



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 59 OF 2013 (OS)

**IN THE MATTER OF SETTLEMENT OF MATRIMONIAL PROPERTY AND SECTION 28 OF
THE MATRIMONIAL CAUSES ACT**

AND

**IN THE MATTER OF PLOT NO. [PARTICULARS WITHHELD] ON LAND REFERENCE
NUMBER 7340/[PARTICULARS WITHHELD] EMBAKASI NAIROBI &
SERGOIT/KOIWOPTAOI BLOCK 3 (SHATREK/[PARTICULARS WITHHELD])**

BETWEEN

J K S.....APPLICANT

AND

P J K.....RESPONDENT

JUDGMENT

PLEADINGS

By an amended Originating Summons the Applicant filed before this Court an application for division of matrimonial property.

The Applicant sought the following orders:

1) A declaration that the suit property (Plot No. [particulars withheld] of Land Reference Number 7340/[particulars withheld] Embakasi Nairobi) was acquired/bought and developed and though is registered in the defendant's name is owned by the Applicant.

2) In the alternative, suit property (Plot No. [particulars withheld] of Land Reference Number 7340/[particulars withheld] Embakasi Nairobi) is jointly and/or commonly owned by the Applicant and the Respondent.

3) A declaration that suit property Sergoit/Koiwoptaoi Block 3 (Shatrek/[particulars withheld]) was acquired/bought and developed and though registered in the name of the defendant is owned by the Applicant.

4) A declaration that the listed assorted household goods and items in paragraph 3 of the application were bought and acquired by the Applicant and defendant are owned jointly by both parties.

5) A declaration that the Plaintiff /Applicant is entitled to rent in the sum of Kshs. 209,000/- from being evicted from the matrimonial home Plot [particulars withheld] L.R 7340/[particulars withheld] Embakasi Nairobi from 8th October 2013.

6) The Court to order division of the matrimonial property and apportionment of shares in respect of contribution by each party.

7) The court to grant any other orders and costs of the suit.

The Application is based on grounds detailed in the supporting affidavit of the Applicant, J K S. He stated that he was married to the Respondent in the year 2001 at the Attorney General's office in Nairobi, the office of the Registrar of Marriages under the **Marriage Act**. But before then; they had cohabited as husband and wife for a considerable period of time had conducted a customary marriage under Keiyo customary law of the Kalenjin community.

He purchased the subject matter of this suit being Plot No. [particulars withheld] on Land Reference Number 7340/[particulars withheld] Embakasi Nairobi from [particulars withheld](K) Limited in the year 2003 at the cost of Kshs. 200,000/=. Annexed and marked "**JKS-2**" is a copy of the acknowledgment of the receipt No. [particulars withheld] dated 3rd November, 2013 issued by the said [particulars withheld] (K) Limited.

Since he was married to the Respondent and cohabited as husband and wife, there existed a mutual trust between them in running affairs of their home and he would entrust the Respondent to process the issuance of the title documents and plot certificate.

In a surprise twist of events, the Respondent had the said plot registered and plot certificate issued in her name by the [particulars withheld] (K) Limited. Annexed and marked "**JKS-3**" is a copy of the plot certificate issued in the Respondent's name on 22nd May, 2004.

Following the curious issuance of plot certificate to the Respondent, he raised the concern with the vendors, [particulars withheld] (K) Limited which termed such change as "**fraudulent**". Annexed and marked "**JSK-4**" is a trail of correspondences between himself (his advocates) and the said [particulars withheld] (K) Limited in this respect. In the circumstance therefore such certificate in the Respondent's name was a fraud.

Upon purchase of the suit property, he commenced construction of his family house in the suit property. Admittedly the Respondent from time to time contributed to the construction of the said house which is their matrimonial home. At the construction the matrimonial home, he stated further that he was working in [particulars withheld] Hospital with the Respondent.

In a similar scheme, the Applicant /Plaintiff purchased another property Sergoit/Koiwoptaoi Block3 (Shatrek/[particulars withheld]). The Respondent had the property registered in her name. On learning this fact he filed a caution as evidenced by copy of title and caution; annexed and marked '**JKS -7**'

On 28th August 2013, the defendant filed an application in Court and alleged falsely that he had assaulted her and claimed to be the sole owner of their home. This is confirmed by the Court Ruling attached as '**JKS-2**'

The said marriage was now dissolved by the Court in **Nairobi High Court Divorce Cause No. 109 of 2011** ("**the divorce cause**") vide a judgment dated 1st day of November, 2012 (Justice E.K.O Ogola). Annexed hereto and marked "**JKS-1**" is a copy of the said judgment.

The Respondent, P J K, filed a Replying Affidavit on 29th January, 2014 and opposed the application on the following grounds;

From the onset of their marriage; the Applicant was irresponsible and uncaring, he was unwilling to take care of the family despite being gainfully employed.

The Respondent survived by taking loans to take care of the four children. Part of the funds she invested in building the home on the plot they bought.

She obtained the loan from Afya Cooperative Society and went with the Applicant to Primeland and bought the plot. A copy of loan form marked **D** is annexed to her affidavit.

When they were building their home on the said Plot, they lived at [particulars withheld] Hospital Staff Quarters and he housed the Applicant. She struggled to develop both properties in Embakasi and Eldoret.

The Respondent also claimed to have bought the household goods in the matrimonial home from loan she took from Afya Cooperative annexed and marked H and attached to the affidavit.

The Respondent purchased the Eldoret property from one Ambrose Kiplagat through her relative F M. Again she obtained Loans from Afya Cooperative as shown by loan forms marked '**B**' attached to her affidavit.

The Respondent confirmed that the Applicant harassed her family. He physically abused her and children. He stopped her from going to work and locked her in the bedroom. She alleged that the Applicant caused her to be terminally ill. He stopped their son from joining Form One in Secondary School. The Applicant sent away her daughter whom she came with to the marriage. She reported the incidents to Embakasi police Station and they are recorded in the OB. She then filed an application in Court and the Court granted her orders against the Applicant and he was evicted from the matrimonial home.

APPLICANT'S CASE

On 17th September 2015, the Plaintiff/Applicant informed the Court that he is a Radiologist by profession. He worked in different hospitals from 1984 -2012. Upon leaving employment he was paid some money in lump sum. He then opened his private clinic in Loitoktok.

He married the Respondent in 1990s and solemnized in 2001. They lived together and had four children of the marriage. In 2012 the Respondent filed for divorce. The applicant stated problems arose when he lost his late brother and he took up responsibility to educate his children.

He said the property Embakasi 7430/[particulars withheld] he bought from Prime land at Ksh. 115,000/- and was issued with receipt attached to the application. The title was issued in the Respondent's name. He questioned and wrote to the land buying Company and they wrote questioning her ownership of the plot. All correspondence was attached to the Application.

With regard to Sergoit/ Koiwoptaoi Block 3/ Shatrek/[particulars withheld] he obtained a loan from Mara Methodist Sacco of Ksh. 250,000/- the loan form is attached.

He purchased the building materials as shown by bundles of documents marked **K-A** at page 14-22 of the bundle; is a list of materials purchased in his handwriting.

Despite purchasing and building on the 2 properties the land Certificates are registered in the Respondent's names.

The applicant stated that he lived with his family for 25 years and he was not violent. He did not neglect his family and he contributed to their upkeep and they bought and developed the 2 properties.

Christopher Kipsum Sarorei testified that he sold part of his land to Ambrose Kiplagat who sold part of his share to the Respondent. He met him once when he found him on the land and welcomed him as a neighbour. He saw him build a small house and kept someone there and visited with his wife and children. After he built a big house and was with a Contractor on the land. The house was not complete.

Benjamin Kiptoo an artisan confirmed to Court that he built the house in Eldoret for the Applicant. He identified the house plan that he drew attached to the bundle produced by the Applicant. At first the Applicant bought building materials but later he left him to buy and gave him money to pay for materials.

S K S younger brother of the Applicant stated that he lived on the land that the Applicant bought in Sergoit. He was with the neighbour and Artisan. He supervised on his brother the construction of the house. The Applicant bought building materials and he oversaw construction. He left the premises but the house was not complete.

RESPONDENT'S CASE

On 3rd December, 2015, the Respondent testified that she is a nurse at [particulars withheld] H. She was married to the Applicant as the 2nd wife. They had 4 children and lived together from 1994 – 2001. The Respondent reiterated that the suit property Plot [particulars withheld] L.R. 7340 / [particulars withheld] Embakasi she bought it through a loan she got from work and paid ksh. 120,000/- They went to [particulars withheld] Company offices with the Applicant and on payment the receipt was issued in the applicant's name. He gave her the receipt and told her the land was for her and the children. She pursued issuance of the title deed paid for it and was issued with the title deed. There was no fraud as alleged by the Applicant. She was summoned to the Company's offices and she explained the circumstances.

She attended all meeting of landowners in the estate and the Applicant did not oppose the same at all.

The Respondent obtained a loan from Equity Bank and constructed the house in Embakasi and bought household goods in the house. She produced the Bank statements, banking slips produced as Exhibit 12 & 13. She stated that the property in Eldoret also belongs to her; she purchased from a relative and constructed a home in the said land.

The Respondent referred to **Divorce No. Cause 109 of 2011** and the order of the Court produced as Exhibit 13. The Respondent also referred to **Children Court Case No. 2683 of 2011** for payment of school fees and school expenses for the children.

A K M informed the Court that he sold her the suit property Sergoit/Koiwataoi Block 3/Shatrek/[particulars withheld] for the negotiated price of Ksh. 136,000/= The Respondent through instalments of Ksh. 100,000/= and Ksh. 36,000/=. He never met the Applicant until the met in Court. They went to Land Control Board and he gave consent to sell to the Respondent the said land.

ISSUES

1. Are the suit properties Sergoit/ Koiwoptaoi Block 3/ Shatrek/[particulars withheld] & Plot [particulars withheld] L.R 7340/[particulars withheld] Embakasi Nairobi matrimonial properties?
2. What is the contribution of the Applicant and Respondent to the purchase and development of the suit properties?
3. How best should the division of the suit properties be done in the circumstances?

DETERMINATION

The law regarding matrimonial property is stipulated under **Section 6** of the **Matrimonial Property Act of 2014** to constitute matrimonial home (s), household goods and effects in the matrimonial home and any other immovable and movable property jointly owned and acquired during the subsistence of the

marriage.

In the instant case, these suit properties were acquired during the subsistence of the marriage from 6th May, 2001 - 1st November, 2012.

It is confirmed from the record that both the Applicant and Respondent were in formal employment during the period of marriage and each contributed directly to the purchase and development of the suit properties and acquired household goods or use by the family.

The Respondent in written submissions relied on **Section 5 of the Matrimonial Property Act, 2014**; that the suit property Sergoit/ Koiwoptaoi Block 3 ([particulars withheld]) was purchased in 1998 before the marriage as evidenced by issuance of the title document which shows it was issued in 1998.

This Court is not convinced of this allegation due to the following facts as per the Court record;

- a) The Applicant deposed in his supporting affidavit that they married under Kalenjin Customary law since 1990 before formalizing the marriage in 2001. This fact was not controverted in the Respondent's Replied affidavit of 29th January 2014 or during the trial.
- b) This fact is raised for the first time during written submissions which ideally should consist of the facts as presented in court and the law applicable.

This Court finds that the suit property was purchased during the subsistence of marriage between the Applicant and Respondent under Kalenjin Customary Law and formal marriage contracted in 2001.

The second issue is whether the Applicant and the Respondent contributed to the purchase of the suit properties and household goods.

Section 2 of the Matrimonial Property Act, 2014 defines 'contribution' as;

both monetary and non- monetary contribution and this includes; domestic work and management of the matrimonial home child care companionship management of family business and property and farm work.

The evidence produced by the Applicant in the Supplementary affidavit filed on 13th February, 2014 is as follows;

- 1) Loan Forms for November, 2002 marked **K- B** of the bundle. He obtained a loan of Ksh. 45,000/= from Cooperative Society
- 2) Loan Forms for March and July, 2003 marked **K- A** of the bundle he obtained loan from Cooperative Society of Ksh. 250,000/= and bought the property in **Plot [particulars withheld] L.R 7340/[particulars withheld] Embakasi, Nairobi.**
- 3) He purchased building materials for construction and development of the Embakasi property as evidenced by documents marked **K-C**. They are handwritten notes dated 22nd September, 2004 showing;
 - Purchase of parcel at Ksh. 115,000/-
 - fencing Ksh. 5,000/-
 - Materials Ksh. 17,000/- &
 - Residential house Plan Ksh 10,000/=
 - Summary of Grand Project Estimates outlining cost of assorted building materials totalling to Ksh 442,000/=

The applicant built the residential home and they moved in 2005.

4) With regard to the Eldoret Property; the Applicant paid instalments to one Rhoda who worked at the Petrol Station of the Respondent's relative F M brother to the seller A M as evidenced by documents marked **K-D** that show a pass with deductions for payments that were advanced to him.

5) He begun construction from money he was paid as he worked for Maua Methodist hospital as shown by documents marked **K-D**

6) He bought building materials for constructing the house in Eldoret as shown by similar lists of materials and estimated costs in documents marked **K-F**

The Respondent also paid for acquisition of the suit properties and household goods in the following manner as depicted in her Repeyng affidavit of 29th January 2014;

a) Loan forms from Afya Sacco show the Respondent got loan of Ksh. 200,000/= in 2002

b) Loan Forms from Afya Sacco show the Respondent got a loan of Ksh. 196,000/=

c) The Respondent got a loan from Equity bank for Ksh. 400,000/- and attached the loan form, statement of account that depict the loan deductions.

From the evidence on record this Court finds that both the Applicant and Respondent were in formal employment as Radiologist and Nurse respectively. They both contributed directly through financial input as demonstrated by acquisition of loans for acquisition and development of properties.

Since both parties do not contest that they were married, have four children and are divorced then they can legally pursue division of matrimonial property as prescribed by **Section 7 of The Matrimonial Property Act, 2014**. The Respondent attached the Ruling by Hon Justice Kimaru of 8th October 2013 and Judgment by Hon Justice E.K.O Ogolla of 1st November, 2012 in **Divorce Cause 109 of 2011**. The Ruling was to deny the Applicant access to the matrimonial home and the Judgment granted the parties divorce.

The third issue is with regard to the Division of Matrimonial property.

Section 7 of the Matrimonial Property Act mandates:

Subject to Section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards the acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

The Court has established from evidence on record that the suit properties were acquired and developed through joint effort and direct contributions by both the Applicant and Respondent as depicted from the Loans each party took and the fact that both parties were formally employed all through their marriage period.

The Respondent claimed that she solely purchased and developed he suit properties and they are registered in her name.

With respect this Court finds that the said statements are not backed by cogent evidence. Firstly, the family consisted of four children whose needs are food, shelter, clothing, school fees and expenses and medical care. Since the Respondent deposed that the Applicant neglected that family; then it follows that Applicant shouldered this responsibility single-handedly. If she carried out these responsibilities; how did she manage with loan repayments for loans that she obtained to buy and develop both properties simultaneously. From the payslips attached this was a huge burden to shoulder alone. The Applicant contributed directly to the upkeep of the family maybe not always or fulfilled all financial needs but he

must have shouldered some responsibility.

Secondly, although the suit properties are registered in the Respondent's name **Section 93 (1)** of the **Land Registration Act** Prescribes as follows;

Subject to the law on matrimonial property, if a spouse obtains land for the co ownership and use of both spouses or all the spouses; there shall be a presumption that the spouses shall hold the land as joint tenants unless.....or the presumption is rebutted in the manner stated in this subsection and the Registrar shall register the spouses as joint tenants.

In the absence of proof of fraud or misrepresentation, the fact of registration of land in the name of one spouse does not guarantee absolute ownership. There's a rebuttable presumption that one spouse was registered as trustee for the other spouse in instances of use of the said properties.

In the instant case; the Respondent is registered owner of both suit properties. The evidence on record proves that not only did the Applicant use the said properties but also directly contributed to purchase and development of the same. He lived in the matrimonial home situated in **Plot [particulars withheld] L.R 7340/[particulars withheld] Embakasi Nairobi** until 8th October, 2013 pursuant to a Court order. He contributed to purchase of the Plot and construction of the home as shown by loan documents filed in Court. Similarly, with regard to the suit property **Sergoit/ Koiwoptaoi Block 3/ Shatrek/[particulars withheld]**.

The Applicant produced evidence of purchase and construction of the home which was left incomplete. His testimony was corroborated by Christopher Sarorei; neighbour, Benjamin Kiptoo the Artisan who drew house plan, bought materials and started construction of the home. Simon Kiprop stayed on the land and supervised building works by his brother.

The totality of the evidence on record is that both Applicant and Respondent worked hard and directly contributed to the purchase and acquisition of the suit properties. This Court cannot with exact precision determine who paid what and when; suffice is to state there is evidence of joint effort and contribution.

The parties cannot give exact and precise sums of what each did as they were a married couple working jointly based on trust and no one can foresee the future so as to earnestly keep proper records.

DISPOSITION

Therefore this Court after considering and analysing the evidence on record find as follows;

- a. Plot [particulars withheld] L.R 7340/[particulars withheld] Embakasi Nairobi & Sergoit/ Koiwoptaoi Block 3/ Shatrek/[particulars withheld] are matrimonial properties**
- b. The Applicant J K S and the Respondent P J K made direct contribution to acquisition and development of the suit properties.**
- c. They are each entitled to 50% of each of the suit properties.**
- d. The Determination on household properties cannot be made as no proof of the items was made to Court and proof of who purchased what was shown to Court.**
- e. The Applicant cannot lawfully and legally claim rent repayments as the denial of access to the matrimonial home was pursuant to the Court order of 8th October 2013. This order was not reviewed or appealed against.**
- f. Each party shall bear own costs.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 10TH NOVEMBER 2016

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

.....

.....