



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL CASE NO. 48 OF 2011**

**N W N..... APPLICANT/PLAINTIFF**

**VERSUS**

**J N K ..... RESPONDENT/DEFENDANT**

**J U D G M E N T**

1. The claim by the plaintiff, **N W N**, vide the originating summons dated 21st April, 2011, is for a declaratory order that the movable and immovable property to wit, land parcel No. *[particulars withheld]*, land parcel No. *[particulars withheld]*, motor vehicle Reg. No. *[particulars withheld]*, a plot wide allotment letter No. *[particulars withheld]* on land belonging to Langata Development co. Ltd., plot No. *[particulars withheld]* on land belonging to Mwana Mukia Housing Co-op Society Ltd and  $\frac{1}{4}$  of an acre of land situated at Kapkoros farm LR. No. *[particulars withheld]* along Eldoret/Turbo road, were acquired during the subsistence of the marriage between the plaintiff and the defendant, **J N K**, through efforts and funds by both of them.
2. It is therefore the plaintiff's prayer that the said property be distributed equally between her and the defendant for reasons that the property was acquired jointly and is in danger of being dealt with by the defendant in a manner detrimental to the plaintiff and that the two have since been granted a divorce.

In his response to the claim vide a replying affidavit dated 20th June, 2011, the defendant avers that Land Parcel No. *[particulars withheld]* was purchased by himself prior to his marriage to the plaintiff and that in his occupation as a teacher from 1974 to 2000, he was an active member of Mwalimu National Co-operative Savings & Credit society Ltd through which he obtained several loans to finance his projects. He used the loans and his salary to purchase the lands in Kapkoros along the Eldoret – turbo road, Lessos within Kitale Municipality, Langata Dev., Company Ltd., Mwana Mukia Housing Co-op Society and Tuwan.

3. The defendant also avers that the plaintiff never contributed financially towards the purchase of the said lands which are in his name. He opened a small kiosk in 1991 which was run by the plaintiff who could not do much due to her medical condition but in 1997 he opened a shop situated in his Tuwan plot which was also run by the plaintiff. The defendant contends that the proceeds from the shop were never used towards the purchase of the material portions of land and avers that in the year 2004, the plaintiff removed all the stock from the shop and moved to Matunda upto the year 2006 during which period he (defendant) re-stocked the shop and sustained it.
4. It is further averred by the defendant that on the 13th March, 2011, the plaintiff took away all the stock in the shop together with household effects and relocated to Nakuru where she is running

- another shop. He (defendant) therefore intends to share his property with his four adult children. That, upon retirement in 2006, he was paid a pension sum of Ksh. 800,000/= with which he purchased a motor vehicle Reg. No. *[particulars withheld]* which he sold at the same price in the year 2008 and constructed a permanent building on plot No. *[particulars withheld]* Mwana Mukia Housing Co-op. Society Ltd.
5. In her reply to the foregoing averments by the defendants, the plaintiff vide the further affidavit dated 7th October, 2013, admits that the land at *[particulars withheld]* was purchased by the defendant prior to their marriage but contends that the lands in Kapkoros , Lessos, Langata Development Co. Ltd., Mwana Mukia Housing Co-op Society and Tuwani Scheme Kitale were jointly purchased by her and the defendant. She also contends that she operated the shop from 1989 to the year 2008 during which time business was lucrative such that it enabled her contribute substantially towards the purchase of their matrimonial property. She denied carrying away shop stock in the years 2004 and 2011 and avers that it is not true that the defendant constructed a complete house at Mwana Mukia Housing Co-op. Society Ltd.
  6. At the hearing of the matter, both parties reiterated their respective averments and contentions contained in the supporting and replying affidavits filed herein. In the process, the plaintiff (**PW1**), indicated that their marriage lasted for twenty six (26) years during which time they jointly acquired property. She produced a court judgment (**Pexh. 1**) proving that the marriage was legally dissolved. She also produced a sale agreement dated 23rd March, 1981 (**P. Exh. 2**) confirming the purchase of a plot No. *[particulars withheld]* at Huruma Estate Eldoret. She stated that the plot contains twenty four (24) rental units and was purchased from proceeds of their farming activity. She also stated that the plot in Lessos Kitale was purchased in 1987 from proceeds realized from business operated by herself while the defendant was a teacher. She said that the plot is No. *[particulars withheld]* and contains a house erected thereon. She produced the necessary sale agreement dated 9th December, 1988 (**P. Exh. 3**)
  7. The plaintiff further indicated that the plot No. *[particulars withheld]* situated in Langata was purchased in 1992 and is partly developed. She produced the necessary allotment letter and share certificate (**P. Exh. 4 a-b**) and went on to state that the plot No. *[particulars withheld]* at Mwana Mukia Housing co-op. Society in Githurai Nairobi was purchased in 1995 and is partly developed with rental units. She produced the necessary share certificate (**P. Exh. 5**). She further indicated that plot No. *[particulars withheld]* at Tuwani Kitale, was purchased in 1986. She presented without formal production the necessary share certificate. She however, produce the title deed (**P. Exh. 6**) to the land at Kwanza and stated that it was purchased in 1978 before being married to the defendant.
  8. The plaintiff testified that she operated a joint bank account with the defendant at the Standard Chartered Bank and contended that the proceeds from their business was deposited in the account. She produced the necessary passbook (**P. Exh. 7**). She also produced necessary receipt books (**P. Exh. 8**) confirming that she operated a retail and wholesale shop between the years 1992 and 2008. She contended that all the property was purchased jointly with the defendant and was treated as matrimonial property. She denied that the property was solely purchased by the defendant through loans from his teachers Sacco and said that between 1981 to 1988 she was unwell and in March, 2011 she closed her shop and relocated to Nakuru but did not remove all the stock from the shop. She indicated that the motor vehicle Reg. No. *[particulars withheld]* was jointly purchased either in 1994 or 1995 but was left with the defendant. Her prayer is for a share of the matrimonial property and costs of the suit.
  9. On his part, the defendant testified that after graduation from Kenyatta University in March, 1974, he was employed as a teacher by the Teacher's Service commission (TSC) and posted to *[particulars withheld]* School, Nandi District, upto August 1982 when he was transferred to *[particulars withheld]* School where he retired in the year 2000. He worked as a teacher and farmed at the same time. His farm was *[particulars withheld]* measuring five (5) acres. He married the plaintiff in 1978 and were blessed with four (4) children who are now adults. He was responsible for their school and college education as the plaintiff was a housewife without any formal training for purposes of employment having dropped out of school while in form one.
  10. The defendant further testified that in 1981, the plaintiff developed a medical condition which persisted upto 1998 when it subsided. He produced the necessary report from one Dr. Murgor – (**D. Exh. 1**) and said that in the year 2009, the plaintiff filed for divorce which was granted by the

- court on 4th March, 2011. He contended that the plaintiff was not a party to the sale agreement respecting the Eldoret plot (see, P. Exh. 2) which he purchased using his salary and proceeds from farming activities without any contribution from the plaintiff. He produced a summary of the loans (**D. Exh. 2**) obtained by him from his Teachers Co-operative Society and stated that he retired from employment in the year 2000 and was paid a pension of Ksh. 811,000/=, which he utilized to purchase a vehicle and pay college fees for two of his children. He said that the vehicle was purchased on 28th May, 2003 and used for commercial activities until it was sold in the year 2008 for the sum of Ksh. 800,000/=. He produced the necessary agreements (**D. Exh. 3 a-b**).
11. The defendant indicated that the plot in Lessos was purchased by himself in 1988 by way of a loan received from his Co-op. Society. He contended that the plaintiff did not feature in the agreement and indicated that he purchased shares in the form of plots from the Langata Development Co. Ltd. and Mwana Mukia Housing Co-op society. He said that the plaintiff played no role in the purchase and that he erected a building on the plot in Mwana Mukia Housing Co-op society but the same does not bring in any income as it is incomplete. He contended further that in 1991, he gave to the plaintiff his own shop so that she may operate it while recovering from her medical condition. He said that the shop was obtained by him in 1990. He produced the necessary agreement (**D. Exh. 4**) and said that he allowed the plaintiff to work in the shop while in 1995 he purchased a plot and erected his own shop which he stocked and permitted the plaintiff to run it.
12. The defendant testified that in December, 2004, the plaintiff absconded from their matrimonial home taking away half of the household goods to Matunda where she lived with a new “husband” called E M. She however, returned to the matrimonial home in the year 2006 and continued to run the shop upto March, 2011, when she left after the lawful dissolution of their marriage.

The defendant indicated that the joint account held at the Standard chartered Bank was opened to facilitate his business transactions but because the plaintiff needed to access the account while he was away, she was co-opted into the same. He contended that he purchased all the material property for the benefit of his children together with the plaintiff and as such, has never sold any of the property nor does he wish to do so. He prayed for the dismissal of this case while contending that the plaintiff never made any contribution towards the purchase of any of the property. He affirmed that the property is for the benefit of his children and their mother (i.e plaintiff).

13. From the pleadings and the evidence in support thereof there emerges two issues for determination viz:- Whether the property in question falls within the definition of Matrimonial property and whether the plaintiff is entitled to equal distribution of the property upon dissolution of her marriage with the defendant.

With regard to the first issue, matrimonial or marital property is said to be property acquired during marriage and that is, subject to distribution or division at the time of marital dissolution. It is the property acquired after the date of the marriage and before a spouse files for separation or divorce (see, **Blacks Law Dictionary 8th Edition**).

14. Indeed, in this case, the claim by the plaintiff against the defendant is for equal distribution of the property acquired during the existence of their marriage which was effected in 1978 and dissolved in 2011.

According to the plaintiff, the property was so acquired with her direct or indirect input and included Land Parcel No. [particulars withheld], a plot or two belonging to Langata Development co. Ltd., a plot No. [particulars withheld] belonging to Mwana Mukia Housing Co-op. Society Ltd and a plot No. LR. [particulars withheld] Kapkoros along Eldoret Turbo road. Also included is a plot No. [particulars withheld] Tuwani Scheme Kitale and a motor vehicle Reg. No. [particulars withheld].

15. The definition of matrimonial property aforementioned would therefore apply to all the said property save perhaps land parcel No. [particulars withheld] which was acquired by the defendant prior to the marriage. However, under the current **Matrimonial Property Act, 2013**, which is the applicable law in the present circumstances rather than the English **Married Women's Property**

**Act, 1882**, Matrimonial property is defined to mean the matrimonial home or homes, household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage, (see, **Section 6 (1) Matrimonial Property Act, 2013.**)

It would therefore follow that all the property indicated herein including land Parcel No. [particulars withheld] falls within the definition of Matrimonial property and may be available for distribution as provided by the Law.

16. With regard to the second issue whether the plaintiff is entitled to equal distribution of the matrimonial property now that her marital relationship with the defendant has since been dissolved, the answer lies in the provisions of the Constitution of Kenya, 2010, and the Matrimonial Property Act, 2013 even though the present claim was brought under section 17 of the Married Women's Property Act, 1882, which provided that:-

***“In any question between husband and wife as to the title or possession of property, either party summary way to any Judge of the High Court of Justice and the Judge may make such order with respect to the property in dispute as he thinks fit.”***

This provision placed upon the applicant the obligation to establish direct or indirect contribution by herself towards acquisition of property. Thus, where the wife had made measurable financial contribution to the family income and property, the court was also required to consider her substantial indirect contribution in paying for household expenses, food and clothing, schooling of the children and enhancing the family welfare (see, **Kivuitu vs. Kivuitu (1991) LLB 1411.**)

It was stated in **Nderitu vs. Kariuki (1977) LLR 2731**, that

***“Wife's contribution, and more particularly a Kenyan African wife, will more often, than not take the form of backup service on the domestic front rather than a direct financial contribution. It is incumbent, therefore, upon a trial judge hearing an application under section 17 of the Act to take into account this form of contribution in determining the wife's interest in the assets under consideration.”***

17. It is without doubt that the concept of direct or indirect contribution towards acquisition of matrimonial property has always been recognized and remains recognized by dint of section 2 and 7 of the Matrimonial Property Act, 2013, which was enacted pursuant to Article 68 of the Constitution to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.

**Section 2 of the Act (Matrimonial Property Act)** defines contribution to mean monetary and non-monetary contribution whereas non-monetary contribution includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.

Family business means any business which is run for the benefit of the family by both spouses or either spouse and generates income or other resources wholly or part of which are for the benefit of the family.

**Section 7** of the Act, provides that:-

***“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.”***

18. Under **Article 45 (3)** of the Constitution, 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. Such rights

would invariably extend to matrimonial property thereby implying that all the property listed in this cause by the plaintiff ought to be equally distributed between herself and the defendant. This however, has to be done in accordance with section 7 of the Matrimonial Property Act 2013 which creates a mode of distribution commensurate with the monetary or non-monetary contribution made towards the acquisition of the property or in other words direct or indirect contribution made towards the acquisition of the matrimonial property. The provision clearly does away with a fifty by fifty (i.e. 50:50) mode of distribution. A party is thus entitled to a share of the matrimonial property equal to his or her contribution towards its acquisition during the subsistence of the marriage. Such a mode guarantees a fair and equitable distribution if not the rights guaranteed under Article 45 (3) of the Constitution.

19. In that regard, the plaintiff herein would be entitled to a share of or interest in the property for which she contributed directly or indirectly towards its acquisition. Among the property listed by herself in the originating summons is parcel **No. [particulars withheld]**. This property was acquired by the defendant prior to the marriage. He said that the property measures five (5) acres and that he purchased it at Ksh. 800/= per acre and that it was initially their matrimonial home where they had a maize farm. The defendant, however, stated that the plaintiff did not undertake any work in the farm as that task was left to employees. He said that the plaintiff was essentially a housewife meaning that she undertook general domestic work and managed the matrimonial home, let alone providing him with companionship and taking care of their children. She oversaw the homestead and all that appertained to it including the maize farm. Such contribution may not have been in monetary form but it was nevertheless a significant non-monetary contribution which went on for a considerable period of time thereby according the plaintiff an interest in land by virtue of **section 28** of the **Land Registration Act, 2012**, which provides for spousal rights over matrimonial property and protects her against gender discrimination in law, customs and practices relating to land and property in land as envisaged by **the Land Act, 2012**.
20. Although the property [particulars withheld] was registered in the sole name of the defendant, the plaintiff enjoys an overriding interest over it such that the defendant may be said to be holding it not only for his own benefit but also that of the plaintiff. However, given the fact that the plaintiff came into the land after she was married by the defendant who had already acquired it, her benefit in the land by virtue of her contribution when it was the matrimonial home would reasonably be placed by this court at 30%. She is thus entitled to 30% of the property in the said land.
21. As for land Parcel **No. [particulars withheld]**, the sale agreement dated 9th December, 1988, (P. Exh. 3) shows that it was purchased solely by the defendant from a person called Ezekiel Kipsang Talam. This means that the plaintiff did not financially contribute to its acquisition although she alleged that the property was acquired from proceeds of a shop which she operated while the defendant worked as a teacher. She thus implied that the shop was a family business whose income was applied towards the purchase of the property but conceded that there was nothing to prove that indeed income from the shop was utilized towards the acquisition of the property. The defendant indicated that he purchased the property at a price of Ksh. 19,000/= which was raised from a loan obtained from his Mwalimu Co-op society. Indeed, the letter dated 7th June, 2011 (D. Ex. 2) from the said Mwalimu Co-op society shows that the defendant obtained several loans between 1983 and 1989. It is highly likely that he exclusively purchased the property from the remnants of his loans. The plaintiff is therefore not entitled to a share of or an interest in that property which is yet to be formally registered.
22. As for Parcel **No. [particulars withheld]** along Eldoret Turbo road, the sale agreement dated 23rd March, 1981 (P. Exh. 2) establishes that the property was purchased by the defendant from one Tariya Khayesi Mukabwa at a price of Ksh. 6,000/= which the defendant said he raised from his salary and proceeds from his farming activities. It is evident that the farming activities were those being undertaken at his then matrimonial home on Parcel No. [particulars withheld] which activities as indicated hereinabove were overseen by the plaintiff who was the housewife and therefore responsible for the management of the matrimonial home in most aspects. She thus made reasonable contribution towards his efforts to acquire the property. This was an indirect contribution which entitles her to a share of or an interest in the property although it does not escape the mind of this court that the contribution was hampered by the onset of her medical condition in 1981 which persisted for a considerable period of time but without rendering her an invalid or disabled person. In any event, she was not bed-ridden within the period and was under

medical treatment as implied by the letter from one Dr. Murgor dated 23rd June, 2011 (D. Exh.1).

Her contribution towards the acquisition of the property may reasonably be placed at a half of the degree for her contribution towards the purchase or acquisition of the initial matrimonial home at Kwanza – Namanjalala (i.e. 15%). This is the percentage of her share or interest in the material property.

23.As for the shares or plots belonging to Langata Development Company Ltd. and Mwana Mukia Housing Co-operative Society Ltd, the share certificates exhibited herein (P. Exh 4 (b) and P. Exh. 5) were issued to the defendant meaning that he is entitled to the respective plots to the exclusion of any other person including the plaintiff as the shares would not form part of the matrimonial property. In any event, there was no significant evidence from the plaintiff to prove that she contributed in one way or the other towards the acquisition of the shares by the defendant.

Indeed, in the case of **Muthembwa vs. Muthembwa (2002) 1 EA 186**, the Court of Appeal indicated that property owned by or belonging to a limited liability company was not matrimonial property available for division and/or distribution (**see also, Mungai vs. Mungai (1995) LLR 405**).

Consequently, the plaintiff's share or interest in the plots belonging to the aforementioned companies would be nil.

24.As for the motor vehicle **Reg. No. [particulars withheld]**, the defendant stated that he retired from his employment as a teacher in the year 2000, and was paid a pension of Ksh. 811,000/= part of which he used to purchase a vehicle. He purchased a vehicle on the 28th May, 2003 and used it as a commercial vehicle for about five (5) years prior to selling it in the year 2008, at a price of Ksh. 800,000/=. This is all established by the appropriate sale agreements (D. Exh. 3 a-b) which however show that the motor vehicle in question was not Reg. No. **[particulars withheld]** as indicated by the plaintiff but **Reg. No. [particulars withheld]** Mitsubishi canter. The existence of the said motor vehicle Reg. No. **[particulars withheld]** was not established even though the plaintiff alleged that it was purchased either in 1994 or 1995 and was left with the defendant.

Whatever the case, it is apparent that none of the vehicles is available for distribution as part of the matrimonial property. The benefits (if any) derived from the vehicles were utilized and extinguished prior to the dissolution of the marriage in the year 2011.

25.It is only the property or properties mentioned herein-above that were specified by the plaintiff in the originating summons dated 21st April, 2011. However, another property known as **[particulars withheld] Plot** was brought to the fore by the defendant in his reply to the originating summons. He indicated that there was a building in that plot which was used as a shop run by the plaintiff. The plaintiff acknowledged the existence of the plot in her further affidavit dated 7th October, 2013, in which it is described as **Plot No. [particulars withheld]**. She said that she operated a shop in that plot from 1992 to 2008 and indicated that the plot was purchased from shop proceeds thereby implying that she contributed significantly towards its acquisition by the defendant. She produced a bank passbook (P. Exh. 7) and receipt books (P. Exh. 8) to establish her contribution and implied that a matrimonial home was later established in the plot.

26.The defendant elaborated that the passbook (P. Exh. 7) was for a joint bank account in his name and that of the plaintiff and that it was opened to facilitate his business transactions which of course included the transactions relating to the shop operated by the plaintiff as a family business. It therefore goes beyond any doubt that there was significant contribution made by the plaintiff in the acquisition of the **[particulars withheld]** plot but it beats logic as to why she omitted it from the originating summons which essentially constituted her claim against the defendant. It could be that she was not interested in the plot anymore following the dissolution of her marriage and having, as stated by the defendant, taken away to Nakuru all the stock-in-trade of the shop. It could also be that she has since found or established another matrimonial home with the person referred herein as E M or that she was only interested in the stock in the shop but not the plot

itself.

Be that as it may, it is not the duty of this court to actualize the plaintiff's apparent afterthought and avail the *[particulars withheld]* plot for distribution in this cause.

27. In the end result, the plaintiff's claim is allowed only to the extent that she is entitled to a share or interest of 30% in the property known as Parcel No. *[particulars withheld]* and 15% in the property known as Plot No. *[particulars withheld]* Farms along the Eldoret – Turbo Road. Otherwise, the plaintiff is not entitled to the division or distribution of the rest of the immovable and movable property in her favour.

Each party shall bear their own costs of the suit if only to promote and maintain peace and harmony between the plaintiff and the defendant.

Ordered accordingly.

**[Delivered and signed this 3<sup>rd</sup> day of February, 2015.]**

**J.R. KARANJA.**

**JUDGE.**