



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL SUIT NO. 3 OF 2014 (OS) (Formerly Civil Suit No. 1088 of 2006)

P M SPETITIONER

VERSUS

M S.....RESPONDENT

JUDGMENT

1. The Amended Originating Summons before me dated 29.11.12 is seeking a declaration that the following properties listed in the Application which were acquired by the joint efforts and funds of the Applicant and the Respondent during marriage and currently in possession of the Respondent are jointly owned by the Applicant and the Respondent:
 - i. Kwale/Diani Beach Block/[particulars withheld]
 - ii. Motor Vehicle Registration No. [particulars withheld]
 - iii. Motor Vehicle Registration No. [particulars withheld] .
 - iv. Assets of three family owned restaurants namely:
 - a. African Pot Restaurant Coral – Diani: Assets worth Kshs. 2,500,000/=
 - b. African Pot Restaurant – Daraad: Assets worth Kshs. 2,000,000/=
 - c. African Pot Restaurant - Ukunda: Assets worth Kshs. 2,000,000/=
 - v. Building materials in particular coral, blocks, hardwood timber, door and window frames worth Kshs. 2,000,000/=
 - vi. Discotheque machines worth Kshs. 117,000/=
 - vii. Monies in the joint account at Barclays Bank Account No. [particulars withheld] of the Applicant and the Respondent.
2. The Applicant further seeks an injunction restraining the Respondent by himself, his servants or agents or otherwise howsoever from transferring, alienating, selling, wasting, charging, mortgaging, demarcating, leasing or disposing the said properties.
3. In her Supporting Affidavit sworn on 29.11.12, the Applicant avers that she and the Respondent married in 1984 under Maragoli Customary law and have one surviving issue, S W. Ahe states that she filed the now pending divorce proceedings against the Respondent in Kwale SRMCC No. 159 of 2006. She claimed that the said properties though registered in the name of the Respondent were held in trust for her.
4. The Applicant claims that the Respondent has made several attempts to evict her from Kwale/Diani Beach Block/[particulars withheld], the matrimonial home which would render her homeless. She further claims that the parties had purchased building materials worth Kshs. 2,000,000/= with the intention of building residential apartments but that the Respondent was in

- the process of disposing/selling the same. She alleges that the Respondent also intends to sell the matrimonial property and has been sending brokers to view the same with a view to scouting for a suitable purchaser; that the Applicant operated the business of supplying fresh juice to hotels in Diani, Ukunda and payment cheques were banked in their aforesaid joint account; that the family properties held in the name of the Respondent were purchased from the funds held in the said joint account. The Applicant prayed for distribution of the said properties to the parties in equal shares.
4. The Application was canvassed orally by the Applicant. She gave vent to the averments made in her Application as well as in her deposition. She referred extensively to the documents that she filed. The Applicant testified that she and the Respondent got married in 1984 under Maragoli Customary law; that at a customary ceremony held in Maragoli, the Respondent gave to the Applicant's parents the items required for marriage purposes including a long coat for her father, a blanket and scarf for her mother, and cash. All this was done in the presence of village elders and her uncles. After the ceremony, the Respondent took the Applicant to his home in Kajiado to live as husband and wife. That they lived in Diani until 2009 when the Respondent deserted the matrimonial home. The Applicant then produced before this court several documents including her NHIF card, employment letter, transfer letter from her employer African Tours & Hotels and Hotel Milimani all of which refer to her as "P M S", S being her husband's name;
 5. The Applicant further testified that the Respondent introduced her to his friends as his wife. She produced the Respondent's Rotary International members' card in which the name "P" is given as his spouse. She also produced the Respondent's Nairobi Hospital Subsidy Scheme Card in which the name of his wife is given as P S. The Applicant stated that she and the Respondent cohabited as husband and wife from 1984 to 2006 when the Respondent threatened to evict her from the matrimonial home and she filed the suit herein. It was her testimony that she and the Respondent purchased the matrimonial home in 2000 for Kshs. 8,000,000/=, that it lies second row from the beach and measures 4.2 hectares.
 6. The Applicant gave a history of her employment. She first worked with African Tours and Hotels as a general assistant from 1986 to 1989. She thereafter worked at Diani Reef Grand Hotel until 2004 when the hotel closed down. Thereafter, she tried a hand at business which did not do well and she stayed home until 2011 when she got a job at Swahili Beach Hotel where she works as an executive housekeeper to date. She further testified that she and the Respondent started a business of supplying juice to hotels and the business was in her name. Funds from the business was banked in the joint account with Barclays bank which as at 30.3.01 had a credit balance of Kshs. 2,577,048/20. It was her testimony that the properties listed above were acquired by the parties together. She prayed for a share in the properties, dissolution of the marriage and costs of the suit.
 7. The Applicant called W C as her witness. He testified that the Applicant was his sister in law by virtue of the fact that his wife C M is the Applicant's sister. He testified that he met the Respondent when he was courting his wife. That his wife took him to the home of the Applicant and the Respondent to introduce them as her future husband. That he knew the Applicant and the Respondent as a happy couple until 2005 when the Applicant began to complain that the Respondent was assaulting her. It was his testimony that the Applicant and the Defendant were husband and wife.
 8. From the record, the Respondent did file a response to the Originating Summons dated 18.12.06. The Respondent further made an application for the striking out the originating Summons which was dismissed on 31.3.10 by Odero, J. Thereafter the Applicant applied for leave to amend the Originating Summons which leave was granted on 6.11.12. The Respondent filed no response to the Amended Originating Summons and called no evidence to rebut the Applicant's allegations. In spite of being served with a hearing notice the Respondent did not make an appearance on the hearing date.
 9. In her written submissions filed on 23.9.15, the Applicant contends that the parties married under Maragoli Customary Law in 1984. In the alternative, that the couple have cohabited as husband

and wife for over 15 years. She reiterated her testimony in which she referred to the filed bundle of documents where the Respondent indicated in various documents that the Applicant was his wife. It was her submission that she and the Respondent were married as there is evidence of presumption of marriage.

10. On the question whether the applicant contributed towards the acquisition of the matrimonial property, it is submitted that the Applicant demonstrated that she was employed and contributed towards the acquisition of the properties herein. It was further submitted that the principle governing the division of matrimonial property is equality which is anchored in Article 45(3) of the Constitution of Kenya. It is therefore the Applicant's prayer that the matrimonial property listed herein be divided between the Applicant and the Respondent in equal shares. She cited several authorities to buttress her position.
11. The Applicant also seeks the dissolution of the marriage between her and the Respondent on the grounds of cruelty and desertion.
12. I have considered the Amended Originating Summons and the testimony of the Applicant and her witness. I have also considered the written submissions together with the cited authorities. As indicated earlier, the Respondent did not file any response to the Amended Originating Summons nor did he appear for the hearing in spite of service. The Applicant's claim therefore remains uncontroverted.
13. This Court having considered the Application, the Affidavits on record, the testimony of the witnesses and the submissions by the Applicant forms the view that the issue for determination is whether the Applicant has established a case for this Court to grant her the orders sought. The central issue for determination is whether the property in question is matrimonial property which would make it amenable to division in the manner proposed by the Applicant. However, before that question can be addressed it must be ascertained as to whether the parties herein were in matrimony at the material time.
16. From the Applicant's uncontroverted testimony, the parties married under Maragoli Customary Law in 1984. From the time of the marriage, the couple cohabited as husband and wife in Kajiado and Diani up to 2009 when the Respondent left the matrimonial home. The Applicant produced several documents notably employment letters and NHIF cards all referring to her as Patricia Musungu Shaaban. She also produced the Respondent's Rotary membership card for 1997 as well as his Nairobi Hospital Subsidy Scheme Card in which the Respondent referred to the Applicant as his wife. The Applicant cited a number of authorities in which this Court and the Court of Appeal have dealt with the issue of presumption of marriage. Presumption of marriage is an assumption based on very long cohabitation and repute that the parties are husband and wife. Before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute - see *Mary Njoki v John Kinyanjui Muthuru* [1985] eKLR). Even if a Customary Law marriage is not established, the Court is not precluded from finding from the evidence presented before it that there existed a common law marriage between the Applicant and the Respondent by virtue of the fact that they had lived together as a husband and wife for a long period of time – see *T V W* [2008] IKLR (G & F).

The Respondent did not tender any evidence to rebut the Applicant's testimony relating to the customary marriage or the long cohabitation of the Applicant and the Respondent as husband and wife.

17. The doctrine of presumption of marriage has a statutory foundation, in section 119 of the Evidence Act, Cap 80, Laws of Kenya, which provides -

“the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

14. Having looked at the facts and circumstances herein as well as the material presented before me, I am unable to find conclusively, that the Maragoli Customary Law marriage ceremonies were concluded. However, sufficient grounds have been demonstrated herein to enable the court presume the existence of a marriage between the Applicant and the Respondent on account of general repute and long cohabitation from 1984 to 2009.

15. Having found that a common law marriage existed between the Applicant and the Respondent, I now turn to the issue of division of matrimonial property. The Applicant claims 50% of the properties listed above claiming that they are matrimonial properties acquired through the joint efforts of the Respondent and herself. It is apparent from the record that the Applicant was employed and was also engaged in business. It is also on record that the parties held a joint account no. [particulars withheld] in Barclays Bank of Kenya which account held as at 30.3.01, a balance of Kshs. 2,577,048.20. This is borne out from a copy of the bank statement produced in Court. The Applicant produced in Court a copy of the title for Kwale/Diani Beach Block/[particulars withheld] registered in the name of the Respondent. It is the Applicant's testimony that this property was purchased by the Applicant and the Respondent in 2000 and is the matrimonial home. The Applicant further produced a copy of a log book for motor vehicle [particulars withheld] registered in the name of the Respondent.

23. The law relating to division of matrimonial properties is found in the Matrimonial Properties Act which provides at Section 17 -

1. ***A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.***
2. ***An application under subsection (1)—***
 - a. ***shall be made in accordance with such procedure as may be prescribed;***
 - b. ***may be made as part of a petition in a matrimonial cause; and***
 - c. ***may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.***

16. Though a petition has not been filed in this Court for the dissolution of the marriage between the Applicant and the Respondent, the Court is empowered by the Matrimonial Properties Act to determine an application for a declaration of rights to any property that is contested between that person and a spouse.

17. In determining the division of the matrimonial property herein I am guided by the principle of equality of spouses contained in Article 45(3) of the Constitution of Kenya which provides –

“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”

The Court of Appeal in Civil Appeal No. 127 of 2011 **Agnes Nanjala William –vs- Jacob Petrus Nicolas Vander Goes**, observed that **Echaria v Echaria** is no longer be good law, and held,

“Article 45(3) of the Constitution provides that 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...”

18. Further, in seeking a fair outcome, there should be no place for discrimination between a husband and wife and their respective roles – see **Miller v Miller: Mcfarlane v Mcfarlane** [2006] UKHL 24.

19. As stated earlier, the Respondent called no evidence to rebut the Plaintiff's allegations in the Amended Originating Summons or indeed in her testimony or that of her witness. In the absence of any evidence by the Respondent to controvert the averments of fact by the Plaintiff, the court

takes the position that the facts are as presented and I therefore find that the Applicant has partly proved her case on a balance of probability and is entitled to some of the orders sought. For this reason I am inclined to grant the orders sought in respect of the property comprising the matrimonial home, the said bank account and the said motor vehicle. No proof of existence of any of the other properties was however produced to the Court. I am therefore unable to make any finding in respect of the same.

20. On the prayer for dissolution of the marriage between the Applicant and the Respondent, I wish to state that no Petition has been filed in this Court. The law requires that a Petition for dissolution of a marriage be filed in court for consideration on merits. The prayer for dissolution was made orally in Court when the Applicant gave her testimony. It has also been slipped in, in the Applicant's submissions. This prayer cannot be granted as it is not properly before the Court. Besides, the matter is as far as the record shows still pending in Kwale SRMCC No. 159 of 2006. The Applicant should therefore pursue the divorce cause in the said court in Kwale to its logical conclusion.

21. In the result, I make the following orders:

- a. The Applicant and the Respondent be and are hereby presumed married on account of general repute and long cohabitation.
- b. The property known as Title No. Kwale/Diani Beach Block/[particulars withheld] be and is hereby declared to be matrimonial property and the same is to be divided equally between the Applicant and the Respondent;
- c. The Respondent be and is hereby restrained by himself, his servants or agents or otherwise howsoever from transferring, alienating, selling, wasting, charging, mortgaging, demarcating, leasing or disposing of the Applicant's portion of the matrimonial property namely, Title No. Kwale/Diani Beach Block/[particulars withheld];
- d. The proceeds in Account No. [particulars withheld] Barclays Bank, Nkrumah Road be and is hereby declared to be matrimonial property and the Respondent to account to the Applicant for the funds therein as at 31.3.01;
- e. Motor Vehicle No. [particulars withheld] be and is hereby declared to be matrimonial property and the Respondent to account to the Applicant for the same;
- f. In line with the principle of equality of the spouses each party will bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA THIS 8th FEBRUARY 2016.

M. THANDE

JUDGE

In the presence of: -

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

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

..... **Court Assistant**