



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 41 OF 2013 (OS)

P N K.....PLAINTIFF

VERSUS

J K M.....DEFENDANT

JUDGMENT

1. The Originating Summons herein dated 11th July 2013 was filed at this registry on 15th July 2013 by the plaintiff seeking: -

(a) a declaration whether the properties movable and immovable acquired through the joint efforts of the plaintiff and the defendant during their marriage and registered in the name of the defendant, and in possession of the defendant are owned jointly by the parties, and the same are held in trust by the defendant for the benefit of the plaintiff in the ratio of 50:50;

(b) a declaration that the properties listed in paragraph 2 here below are jointly owned by the plaintiff and the defendant and the same are held in trust by the defendant for the benefit of the plaintiff;

(c) an order to restrain the defendant or his servants or agents from alienating, transferring, giving in exchange or encumbering or in any other way disposing the properties listed in paragraph 2 here below;

(d) a declaration that LR No. [Particulars withheld], Karen, Warai North Road, House No.[Particulars withheld] is the matrimonial home to which the plaintiff is entitled to a share in any event;

(e) an account from the defendant in respect of the following assets –

(i) Pieces of land from Katelembu purchased during the subsistence of the marriage that he allegedly sold and kept the proceeds of sale;

(ii) LR No. [Particulars withheld], South C Estate, House No. [Particulars withheld] – the rental income that he receives therefrom;

(iii) Land in Narok, Maasai Mara and Amboseli – the income that he receives from businesses conducted therefrom; and

(iv) Any other property –proceeds of sale from disposal of such property and or income generated as rent or from businesses conducted on such assets;

(f) an order that the properties listed in paragraph 2 be shared equally between the plaintiff and the defendant;

(g) an alternative order that the said assets be valued, their value be divided, and each party be given an option of buying out the other's share within a period of 120 days from the date of the judgment, and in default the said properties, with the exception of the matrimonial home be sold and the net proceeds of sale shared out between the plaintiff and the defendant; and

(h) an order that the registrar of the High Court be authorized to sign transfer documents in the place of the defendant or any other person holding any title on behalf of the defendant to effect all the orders of this court in favour of the plaintiff.

2. The assets in question are listed as –

a) Land at Katelembu – title numbers Athi River/Athi River Block Numbers [Particulars withheld];

b) LR No. [Particulars withheld] South C Estate, House No. [Particulars withheld];

c) LR No.[Particulars withheld], Karen, Warai North Road, House No. [Particulars withheld];

d) 20 acres of land at Maruba in Machakos County (details and title documents are said to be with the defendant)

e) 30 acres of land in Kiu in Machakos County (details and title documents are said to be with the defendant);

f) 80 acres of land in Narok County (details and title documents are said to be with the defendant)

g) 100 acres of land at Maasai Mara (details and title documents are said to be with the defendant);

h) 100 acres of land in Amboseli, presumably in Kajiado County (details and title documents are said to be with the defendant); and

i) Motor vehicles registration marks and numbers [Particulars withheld] Peugeot 504, [Particulars withheld] Peugeot 504, [Particulars withheld] Peugeot 504, [Particulars withheld] Range Rover Sports, [Particulars withheld] Isuzu pick-up, [Particulars withheld] Toyota Land Cruiser, [Particulars withheld] Range Rover Discovery, [Particulars withheld] Range Rover, [Particulars withheld] Audi A4, [Particulars withheld] tractor, [Particulars withheld] tractor, [Particulars withheld] tractor, [Particulars withheld] tractor, [Particulars withheld] tractor and [Particulars withheld] trailer.

3. The facts upon which the application is founded are set out in the affidavit sworn on 13th July 2013 by the plaintiff. She deposes that the defendant is her husband, having married him in 1979 under customary law and later under statute in 1999. She avers that there are pending divorce proceedings. They have three children together and she says she and the defendant jointly contributed to the acquisition of the property set out in paragraph 2 here above. She avers that she was a student and the defendant was working at the time they got married, but that she was receiving a student allowance from the government. She later qualified as a medical doctor and was subsequently employed. She asserts that all the assets listed in paragraph 2 hereof were acquired during the subsistence of the marriage through their joint efforts and contribution, but they were all registered in the name of the defendant save for LR No. [Particulars Withheld](IR No. [Particulars withheld], South C Estate, House No. [Particulars withheld] which was registered in their joint names.

4. She gives details as to the time and how the Katelembu lands were acquired, stating that they had intended the same to be their rural home, and that they did infant develop the same into their rural home. She claims to have had directly contributed to 40% of the purchase price for these lands, by giving money directly to the defendant but she did not have documented proof. Her indirect contribution was through

meeting the financial expenses of running the house and taking care of the defendant and the children. She also alleges to have bought some items for the house built on the land, such as curtains, kitchen items, among others. She pleads that some of the pieces of the land in Katelembu have been sold by the defendant who did not share the proceeds therefrom with her. LR No. [Particulars withheld] (IR No. [Particulars withheld]), South C Estate, House No. [Particulars withheld] was allegedly bought with a loan that was taken from the Central Bank of Kenya, where the defendant worked. The property was registered in their joint names and they moved into it in 1994 and made it their matrimonial home till 2004. The loan was apparently in the name of the defendant, but the plaintiff avers that she contributed indirectly by meeting the domestic budget.

5. She has attached a number of documents to her affidavits. There are copies of affidavits sworn by the defendant and the plaintiff's father attesting to the fact of the customary law marriage between the two parties. There is also a certificate of marriage as proof that the customary law marriage was solemnized. She has also attached copies of the certificates of birth of their three children. There is also copy of her employment document dated 13th February 1987 and copies of her payslips for diverse years, including 2001. There are also copies of documents to effect that she was licensed to practice as a medical doctor.

6. I have carefully gone through the entire record, there is no evidence that the defendant ever responded to the Originating Summons. The only affidavit on record by the defendant was sworn on 12th August 2013. The same, however, is not on the Originating Summons, but on an interlocutory application by way of Notice of Motion dated 11th July 2013. I shall nevertheless take it into account as in it the defendant has deposed to matters the subject of the Originating Summons. He concedes that the parties were originally married under customary law but thereafter had the marriage solemnized. It is his case that the marriage was a customary law one, consequently the property acquired during the marriage ought to be dealt with in terms of the principles of customary law on the matter. His position is that under customary law upon dissolution of the marriage each parties leaves with what they had personally acquired during the marriage.

7. He states that the plaintiff had not proved that he owned the property listed in her papers. He avers that the plaintiff had not demonstrated that she did contribute to the acquisition of the property listed. He says that the plaintiff has been able to demonstrate that she was working; but she did not show how she was spending her salary. He states that the plaintiff had established that he had been working throughout their marriage life and therefore he had the money to acquire the property in question. He alleges that during the marriage, he maintained the family without seeking her support, and that he bought cars for her on mortgage which she was utilizing while he was being deducted.

8. He asserts that they had established a matrimonial home at South C and not at Karen. His case appears to be that as the South C property is in their joint names so it ought to be the matrimonial home, while the Karen property is in his sole name. He states that the plaintiff is at liberty to move to the South C house. He argues that the plaintiff has produced bank statements and sale agreements to show what he had acquired but she was not able to provide documents to support her claim that she had expended some money on the same properties. He says that although the South C house was registered in their joint names the defendant had not contributed to its acquisition. He says he got the money to buy it from a loan extended to him by his employer. On the Karen property, he avers that he bought it with loan money that he got from the Housing Finance Company of Kenya (HFCK), adding that there was no contribution at all from the plaintiff. He avers that he repaid the loan through salary deductions.

9. On the acquisition of the Katelembu lands, the defendant states that the same were acquired by himself solely without any assistance from the plaintiff. He says that he either took commercial loans to acquire the properties, or he paid for them in installments. He states that he had assumed that he had lost the documents only now for him to realize that it was the plaintiff who took them. He states that as he had bought the same without support from the plaintiff, and he caused them to be registered in his name. He concedes to selling part of the Katelembu land, but submits that he utilized the money for family benefit and also to repay some of the loans he had taken. On the twenty (20) acres in Maruba, he concedes that he bought the same, but with money from his own sources and the plaintiff did not assist him in any way. For the thirty (30) acres from Kiu, he explains that he acquired the same through a cooperative society,

some he got through his father and the rest he purchased with loan money. He states that he owns no land in Narok, saying that he only leases 200 acres of land for farming purposes. He adds that he has also leased land in the Maasai Mara area, jointly with other persons. He however says that the Amboseli property is owned jointly by him and the alleged investors. On the motor vehicles, the defendant attests to have acquired all of them without any support from the plaintiff. He has detailed how he got loans from diverse financial institutions to facilitate acquisition of the said vehicles. He mentions that he also got loans to buy the plaintiff two other cars that she has not mentioned in her papers. He states that he gave her a bank card to cater for shopping for goods for their home and for fueling her car.

10. He avers that he was the one who bore the burden of paying school fees for their children from primary through to high school. He states that it was only when it came to university that the plaintiff insisted on two of the children going abroad rather than studying locally. He contests the plaintiff's contention that she footed the domestic budget and paid the outgoings such as electricity, water, among others. He denies too that she contributed in any way in the development and maintenance of the Karen house. He asserts that he bought the property solely and when they moved in everything was in good condition and there was no need for renovation. He states that the plaintiff's university stipend was not utilized for the benefit of the family. He says that the only money he recalls borrowing from the plaintiff was Kshs. 150, 000.00 when he was hard up with loans and school fees. He avers that the plaintiff applied her income for her own benefit. He states that she has acquired two houses which are still under her name, yet she has not disclosed the two to the court. He alleges too that he had bought her three vehicles that she has not also disclosed.

11. To that affidavit, the plaintiff swore a further affidavit on 18th October 2013. She asserts that she did give money to the defendant, often in cash, whenever, he asked. She was not actively involved in the actual works on account of her busy work schedule. Whenever they acquired property, the defendant would give her the documents for safekeeping. That is how she ended up with them. She denied taking them without his permission. On the matrimonial home, she states that the South C was their matrimonial home before they moved into the Karen property in 2004. She says that the defendant gave her the keys to the Karen house and told her that she could do whatever she pleased with it as it was from then on going to be their matrimonial home. She thereafter proceeded to effect certain repairs to it, which included waterproof cement, the sitting room and paint work. She reiterates that the Karen house was their matrimonial home, for after they left South C the house was rented out. She discloses that she bought an Opel Astra, a Mercedes Benz and a Toyota Runx from her own resources without any support from the defendant.

12. Only the plaintiff gave oral evidence. She testified on 23rd January 2015 and on 28th January 2016. Her oral testimony breathed life to the averments made in her affidavit in support of the Originating Summons. She then went into details on how each of the assets was acquired. The defendant did not adduce any evidence in opposition to the application, the allegations made in his replying affidavit were not tested, and the oral testimony of the plaintiff went unchallenged. I find no basis upon which I can hold that the plaintiff's case is not established.

13. I directed the parties do file written submissions. There has been compliance therewith. I have perused through the submissions and taken note of the arguments made therein. It is not disputed that virtually all the assets were acquired during matrimony. The defendant does not appear opposed to the property being shared equally, save for the Karen property which he feels should be given to him exclusively on the grounds that the plaintiff had not contributed in any way in its acquisition, or even made any contribution to its acquisition.

14. 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. 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.

15. The defendant had pleaded that Kamba customary law applied as their marriage had initially been contracted under that law, before conversion to statutory. That contention does not hold as at the time division of matrimonial property was sought the parties were in a statutory marriage. In any event division of matrimonial property is guided by the Constitution and the Matrimonial Property Act. The Matrimonial Property Act does mention, at Section 11, the consideration of customary law principles in division of matrimonial property. However, it has not been demonstrated that section 11 of the Act was of application to the circumstances of the present case.

16. In *ENK vs. JNK* (2015) eKLR, I stated that when parties enter into marriage especially of the Christian kind, 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.

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

18. From the material placed before me by both parties, it is plain that the entire estate was acquired during matrimony. There is no material which suggests that the defendant had acquired any property before he contracted marriage with the plaintiff. The defendant asserts that he acquired all the assets without any input from the plaintiff, saying that he did not know what she spent her salary on. The plaintiff on her part states that she did contribute both financially and in other ways to the acquisition of the assets, she avers that she is a medical practitioner who has been in practice for the greater part of the marriage. She says that she did give money to the defendant during the period that the assets were acquired, especially during the purchase of the Katelembu lands, that she spent money improving the Karen property, that she also took care of the domestic budget and footed the bill for education of two of the children of the marriage abroad. She says that she generally cared for the defendant and the children domestically. Much of what the plaintiff testified on was not supported by documentary proof, save for the improvements allegedly done to the Karen property. She produced invoices and receipts therefor. On her indirect contribution to the raising of the children, I do not think that there can be any contest with respect to the same. She must have taken care of the children from their infancy till adulthood. It is also common ground that she was responsible for the education of the children who schooled in Europe.

19. There is the issue that the defendant sold some of the lands in Katelembu, a fact which the defendant concedes but explains what he did with the money raised from the sales. Not much detail was given, as to which parcels were sold and the amounts involved. However, the defendant appears to have invested heavily during matrimony, and no evidence has been led to paint him as a person who was irresponsible with his resources. I am therefore satisfied by his explanation that he spent the money on the family, and there is no need for him to both account and pay the plaintiff the value of the plots sold.

20. Whereas the defendant has conceded that the assets listed in paragraph 2(a) (b) (c) (d) and (e), he states that the property said to be at Narok, Maasai Mara and Amboseli either does not exist, or it does not belong to him, or is leased out by him or is jointly owned with others. The plaintiff provided no

documentary proof that the defendant owned the said property. In the absence of such proof I do not think it would be prudent to presume that the defendant owns the same. The court should not make orders in vain.

21. The plaintiff lays claim to about fifteen cars. The defendant has stated that he had bought two cars for her, with borrowed money, which cars she has not disclosed. The plaintiff herself has said that she bought for herself four cars. I believe vehicles only become matrimonial property if they were bought specifically for the general use of the family. It is not pleaded that the vehicles listed in paragraph 2(i) hereabove were family vehicles. It would appear that each spouse had their own car or cars that were specifically at their disposal. The cars listed in the aforesaid paragraph appear to have been for the defendant, while the plaintiff had her own. I do not think justice will be served in dividing the listed vehicles as between the plaintiff and the plaintiff.

22. The issue of what is being called a matrimonial home has been raised by the plaintiff; she urges that the property could be sold for sharing purposes save for the matrimonial home. I doubt whether the issue of a matrimonial home arises here. The parties are either divorced or in the process of doing so, so, ultimately without marriage there cannot be a matrimonial home. In any event, both parties appear to reside at the Karen property, which was their last residence before these proceedings commenced. Both would be entitled to it, and from what has been placed before me, although it would appear the defendant might have toiled more for its acquisition.

23. The plaintiff prays for accounts with relation to income from the South C property and the businesses carried on in the lands at Narok, Maasai Mara and Amboseli. Regarding the South C property income, the claim for the income was not properly laid out and no evidence was laid to support it. In any event, the suit herein is for division of matrimonial property, not for recovery of *mesne profits*. The plaintiff ought to initiate a proper suit in the proper forum with respect to that claim. Regarding income from the businesses at Narok, Maasai Mara and Amboseli, the plaintiff has not pleaded that the alleged businesses were family enterprises, or that she was a partner of the defendant in them. She did not lead any evidence to establish the claim, and therefore there is no foundation to grant orders with respect thereto.

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

(a) that I declare that the assets named in paragraph 2(a)(c)(d) and (e) hereof were acquired during matrimony with the joint funds and efforts of the plaintiff and the defendant, and although the same are registered in the sole name of the defendant the same are held or registered in trust for the plaintiff;

(b) that the property named in paragraph 2(b) hereabove is registered in the joint names of the parties and I hereby declare that either party is entitled to equal share thereof;

(c) that I order that the assets mentioned in (a) above shall be shared equally between the plaintiff and the defendant;

(d) that the parties have six (6) months to agree on and share out the assets above, failing which the same shall be sold and the proceeds of sale shared equally between them;

(e) that the order in (d) above shall not apply to the matrimonial home at Karen, the order with respect to it is that the defendant shall have the option of buying out the plaintiff within six (6) months of this order, failing which the option shall be exercisable by the plaintiff within the next six (6) months following, failing which the property shall be sold and the proceeds shared equally between the parties; and

(f) that there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF JANUARY, 2017.

W. MUSYOKA

JUDGE