



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO 170 OF 2010 (O.S)

IN THE MATTER OF AN APPLICATION BY DYSELEER MIREILLE LESOIPA UNDER SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT 1882 AS AMENDED

BETWEEN

DYSELEER MIREILLE LESOIPA.....PLAINTIFF

VERSUS

MANUEL LESOIPA alias EMMANUEL LESOIPA.....DEFENDANT

JUDGMENT

1. Dysseleer Mireille Lesoipa (hereinafter referred to as “*the applicant*”) took up the originating summons dated 16th July, 2010 against the respondent (Manuel Lesoipa) for determination of the following questions which also form the issues for determination.

ISSUES FOR DETERMINATION

i) Whether the Plaintiff should be allowed to retain Plot No. 14 Maralal Township together with all developments therein and the defendant ordered to effect transfer of the said property to her?

ii) Whether Plots No. 33 and 112 Maralal Township should be sold and the Plaintiff be allowed to recover the initial capital invested in purchasing the said plots with any profits over and above the initial capital invested thereon being shared equally between them?

iii) Whether the defendant should be allowed to keep the unregistered plots at Loosuk and Ngweta; motor vehicles registration Nos. KAN 610N (Toyota Prado) and KAJ 148 E (Lorry)?

iv) Who should pay the costs of the suit.

FACTS

2. The originating summons is supported by the affidavit of the applicant sworn on 10th July, 2010.
3. In opposing the suit (application) the defendant filed the replying affidavit sworn on 6th September, 2010.
4. During the pendency of this suit, the parties recorded a consent whose effect was to dispose off question (i) in favour of the plaintiff. They also sold Plot No.33 Malaral Township and shared the proceeds therefrom equally between themselves. That being the case and there being no dispute

concerning question number (iii) (question number (iii) concerns the plaintiff's proposal that the defendant should be allowed to keep those properties), this judgment is restricted to a portion of question (ii) to wit, whether Plot No.112 Maralal Township (hereinafter called the suit property) should be sold and the plaintiff allowed to recover her initial investment therein, with the remainder being shared equally between them (the plaintiff and the defendant) and the issue of costs of the suit.

5. After the hearing of this suit failed to kick off severally, owing to the defendant's health status, this court, with the concurrence of the advocates for the parties, directed that the suit be disposed off by way of written submissions. Consequently, advocates for the respective parties filed submissions, which I have read and considered.

SUBMISSIONS BY PLAINTIFF'S COUNSEL

6. In the submissions filed on behalf of the plaintiff, a brief background of the circumstances leading to the filing of this suit is provided. In this regard it is explained that the plaintiff got married to the defendant on 13/12/1995. On or about 2004 problems cropped into their marriage leading to filing of Maralal SRMC's Separation Cause No.2 of 2004. In that Cause the parties entered into a consent that was adopted as an order of the court in the following terms:-

“(1) That the agreement entered in this case (read in that cause) be confirmed:

(2) That the properties purchased by the petitioner and the respondent before their separation are not to be sold by either of the parties without the consent of the other;

(3) That in the event that the properties purchased by the petitioner and the respondent are sold, the petitioner must receive the initial capital and the profits be shared between them equally.”

7. It is contended that during the subsistence of their marriage the parties herein acquired a number of properties, including but not limited to the suit property herein.
8. With regard to the suit property (that is Plot No.112 Maralal Township), it is admitted that it was bought by the defendant but contended that the plaintiff financed its purchase and development. The plaintiff's contention that she financed the purchase and development of the suit property is said to be borne out by the documents annexed to her supporting affidavit, which documents are said to be uncontroverted. The said documents are cheque No. 000005 drawn in favour of Francis Kinyanjui Ngugi, the vendor in the sale agreement executed in respect of the suit property; cheque No. 000004 drawn in favour Kenya Commercial Bank Maralal Branch, in accordance with clause 2 of the Sale Agreement executed between the defendant and Francis Kinyanjui Ngugi and bank statements allegedly attesting the monies the plaintiff withdrew from her bank to finance the development of the suit property.
9. The suit property is developed with a storey building erected thereon. Valuations reports filed in court in 2013 and 2014 respectively placed the current value of the property at between Kshs. 16, 200,000/= and 17,900,000.
10. Concerning the documentary evidence produced by the plaintiff to prove her claim that she financed the purchase and development of the suit property, it is submitted that the defendant's allegation that he bought the property and thereafter got them registered in his name, without any comment on the documents annexed to her supporting affidavit in support of her claim, is incapable of controverting the plaintiff testimony to the effect that she financed the purchase and development of the property.
11. Concerning the plaintiff's claim counsel urged this court to be guided by the decision of Kimaru J. in the case of **Lilian Mweru Thuita V. Samuel Thuita Wanjama**, Nakuru HCCC NO.144 of 2003 (2006)e KLR. In that case the judge observed:-

“In the instant case, it is undisputed fact that the respondent purchased the suit parcel of land in 1987, five years before he met the applicant. The respondent had constructed some houses. It is clear that it is when the applicant moved into the parcel of land that

the construction of the permanent houses commenced in earnest..... Although there is evidence that the initial construction was financed by the respondent, the applicant adduced evidence that she borrowed money from her cooperative to the tune of Kshs.197,000/= to fund the said construction. She further sold her shares of Barclays bank to complete the said construction. This was in addition to the salary she received in her employment as a teacher.

.....In this regard the receipts that she produced in evidence established on a balance of probabilities that she was a major contributor for the construction of the said premises. I found no merit with the evidence adduced by the respondent that the applicant played no part in the construction of the said premises, either by supervising it or by contributing to the purchase of the building materials.

.....In the circumstances therefore, I hold that the applicant has established on a balance of probabilities that she is entitled to half share of the suit property by virtue of the fact that the said property comprised her matrimonial home and further that she had substantially contributed to the developments thereon and the improvement of its value.”

SUBMISSIONS ON BEHALF OF THE DEFENDANT:

12. Based on the provisions of Sections 6 and 7 of the **Matrimonial Property Act, 2013** which vests ownership of matrimonial properties to spouses according to their contribution towards the acquisition of the properties it is submitted that the sole issue for determination in this suit is whether the plaintiff made a direct contribution to the acquisition of the suit property?
13. With regard to that question, it is submitted that the Sale Agreement in respect of the suit property does not capture the plaintiff either as the buyer or having played any other role in it.
14. Concerning the cheque exhibited in the plaintiff's supporting affidavit which apparently indicates that it was the plaintiff who paid the purchase price in respect of the suit property, it is submitted that the cheques contain inadequate information concerning the plaintiff's participation in payment of the purchase price.
15. As for the bank statements annexed to the plaintiff's supporting affidavit it is submitted that it offends **Sections 67, 68 and 69 of the Evidence Act, Chapter 80 Laws of Kenya** and as such have no probative and evidential value.
16. Based on a passage by Lord Morris of Borthy-Y-Gest in **Gissing V. Gissing**, (1971) AC 886, it is submitted that there is no evidence that the parties in this suit intended or treated each other as equal partners as far as the suit property is concerned.
17. In **Gissing V. Gissing** (*supra*) the said Lord Morris of Borthy-Y-Gest stated:-

“...the court does not decide how the parties might have ordered their affairs. It only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had. Nor can ownership of property be affected by the mere circumstances that harmony has been replaced by discord. Any power in court to alter ownership must be found in statutory enactment.....”

18. Counsel also referred to the decision in the case of **Beatrice Bonareri Nyabuto V. Eldad Kanyanya Wapenyi**, Nairobi High Court Civil Suit No.4 of 2006 (2006)eKLR to argue that the plaintiff's contribution is a matter of evidence to be established by cogent evidence, which the plaintiff failed to adduce. In the case under reference, **Beatrice Bonareri Nyabuto V. Eldad Kanyanya Wapenyi**, George Dulu Ag. J. (as he then was) held:-

“...The Married Women Property Act (1882) provides that a woman can own her own separate property either within or outside marriage. If she contributes to acquisition of property she acquires proprietary interest in the same. In my view, even if property is acquired by husband prior to the marriage, but the wife has contributed to its

improvement, she acquires, an interest in it, and it can be called matrimonial property. Her contribution is however a matter of evidence. It has to be established by cogent evidence.”

ANALYSIS:

19. In the supporting affidavit sworn in support of the plaintiff claim, the plaintiff had deposed as follows concerning the suit property:-

“10. That plot No.112 Maralal Town was purchased on or about June, 2000;

That the purchase price for Plot No.112 Maralal Town was Kshs.2, 040,000/= all of which was paid from my account at KCB Maralal Branch. (Copies of the cheques evidencing payment are annexed to this affidavit and marked exhibit DML III (a) and (b);

That the Plot is now fully developed (A photograph showing the storeyed building on Plot No.112 Maralal is annexed to this affidavit and marked exhibit DML IV;

That the plot was solely developed by myself and money for development came from my account (statements of my account showing the cash withdrawals are annexed to this affidavit as a bundle and marked exhibit DML V.”

20. In reply to the said averments, the defendant vide the replying affidavit sworn on 6th day of September, 2010, has deposed as follows:-

“That in reply to the reply to the contents of paragraphs 10, 11, 12, and 13 of the said affidavit, I wish to state that the said plot No. 112 Maralal is a property I personally acquired and indeed upon the purchase of the said property I was issued with title on the 21st may 2002 and the said property registered as Samburu/Maralal township/112. Annexed herewith and marked “ML1” find a copy of the Title deed.”

21. There being no oral evidence concerning the participation of the parties in acquisition of the suit property, this court has to determine the issues concerning the acquisition and development of the suit properties on the basis of the said averments. In this regard, it is noteworthy that in his replying affidavit, other than stating that he personally acquired the suit property and registered it in his name, the defendant did not explicitly deny the plaintiff's allegation that the money used to purchase and develop the suit property was drawn from the plaintiff's account. Besides, he did not challenge the documentary evidence annexed to the plaintiff's supporting affidavit which *prima facie* shows that the plaintiff participated in acquisition of the suit property.

22. To counter the plaintiff's allegation that she provided the purchase price and the money used to develop the suit property, the defendant needed to specifically respond to those allegations, and in particular the cheques which show that the plaintiff paid some money to the seller of the suit property and to the bank, in accordance to a clause in the sale agreement.

23. For this reason, in respect of the submission by counsel for the defendant that the documents annexed to the plaintiff's supporting affidavit are of no evidential value, I find and hold that for the defendant to rely on that contention to defeat the plaintiff's claim he needed to have challenged the propriety of those documents in his replying affidavit. In this regard see the case of **Emmanuel Kuria Gathoni V. Commissioner of Police & Another (2012)eKLR** where Nambuye J.A stated:-

“The plaintiff has sought to rely on the set of documents which were classified, exchanged between the relevant mentioned authorities to show that there was no basis for prosecution. To counter this, the defendant has not argued that the said documents were never exchanged by the named relevant authorities. All that the defendant has tended to assert to counter them is that they are classified and evidence will be required

to clarify them. This argument does not hold on two fronts namely, being documents, the best way to deny their authenticity should have been through affidavits sourced from their alleged originators to deny their authenticity. This was not done and for this reason they stand as documents. Upon being accepted as such they became protected by the provisions governing proof of documents namely section 64-79 of the evidence Act to the effect that the document itself is proof of its content and no oral evidence can be tendered to controvert it. It means that the defendants assertion that the contents of the alleged classified documents need to be interrogated through evidence does not hold and the calling of the makers of the said documents other than for purposes of tendering them in evidence for purposes of production as exhibit and not for purposes of oral evidence to controvert the alleged contents is unnecessary.” (emphasis mine).

FINDING AND DETERMINATION

24. The upshot of the foregoing is that the averment of the plaintiff to the effect that she contributed to the purchase and development of the suit property was not adequately controverted. On the basis of the documentary evidence annexed in support of those averments, namely cheques and bank statements, I find and hold that the plaintiff has proved on a balance of probabilities that she contributed and participated in the acquisition of the suit property.
25. In the special circumstances of this case, I find and hold that the plaintiff is entitled to the order sought, being recovery of her investment in acquisition of the suit property and an entitlement to an equal share (50%) of the proceeds of sale of the suit property over and above her capital invested. This finding is informed by the consent executed between the parties herein in the Separation Cause herein. However, in view of the fact that it is difficult to decipher from the bank statement the total amount of money the plaintiff applied in developing the suit property, I direct that the capital investment of the plaintiff be limited to Kshs. 2, 050, 000/= being her share of the purchase price.
26. I also direct that the suit property be sold and/or the parties buy off each others entitlement in respect thereof.
27. Each party to bear their own costs of the suit.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 9th day of February, 2015

A. MSHILA

JUDGE