



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT NO. 1 OF 2011 (OS)
IN THE MATTER OF THE MATRIMONIAL CAUSES ACT AND
IN THE MATTER OF THE MATRIMONIAL PROPERTY

BETWEEN

I A O.....PLAINTIFF

AND

S O N.....DEFENDANT

JUDGMENT

1. The plaintiff and defendant solemnised their marriage on 27th December 1992. They were blessed with three children. The marriage was dissolved by a decree of this court made absolute on 16th June 2010 in **Kisumu High Court Divorce Cause No. 14 of 2008**. The plaintiff filed the Originating Summons dated 16th December 2010 seeking division of matrimonial property. The suit was filed prior to the enactment of the **Matrimonial Property Act, 2013** (“the **MPA**”) and although the plaintiff did not specifically refer to it, the law applicable law at the time was **section 17** of the **Married Women’s Property Act, 1882** (“the **MWPA**”).

2. In the originating summons the plaintiff prayed for a declaration that an immovable property known as **South C House No.** [particulars withheld] **situate on LR No.** [particulars withheld] (“the South C House”) bought by the defendant and the plaintiff using their joint funds and registered in the name of the defendant is matrimonial property and is jointly owned by both the plaintiff and defendant. She also sought a declaration that motor vehicle registration number [particulars withheld] (“the motor vehicle”) bought and maintained by both parties’ contribution is jointly owned by the parties.

3. Both parties filed affidavits and witness statements in support of their respective positions which they adopted in their testimony. They were cross-examined on the contents of their respective depositions and witness statements. After hearing the advocates filed written submissions.

4. The plaintiff’s case was that during subsistence of the marriage they jointly acquired a property where they constructed the South C House from their joint savings and a personal loan she obtained from the Co-operative Bank. She produced an application to the bank dated 26th February 2004 for Kshs. 300,000/- for development. She applied for a further loan by an application dated 1st August 2005 for Kshs. 280,000/- for house improvement. They lived in the house until May 2009 when she claimed that she was chased away from the house. In addition, the plaintiff claimed the motor vehicle which she said was purchased with their joint funds.

5. The defendant's case was that he purchased the South C House through a loan of Kshs. 1.8 million from his employer. After purchasing the empty plot, he constructed a house and moved with the family in 2002. He denied knowledge of any loans taken by the plaintiff from Co-operative Bank for development of the house. He told the court in cross-examination and re-examination that the plaintiff took the loans to purchase another property in Ruai. He also stated the motor vehicle [particulars withheld] was bought as a family car but registered in the name of their adopted son, K M. The defendant stated that the plaintiff renounced her right to claim any property in event of the divorce in a handwritten agreement dated 3rd December 2007 and that she did not contest the divorce in her answer to petition.

6. From the evidence, two issues fall for consideration. First, whether the plaintiff renounced her right to claim any matrimonial property after separation and divorce. Second, if not, whether the plaintiff is entitled to any part of the South C House and motor vehicle.

7. On the first issue, the handwritten agreement dated 3rd December 2008 stated in part, as follows;

This is to confirm that I I A O want to divorce my husband S O N with the following condition agreed between the two of us.

I. That I will not claim any property from him whatsoever after I leave.

The above agreement is written by I A O. This agreement should be signed by both parties, to signify their acceptance of the details with two witnesses.

8. When the agreement was put to the plaintiff in cross-examination, she admitted that she signed the agreement but added that she was forced to sign it. For an agreement to be valid it must satisfy formal and substantive validity. I have looked at the agreement and while I agree it is capable of amounting to a renunciation of rights, the agreement was not witnessed by the two witnesses as required hence I find that it was not a valid agreement capable of amounting to a renunciation of her interests in the matrimonial properties. I further hold that the Answer to Petition filed in the divorce cause could not amount to renunciation, as it was limited to agreeing to the divorce rather than renouncing any interest in the matrimonial property, as the issue was not subject of the divorce cause.

9. I now turn to the second issue whether the plaintiff is entitled to a share of the two properties. Since the promulgation of the Constitution in 2010, the law regarding division of matrimonial property has undergone a transformation. Both parties were on separate parts of the divide of applicable law in their submissions. The plaintiff's case was predicated on the application of **Article 45(1)(3)** of the Constitution which states that parties to a marriage are entitled to equal rights at the time of marriage, during and at the dissolution of the marriage. Counsel referred to *dicta* in case of **RMM v TSM KSM CA Civil Appeal No. 7 of 2013 [2015]eKLR** to support the proposition that the properties acquired during marriage should, according to the Constitution, be shared equally.

10. The defendant's case was that the plaintiff, apart from renouncing her rights to the matrimonial property, was not entitled to any part of the properties, as she did not make any contribution to its acquisition and improvement during subsistence of the marriage. His case was based on the pre-Constitution principles for the division of matrimonial property established in **Echaria v Echaria [2007] 2 EA 139 [2007]eKLR** where the Court of Appeal held, inter alia, that *only a wife's financial contribution, direct or indirect, would be considered as contribution to matrimonial property and that non-monetary contribution, like performance of domestic duties, does not count towards determining the contribution of the wife towards the acquisition of the property (see also Francis Njoroge v Virginia Wanjiku Njoroge [2013] eKLR)*. The defendant's case is that the plaintiff failed to prove that she contributed financially, directly or indirectly, to the purchase of the South C House and the motor vehicle.

11. This suit was filed on 17th January 2011 after the coming into force of the Constitution but before the enactment of the **MPA** which is enacted pursuant to **Article 68(3)(iii)** of the Constitution. Since the **MPA**

was enacted in 2013, it does not apply to these proceedings, as it does not have retrospective effect.

12. In my view, the provisions of **Article 45** of the Constitution apply to this case and in so holding I am guided by ***Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes MSA CA Civil Appeal No.127 of 2011 (UR)*** where the Court of Appeal applied the provisions of **Article 45(3)** of the Constitution to a cause of action accruing before the promulgation of the Constitution and held that:

The new Constitution is expected to re-shape the legal landscape. A positive feature of this new Constitution is that it has the principles of equality and social justice woven through it. It places an obligation on all persons to live up to the national values set out in Article 10(2) which include sharing, equity, social justice and protection of the marginalized. Having said that, there are specific articles that deal with women's property rights. Article 45(3) of the Constitution provides that the 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. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends.

13. The Court further observed that;

Having found that the right to equality is inherent and inalienable to all human beings, it matters not that the cause of action accrued before the current constitutional dispensation. We therefore do not find favour with the defendant's submissions to the contrary.

14. In the more recent case of ***Peter Njuguna Njoroge v Zipporah Wangui Njuguna NRB CA Civil Appeal No. 128 of 2014 [eKLR]***, the Court of Appeal emphasized the equality principle of the Constitution. In that case, the suit was filed before the promulgation of the Constitution and therefore the governing law and controlling decision were **section 17** of the **MWPA** and ***Echaria v Echaria (Supra)*** respectively. Writing for the majority, Waki JA., held that **section 17** of the **MWPA** should be construed in accordance with **section 7 (1)** of the **6th Schedule** of the **Constitution** which provides:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with this Constitution.

15. The learned Judge concluded that:

It seems to me that each case must be examined on its own facts particularly where retrospectivity would affect accrued rights. Generally, however, the Constitution ought to be given a broad and purposive interpretation that enhances the protection of fundamental rights and freedoms. The right to equality, for example, is inherent and inalienable to all human beings. It would therefore matter not that the cause of action accrued before the current constitutional dispensation. In sum, I do not fault the High Court in this matter for seeking guidance of the Constitution 2010 and the Covenants which Kenya has ratified to inform its application of Section 17, MWPA.

16. I would add that although the Court of Appeal recognised the principle of equality under the Constitution in ***RMM v TSM (Supra)***, it upheld the decision of the High Court grounded on pre-2010 case law on the ground that the suit was filed in 2002 before the Constitution came into force. It is also apparent from that case that the Court's attention was not drawn to **section 7(1)** of the **6th Schedule** of the Constitution. In summary the Constitution recognizes equality of spouses within a marriage and has laid to rest the principles enunciated in ***Echaria v Echaria (Supra)***. I now turn to the facts of the case.

17. It is not in dispute that the South C House was purchased in 2001 from Kuguru Food Complex Limited while the parties were married. The defendant produced an offer for sale dated 24th April 2001 and an agreement for sale between him and the vendor dated 21st March 2001 for the sum of Kshs. 725,000/-. The defendant also produced cash sale receipts from the vendor dated 21st March 2001 and 7th

August 2001 confirming that he had paid the entire purchase price. A letter dated 23rd February 2011 from the defendant's employer, [particulars withheld], to their lawyers confirmed that he had repaid the loan and authorized them to release the title documents to him. These documents show that the defendant purchased the plot from loan proceeds from his employer.

18. In her founding affidavit sworn on 16th December 2010, the plaintiff stated that after the house was bought, they constructed the house from their savings and loans she took from the Co-operative Bank. The two loans were taken in 2004 and 2005 respectively and the purpose was stated to be for development and home improvement respectively. In my view, these loans were likely taken by the plaintiff to assist in construction and improvement of the house. I reject the defendant's testimony that the loans were intended for development of the Ruai Plot. The defendant initially pleaded ignorance of the loan but revealed that the loan was likely for the Ruai Plot, a matter which had never been raised in all the previous depositions and witness statements. I am more inclined to believe the plaintiff's testimony when she stated that she assisted and contributed to construction and improvement of the house as she was working at the time. At that time the parties were still married and living together and there is no indication that they were having marital problems. I heard both parties testify and the bitterness and recriminations that led to their separation was still evident and I got the distinct impression that both parties were economical with the truth. The duty of the court, though, it to consider the evidence before it and make findings in light of applicable principles. I therefore find and hold that the made direct contribution to amounting to Kshs. 580,000/- by taking out two loans for the construction and improvement of the house. The plaintiff also made indirect contribution as a wife taking care of the children and supporting her husband.

19. Since the property was purchased and improved during marriage, I find and hold that there is no reason why the plaintiff should not be awarded 50% of the value of the **South C House No.** [particulars withheld] **situate on LR No.** [particulars withheld]. Although the plaintiff claimed rental income from the property, I am far from satisfied that the property was rented out hence I decline to order accounts for the rent.

20. The evidence regarding the motor vehicle is that the plaintiff paid the insurance premium for a specific year. The motor vehicle is registered in the name of a third party who was not a party to this suit hence I cannot make an order in that respect.

21. In conclusion, I make the following orders;

(a) I declare **South C House No.** [particulars withheld] **situate on LR No.** [particulars withheld] is matrimonial property and that the plaintiff is entitled to a 50% share thereof.

(b) That the property shall be valued within **ninety (90) days** and sold thereafter and the proceeds shared equally between the plaintiff and the defendant. The costs of valuation shall be shared equally.

(c) **In the alternative**, either the plaintiff or defendant shall be at liberty to buy out the share entitlement of the other should they deem fit.

(e) Each party shall bear its costs.

(f) Either party shall be at liberty to apply for further and other orders.

DATED and DELIVERED at KISUMU on this 13th day of March 2017

D. S. MAJANJA

JUDGE

Mr Ojuro instructed by Otieno, Yogo, Ojuro and Company Advocates for the plaintiff.

Mr Oyuko instructed by Amos Oyuko and Company Advocates for the defendant.