



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 22 OF 2013 (OS)

JACKLINE MINAYO SHAKAH.....PLAINTIFF

VERSUS

DAVID MUKAVALE MWILITSA MAKANI.....DEFENDANT

JUDGMENT

1. The Originating Summons herein dated 24th April 2013, filed herein on 15th July 2013, by the plaintiff seeks, in the main, three orders:-

- (a) A declaration that the property known as S/Kabras/Shamberere/2053, together with any developments on it, is matrimonial property;
- (b) A declaration that the said property was acquired by the joint funds and efforts of the parties during matrimony, although registered in the name of the defendant, and was therefore jointly owned in equal shares by the parties; and
- (c) An order that the said property be sold and the net proceeds be shared equally between the parties hereto or in such other manner as the court may deem just.

2. The facts upon which the application is founded are set out in the affidavit sworn on 24th April 2013 by the plaintiff. She deposes that the defendant is her former husband, having married him in 1995 under customary law and later under statute in 2000. She avers that the marriage was dissolved by a decree made on 20th December 2012. They have two children together and jointly contributed to the acquisition of the property set out in paragraph 1 here above. She avers that both parties were in employment. She asserts that she attended to the home as a wife of the defendant and as a parent of their children, and that she contributed financially towards the welfare of the family. Later the defendant moved to another town and she was left paying rent for the family house in Nairobi, and paying school fees for the children and meeting their daily needs. She states that she and the defendant acquired the subject property in 2006, and the same was registered in the name of the defendant. She asserts that she contributed a sum of Kshs. 120,000.00 to the said purchase. She had also bought materials for development of the property but the marriage fell apart before the materials could be utilized and the defendant ferreted away the said materials.

3. She has attached to her affidavit copies of her payslips to show that she paid rent for the family house in Nairobi. There are receipts from Riruta Academy and Embakasi Girls Secondary School and bank slips as evidence that she paid school fees for the children. There also other receipts to demonstrate that she bought school uniforms, books and related items towards meeting the other school needs of the children. There are receipts too from supermarket stores as evidence that she paid for the family's subsistence and

upkeep. There is a copy of a bank statement showing that on 27th October 2006 she withdrew a sum of Kshs. 37,000.00, which she alleges went into the purchase of the subject property.

4. Upon being served, the defendant swore an affidavit on 22nd October 2013. He avers that the parties' marriage was dissolved by a decree pronounced on 20th December 2012, which was made absolute on 30th March 2013. He argues that the decree being sought herein relates to division of matrimonial property, however as at the date the papers were filed in court the parties had ceased to be married. He asserts that the subject property was not acquired through contribution of the plaintiff. He says that he bought it with money that he had raised from sale of his ancestral land. He allegedly sold the land to his brother. He alleges that he subsequently sold S/Kabras/Shambere/2053 to a third party. He states that the plaintiff bought her own land adjacent to S/Kabras/Shambere/2053 and that she had also bought another property in Ruai which he was not claiming. He denies that the plaintiff gave him any money as her contribution to the purchase of the subject land. He concedes that they lived in a house in Nairobi provided by the plaintiff's employer.

5. He has attached documents to his affidavit. One is an agreement between him and his brother, Jesse Lumumba Makani, from whom he borrowed a sum of Kshs. 350, 000.00, allegedly to purchase land of his own. The understanding was that the defendant would forgo his entitlement to a share of his father's estate. He has also attached a copy of the affidavit drawn in support of the petition lodged to the estate of the defendant's father in Kakamega HCSC No. 442 of 2012. There are also copies of documents showing that the defendant was paying school fees for the children.

6. The matter was disposed of orally. The plaintiff testified on 5th February 2015 and called two witnesses, the seller and one of the persons who were witnesses to the sale. It was asserted that the sale was initiated by the plaintiff, who was introduced to the seller by her colleague at work. The plaintiff asserted that she raised the initial deposit and that she is the one who initially negotiated with the seller.. According to the seller the sale transaction was actually carried out between him and the plaintiff. .

7. The defendant testified the same day. He explained that the need to buy the property arose after the plaintiff indicated that she was unwilling to live with his parents, and wanted the parties to acquire a property of their own. So he asked a parent of a child in a school where he was working to identify a property for him to buy. She got one. He borrowed money from his brother to buy the same. He stated that his brother was to be compensated with the defendant's share of the ancestral land. He insisted that the property was not matrimonial property at all. He asserted that he was the one who bought the land and that he was the one who negotiated with the owner. He asserted that in his culture women to not do such things. He insisted that the plaintiff did not contribute a dime to the acquisition of the property. He said the payment was in installments.

8. At the conclusion of the trial, it was directed that the parties do file written submissions. Both sides have complied with the directions. I have read through their written submissions and noted the arguments made in both sets of written submissions.

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. 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. Section 3(2) of the Matrimonial Property Act echoes the provision in Article 45(3) of the Constitution.

10. It is common ground that the property in question was acquired during matrimony. That is not disputed. What is disputed is whether the plaintiff contributed to its acquisition. I have noted the oral testimonies of the parties and the witnesses. None of them produced a copy of the sale agreement in respect of the subject property. I therefore have no material upon which I can determine as to who, between the two parties, was actually actively involved in the actual sale. I can only go by the word of the one party against the other. A copy of the sale agreement in my view would have settled the matter.

11. The defendant raised the issue that the property in question was not matrimonial property at all. His case being that he had to forgo his rights to the ancestral land that he was to inherit from his father's estate. That appears to suggest that the said land was, by extension, ancestral or inherited property, and therefore, by dint of section 5 of the Matrimonial Property Act, not part of matrimonial property. I am not persuaded by that argument. The subject property did not form part of the estate of the deceased. It, therefore, could not be ancestral or inherited land. In any event, from the papers lodged herein by the defendant, the estate of his deceased father had not been distributed by then for the succession cause was not initiated until 2012, and the defendant has not even availed a copy of certificate of confirmation of grant as evidence of the distribution of his father's estate. Even if the money used to acquire the property was raised from sale of ancestral property that by itself would not make the property bought inherited property. Once the holder of ancestral or inherited land disposes of it by whatever means in exchange for another property, the other property does to become ancestral nor inherited property. At least, the defendant has not pointed me to any legal proposition to that effect.

12. I am convinced from the material before me, that the plaintiff herein did contribute to the acquisition of that property both financially and indirectly. She is a mother of two children. The defendant has not denied that she cared for these children and she kept house. She took care of the rent. There is contest on the issue of who paid school fees, but the material before me suggests that both parents did participate in the education of their children.

13. On the issue of the validity of the suit, given that the same was filed after the divorce decree had become absolute, is answered by the provisions of section 7 of the Matrimonial Property Act. The said provision states that matrimonial property "shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."

14. The final orders that I feel compelled to make in the circumstances are:-

(a) that I declare that the property known as S/Kabras/Shamberere/2053, together with any developments on it, is matrimonial property;

(b) that I declare that the said property was acquired by the joint funds and efforts of the parties hereto during their marriage, although registered in the name of the defendant, and was therefore jointly owned in equal shares by the parties;

(c) that I hereby order that the said property shall be sold and the sale proceeds shared equally between the plaintiff and the defendant;

(d) that should it turn out that the property has already been sold and transferred to a third party the defendant shall pay to the plaintiff the equivalent of one half of the value of the said property at current market rates; and

(e) That the plaintiff shall have the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF FEBRUARY, 2017.

W. MUSYOKA

JUDGE