (MUWA) and Miti Mingi/Mbaruk Block 5/[Particulars Withheld]; that he took two loans to purchase the Miti Mingi/Mbaruk Block 5/[Particulars Withheld]; that he is not aware of the existence of Miti Mingi/Mbaruk Block 5/[Particulars Withheld]; that the two plots in Kajiado County are owned individually with each party owning a piece; that they both contributed to the purchase of their matrimonial home flat no. 3 block B, Way bridge Apartments and erected on L.R. No. 13302/[Particulars Withheld] in Mlolongo with him contributing to a tune of Kshs.2,120,000/=; that he sacrificed 4 years of his career progression and took an unpaid leave in 2012 to join the applicant in Dar-es-Salam where she had been posted for four years; that the applicant earned a salary of USD 5437 per month because of the fact that she had a family; that motor vehicle registration number [Particulars Withheld] BTM is his car that he purchased and is registered under his name hence he is not under any obligation to share the proceed from the insurance firm; that he deposited Kshs.1,000,000/= into the applicant's account on 4th February 2015 to facilitate the payment; that motor vehicle registration number KCK [Particulars Withheld] Toyota Fielder is registered under his name; that motor vehicle registration number KCM [Particulars Withheld] a Toyota RAV 4 which the applicant currently drives and which is registered under her name is a family car; that he is the sole owner of the 3 wheeler Tuk Tuk registration number KTWA [Particulars Withheld] which he solely purchased; that he solely purchased motor vehicle registration number [Particulars Withheld] BTN a Nissan Pickup which vehicle is registered under his name; that motor vehicle registration number [Particulars Withheld] DGC a Toyota Premio is his car and is registered under his name; that both applicant and respondent have withdrawn money from the Tanzanian joint account on countless occasions; that the car hire business is not jointly owned as intimated by the applicant but is solely owned by him; and that he is not aware of the existence of share certificates for Safaricom or Cooperative Bank shares.

5. The applicant filed written submissions in support of her application. I have read and considered the submissions.

6. Section 6(1) of the Matrimonial Property Act, 2013 defines matrimonial property as-

“(a) the matrimonial home or homes;

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

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

Section 14 of the Act provides that:-

“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.”

7. I note that the parties got married on 25th November 2007. They stayed together as such up to about May 2017 when they separated. From the evidence adduced by the parties there is substantial property between them. According to the applicant the properties were acquired during the subsistence of their marriage. The respondent did not dispute that the above listed properties were acquired during the subsistence of their marriage, but stated that those that are registered in his name were solely acquired by him and therefore belong to him. The issue as to who made what contribution will be determined in the originating summons. It is, however, notable to mention that under the Act contribution may be financial or non-financial. It may be direct or indirect contribution.

8. The applicant prayed to be granted access to the two matrimonial homes, Mlolongo Waybridge Apartments Flat No. [Particulars Withheld] erected on LR No. [Particulars Withheld] and the home in Nakuru, and to be granted motor vehicle Registration No. KCK [Particulars Withheld] Toyota Fielder for the use of the family. It was her case that the two properties and the said motor vehicle are in the possession of the respondent; she had custody of the two minor issues of the marriage; that the respondent chased her from the Mlolongo, Waybridge Apartments Flat No. [Particulars Withheld]; and she had been forced to incur extra costs of renting a house for herself and the minors. Though the respondent denied having chased the applicant from the Mlolongo home, he confirmed having possession of the Nakuru house for which he stated that he had employed a caretaker to look after the house. He also confirmed that he applicant had custody of the minors. The respondent also confirmed possession of the motor vehicle registration No. KCK [Particulars Withheld] Toyota Fielder, among other vehicles.

9. The parties are still married and have children. They have two matrimonial houses. For the time being, each party has to occupy a matrimonial home. The children are entitled to shelter, among other rights, and the parties have each equal responsibility over them. Each party is entitled to basic comfort, and this can only be determined by the extent of the properties that is in the hands of the parties.

10. Secondly, because the applicant is seeking declaratory orders over the properties in question, and because all these properties have to be available at the time of the determination of the originating summons, it makes sense that they have to be preserved. They will not be alienated, transferred or charged until the suit is heard and determined.

11. These are the reasons why I order that the applicant be allowed vacant possession and use of Mlolongo Waybridge Apartments Flat No. [Particulars Withheld] erected on L.R. No. [Particulars Withheld], and be provided vehicle registration number KCK [Particulars Withheld] Toyota Fielder for use, and the possession and use of the house and the vehicle be until the suit is heard and determined.

12. In those terms, the application is allowed. Costs shall abide the determination of the suit.

DATED and DELIVERED at NAIROBI this 15TH day of NOVEMBER 2018.

A.O. MUCHELULE

JUDGE