



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
ORIGINATING SUMMONS NO. 26 OF 2009
B W MAPPLICANT
VERSUS
J M M.....RESPONDENT
JUDGEMENT

1. In the Originating Summons herein dated 9.2.09, B W M the Applicant seeks a determination of the following questions:

1. Whether Plot No. Mombasa/Block [particulars withheld] and L. R. No. [particulars withheld], I. R. No. [particulars withheld] (“the suit property”) are matrimonial properties held by the Respondent in trust for both himself and the Applicant.
2. Whether the Applicant enjoys any right or interest in the suit property by way of a constructive trust and the percentage of such interest.
3. Whether the Defendant should give account of all financial benefits and income received from the suit property and whether such income should be deposited in a joint account of the parties or their lawyers with a view to taking account and establishing the Applicant’s entitlement.
4. Whether a caution and caveat should be registered against the suit property and a permanent injunction issue prohibiting the Respondent from selling, transferring, charging or in any other way adversely dealing with the the suit property until the Applicant’s interest has been fully paid and discharged.
5. Whether the suit property should be valued and sold and the proceeds shared equally or whether the Respondent should transfer L. R. No. [particulars withheld] to the Applicant being her full share in the suit property.

2. The Originating Summons is supported by Applicant's Affidavit sworn on 9.2.09. The parties got married on ____64 at the [particulars withheld], and were blessed with 6 children. The Applicant avers that during the subsistence of the marriage, the parties acquired the suit property. She raised the children of the marriage as well as the Respondent’s 5 brothers and 1 sister mostly single handedly as the Respondent was often away on business trips. She took charge of the general welfare of the children including their food, clothing, shelter, schooling, medical, love and affection. The Applicant further avers that the Respondent retired from [particulars withheld] as a Sergeant Corporal in 1970. Thereafter the parties set up [particulars withheld] in which the Applicant managed single handedly while the

Respondent travelled a lot attending to other business.

3. In 1974, the parties closed that business and set up [particulars withheld] which had a textile shop along Digo Road, managed singlehandedly by the Applicant. In the same year the parties set up another company,[particulars withheld] which had a shop. They employed a manager for the shop as the Applicant was fully occupied and Famutex while the Respondent was busy with other businesses. Both the parties were shareholders of these 2 companies and signatories to the bank accounts. The parties owned other companies including:

i. M G Ltd

ii. F and S Co. Ltd

iii. M I Ltd

iv. M C Ltd

v. H W H Ltd.

vi. A F C Ltd

vii. A S P Ltd

viii. P T A Ltd

ix. M Ltd

x. O T C Ltd

xi. C E Ltd

xii. M C S Ltd

xiii. F and T C Ltd

4. In 1974, the parties jointly purchased Mombasa/Block [particulars withheld], as their family home. Other properties jointly purchased including Mombasa/Block [particulars withheld], Digo Road, Mombasa/ Block [particulars withheld], Tudor were sold to pay off debts incurred due to the Respondent's lifestyle and for acquisition of other properties.

5. The Applicant avers that she made direct and indirect contribution towards the acquisition of all the properties. Plot No. Mombasa/[particulars withheld] was purchased on 23.11.75 for Kshs. 600,000/= while L. R. No. [particulars withheld] was purchased on 20.2.86 for Kshs. 1,000,000/=. Both properties were purchased through bank loans which were serviced by the proceeds of the aforesaid family businesses and were registered in the name of the Respondent.

6. The Applicant claims that in May 1997, the parties agreed to sell their [particulars withheld] home Mombasa/Block [particulars withheld] in order to save Mombasa/Block [particulars withheld] from being auctioned. That on 18.9.08, the Respondent charged Mombasa/Block [particulars withheld] for Kshs. 25,000,000/= without regard to the Applicant's interest therein and the property is now at risk of being auctioned.

7. The Applicant claims that since June 1999 the Respondent has treated her with cruelty and has had affairs with A W, a Ugandan national, M N and I C W K leading to the separation of the parties.

8. It is the Applicant's prayer that the income from Harbour Way Hotel on Plot No. Mombasa/Block

[particulars withheld] and the rent from the shops and offices thereon be deposited in a joint account of the parties or their lawyers with a view to taking accounts and establishing the Applicant's entitlement thereto.

9. The Originating Summons is contested. In his Replying Affidavit sworn on 4.6.09, the Respondent denies that the Suit Property is matrimonial property or that he holds the same in trust for the Applicant. He claims that he acquired the same from his proceeds at the companies where he was director and a loan from a friend with no contribution from the Applicant. He provided general upkeep for the children of the marriage including medical care and school fees. The proceeds of Famutex Limited and Coast Uniforms Limited were used to purchase Mombasa/Block [particulars withheld], the first matrimonial home.

10. The Respondent further avers that the Kshs. 25,000,000/= loan against Mombasa/Block [particulars withheld] was for expansion of his business. He further states that the said property was charged by himself, the Applicant and their children and the loan proceeds divided amongst themselves. He is however servicing the loan alone. He avers that he owns other immovable properties which he acquired during the subsistence of the marriage and are all matrimonial properties. One such property is Msa/Block [particulars withheld] where the Applicant lives.

11. The Respondent states that he is an honourable man and denies knowledge of the women referred to by the Applicant in paragraph 28 of her affidavit.

12. The Respondent died on 21.8.15 before the matter was heard. Upon his death, a Limited Grant of representation was issued to his sons K M M and K M M on 26.10.15. Thereafter by a consent filed on 15.8.16, the administrators substituted the Deceased in the suit herein.

13. At the hearing, the Applicant gave vent to vent to the allegations in the Originating Summons. K M M one of the Administrators of the Respondent's estate gave evidence in place of the Respondent. It became apparent to the Court that the said K M M was not in a position to adduce evidence as effectively as the Respondent would have in support of his case. He found himself in the difficult position of being pitted against his mother, the Applicant.

14. The Court is aware that Succession Cause No. 367 of 2015 in respect of the estate of the Respondent is pending before it. The cause is highly contested with several persons claiming an interest in the estate as wives and children. Those persons are not parties in this matter. Making a determination herein during the pendency of the succession cause may be prejudicial to all parties concerned including the Applicant herein and may result in a miscarriage of justice. In the circumstances, I do defer the ruling herein until the hearing and determination of the said succession cause. This matter does not preclude the Applicant from adducing the same evidence in the succession cause.

DATED, SIGNED and DELIVERED in MOMBASA this 12th day of May 2017

M. THANDE
JUDGE

In the presence of: -

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

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

.....**Court Assistant**