REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 122 OF 2011 (OS)

M W N ..... PLAINTIFF

VERSUS

G N K..... RESPONDENT

JUDGMENT

M W N (applicant) got married to G N K (respondent) on 18th December 1965 and had eleven children who are now adults. On 31st November 2010, their union was dissolved following determination of a Divorce Cause No.20 of 2004 which had been filed by the applicant. She has now filed this suit claiming her share of interest in the matrimonial properties. She depones in the supporting affidavit that during the substance of this marriage, they jointly purchased the following properties in which one made direct and indirect contributions:-

Kericho/Sorget Block [particulars withheld], Kericho/Sorget Block [particulars withheld], Kericho/Sorget Block [particulars withheld], Kericho/Sorget Block [particulars withheld], Bahati/Kabatini Block [particulars withheld], Nakuru Municipality Block [particulars withheld], Bahati/Kabatini Blcok [particulars withheld], Njoro/Ngata Plot No[particulars withheld], Plots Nos. [particulars withheld], [particulars withheld], [particulars withheld] and [particulars withheld], Kericho/Sorget/Sorget Block [particulars withheld], LR No. Kericho/Sorget Block [particulars withheld], Mugomoini Plot Nos. [particulars withheld] and [particulars witheld], Nakuru Municipality Block [particulars witheld]& [particulars witheld], Nakuru Teachers Phase II Plot No[particulars witheld]and [particulars witheld] and Business Premises.

She states that out of these properties, the respondent has sold LR Kericho/Sorget Block [particulars witheld], Mugumoini Plot No. [particulars witheld], Mugumoini Plot No[particulars witheld], Nakuru Municipality Block [particulars witheld], Nakuru Municipality Block [particulars witheld], Nakuru Teachers Phase II Plot No[particulars witheld], Nakuru Teachers Phase II Plot [particulars witheld] and Business Premises.

The applicant deposes that there was an agreement between her and the respondent that between 1968 – 1995 she would stay at home and work at the various farms to generate income, when he went to his formal employment as a teacher. After their marriage in 1965, the applicant started farming maize on

leased parcels of land, while the respondent was earning a salary of Kshs.223/- per month. They purchased their first properties in 1968 using the farming proceeds, these were Kericho/Sorget/Sorget Block [particulars witheld] and Kericho/Sorget/Sorget Block [particulars witheld], each measuring 2.8 hectares. They eventually built their family house therein in 1973. She lived with the children on that property and the respondent had been transferred to Kipkabus. Meanwhile she continued with large scale maize farming and also kept diary cattle whose milk she sold to Kenyan Co-operative Creamery (KCC) in Eldama Ravine. All the proceeds from these activities were paid into the respondent's personal account in Barclays Bank.

In 1969, they acquired Kericho/Sorget Sorget/ Block [particulars witheld]and Block [particulars witheld] measuring 2.4 hectares and 2.90 hectares respectively. She began planting pyrethrum which she could sell at Subukia Farmers Society and she could then deposit the proceeds into the respondent's bank account. From the proceeds of selling pyrethrum and sheep wool the couple built their family house on Kericho Sorget Block [particulars witheld] and [particulars witheld].

In 1977, the respondent purchased a residential house at Section 58 being Nakuru Municipaliy Block [particulars witheld] through a loan he obtained from Housing Finance Bank. The respondent moved to live there with the children subsequent to that, the respondent was able to service the loan himself from proceeds raised from the applicant's farming activities and in 1984, they acquired Bahati/Kabatini Block [particulars witheld] and block [particulars witheld]. In 1986, they acquired the two plots at Teachers and Kericho/Sorget/Sorget Block [particulars witheld] 7 which the respondent jointly with three others. They also acquired LR Kericho/Sorget Block [particulars witheld] in 1973 and were given the two Mugomoini parcels as a gift by Subukia Farmers Society.

Following the ethnic clashes in Timboroa the respondent insured that applicant came to reside in the Kericho property alone, and he cut down the trees she had planted thereon and sold them. In the year 1995, the respondent retired from formal employment and rented out the house at Section 58 between 1996 – 2005. From the rented proceeds, he constructed a two bed-roomed stone house and a grocery shop on parcel Bahati/Kabatini Block [particulars witheld] and [particulars witheld]. On 11th December 2000, they acquired parcels Nakuru Municipality Block [particulars witheld] and [particulars witheld]. The respondent also constructed twelve residential one bed-roomed houses on Mugumoini Plot [particulars withheld], and on parcel No. Mugumoini 68 he constructed a shop to which he denied the applicant access and allocated the same to J M (his second wife). Since the respondent was residing in Bahati, the applicant moved to the Section 58 property. Meanwhile the respondent acquired property Njoro/Ngata Block [particulars witheld] – Plots Nos. [particulars witheld], [particulars witheld], [particulars witheld] and [particulars witheld] and settled there with his second wife and three children. On 7th January 2000, the respondent sold Kericho Block [particulars witheld] measuring 9 acres at 700,000/- to one John Ngotho, without the applicant's consent and did not share with her the proceeds.

The respondent confirms the list of assets except that in Njoro he only owns property known as Njoro/Ngata Block [particulars witheld] No. [particulars witheld]. He says he has no knowledge of the plots described as Nos. [particulars witheld], [particulars witheld], [particulars witheld] and [particulars witheld]. He denies that the applicant made any contribution towards the acquisition of properties in Kericho, Subukia and Mugumoini, saying he bought shares in Subukia and Mugumoini Co-operative Society at Kshs.400/- per share because he was working as a trained teacher at [particulars witheld] Primary School. He describes the applicant as a mere housewife who could not work. He explained that in 1975/76 he applied and was allocated LR NKR Municipality Block [particulars witheld] Mama Ngina Estate Section 58. He purchased the property through a loan obtained from HFCK which was repayable in 15 years.

He maintains that the 1½ acre parcel in Eldoret Town in his own property which he purchased in 1963 before marrying the applicant and was compulsory acquired by Government for setting up Rwatea Industries Ltd, for which he was paid compensation of Kshs.55,000/-. He used that money to offset the HFCK loan and was able to complete the repayments within 3 years. He rented out the property until the year 2005 when the applicant chased away the tenant who was in occupation and has occupied it to date. He says that while teaching in NKU Municipality in 1984 he borrowed Kshs.48,000/- from NKU

Teachers Society and utilized Kshs.40,000/- to purchase Title No. Bahati/Kabatini Block [particulars witheld]and that the applicant never assisted in its acquisition. He retired in 1995 and was paid gratuity of Kshs.530,231, so he used Khss.300,000/- form that payment to purchase Title Bahati/Kabatini Block [particulars witheld]and used the balance of Kshs.260,000/- to erect a permanent house thereon.

Further that the property in Sorget division in Kericho District is situated in a cold wet area with very law production and when the applicant farmed she could only get food for her subsistence and not for investment. He explains that in January 2004 he sold property NKU Municipality Block [particulars witheld]and [particulars witheld] for a total sum of Kshs.400,000/- which he used in payment of school fees for children in secondary schools and colleges. In 2003, he sold NKU Teachers Phase II Plot [particulars witheld] for a total of Kshs.80,000/- which sum he also used to pay school fees. He also sold Title No. Kericho/Sorget Block [particulars witheld]at Kshs.700,000/- and used part of the money to build a shop on Title Bahati/Kabatini Block [particulars witheld]. He started a shop for his son M K at Shabab Estate using part of the proceeds.

He complains that the applicant has ganged up with her children to harass and frustrate him and two of her sons broke into his house in Engashura and stole Title documents for the Kericho Bahagi/Kabatini and NKU plots which they gave to the applicant so that she could place a caution on them. It was only after filing a suit in court that the applicant was ordered to return the titles. She refused, so the respondent was eventually issued with fresh titles. He argues that applicant should not be allowed to continue living in the property at Section 58 NKU Municipality Block [particulars witheld]as she does not even pay ground rent. He prays that she be ordered to move to the family house in Timboroa. Further that if at all she made any contribution towards acquisition of the assets, then it was negligible.

The parties testified in court, basically their evidence reiterated their depositions. The applicant described how one used to do diary farming and deliver milk to Kenya Co-operative Creameries (KCC), she also grew potatoes on 15 acres of land. She would deliver the produce but the accounts were in the name of her husband who would collect all the proceeds. He would use the money to buy land. She also farmed pyrethrum and would deliver the same to Pyrethrum Board. The respondent purchased properties using he proceeds and all the properties were registered in his names.

The applicant confirmed that from some of the properties, like the one at Section 58, the respondent obtained a loan from HFCK which he used to purchase. However, she insists that they jointly repaid the loan – although she did not have liquid cash, the respondent would collect this produce she farmed, sell it and keep the money.

The respondent insists that the applicant had no source of income and he is not willing to share with her any of the properties. He offers her 15% of the property and says she is alone as all the children are grown up. Further that she should say which of the matrimonial property she wants – whether the one in Timboroa or the one in Nakuru. He quipped as follows:-

> **"If she wants the 58 property, she can have it but will she afford land rates and insurance. What will she do with a huge house."**

The applicant called her sister, R W to confirm that she was involved in farming activities which the respondent enjoyed in banking. The respondent on the other hand called D G, his younger brother to testify that the applicant was a housewife. He however, confirmed that the plaintiff did farm work. This was also confirmed by the defendant on cross examination when he stated that:-

> **"Miriam used to manage the farm. I would visit over the weekend and also follow up on farm management and settle disputes between her and the farm workers."**

The respective counsel filed their written submissions. The applicant's counsel submits that the properties Njoro/Ngata Plots [particulars witheld], [particulars witheld], [particulars witheld], [particulars witheld] and [particulars witheld] were purchased during the substance of the marriage, so they form part of the matrimonial property. She also urges the court to consider the provisions of **Matrimonial**

Property Act 2013 regarding what constitutes contribution. Counsel submits that the applicant has proved that she contributed towards acquisition of the properties.

Further that, Section 14 of the Act provides that where matrimonial is acquired during marriage, there is a rebuttable presumption:- (a) that it is held in trust for the other spouse. Although this counsel urges the court to pay heed to **Section 93(2)** of the **Land Registration Act No. 3 of 2012,** which embraces indirect contribution in the form of labour, upheld and improvements on land as a form of contribution which gives a spouse whose name is not registered, equal right over the matrimonial property with the registered spouse.

The court is also asked to pay attention to provisions in **International Law,** especially **Article 16(1)** of CEDAW (Convention on Elimination of all Form of upheld by ordinary statutory of the property at 50:50%. It is argued on behalf of the respondent that spouses in a marriage own matrimonial property, so that if a spouse contributes nothing, then she/he gets nothing. He argues that **Article 45(3)** of the Constitution and the entire Matrimonial Property Act is about equity and the issue of 50:50% equivalent does not apply.

I am alive to the provisions of **Article 45(3)** of the **Constitution** which gives equal rights to parties in a marriage, as well as **Article 27(1)** which provides that every person is equal before the law and has equal protection and equal benefit of the law. The issue for consideration is whether that means a 50:50% equally in marriage? The applicant was not engaged in formal employment and the respondent describes her as a 'mere' housewife who contributed very little if any towards acquisition of the properties. The respondent, however, did acknowledge that she managed their farms while he pursued his career as a teacher. This was also confirmed by his own defence witness.

I share the sentiments expressed by Tuiyott J in **Umm v Imm (2014)eKLR** that:-

> **"....at the dissolution of the marriage each partner should walk away with what he/she deserves. What are deserves must be arrived at by considering the respective contributions whether it be monetary or non monetary.... Where there is evidence that a non-monetary contribution entitles a spouse to half the marital property, then the courts should give effect. But to hold that Article 45(3) decrees an automatic 50:50% sharing could imperil the marriage constitution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non monetary contribution, distress the union, and wait to reap half the marital property...."**

It is in recognition of **Section 2** of the **Matrimonial Property** defines contribution to mean monetary and non-monetary contribution including:-

- domestic work and management of the matrimonial home;
- child care;
- companionship;
- management of the family business and property; and
- farm work.

It is common ground that in the earlier years of their lives, the applicant lived with their young children and took care of the farm. The respondent would visit during the weekends. In terms of domestic work and management for the matrimonial home, there is evidence that the applicant undertook domestic work and managed the farms. She provided him with companionship whenever he visited over the weekends, and later when she would visit him in Nakuru.

Apart from the non-monetary contribution the applicant produced receipts showing delivery of milk to the dairy and pyrethrum to the Pyrethrum Board. The accounts for these goods were in the respondent's names and this is not denied. If the applicant did not contribute money, the work of her hands translated into money and the respondent has offered no explanation as to what he did with the proceeds he continually collected. The only reasonable inference to draw is that he used these proceeds to supplement

the other monies he had and which he would then use to either offset loans or acquire more property.

I think the issue of contribution is not contested but the extent of that contribution is in issue and is assessed by the applicant at 50% while the respondent give it a 15%. Certainly in terms of monetary contribution the respondent had the financial base as he was in gainful employment; yet the role the applicant played in taking care of the family to assist so that he could make that money cannot be down played. What constitutes matrimonial property is defined under **Section 6** of the **Matrimonial Property Act** to mean either:-

- **the matrimonial home;**
- **household goods and effect in the matrimonial home or**
- **any moveable or immovable property jointly owned and acquired during the marriage.**

It is not disputed that the properties in question were acquired during the subsistence of the marriage although they all are registered in the name of the respondent. **Section 14** of the **Act** provides that where matrimonial property is acquired during marriage (a) in the name of one spouse, there shall be rebuttable presumption that the property is held in trust for the other spouse. What this means is that even for those properties that the respondent took a loan, purchased and repaid the loan, the presumption is that he did so in trust for the applicant. It was upto the respondent to rebut his presumption which he did not. It is imperative to first establish that the matrimonial home means **any** property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home. This means that homes in Timboroa, Kericho and Nakuru Section 58 are matrimonial homes within the meaning of the **Act**, as evidence has been presented that at different times the family occupied these homes as their family homes. They form part of the matrimonial property as interpreted by **Section 6(1)(a)** of the **Act**. The other matrimonial properties are deemed to be such under **Section 6(1)(c)** if they are **jointly** owned and acquired during the subsistence of the marriage.

The respondent confirms that he has disposed of some of the properties. This has been done without involving the applicant. The argument presented is that given this disposal, coupled with the direct and indirect contribution made by the applicant, then it is only equitable that for the remaining of the properties, the parties should share on a 50”50% bases. Although the respondent says he sued the proceeds of such sales for the benefit of the children, this does not disentitle the applicant to claim a share in the properties. There is no denying that without the financial means, none of the properties would have been acquired. Yet without the applicant’s contribution in (a) creating an environment which enabled the respondent to carry on with his financial pursuits (b) created another source of wealth – whether the same was used to supplement the family’s livelihood or to purchase properties, this contribution cannot be downplayed. **Section 7** of the **Matrimonial Properties** act provides that:-

> **“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.”**

Even the argument raised by the respondent that he acquired the properties for the children’s benefit does not disentitle the applicant from pursuing her claim over property acquired during the subsistence of their marriage. The respondent enhanced the family’s welfare through her farming and domestic activities. I borrow from the sentiments expressed by Omolo Ag. J.A. (as he then was) in the case of **Kivuitu v Kivuitu**, that a Kenyan African wife’s contribution takes the form of a back-up service which fortunately the Matrimonial Causes Act has enumerated its manifestation in various forms.

The applicant’s contribution which is the upkeep, improvement or supervision of workers on the properties, have inferred on her an interest on those properties as contemplated by **Section 93(2)** of the **Land Registration Act No. 3 of 2012**. I have no hesitation in finding that the applicant has sufficiently demonstrated her contribution in the acquisition of the properties as contemplated by the Matrimonial Properties Act and she is entitled to 50% share.

The respondent in cross examination indicated he had no objection to the Section 58 property being given

to the applicant but he wonders how she will sustain it due to charges on land rates and insurance. From the evidence, there are three matrimonial houses i.e. in Kericho, Timboroa and Nakuru's Section 58. I do not think a 50"50% division means sharing each property at 50%. I think it is more practical to identify specific property and assign it to the respective parties. This can only be achieved after taking into account the actual value of each property. It also requires that the exact status of each property be determined, to avoid a situation where the court awards property which has already been disposed off to a third party. For avoidance of doubt I direct as follows:-

a. The applicant is entitled to 50% share of the matrimonial property;
b. Each party to file a search certificate emphasizing the status of the undistributed property;
c. A valuation report be filed within 21 days by a valuer to be agreed upon by the parties within 7 days;
d. Once the requirement on (b) and (c) are met, requitable division of the property will be done on a gain and balanced basis;
e. Each party to bear its own costs.

Written and dated this 25th day of June 2015 at Nakuru.

H.A. OMONDI

JUDGE

Delivered and dated this 14th day of July 2015 at Nakuru.

MAUREEN A. ODERO

JUDGE