



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE NO. 12 OF 2015 (O.S)

M B K.....PLAINTIFF

VERSUS

M B.....DEFENDANT

JUDGEMENT

The originating summons dated 25th March, 2015 seeks the determination of the following issues: -

- 1. Whether the all that house properties situated on plot number [particulars withheld]/R Kilifi and apartment number [particulars withheld] within Woburn resident Club forms part of the matrimonial properties.***
- 2. Whether the aforementioned properties should be divided into two equal shares or on such other proportions between the plaintiff and the respondent after the divorce herein.***
- 3. Whether the respondent should account for the proceeds of the sale of the matrimonial home/house on plot number [particulars withheld]/R Kilifi which she sold at the back of the plaintiff.***
- 4. Whether the respondent should be condemned to meet the costs this summons.***

The summons are supported by the affidavit of the plaintiff sworn on 25th March, 2015. The plaintiff filed a supplement affidavit sworn on 27th May, 2015. She filed a replying affidavit sworn on 14th April, 2015. The defendant also filed a supplementary affidavit sworn on 28th October, 2015. The matter proceeded by way of oral evidence.

The plaintiff testified that the defendant is his x-wife. They lived together for a period of four (4) years. Before they got married he was working as a social worker at [particulars withheld] in Malindi. The defendant used to visit the orphanage and was satisfied with the manner in which he was running the institution. They became close and intimate friends. The defendant promised to have him employed at another organization as a secretary. He left his employment at Rainbow Orphanage and joined the defendant's organization.

It is his evidence that they later got married. Before the marriage they entered into a prenuptial agreement whereby each party was to own any property owned by that party before the marriage. The agreement was signed on 27th April, 2007 while they got married on 2nd of June, 2007. They lived at [particulars

withheld] in Malindi where the defendant had a one bed roomed house. They stayed there for about 6 months. The house was small as they had a small child whom the defendant was living with. They were planning to adopt the child. They agreed to look for a big house to purchase. They found a house in Kilifi and they bought it jointly. The house required renovations and he supervised them. During renovations the defendant was living in Malindi. Electricity and Water had been disconnected and it were restored. The bills were in his name. The defendant had financial problems during that time. The plaintiff was doing some commission jobs. He started a boutique in Kilifi. At one time they were loaned a sum of Kshs.1 million by his friend. They agreed to share the money equally. He invested Kshs.400,000/= in his business. It is his further evidence that he did not contribute financially towards the purchase of the house in Kilifi. However, at one time he purchased materials for Kshs.100,000/= on 18th January, 2008 and another expenditure on materials of Kshs.100,000/= on 7th December, 2007. All along, he knew that the house was theirs jointly. The defendant has sold the house without giving him anything. The house was transferred into the names of the defendant and she later sold it. He was not refunded his expenses after the house was sold. They also had one Toyota vehicle. The defendant has tried to sell her property at Woburn residence.

The plaintiff also testified that the defendant did not build for him a house at his rural home in Ganze. When he introduced the defendant to his parents, they objected to the marriage as he was 38 years old while the defendant was 50 years old. His parents wanted a grandchild. In a bid to convince his parents to accede to the marriage, the defendant agreed to build a house for his parents. The house was not completed. It has no roof, windows or doors. It is not part of the Giriama customs that a man must have a house before he gets married. The house was not completed yet they got married.

It is his prayer that he get his share of the sale proceeds from the Kilifi house. Since the house was sold he should be given shares in the defendant's property at Woburn Residence. At one time he filed a Misc. Application before the Kilifi Court to have the defendant investigated for child trafficking but the application was dismissed. He understood the prenuptial agreement to mean that all properties acquired after the marriage were to be owned jointly.

The defendant testified that she purchased an apartment at Woburn residence in 2005. She also had a Toyota Rav 4 registration number KAT. The two properties were purchased before the marriage. She took up permanent residence in Kenya in 2005. Since then she has been permanently living in Kenya but her permit does not allow her to engage in any gainful employment. She met the plaintiff in 2006. The plaintiff was working at [particulars withheld] in Malindi as a social worker. She used to visit the orphanage as a volunteer and a donor. In 2006 she became a member of another organization called [particulars withheld] Partners (RAPO). RAPO was based in Malindi and was a registered charitable institution. It had been registered long before she came to Kenya. She was only a member as well as acting secretary. It was an organization based on voluntary bases. When she met the plaintiff he was attending classes at Malindi. He was attending the course on part time basis. He convinced her to support him so that he could do the course on full time basis. That is the reason why the plaintiff resigned from his job at [particulars withheld] and became the full time student. She later discovered that he did not complete the course as he failed some subjects which he was to re-sit.

Before their marriage, the plaintiff took her to his paternal family in Ganze. She was welcomed by the family members and there was no reservations about their relationship. In April, 2007 she embarked on building their Ganze home as the plaintiff had informed her that it was part of the Giriama customs that he builds a house at their homestead. According to her, the house was not built to entice the plaintiff's parents to bless the marriage. The plaintiff's parents had their own good house where they were living with their young children. From that April, 2007 onwards, the plaintiff spent most of his time in Ganze supervising the construction.

It is the defendant's further evidence that they had a civil marriage on 2nd June, 2007 at the Malindi District Commissioner's office. After the marriage, the plaintiff spent four days in Malindi and three days in Ganze. By August, 2007 the plaintiff did not return to Malindi. In July, 2007 they identified a house in Kilifi as the plaintiff preferred Kilifi to Malinid. In September, 2007 the owner of the Kilifi rental home wanted to sell it. She wanted to sell her Woburn residence apartment in Malindi to finance

the acquisition of the Kilifi house but there were no buyers due to post election violence. She decided to liquidate an endowment proceeds which she had held for over 19 years before the marriage and paid the purchase price of the Kilifi house. The plaintiff did not make any financial contribution.

The defendant also testified that she supervised the renovations of the Kilifi house. The plaintiff was busy constructing the Ganze house while at the same time campaigning for the post of a local councilor. The plaintiff would at times place orders for construction materials for the Kilifi house renovations. All monies for the renovations came from her. Power and water bills were changed to the plaintiff's name for economic reasons as foreigners are required to pay deposit of about Kshs.50,000/= while locals pay only Kshs.3,000/=. They moved to the renovated house on 29th November, 2007. Within days she discovered that the plaintiff had an affair with another woman. She decided to file for divorce. She stopped the construction of the Ganze house. She decided to register the Kilifi house in her name. She is not claiming the Ganze house. Although they lived in the same house in 2008 and 2009, they never shared one bed. She denies that they cohabited for four (4) years. They only cohabited for one year and two months.

The defendant informed the court that in November, 2008, they took a private loan of Kshs.one million. The plaintiff took Kshs.500,000/= but never repaid his part forcing her to pay the entire loan. The plaintiff never worked throughout the marriage. She financed him before and after the marriage. She sold the Kilifi house and made a small profit. The amount spent on renovating the Kilifi house totaling about Kshs. one million was not recovered when the house was sold. When they bought the Kilifi house, both names were indicated as purchasers. He informed the plaintiff that she was going to sell the house. When they took the Kshs. one million loan they were not living as a couple. While building the Ganze's house, the plaintiff's father would also supervise the construction and she used to pay him Kshs.5,000/= monthly. The plaintiff informed her that they were to have a Giriama traditional ceremony after the civil marriage. At one time the plaintiff engaged in selling curious and second hand clothes but the business lasted for only three months as he failed to pay the rent.

Both parties filed written submissions. I have read both submissions. Counsel for the plaintiff maintains that the parties entered into a pre-nuptial agreement. It was agreed that any property obtained during the marriage was to be owned equally. This applies to both movable and immovable property. The parties acquired the house on Plot Number [particulars withheld] Kilifi. The property was later registered as CR [particulars withheld] Land Reference No. [particulars withheld] (Original Number [particulars withheld]/1). It is further submitted that the sale agreement had both parties as purchasers and is binding to both of them.

Counsel for the plaintiff maintains that the plaintiff contributed physically, ideally and monetarily towards renovation of the house until it became habitable. He gave advice and decent ideas on the renovations and the entire beautification of the house. At one point the plaintiff borrowed a sum of Kshs.1,000,000/= from a friend. This shows that the plaintiff was a potential and productive man and the society trusted him.

Mr. Otara further submit that the defendant could not sell the house without involving her co-purchaser. They were joint owners in the property. Further, the house was sold without the consent of the land control board. It is reiterated that the plaintiff is entitled to a 50% share of the proceeds received from the sale of the Kilifi house. Since the defendnat owns a flat at Woburn Residence Club, the property be sold so that the plaintiff can recover his share. According to the plaintiff the house at Ganze is not part of the matrimonial properties.

On her part, the defendant mainly reiterates her evidence and contends that she suffered financial loss out of the marriage. They only cohabited for one year and two months. She spent about Khs.1,000,000/= for the Ganze house. She bought the Kilifi house for Kshs.4,500,000/=. She spent Kshs. 1 million renovating the house. The house was sold for Kshs5,250,000/=. She further paid the plaintiff's share of the loan they took amounting to Kshs.500,000/=. It is her submissions that she incurred losses. She only mitigated her losses by selling the Kilifi house. She even financed the plaintiff's campaigns for the post of a councilor in 2007. The parties were married in 2007 and the divorce was granted on 13th December,

2011. The plaintiff took over 3 ½ years to file the current claim. According to the defendant, the plaintiff would like to benefit from the new Matrimonial Property Act.

From the evidence on record and the rival submissions, I do find that the questions framed in the originating summons effectively represent the issue to be determined by the court. These are: -

- 1. Whether the all that house properties situated on plot number [particulars withheld]/R Kilifi and apartment number [particulars withheld] within Woburn resident Club forms part of the matrimonial properties.**
- 2. Whether the aforementioned properties should be divided into two equal shares or on such other proportions between the plaintiff and the respondent after the divorce herein.**
- 3. Whether the respondent should account for the proceeds of the sale of the matrimonial home/house on plot number [particulars withheld]/R Kilifi which she sold at the back of the plaintiff.**
- 4. Whether the respondent should be condemned to meet the costs this summons.**

There is also the issue relating to the house at Ganze. I will add that to be the 5th issue. That is to say whether the Ganze house forms part of the matrimonial property. I will divide the first issue into two as it involves two separate properties namely the apartment and Woburn Residence identified as number **[particulars withheld]** and the Kilifi house. With regard to the Woburn apartment, it is agreed by both parties that the property was bought by the defendant before the marriage. The defendant testified that she bought the property in 2005. Parties got married in June 2007. Before entering into the marriage, they entered into a pre-nuptial agreement on 27th April, 2007. The agreement contain only two clauses. The two clauses states as follows: -

- 1. The parties will get married at the District commissioner' Office at Malindi, Kenya on a date to be appointed after the publication of their banns.**
- 2. That the parties hereby agree and affirm as follows: -**
- 3. That any property whether moveable or immovable or any money acquired by either party before the said intended marriage belongs to that party and will remain the sole property of that party after the marriage.**

The Matrimonial Property Act No. 49 of 2013 recognizes the fact that parties to a marriage can enter into a pre-nuptial agreement. Section 6 (3) of the Act states as follows: -

Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

Since there is no evidence that parties agreed to have the Woburn apartment to be part of the matrimonial property, I do find that that property does not form part of the couples properties acquired during the marriage. That property belonged to the defendant before the marriage and is exclusively the defendant's property. That is the essence of the pre-nuptial agreement.

The second immovable property is the Kilifi house located on Plot Number [particulars withheld]/R Kilifi also described as CR [particulars withheld] Land Reference Number [particulars withheld] (Original Number [particulars withheld]/1). The record shows that the property was bought in 2007. The sale agreement does not give any specific date of purchase. It was drawn by Guinness Construction and Housing Co. Ltd and witnessed by the same company instead of an Advocate. The plaintiff admits that he did not make any financial contribution towards the purchase of the property.

Section 6 of the Matrimonial property Act No. 49 of 2013 defines Matrimonial Property under Section 6

(1) as follows: -

- a. The matrimonial home or homes;**
- b. Household goods and effects in the matrimonial home or homes; or**
- c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.**

Section 7 of the same Act provides for ownership of matrimonial property. It states as follows: -

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.

Contribution towards the acquisition of a matrimonial property is defined under section 2 of the same Act as follows: -

“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;**

Other relevant provisions relevant to the disputes are sections 9, 12 (1) and 14. Section 9 states as follows: -

Acquisition of interest in property by contribution

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes contribution acquires a beneficial interest in the property equal to the contribution made.

Section 12 (1) provides as follows: -

An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

There is section 14 which provide for certain presumptions on matrimonial property. It states as follows: -

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; and**
- b. in the name of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.**

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. It is clear that the Kilifi house was bought during the marriage. The defendant testified that they moved to the Kilifi house on 29th November, 2007. That house became their matrimonial home. According to the defendant, their stay at the Kilifi house was short-lived as she discovered that the plaintiff was having an affair with another woman. I have seen the demand letters from the firm of M/s K. Lughanje & co. Advocates dated 21st August, 2008 and 30th December, 2008. The first letter refers to three different women. However, that issue was relevant for the divorce case which has been finalized. What is important is that on 21st August, 2008, the defendant asked the plaintiff to vacate the Kilifi house. By 30th December, 2008 the plaintiff had left Kilifi and was living at the Malindi Woburn apartment.

Turning to the issue as to whether the Kilifi house forms part of the parties' matrimonial property, I do answer that issue in the affirmative. The house was bought during the marriage and became a matrimonial home between November, 2007 upto August, 2008.

Whether the Kilifi house sale proceeds should be divided into two equal shares

The evidence shows that the purchase of the property was entirely financed by the defendant. The defendant provided the paper trail from Norwich Union Bank in the United Kingdom to Barclays Bank. It shows that 36,255 pounds was transferred to the latter bank. The transaction took place in November, 2007 within the time they were buying the Kilifi house. The property was registered in the names of the defendant only. The reasoning for this act is understandable. The defendant suspected that her husband was having an affair and opted to have the property registered in her name. Section 14 of the Matrimonial Property Act states that even where a property is bought and registered during the marriage in the name of one spouse, the presumption is that the property is being held in trust for the other spouse. That presumption is subject to the requirement for the party's contribution towards the acquisition of the property.

In the case of **NJOROGE V NGARI [1985] KLR, 480**, the court held that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse had proprietary interests in that property. That decision was made way before our Matrimonial Property Act was enacted. The decision is in line with Section 14 of the Matrimonial Property Act, 2013.

In the case of **CWN V BN Nairobi Court of Appeal Civil Appeal No. 236 of 2009**, the court held that distribution of matrimonial property does not depend on whose name the property is registered.

According to the plaintiff, he contributed both financially and physically towards the renovations of the house. Under the definition of contribution, companionship is also recognized as part of contribution. There was no family business for the plaintiff to manage. The parties had no child out of the marriage. There was no farm work or domestic work done by the plaintiff.

The plaintiff testified that he paid over Kshs.200,000/= towards the purchase of building materials. That evidence is countered by the defendant. The defendant provided two receipts for Kshs.100,000/= each. They are dated 7th December, 2007 and 18th January, 2008 respectively. The defendant produced her bank statement. It shows that on 4th January, 2008 she withdrew Kshs.100,000/=. On 21st December, 2007 she withdrew Kshs.50,000/=. On the same date she withdrew Kshs.30,000/= through the ATM and on 31st December, 2007 she withdrew Kshs.40,000/= through the ATM. On 15th January, 2008 she withdrew a further sum of Kshs.100,000/=. I find that the purchase of the materials were done using the defendant's funds. There is no evidence that the plaintiff used his own money. The fact that the receipt bears his name is not proof that he used his own money to purchase the materials. The same applies to the names used in the Water and Electricity bills. The plaintiff's names in those bills do not prove that he owned the property. I will turn to this issue later.

There is the issue of the house in Ganze. According to the plaintiff, the house was built by the defendant

so that she could entice his parents to bless the marriage. The house started to be built even before the parties were married. The defendant's position is that the house was to be their matrimonial home. The evidence shows that the parties were married on 2nd June, 2007 at the District commissioner's office in Malindi. The plaintiff was 38 years old while the defendant was 50 years old. At 38 years the plaintiff was an adult who could make his own decisions. He decided to marry the defendant and the issue of enticing his parents cannot arise. He was the one expected to pay dowry to the defendant under African Customs. I believe under Giriama Customs the woman does not pay dowry. It is the man to pay the dowry. There is no evidence that the defendant was so desperate to get married to the plaintiff to the extent of building a house for the plaintiff's parents. I do find that the Ganze house forms part of the matrimonial properties. The plaintiff contends that the house is not complete. The defendant admits that fact and testified that the house has no roof. The walls are complete. She had bought the doors and windows. She stopped funding the construction.

The other issue relates to the sale proceeds of the Kilifi house. The proceeds can only be shared according to one's contribution. The constitution under Article 45 does not provide for equal distribution of matrimonial property. The plaintiff made no financial contribution. I can only hold that the plaintiff's contribution was through companionship. Since the defendant spent about Kshs. one million towards the construction of the Ganze house and having held that the Ganze house is part of the matrimonial property, I do hold that the Ganze house is enough compensation for the plaintiff's contribution towards the purchase of the Kilifi house. The Kilifi house was bought for Kshs.4.5 million.

There is the evidence on the friendly loan. Although the plaintiff testified that he borrowed the money, the loan agreement dated 28th November, 2008 is between the defendant and the lender, Philemon Mwakilulu Mwavala. On 5th January, 2009, about one week later, the plaintiff signed an acknowledge of receipt of funds document whereby he received Kshs.490,000/= from the defendant and was to pay Kshs.500,000/= plus interest. The amount is a loan and refers to the loan agreement between the defendant and Philemon Mwavala. The defendant exhibited her bank statement indicating that she took Kshs.500,000/= on 25th September, 2012 another Kshs.500,000/= on 8th July, 2014. It is her evidence that the withdrawals were used to repay the loan. The plaintiff did not pay the sum of Kshs.500,000/= advanced to him.

Turning back to the issue of the Kilifi house, I do find that the plaintiff is not entitled to a share of the sale proceeds of the house. His contribution towards the purchase of the house is quite minimal. The defendant is not interested in the Ganze house. Taking into account, the value of the house in Ganze estimated at around Kshs. one million plus the unpaid loan of Kshs.500,000/=, I do find that a sum of about Kshs.1.5 million is more than enough compensation to the plaintiff. The plaintiff should be satisfied that he walked out of the marriage with the Ganze house and the sum of Kshs.500,000/=. It should also not be lost that the plaintiff also campaigned for the post of a councilor in 2007 and the defendant assisted him financially.

The originating summons do not make reference to the vehicle. I do find that the vehicle registration Number KAW [particulars withheld] belongs to the defendant and she shall retain it.

I do find that the defendant need not account for the sale proceeds of the sale of the matrimonial house at Kilifi. She used her money to buy it and she was entitled to sell it as it was in her name. There was no requirement for consent from the Land Control Board for the sale of the house. When the house was being purchased, no consent was obtained. The house is not agricultural land to have required the consent of the Land Control Board.

In the end, I do find that the originating summons dated 25th March, 2015 lack merit. The summons were filed over three years after the dissolution of the marriage in 2011. It is an afterthought. The plaintiff's suit is hereby dismissed. Parties shall meet their own respective costs.

Dated and delivered in Malindi this 5th day of September, 2016.

S.J. CHITEMBWE

JUDGE