



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 11 OF 2007

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

BETWEEN

E N K APPLICANT

AND

J N KRESPONDENT

JUDGMENT

1. The applicant herein took out an Originating Summons dated 14th March 2007 seeking declarations that the properties listed in the application were acquired by the parties during marriage, registered in the name of the respondent, were in the possession of the respondent, but were owned jointly by the applicant and the respondent. She specifically sought that the said assets be shared equally between them or sold and the net proceeds be shared equally between them.
2. She has deposed in her affidavit of 14th March 2007 that she and the respondent had married under statute in 1975, a marriage which produced three children, before it was dissolved by a court in the United Kingdom in 2004. She has detailed her employment history as a secretary at various places in Kenya and the United Kingdom, alleging that during periods when the respondent was undertaking further studies she would be solely taking care of the family. She deposes that she ran businesses in Kenya between 1991 and 1999, when she left for the United Kingdom where she remains today.
3. On the assets the subject of the proceedings, she deposes that she did contribute to their acquisition, both directly and indirectly. She and the respondent held joint bank accounts and pooled resources to raise the funds for the acquisitions. They put up a residential house on the [Particulars withheld] Estate which was meant to be their matrimonial house, completing the same in 1992, but the house is currently unoccupied by either of them. She also mentions acquisition of another house at Njoro, Nakuru. She accuses the respondent of attempts to dispose of some of the assets.
4. Attached to her affidavit are copies of the marriage certificate serial number [Particulars withheld], of a marriage celebrated on 4th October 1975, a letter of appointment from the University of London, copy of an international money order for her to pay her son in London sometime in 1992. There is also copy of a document to acknowledge receipt of the said moneys, copy of certificate of registration of a business name, copy of a divorce decree and caveats lodged

against certain titles.

5. To the affidavit in support of the Originating Summons, the respondent swore and filed an affidavit in reply. The replying affidavit was sworn on 11th September 2007. He asserts that almost all the properties that exist in his estate were acquired exclusively by him as the applicant secretly disappeared from Kenya and went to the United Kingdom and obtained a divorce decree. He states that the three (3) acre property at [Particulars withheld] is where he resides with his wife and all the structures in the property were put up by him. The land adjacent to the [Particulars withheld] property was also bought by him. He states further that all the three pieces of land in the Mugumo [Particulars withheld] farm were bought by him with his own money without any contribution from the applicant. He explains that the property was part of a women's project and men were not allowed to buy property there unless they did so through their wives. He says that the Kanunga property does not exist, while Nyandarua/Karati/[Particulars withheld] was his sole property. He states that the vehicles, farm animals and assorted domestic goods and appliances listed in the application did not exist or if they did exist, they had been given out by the applicant to her friends and relatives without the respondent's knowledge.
6. The respondent further explains that he disposed of some of the assets with the knowledge of the applicant. The said disposal was for the purpose of raising funds to pay school fees for their children who were in school at the time of sale. He states that the house next to Egerton University is still under mortgage and that he bought it alone after the divorce. He accuses the applicant of running away with a sum of Kshs. 346,000.00 which she withdrew from a bank account that they maintained jointly. The withdrawal was said to have been made without his consent. He asserts that the applicant had herself acquired property in London with part of the money she ran away with. He explains that he had established a family business with her in Nairobi which is currently being ran by her relatives to his exclusion.
7. The applicant replied to the respondent's contentions through her affidavit sworn on 18th October 2007. She states that at the time they got married in 1975 she was already a senior secretary to a Deputy Permanent Secretary, while the respondent had just graduated from University and working as a high school teacher. She asserts that as at the date of their marriage, the respondent had not acquired any property and that all the property that exists in his name was acquired after the celebration of their marriage in 1975. She asserts that when she left for the United Kingdom for further studies she left behind all her property which included the $\frac{3}{4}$ acre of land at [Particulars withheld] Estate where her matrimonial home stood with all her personal belongings and those of her children, assorted household goods, appliances, a pick up vehicle, a saloon car and farm animals. She states that the other two pieces of land at Thimbigwa, being LR Nos. [Particulars withheld], were brought jointly by her and the respondent. She asserts that the three pieces of land at Mugumo [Particulars withheld] farm are jointly owned property. The same applies to the two and a half acre plots at Kanunga and Nyandarua/Karati/[Particulars withheld] . She accuses the respondent of lying when he claims he sold property to raise school fees. She says the house next to Egerton University was bought with family resources. She explains that the sum of Kshs. 346,000.00 she is alleged to have had ran away with was raised from sale of a car she had bought from Britain, which was kept in a joint account for family welfare. She states that the same was wired to Britain for their son's maintenance while there. Regarding the business in Nairobi, she explains that the same collapsed soon after she left for Britain because the respondent refused to take care of it. She states that she has no money or property in her possession and therefore there is nothing for her to disclose. She concludes by saying that she was in employment throughout the tenure of the marriage, and thereafter she contributed heavily to the purchase of all the matrimonial property and the developments on it. She asserts that she supported the respondent emotionally, spiritually, financially and academically while he was studying in London, where he had a bursary which was only enough to pay for his books and accommodation.
8. The respondent swore a detailed further affidavit on 6th May 2009, which was filed herein on the same date addressing various issues, such as-

- a. **The law relating to matrimonial property, where he stated-**
 - i. **That it must be established that the interest claimed was acquired during coverture;**
 - ii. **That the claimant made financial contribution to its acquisition;**
 - iii. **That such interest depends entirely on the financial contribution proved;**
 - iv. **That where property is registered in the name of a person, whether the person holds it in trust for another depends on whether the other made any financial contribution towards its acquisition;**
 - v. **That where spouses managed their finances independently during coverture the claimant would have no claim towards properties acquired by the other spouse alone; and**
 - vi. **That no spouse can in law acquire an interest in a property inherited by the other spouse from his or her parents;**
 - b. **The applicant did not demonstrate when the assets she claims interest in were acquired and the nature of her contribution and when she made the same; and her affidavit in support of the application did not disclose what she earned during the periods in question, her terms of service during her employment, her educational or professional qualifications over the period, the income she derived from her business endeavours and did not disclose that coverture came to an end in 1999 when she deserted;**
 - c. **The amounts of moneys that the respondent earned throughout his employment life which started in 1970 after he qualified as a P1 teacher from the [Particulars withheld] Teachers College to March 2009, two months prior to swearing the affidavit;**
 - d. **The highest position that the applicant ever attained in employment was that of senior secretary in civil service earning a sum of Kshs. 5,000.00 per month whilst his salary as at March 2009 was Kshs. 186,520.00 per month;**
 - e. **The respondent bought all the assets that are in his name in the period between 1975 and 1999 alone, without support from the applicant, at a time when both of them managed their financial affairs separately, and when the applicant showed no interest at all in investments;**
 - f. **The respondent inherited a portion of Plot from his late father after his death in October 1995;**
 - g. **The respondent opened a fixed deposit account with the Barclays Bank of Kenya for Kshs. 500,000.00 in his name and that of the applicant to avail the applicant with a fund from which to draw money to meet emergencies during the respondent's absence in the United Kingdom where he was furthering his education; and the applicant though a co-signatory did not contribute a single cent to the said account; she abused the trust and in 1999 withdrew all the money from the said account, transferred it to her account in Britain and used it as a deposit to acquire a house there;**
 - h. **The applicant used resources raised from her earnings between 1995 and 1999 to contribute to the purchase of the three (3) shares in Mugumo [Particulars withheld] Company, purchase a car, invested in a computer centre after selling the car and with support of the respondent, invested in a college at Ngara, bought lorry registration [Particulars withheld] and bought a house in Britain; and**
 - i. **There is evidence that the parties managed their respective finances independently of each other and therefore he has the sole proprietary right to all the properties the subject of the suit.**
9. To the affidavit sworn on 6th May 2009, the respondent attached a bundle of documents to support his case. There are various certificates and related documents to show his academic and professional qualifications. There are too pay slips to show his earnings over the period. There are letters relating to the employment of the applicant. He has also attached documents relating to his employment history. There are also documents relating to the acquisition of some of the assets the subject of the proceedings.
10. The applicant responded to the respondent's further affidavit by swearing an affidavit on 10th June 2011, filed herein on 14th September 2011. She asserts that she was not claiming interest in the

said assets purely on grounds of being a spouse but specifically because she contributed to their acquisition. She details what she earned from 1975 from her various endeavours. She then mentions the assets acquired over the period, which included two cars bought in London, then sold to raise money to develop the home at [Particulars withheld], her contribution of Kshs. 48,000.00 towards the sale price of Kshs. 66,000.00 for LR No. [Particulars withheld], her contribution of Kshs. 150,000.00 towards the sale price of Kshs. 250,000.00 for the purchase of Nyandarua/Karati/[Particulars withheld], the two pieces of the three-quarter acre of land at [Particulars withheld], three pieces of land at the Mugumo Nyakinyua farm and two ½ acre plots at Kanunga. She mentions that she did not contribute directly to the purchase of Njoro/Njoro/Block [Particulars withheld] but the same was acquired with family resources. She lays claims on Plot [Particulars withheld] on the basis of her financial contribution to its development. She says the sum of Kshs. 346,000.00 was mainly raised from sale of a car she had brought back from Britain for sale and what she kept in a joint account for family welfare and the money was wired to her son in Britain for his upkeep to obviate its misuse by the respondent on his own personal affairs. She asserts that she was employed throughout her marriage to the respondent and therefore she was able to contribute financially and substantially to all the purchases and developments of the properties in the suit. She concedes that they largely managed their finances separately, but denies owning any landed property in Britain.

11. The respondent swore an affidavit on an unknown date in 2012, filed in court on 5th September 2012, in reply to allegations made against him in the applicant's affidavit of 14th September 2011. It specifically dwelt on the allegation that the applicant is the one who took care of the children and the accusation that he was the one solely responsible for the breakup of their marriage. He details how the applicant suddenly left the country in 1999, without informing the respondent and leaving behind a ten-year old child. She never came back. The child was later spirited out of the respondent's house sometime in 2000 and ended up with the applicant in Britain. He also gives details of how he enrolled the children in various schools in Kenya and paid for their education. When the last born child died in Britain he wired money to the applicant for the removal of her body to Kenya, but his efforts were in vain for the money was wired back to him and the child's remains cremated in the United Kingdom. She thereafter married another Kenyan in Britain after obtaining a divorce without involving him. He provides details of assets he acquired in 1974 and information that he was on full scholarship and 80% pay when he was undertaking further studies in Britain. He explains that the applicant utilized the savings she had invested in the businesses she was running in Kenya, to which he was a partner but he did not receive any income from the businesses, to relocate to Britain. He asserts that the animals and domestic goods she claims cannot possibly be still in existence ten (10) years after the applicant left.

12. It was directed on 11th December 2014 that the application dated 14th March 2007 be disposed of by way of written submissions and be based on the affidavits on record. The written submissions referred to in the directions had been filed on 2nd July 2012 for the applicant and 29th August 2012 for the respondent. I have noted the analysis of the facts in the said submissions, as well as the case law cited in support of the rival contentions.

13. In applications for division of matrimonial property the factors to be taken into account while determining such applications are:

- a. **whether property in question was acquired during marriage;**
- b. **whether contribution of either party is a factor, and if so, whether the claimant made such contribution; and**
- c. **if contribution is a factor, how the property is to be distributed.**

14. Matrimonial property is now governed by the Matrimonial Property Act, No. 49 of 2013, Laws of Kenya. The provisions of that law which are relevant to the determination of the dispute before me are Sections 5, 6(1), 7, 9, 13 and 14 of the Act. The said provisions state as follows-

"5. ... the interest of any person in any immovable or movable property acquired or

inherited before marriage should not form part of the matrimonial property.

6.(1). For purposes of this 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 or movable property jointly owned and acquired during the subsistence of the marriage ...”

7. ... 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 ...

9. Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made”

13. ... marriage does not affect the ownership of property other than matrimonial property to which either spouse may be entitled, or affect the right of either spouse to acquire, hold or dispose of any such property.

14. Where matrimonial property is acquired during marriage-

(a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

15. What constitutes matrimonial property is stated in Section 6(1), as read with Section 14 of the Act. It is essentially the property acquired by either spouse during marriage as where the property is acquired jointly, or is registered in the joint names of the parties, the presumption would be that it is to be divided equally between them in the event of divorce. The presumption is rebuttable. Where it is acquired by one spouse or is registered in the name of one spouse, the presumption would be that the one holds the same in trust for the other. The provision in Section 14(a) does not say so, but it is subject to Section 7, so that division of such property will take into account the contribution of either spouse to its acquisition.

16. What constitutes contribution is defined in Section 2 of the Matrimonial Property Act to include both monetary and non-monetary contribution. The non-monetary contribution includes, according to that definition, domestic work and management of the matrimonial home, child-care, companionship, management of family business or property and farm work. What constitutes family business is defined in the same provision to mean any business 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.

17. When parties get into a marriage arrangement, they usually intend the arrangement to be for life. Divorce is not in their minds. This is the position regardless of the system of law under which the parties contract marriage. Indeed, that is the conception of marriage in Section 2 of the now repealed Matrimonial Causes Act, which drew from the definition of marriage in *Hyde vs Hyde*

and Woodmanse (1866) 1LR1 P & D. 1230. The parties to the marriage there live their lives according to that concept, the permanence of their marriage. They beget children and acquire property believing that they would be together for life. This then creates the presumption that whatever property is acquired by the parties during their marriage must have been intended to be for the benefit of the family.

18. I have noted from the record that the parties hereto contracted a marriage under the now repealed African Christian Marriage and Divorce Act, Cap. 151, Laws of Kenya, at the University of Nairobi's St. Paul's Chapel. This is what is called a Christian marriage, whose foundation is Genesis 2:24, which says-

“Therefore shall a man leave his father and his mother, and shall cleave unto his wife; and they shall become one flesh.” (King James Version).”

19. The Christian notion of marriage, the type of marriage the parties before me got into, is that upon celebration thereof the man and the woman became one unit, one flesh. Whatever the man does, he does for the woman; and *vice versa*. This would mean that whatever property he acquires during the marriage, he acquires for himself and for the woman, for the two are one. Therein too should lie the answer to the question, what should happen to property acquired by parties to a Christian marriage upon divorce?

20. The African Customary Law and Muslim law notions of marriage are slightly different, especially on matters touching on property. The African traditional notion is that whatever property is acquired during marriage, whether by the man or the woman, belongs to the man. Ideally, it should be persons who are party to African traditional marriage who should have difficulty coming to terms with the law on division of matrimonial property. The Christian notions of marriage and matrimonial property overwhelm whatever other positions held by other law traditions. It is what is considered to be the modern view of the matter.

21. The notion of equality of spouses in marriage is embraced by legislation. The Constitution of Kenya, 2010, at Article 45(3), says that parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of marriage. Article 45(3) of the Constitution is echoed by Section 3(2) of the Marriage Act, No. 4 of 2014, which states that the parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage. It is this same notion of equality that informs Section 14 of the Matrimonial Property Act.

22. I shall proceed to deal with the matter at hand guided by the above position.

23. From the record before me, I deduce that the bulk of the assets claimed by the applicant in her Originating Summons dated 14th March 2007 were acquired during matrimony or at least during the period the parties cohabited as man and wife. There is only one asset that falls outside that bracket – the property described as Njoro/Njoro/Block [Particulars withheld].

24. I will first consider the parcels of land that were bought or allotted to the respondent during the currency of the marriage. These include LR No [Particulars withheld], the pieces of land in the Mugumo [Particulars withheld] farm, the two pieces of land at Kanunga, Nyandarua/Karati/1 [Particulars withheld], LR No. [Particulars withheld] Thindigua and Plot [Particulars withheld] Nyandarua. From the material before me all these assets came into the respondent's hands during the time that he was in cohabitation with the applicant. He bought some outrightly, some were allotted to him from shares he held in a land buying company in a stake he acquired after marriage and some he inherited from his father.

25. By dint of Section 14(a) of the Matrimonial Property Act, and by reason of the said assets having been acquired during matrimony, and especially during cohabitation, the presumption kicks in that the said assets are held in trust by the respondent for the applicant. The presumption as earlier

indicated, is rebuttable by evidence to the contrary. The presumption having arisen, the respondent was bound to provide evidence to displace the presumption. The only duty on my part is to determine whether such evidence has been provided that would displace the presumption.

26. I am alive to the provisions of Section 7 of the Matrimonial Property Act, which ought to be read together with Section 14(a) of the Act. My understanding of these two provisions is that once the presumption stated in Section 14(a) arises and is not displaced, the court has to determine how the subject property is owned as between the man and the woman, according to the contribution of either of them.
27. The respondent has placed before me material to demonstrate how the said assets were acquired by him solely. He has endeavoured to disclose the sources of the finances that he utilized to acquire the said assets. He has argued that he and the applicant maintained separate finances and accounts and therefore each of them was entitled to acquire separate assets, and that is precisely what he claims he did in his case. He argues that the applicant did acquire certain assets from her own resources and finances.
28. On her part, the applicant argues that not only were the said assets acquired during marriage or cohabitation, she contributed to their acquisition. She went on to give details of her alleged contribution. I have noted that her alleged direct monetary contribution is not supported by any documentary evidence. She argues that she was in employment for the most part of the cohabitation and was in business for the other, and therefore she was able to make the alleged direct contributions. She also puts up a case of indirect contribution. She argues that she was the one who took care of the children. She was the home maker. When the respondent was undertaking his further studies, she said, she was raising the children and working to provide for them and for the respondent. She invites the court to take into account both her direct and indirect contribution in the acquisition of the assets.
29. It is common ground that it was the respondent who had a higher earning power. He went for further studies abroad leaving the applicant behind in Kenya with the children. She no doubt at that time did everything at the domestic front for the children and at the home. She later joined him in Britain, where she also worked and cared for the family. The respondent worked at various places – [Particulars withheld]. He was no doubt often away from the family, and it fell on the applicant to make the home and raise the children. She no doubt provided an environment for him to do his work and excel professionally, and to acquire assets. She was working also or doing business. May be she was not earning a lot or at any rate as much as the respondent, but she had resources that were no doubt deployed to meet the needs of the family. She must have therefore contributed one way or the other in the acquisition of the assets in question.
30. There was quite some dispute covering the parcel of land that was inherited from the respondent's father. The respondent argues that it cannot possibly form part of matrimonial property, while the applicant takes the position that the same was indeed matrimonial property for she had improved it. Regrettably, she placed no evidence before me of the alleged improvements done by her on the said property.
31. To buttress his case, the respondent cited *Muthembwa vs Muthembwa* (2002)1 EA 186, where it was held that no spouse can acquire an interest in any property inherited by the other spouse from his or her parent unless the property had been improved with finances provided by the other spouse. Is *Muthembwa vs. Muthembwa* (supra) still the law following the coming into force of the Matrimonial Property Act? I think not. From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property. Indeed, Section 5 of the Act impliedly includes it in the definition. According to Section 5, the only time such property would not form part of matrimonial property where the inheritance was before the marriage. In this case, the asset in question was inherited during matrimony and therefore it forms part of matrimonial property.

32. Taking into account everything that I have stated above, I am convinced that the landed assets that I have set out in paragraph 24 here above were held in trust by the respondent for the applicant at the ratio of 50:50. That excludes the Kanunga lands that were allegedly sold to meet the educational needs of the children.

33. Njoro/Njoro/Block [Particulars withheld] was acquired after the parties had separated permanently, following the desertion of the respondent in 1999 by the applicant, who travelled to Britain never to come back. Indeed, it said that it was acquired in 2004, following the dissolution of the parties marriage by a British court in 2003, with the decree becoming absolute on 15th January 2004. The applicant did not disclose the family resources that were utilized in the acquisition of the said asset. I have noted from the record that the property was acquired five (5) years after the parties ceased cohabitation and sometime after dissolution of their marriage. It would be stretching the definition of matrimonial property beyond its borders to hold that such property to be matrimonial property. It was acquired outside matrimony and therefore it was not matrimonial property and it is for that reason not available for distribution.

34. On the immovable assets – the motor vehicle, cattle, farm implements and household goods – it is common ground that these assets existed at one time. Motor vehicles only become matrimonial property if they are acquired as family vehicles or for the use of the family. Cars bought for the exclusive use of a particular spouse cannot be said to be family property. A family car should ideally be what is loosely known as a pool car, available to all within the family. No evidence was led on whether any of the vehicles claimed fell into such category. I agree with the respondent that it would be ludicrous to expect the cattle and the household goods the applicant left in 1999 to be still in existence fifteen (15) years down the line.

35. In the end, I make the following orders-

- a. **I declare that LR No. [Particulars withheld] were acquired by the joint funds and efforts of the applicant and the respondent during marriage and although the same is registered in the name of the respondent the same is so held or registered in trust for the applicant;**
- b. **I declare that the said assets are to be shared between the applicant and the respondent at the ratio of 50:50;**
- c. **The parties are to agree and share the said assets in the proportions decreed above in the next six (6) months, in default of which the same shall be sold and the net proceeds of sale shared in the decreed ratios between the applicant and the respondent; and**
- d. **The applicant shall have costs of the application.**

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE