



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

ORIGINATING SUMMONS NO. 1 OF 2012

A alias A M M SAPPLICANT

VERSUS

R M KRESPONDENT

RULING

1. In the Originating Summons herein dated 20.1.12, Ag alias A M M S the Applicant seeks in the main, the following:

a. A declaration that the below listed properties are owned jointly by the Applicant and the Respondent:

- i) Kiembeni house and Plot No. 3642 (Original No. 161/7) Section II MN;
- ii) Matrimonial house built in Machakos in 1999-2000;
- iii) Plot in Machakos bought from Henry Muthoka Mulei in May 2005 for Kshs. 500,000/=;
- iv) Plot in Athi River bought in 2006;
- v) Plot No. 173/II/MN near Turkey Base;
- vi) Subdivision No. 6111 (Original No. 212/4) Section I MN Utange;
- vii) Motor vehicle registration no. KAS 392W;
- viii) Motor vehicle registration no. KAU 322C;
- ix) Plot bought from Mrs. John Kauondo Mulei in May 1999 for Kshs. 100,000/=.

b) An order for division of the above properties and apportionment of the same between the parties hereto in such percentages as the Court deems fit.

c) An order that the above properties be sold and the net proceeds be shared equally between the parties.

d) An order that the Respondent do execute necessary documents of transfer of the Applicant's

portion in the above properties and in default, the Deputy Registrar or other official execute the same.

e) In the event that any property has been transferred to a third party that the Respondent does account for the proceeds therefrom for equal division between the parties.

2. The parties herein got married under Kamba customary law in April 1999. Thereafter their marriage was solemnized on 14.12.02 at the A.B.C. Masaku in Machakos. The marriage was blessed with one child D M M born on 29.10.00. The marriage experienced difficulties and the parties are presently divorced. The Applicant now seeks a determination of her rights in the above properties and her share therein.

3. By an order of this Court dated 19.2.13, the Respondent was restrained from evicting or interfering with the Applicant's occupation of the matrimonial home on Plot No. 3642 (Original No. 161/7) Section II MN. He was also directed to provide an account of the property acquired since the parties married in 1999 under Kamba Customary Law. The Respondent was also directed to provide an account of the proceeds of sale for the following properties:

- a) Plot in Machakos bought from H M M in May 2005
- b) Plot No. 173/II/MN near Turkey Base;
- c) Subdivision No. 6111 (Original No. 212/4) Section I MN Utange;
- d) Motor vehicle KAS 392W;
- e) Motor vehicle KAU 322C;

On her part, the Applicant was ordered to account for proceeds of sale of motor vehicle KAS 240D.

4. The Originating Summons is supported by Applicant's Affidavit sworn on 20.1.12. In her Affidavit the Applicant states that the properties claimed were acquired during their marriage and that she contributed both directly and indirectly to the acquisition and development of the same. She also took care of and continues to take care of the physical, emotional financial and psychological needs of the child. The Respondent does not pay maintenance in spite of a court order that he does so. She also states that she was a good companion to the Respondent and was always there for him as a dutiful wife.

5. That the Respondent sold the family cars in 2005 and the plot at Wema Centre in 2009. That he intends to sell the properties thereby depriving the Applicant of her interest therein and leaving the Applicant and their child destitute. She continues to use her money to buy household goods, food, clothes, paying workers and utility bills. She argues that she is entitled in law and equity to a share in the said properties. She annexed copies of various documents to support her claim.

6. The Summons is opposed by the Respondent who filed a Replying Affidavit sworn on 17.11.2014. He concedes that he married the Applicant under Kamba customary law and later under statute. He however denies cohabiting with the Applicant before the marriage. He avers that the properties sold were sold with the full knowledge of the Applicant. He opposed the Applicant's claims over the suit properties.

7. In their testimony, the parties vehemently articulated their respective opposing positions. The evidence on record shows that the parties got married in April 1999. In his affidavit sworn on 9.2.01, the Respondent states that he got married to the Applicant under Kamba Customary laws and that since then they have lived together as husband and wife and have one child. The cutoff date for purposes of determining when properties were acquired is therefore taken to be April 1999. I shall consider each of the properties individually.

8. While called upon to determine division of matrimonial property upon the dissolution of marriage, the Court is enjoined to consider the provisions of Article 45(3) of the Constitution which stipulates:

“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”.

At the dissolution of marriage, both parties enjoy equal rights. In relation to division of matrimonial property, the phrase “equal rights” does not however mean a 50:50 sharing of matrimonial property. Rather it means that parties are entitled to whatever portion of the matrimonial property they deserve notwithstanding that the property is registered in the name of one spouse. As Lord Morris stated in Peit v Pettit [1970] at pg 798

“The question before the Court is “whose is this?” rather than “to whom shall this be given?”

9. With the enactment of the Matrimonial Property Act, the decision in **Peter Mburu Echaria –vs- Priscilla Njeri Echaria [2007] eKLR** that entitlement to matrimonial property must be based on monetary contribution is no longer good law. Section 2 of the Act defines contribution as:

“contribution” means monetary and non-monetary contribution 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;”

10. Plot No. 3642 (Original No. 161/7) Section II MN

The Applicant contends that Plot No. 3642 (Original No. 161/7) Section II MN, the matrimonial home, was acquired during coverture. She claims that she identified the plot. Both parties contributed towards the acquisition and development of the plot from their savings. At the time, the Applicant worked at Surgipharm Medisel Kenya Limited as a medical representative and she attached her pay slips. Initially she built poultry houses which she demolished in September 2003 to pave way for construction of the matrimonial home. The Applicant denies that the Respondent obtained a loan to develop the property. Construction commenced in 2002 and they moved into the house in December 2003 before construction was completed. She claims that she lives in this house and has never moved out and that she pays all the utility bills.

11. The Respondent on the other hand claims that he solely acquired the property in 2002 before marriage and for that reason the same is not matrimonial property. He avers that he constructed the house himself from a loan he took from Commercial Bank of Africa which he services himself. That the property is charged to the Bank. The Respondent annexed a letter dated 19.1.12 from Quest Holdings Limited giving him 14 days to pay the amount owed to the bank. That there was no express agreement between the parties that the property shall form matrimonial property and that is why he repays the loan himself. In his testimony however, he states that the loan was taken to construct a perimeter wall around the property.

12. From the evidence, this property was acquired in 2002, well into the marriage of the parties herein. Although the Respondent claims that the property is charged to Commercial Bank of Africa, to secure the loan he took to develop the property, the evidence he produced shows that the loan is unsecured. The letter from Quest Holdings Limited demands payment by him of “KES 437,771,08 (“Debt”) plus interest in respect of the Unsecured Loan, obtained to develop plot number 3642 MN II, Mombasa (development loan)...”.

13. Section 2 of the Matrimonial Property Act defines matrimonial home as:

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;

14. From the material placed before me, I am satisfied that this property is where the parties lived as husband and wife. It is therefore the matrimonial home as per the definition in Section 2 of the Act. Being the matrimonial home, this property is matrimonial property as defined in Section 6(1)(a) of the Act which provides:

(1) “For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(b) ...

15. This property is registered in the name of the Respondent, (the copy of title produced confirms this). There is a presumption that the same is held in trust for the Applicant as stipulated in Section 14(a) of the Act.

“14. Presumptions as to property acquired during marriage

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;

The above stated presumption is rebuttable. However, the Respondent has not produced any evidence to rebut the presumption that he holds the property in trust for the Applicant.

16. Matrimonial house built in Machakos in 1999-2000;

The Applicant has claimed that the Respondent’s father showed them a portion of land upon which to build their matrimonial home. They built the house together in 1999-2000. She claims she bought furniture from Mombasa for the house which remains in the house to date. She however stated that she got her first employment towards the end of 2000 and started working in 2001. The Respondent states the house is built on his father’s property who inherited the same from his own father. That the parties were not together when construction of the house was completed. He was living and working in Tanzania and would send money to his father for construction. The Respondent claims that the title to the property is in his father’s name and may not be sold.

17. Section 5 of the Act provides

“Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property”.

18. The Applicant has not availed any proof that the house was built during marriage or that she had any income from which she contributed to the construction of the same. She had just finished school and was not in employment during construction of the house. Her testimony is that she reared chicken on the Kiembeni plot which was acquired in 2002 after completion of the house herein. Further, no title was produced to show that the property is in the Respondent’s name. It is trite law that he who alleges must prove. In the absence of that proof, then under the provisions of Section 5 of the Act, this property does not form part of matrimonial property. This is further buttressed by the finding of Omolo, J. (as he then was) in the case of Gathiya Essa v. Mohamed Alibhai Essa (CA No 141 of 1998), where he opined:

“...when a woman gets married to a man who already has property registered in his sole name, the fact of marriage alone cannot by itself confer any rights over such property to the woman.

Nor would the act of marriage alone confer on the man any property rights over that of which the woman is the registered owner at the time of marriage.”

19. Plot in Machakos bought from H M M in May 2005

The Applicant states that the above property (Plot 2681) was purchased in 2005. She produced an exercise book in which the agreement was recorded. She claims that the purchase of the land was successfully completed. The Respondent insists that the purchase was not completed. He states that it was decided at a family meeting that the transaction should be reversed as M who is his uncle had sold all his property. The purchase price is yet to be refunded.

20. I have looked at the agreement which indicates that, the property was purchased in instalments from April 2005 to 10.9.11 when the final balance was paid. The agreement shows that M received the instalments from both the Applicant and the Respondent. No record of the family meeting was produced. It is remarkable that the Respondent ensured that the purchase was reduced in writing in the form of an agreement yet the reversal of the agreement was not documented to secure the refund of the purchase price. The onus was on the Respondent to prove that the purchase of this property was reversed. In the absence of evidence to disprove the successful purchase of this property, I do find that from the available material, the property was purchased by the parties and the same is matrimonial property. This property was purchased during the subsistence of the parties' marriage in the names of the spouses jointly. Section 14(b) of the Act provides:

Where matrimonial property is acquired during marriage—

(a) ...

(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

21. This property was purchased during the subsistence of the parties' marriage in the names of the spouses jointly. Accordingly, under Section 14(b) of the Act, the beneficial interests of the parties therein are presumed to be equal. This presumption has not been rebutted by evidence to the contrary.

22. Plot in Athi River bought in 2006

The Applicant's case regarding this property is that the parties were to purchase the property together but the Respondent proceeded without her and purchased the same on his own. She avers that she contributed cash towards the purchase of the property and even farmed and planted trees thereon. She states that the sale was completed but that the Respondent did not show her the documents in relation thereto. She further states that she does not have proof of purchase of this property. The Respondent denies owning this property and further states that the Applicant may have the same if she insists that it does exist. This Plot is described as "Plot in Athi River". No other particulars have been provided such as Plot number, acreage, exact location, purchase price, etc. The Applicant states that she made cash contributions. She however does not state how much cash she contributed towards the purchase. No material has been placed before this Court to assist in making any finding regarding this property.

23. Plot No. 173/II/MN near Turkey Base

The Applicant claims that she contributed Kshs. 47,000/= towards the purchase of this property which the record shows was bought for Kshs. 100,000/=. She avers that this property was sold by the Respondent for Kshs. 260,000/=. She got to know about the sale when she stumbled upon transaction documents and they did not have her name. She produced a copy of an agreement dated 30.5.09 between the Respondent and one S N K in which the Respondent acknowledges receipt of the said sum. The Respondent claims they had agreed to sell Plot No. 137/II/MN near Turkey Base to offset her loan with Kenya Women Finance Trust., which is denied by the Applicant. No evidence to this effect was however produced. The Applicant's contribution was also not disproved.

I do find that the property is matrimonial property. The Respondent sold the property and should account for the proceeds of sale.

24. Subdivision No. 6111 (Original No. 212/4) Section I MN Utange

The Applicant states that this property was purchased from Marchet Auctioneers (K) Ltd. From the copy of agreement on record dated 2.9.04 the purchase price was Kshs. 200,000/=. There is a receipt acknowledging Kshs. 200,000/= from the Respondent issued by Marchet Auctioneers (K) Ltd on 2.9.04. The Respondent avers that his employer had granted him a loan to buy this property. However, the sale fell through. He got a refund and he returned the money to his employer. The Respondent has however not produced any evidence to buttress his claim that the transaction fell through and that he got a refund. Consequently, in the absence of proof to the contrary, I do find that this property belongs to the Respondent. Is the Applicant entitled to the same? Section 7 of the Act provides:

“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.”

25. Although the Applicant has not produced any evidence of her monetary contribution there is no doubt that she made non-monetary contribution in the form of child care and companionship to the Respondent. Consequently, I do find that this property vests in the parties according to their contribution.

26. Motor Vehicles KAS 392W and KAU 322C

The Applicant states that KAS 392W was purchased in 2004 and she used it for her job as a medical representative. KAU 322C was purchased in 2005 and was used by the Respondent. Both vehicles are registered in Respondent's name. She claims that the Respondent later sold both vehicles. She produced an agreement for sale of KAS 392W for Kshs. 390,000/=. The Respondent states that the vehicles were acquired for purposes of sale and were sold with the Applicant's knowledge. He avers that KAS 392W was bought through a Sacco loan that he took and top up from his employer. He further states that the proceeds of sale of KAS 392W were used as a top up the purchase price of KAU 322C. The proceeds of sale of KAU 322C were used to start a rice business for the parties. The Respondent does not however state for how much he sold KAU 322C. He claims that they bought KAS 138A for marketing the business and KAS 240D for distribution. When they parted ways however, the Applicant took the cars and the business.

27. The Applicant states that she borrowed Kshs. 400,000/= from Standard Chartered Bank and purchased motor vehicle KAS 240D. She used the vehicle for her work until 2007 when she sold it for Kshs. 425,000/= and purchased motor vehicle KAS 138A. She sold this vehicle in 2012 for Kshs. 230,000/=.

28. Plot bought from Mrs. J K M

The Applicant claims that this is one of the matrimonial properties. The Respondent states that he does not know anything about it. No material was placed before me to make any finding thereon.

29. In the result having evaluated the evidence and the law relevant in this matter, I do make the following orders:

a) Plot No. 3642 (Original No. 161/7) Section II MN though registered in the name of the Respondent is hereby declared to be jointly owned by the Applicant and the Respondent. I further direct that the same be sold and the proceeds thereof, after deduction of outstanding loan borrowed by the Respondent be shared equally by the parties.

b) Plot in Machakos bought from H M M is hereby declared to have been acquired through the joint efforts of the Applicant and the Respondent and the same shall be shared by the parties equally. In

the event that parties fail to agree on the sharing in the next 6 months then the same shall be sold and net proceeds of sale shall be shared equally between the parties.

c) Subdivision No. 6111 (Original No. 212/4) Section I MN Utange is hereby declared to have been acquired through the joint efforts of the Applicant and the Respondent and the same shall be shared by the parties equally. In the event that parties fail to agree on the sharing in the next 6 months then the same shall be sold and net proceeds of sale shall be shared equally between the parties.

d) Plot No. 173/II/MN near Turkey Base is hereby declared to have been acquired through the joint efforts of the Applicant and the Respondent. The Respondent shall pay to the Applicant the sum of Kshs. 130,000/= being 50% of the proceeds of sale of within 90 days from the date hereof.

e) Motor vehicle registration nos. KAS 392W, KAU 322C, KAS 240D and KAS 138A are hereby declared to be jointly owned by the Applicant and the Respondent. I direct that the Respondent accounts for the proceeds of sale of KAU 322C and pay to the Applicant 50% thereof. I further direct that the Applicant pays to the Respondent the sum of Kshs. 115,000/= being 50% of the sale proceeds of KAS 138A.

f) Each party to pay own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 31st day of March 2017

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**