



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 79 OF 2013 (OS)

B M M.....PLAINTIFF

VERSUS

E G M.....DEFENDANT

JUDGMENT

1. The Originating Summons herein dated 18th December 2013 was filed at this registry on 19th December 2013 by the plaintiff, and it seeks various declarations relating to the assets set out in the suit to the effect that they were all acquired during matrimony with the joint efforts of the parties. In the affidavit in support, the plaintiff states that the parties married in 2001, had two children between them, moved to and lived in the United Kingdom for a while during which time both were in employment, they later relocated to Kenya and were both engaged in income generating activities. The plaintiff states that she is the one who took care of the children and attended to their education and school related activities.

2. In his affidavits in response to the suit, the defendant concedes the marriage, the fact that it produced two children, the relocation to the United Kingdom for a while and the fact that both parties worked there. He, however, contests the allegation that it was the plaintiff who catered for the children, stating that they had engaged help to attend to them. He submits that virtually all the assets were acquired by his sole efforts. He points to property that the plaintiff allegedly acquired on her own and which she had not cared to disclose to the court.

3. On 3rd March 2016, the parties obtained directions that the matter be determined on the basis of the affidavits filed by the parties on the grounds that the parties were based abroad and would not be able to attend court. Directions were given that the parties do also file written submissions. I note from the record that the parties have complied by filing written submissions and authorities to support their respective cases.

4. The principal statutory basis for division of matrimonial property is the Constitution and the Matrimonial Property Act, 2013. Article 45(3) of the Constitution pitches for equality of the parties to a marriage at the time of its celebration, during its course and at its dissolution. Section 7 of the Matrimonial Property Act, 2013 requires that ownership of matrimonial property be determined on the evidence of contribution of either spouse to the property.

5. The two provisions appear to be mutually inconsistent. The Constitution appears to say that parties to a marriage have equal rights, so that when property is acquired during marriage for the benefit of the family, then, at dissolution of the marriage, it shall be divided equally between the parties. The other

provision appears to advocate for proof of contribution to acquisition as basis for assessing the rights of either party to the property.

6. Of course faced with such contradictions, the constitutional provision must hold sway. The principle to apply in the circumstances should thus be the constitutional imperative.

7. Looking at the affidavits placed on record, I note that none of the parties have presented material on the acquisition of the assets in question. No copies of sale agreements or cheques or other modes of payments have been placed on the record. It cannot therefore be said without contradiction what each one of the parties have contributed in the acquisition of the assets. In the absence of such material it can only be presumed that both parties made equal contributions to the acquisitions.

8. In the end the orders that I am moved to make are as follows: -

a. **That I allow the Originating Summons dated 18th December 2013 in the terms proposed; and**

b. **That each party shall bear their own costs.**

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

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE