



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL SUIT NO. 59 OF 2011 (OS)

J. W.C.....APPLICANT

VERSUS

P.B.W.....RESPONDENT

JUDGMENT

1. The applicant and the respondent got married on 6th May 1989 at Banana Hill in Kiambu under Luhya customary law. The marriage was solemnised on 7th December 1997 at Tassia in Nairobi under the **African Christian Marriage and Divorce Act (Cap. 151)**. The marriage was blessed with six children who are attending school. The parties were separated in September 2009, following which the applicant filed Divorce No. 7 of 2010. The marriage was dissolved in 2012 and *decree absolute* issued.
2. The applicant filed this originating summons on 21st October 2011 seeking a declaration that the following properties were acquired by their joint efforts during the subsistence of their marriage, are jointly owned as matrimonial property and should be shared in accordance with **section 17** of the **Married Women Property Act (1882) of England** and all other enabling provisions of the law:-
 - a. matrimonial home on Plot No. LR No. *[particulars withheld]* Waiyaki way;
 - b. parcel South Teso/Angoromo/*[particulars withheld]*;
 - c. household properties in the matrimonial home;
 - d. motor vehicle Reg. No. *[particulars withheld]* Prado;
 - e. motor vehicle van;
 - f. motor vehicle salon car; and
 - g. *[particulars withheld]* Limited - 40% shares owned by the respondent.
3. The applicant's case was that all these properties were acquired by the joint efforts of the parties during the subsistence of the marriage, but that were registered in the name of the respondent to hold in trust for his and her benefit, and on benefit of the children of the marriage. She wants an equitable share of the property. In the submissions filed by her advocate Mr Wafula she stated that she was entitled to equal share of the property. She relied on **Article 45(3)** of the Constitution of Kenya 2010.

4. It is not in dispute that the applicant worked as an accounts clerk after the marriage. She worked up to 1998. Otherwise she was a housewife taking care of the family and providing companionship.
5. The respondent is a pastor and businessman. His case was that the applicant refused to work and did not contribute to the acquisition of the property in the family. He testified that when they separated in 2009 he had only one property (South Teso/Angoromo *[particulars withheld]*) in his name. He works for *[particulars withheld]* Ltd where his gross salary is Ksh.149,141/= and the house they were staying in on Waiyaki Way (LR NO. *[particulars withheld]*) belongs to the company. They were only staying there by virtue of the employment. He further testified that the vehicles all belong to the company. His case was that the properties in the name of the company were not his, and were not available for sharing as they were not matrimonial property. In respect of the house, his case was that when he got married he was staying in Kiambu. When he was employed the company bought the house through a mortgage so that he could be housed therein. The house was bought for Kshs.9.2 million from Equity Bank. The house, therefore, is in joint names of the company and the bank. He stated that he uses the vehicles, but they belong to the company. As for South Teso/Angoromo/ *[particulars withheld]*, the respondent testified that he bought it in 2004 through a bank loan. He was then working for a company called *[particulars withheld]*. He was repaying the loan through salary check-off. When the applicant left work, he said, she was earning little money that was not even enough for her bus fare. He was the one who had trained her up to ACNC II level. He denied that she made any financial contribution towards the purchase of any of the said properties.
6. The Court has considered the affidavit and oral evidence, and the written submissions filed by counsel.
7. The parties agree that the **Married Women’s Property Act (1882) of England** ceased to extend to or apply to matrimonial property disputes in Kenya when the **Matrimonial Property Act, 2013** became operational. Under **section 6(1)** of the new **Act**, matrimonial property means –
 - 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.

Under **section 7**, ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between spouses if they divorce or their marriage is otherwise dissolved. **Section 2** of the **Act** defines contribution to mean 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. **form work.”**

The **section** defines matrimonial home to mean:-

“**any property that is owned or leased by one or both spouses and occupied or utilised by the spouses as their family home, and includes any other attached property.”**

6. These provisions are strengthened by **Article 45(3)** of the Constitution of Kenya 2010 which provides as follows:-

“**45(3) parties to a marriage are entitled to equal rights at the time by the**

marriage, during the marriage and at the dissolution of the marriage.”

7. The House of Lords in **White -v- White [2000] 3WLR1571** was dealing with how the property of the husband and wife would be divided upon divorce. Lord Nicholls of Birkenhead observed as follows:-

“But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to parties’ contributions.....”

There should be no bias in favour of the money-earner and against the home-maker and the child-carer.”

This is why under the **Matrimonial Property Act 2013** contribution may be monetary or non-monetary. A spouse should not be disadvantaged just because she/he sat at home while the other went to work to earn money. Caring for the children, doing domestic work, managing the home or providing companion, are all important contributions that should be taken into consideration when sharing matrimonial property. It should be quite clear that in assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with on the basis of its peculiar facts and circumstances, but bearing in mind the provisions of the **Act** and Constitution. Lastly, property acquired by spouses during separation or after divorce is not subject to an application under the **Act (M. -v-M. [2008] 1 KLR (G & F) 247)**.

8. There was no dispute that when the applicant and respondent got married in 1989 they stayed at Banana Hill in Kiambu up to 2005 when they moved to the house on Plot LR No. **[particulars withheld]** on Waiyaki Way. They stayed here until the separation in 2008. Their six children were born between 1990 and 2003. The respondent stays with the bigger four and the applicant stays with the younger two, but the former is responsible for their education and upkeep. The applicant was employed between 1995 and 1998. The respondent has always been employed and on salary. The applicant has always considered the Waiyaki Way house to be their matrimonial property and the three vehicles to be family property. However, the house and the vehicles are all registered in the name of **[particulars withheld]** Ltd. The respondent is a director of the company and works for it. He has 40% shares in the company which has two other directors. According to the availed documents, the company bought the house in 2006. The respondent’s case was that the house and vehicles are not his, but belong to the company and were only available for his use and that of the family by virtue of his employment. He testified that he joined the company in December 2005. He further stated that he was invited to join the company without making any financial contribution.
9. The applicant’s case was that since the shares in the company were acquired during the subsistence of the marriage they are matrimonial property which the respondent holds in trust for the two, and that she is therefore entitled to half of the shares which works to 20% shares. The respondent argued that since there was no evidence that family resources had been used in the acquisition of the shares, the house and vehicles cannot form part of matrimonial property. One cannot dispute the fact that, whatever is the case, the shares in the company were acquired during the subsistence of the marriage.

10. However, there is settled principle of company law that a company is a separate legal entity from its shareholders and directors (**Salomon v Salomon (1897)AC 22**). Under **section 17** of the **Married Women's Property Act (1882)** it was provided that:-

“In any question between husband and wife as to the title to or possession of property, either party or any such bank, corporation, company, public body or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may applyand the judge of the High Court of Justice.....may make such order with respect to the property in dispute as he thinks fit.”

The Court of Appeal in **M. -v- M.** (Supra) construed the jurisdiction of the court under **section 17** of the **1882 Act** as extending to shares in limited liability companies owned by the parties while making it clear that the court has no jurisdiction to distribute properties registered in the name of the company in which the spouses are shareholders. In **D.M. - v – M.M. [2008] I KLR (G & F) 263** the Court of Appeal, in agreeing with the above case, states as follows:-

“If there are disputes between husband and wife as to their respective rights to shares in the name of one spouse, then, the court, like, in the case of any other property in dispute between husband and wife has power to ascertain the respective beneficial rights of husband and wife to the disputed shares. It can declare..... that one spouse holds a certain number of shares in trust for the other spouse. What the Court cannot do under section 17 of the 1882 Act, like in respect of all other properties, is to order the transfer of the legal titles to property or in other words to pass proprietary interest from one spouse to the other”

11. Quite unfortunately, the **Matrimonial Property Act 2013** does not have a similar provision in relation to companies, etc, but I consider that, for purposes of fairness and equity, the principles enumerated in the decisions above are relevant and do apply to a dispute in respect of shares in a limited liability company. In the premises, I declare that the respondent holds the 40% shares in **[particulars withheld]** Ltd in trust for himself and the applicant as they constitute matrimonial property. In the circumstances of this case, I further declare that the applicant's interest in the shares is half. They have equal share in the shares. I have considered the company has liabilities in excess of its assets.

12. The respondent admitted that land parcel South Teso/Angoromo/**[particulars withheld]** was matrimonial property, although he financed its purchase for Kshs.900,000/= in 2004. It is 6.6 Ha. The applicant stated that they planted eucalyptus trees therein for commercial purposes. That was not disputed. Unfortunately the respondent unilaterally entered into agreement with a third party, Africa Polysack Limited, to whom he sold the land for Kshs.1,600,000/=. He did this in 2013 while fully aware that this case was ongoing and that the land was being claimed as part of matrimonial property. Under **section 12** of the **Matrimonial Property Act 2013** the sale was prohibited. But also, the common law principle of *lis pendens* applied in this case. Litigation was pending between the parties and therefore it was incumbent upon either party to preserve the land and not alienate it. Ideally, the purchaser is stopped from claiming that he had no notice of the dispute or that he paid valuable consideration for it. However, he was not made a party to the dispute and the rules of natural justice would prevent the court from making orders against him without a hearing. But that does not mean that the applicant will be without a remedy. The respondent states that he spent the money on the fees of the children. But gave no records. He sold the land and spent the money without saying. I take it that he utilised all the money on his own. In fact, I find that the whole reason why he sold the land was to make sure that the applicant goes away empty-handed at the end of this dispute. I consider that the land with the trees would be a lot more than Kshs.1,600,000/= today. I order that the respondent pays the applicant Kshs.2,000,000/= (Two Million shillings) which I estimate to be half the present value of the land.

13.I ask that the respondent pays costs of the suit.

DATED and DELIVERED at NAIROBI this 9th day of July 2015

A.O. MUCHELULE

JUDGE