



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 1 OF 2012 (O.S.)**

**F W M.....APPLICANT**

**Versus**

**P M K.....RESPONDENT**

**R U L I N G**

1. The Applicant F W M brought an application by way of Originating Summons dated 29<sup>th</sup> November, 2011. In it she seeks a declaration that the following movable and immovable properties were acquired by joint funds and efforts of the Applicant and the Respondent:-
  - a. Parcel of Land Title No. [Particulars Withheld] situated in Murang'a District comprising of Matrimonial home;
  - b. Plot No. [Particulars Withheld] situated in Ithanga location, and
  - c. [Particulars Withheld] Memorial Academy situated in Ithanga location

The Applicant also seeks an order of division of the above matrimonial properties, as well as costs of the suit.

2. The application is premised on grounds that the said properties were acquired while the parties were married and both parties contributed to the purchase thereof.
3. The application is opposed by the Replying affidavit of P M K sworn on 9<sup>th</sup> August 2012. In the said Replying affidavit the Respondent deponed that Plot No. [Particulars Withheld] was sold in the year 2007 and the proceeds thereof utilized by the family; that he single handedly put up their matrimonial home and [Particulars Withheld] Academy, without the assistance of the Applicant. The Respondent averred that the Applicant did not contribute in any way to the acquisition of the said properties as she rarely stayed at home.
4. Both parties gave *viva voce* evidence at the hearing of the case. In her testimony the Applicant told the court that both parties had contributed to the acquisition and development of their properties during the pendency of their marriage. She asked the court to give her land parcel No. [Particulars Withheld] as a whole, because it is their matrimonial home and it is she who is living in it with the children, since the Respondent deserted them.
5. The Applicant also testified that the Respondent has land which he inherited from his father and

- upon which the couple by their joint efforts had constructed a school. That the Respondent has yet another piece of land measuring  $\frac{1}{4}$  acre upon which he has built a house for his second wife. In her view these two properties should be given to the Respondent.
6. The Respondent on the other hand told the court that all the three properties belonged to him solely, because any contribution made by the Applicant for their acquisition or development came from money generated from his shop. That in any case the property known as [Particulars Withheld] has already been sold and although it has not yet been transferred to the buyer due to a caveat placed thereon by the Applicant, it is not available for distribution.
  7. The Respondent proposed that the matrimonial home be divided into two with the Respondent getting the side on which the main house stands because he has a young family. That the Applicant should get the side on which the smaller cottage built for the use of their three sons stand, since the sons are now grown up and have left home to work in Nairobi.
  8. The parties filed written submission. Miss Namisi learned counsel appearing for the Applicant, recalled of the Applicant's testimony that at the time of their marriage, all that the Respondent had to his name was a two roomed, mud walled, grass thatched structure for a house. Further that the two plots known as [Particulars Withheld] and [Particulars Withheld] were bought and developed through the joint efforts of the two parties.
  9. Miss Namisi cited **Section 2** of the **Matrimonial Property Act of 2013**, which defines contribution in a matrimonial set up to include both monetary and non-monetary contribution. She urged the court to note that the Respondent had admitted the various ways in which the Applicant contributed to the wellbeing of family including bearing four children, caring for them together with the Respondent and managing all other domestic affairs, before her flight from the matrimonial home following disagreements. Further that the Applicant also made monetary contribution from money she acquired through loans.
  10. On the property which comprises [Particulars Withheld] Memorial school, Miss Namisi contended that although both parties admitted that it was a family initiative, the Respondent did not dispute the record book kept for accounting purposes, which was in his own handwriting. It was produced in evidence and it indicated the contribution he had made and those which the Respondent had made as separate entries. Miss Namisi urged the court to take note of the provisions of **Section 9 Matrimonial Property Act 2013**, but note that the Applicant had chosen to forego her share in this property, due to the hostility between her and her former in-laws.
  11. On the property that is parcel No. [Particulars Withheld] counsel argued that despite the Respondent's testimony that it had been sold, the property is still in his name eight years later on. Further that the alleged purchaser has not made any effort to have the caution placed upon it by the Applicant removed, nor did he avail himself in court to testify. She urged the court to order the sale of this property at the prevailing market rate and the proceeds of sale be divided between the two parties equally.
  12. Mr. Ndungu Mwaura learned counsel for the Respondent, filed submissions in reply stating that the Respondent had testified that, he sold Plot No. [Particulars Withheld] in the year 2007, to one P M, for a consideration of Kshs.80,000.00. According to the Respondent this was necessitated by the heavy burden of paying school fees for his children and the many court cases the Applicant had put him through. That at one time he was put in Civil Jail by a Children's Court for being unable to pay school fees. Learned counsel urged the court not to consider the said plot as part of the matrimonial property, since the Respondent produced a sale agreement as proof of his contention that he had sold the plot.
  13. On land parcel [Particulars Withheld] on which the matrimonial home is built, the Respondent testified that he contributed the bigger percentage towards its purchase and towards construction of the matrimonial home. He testified further that he married a second wife due to the problems

he had with the Applicant. It was his wish that this land be divided equally between the Applicant and his second wife. The Respondent argued that the Applicant has four children who are all adults and are working and should therefore get the smaller house, while the second wife who has two children who are young and still in school should get the matrimonial home. Mr. Ndungu also submitted along those lines concerning this property.

14. Mr. Ndungu elected to make no submission concerning the property that is [Particulars Withheld] Academy, since the Applicant was not laying any claim on it. He lastly prayed that each party be made to bear their own costs of the suit.
15. In order to comprehend the contentions in this cause, I have set out a brief summary of the uncontested facts thereof. The Applicant and the Respondent got married in 1984 under the **African Christian Marriage and Divorce Act** (repealed). Their union was blessed with three sons and one daughter. The properties adverted to above were acquired by the parties during the pendency of their marriage and registered in the Respondent's name solely.
16. Later on in the marriage, the Respondent moved out of the matrimonial home and commenced cohabitation with another woman known as M S elsewhere. In 2011 the Applicant filed for divorce in Thika Chief Magistrate's Court, being Divorce Cause No. 7 of 2011. The marriage was finally dissolved in 2012, hence this application for distribution of the properties acquired during the life of the marriage.
17. Having considered the pleadings, the *viva voce* evidence on record and the submissions from either side, I have framed the issue for determination to be what contribution the parties made to the acquisition of the matrimonial property and therefore, what their respective entitlement to the said property should be.
18. What is the meaning of matrimonial property? The Matrimonial Property Act No. 49 of 2013 (hereinafter the Act), defines matrimonial property as follows:

**“Section 6 (1)** For the 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 and movable property jointly owned and acquired during the subsistence of the marriage.”**

Ownership of matrimonial property vests in the spouses according to their respective contribution towards its acquisition, and shall be divided between the spouses when the marriage is dissolved as in the cause now before me. These are the provisions of Section 7 of the Act.

19. The Respondent has disputed the Applicant's contribution on the premise that he is the one who gave her the capital to set up a family business in the form of a general stores shop and that now and then he would inject money from his salary into the business to boost it. In his view the Applicant was therefore only contributing that which belonged to the Respondent and all the properties should be taken to belong to the Respondent.

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) farm work**

20. The said section also defines family business as follows:

“**family business**” means any business which—

- a. **is run for the benefit of the family by both spouses or either spouse; and**
- b. **generates income or other resources wholly or part of which are for the benefit of the family;”**

It is not contested that it was the Respondent who set up the Applicant in the family business, nor that she ran it alone on a daily basis with the help of one hired help. Although the Respondent put in money from time to time, he admitted that those monies would be such as were left over after he paid school fees and made other provisions for the family. I observed that his salary together with allowances came to no more than Kshs.10,000/= per month.

21. The Applicant would have had to work equally hard to turn the kind of profit that enabled them to maintain their family as they did and also acquire and develop their properties. There is also evidence that besides her services at the family business the Applicant obtained loans and put them towards the improvement of the family lot. Equally the Respondent obtained loans and also applied the monies paid to him in arrears upon graduating from the teachers training college, towards the improvement of the family fortunes.

22. On the evidence before me I find that it would be unfair and unrealistic to attribute the profits of the family business and the acquisition of the properties and development thereof, entirely to the exertion and expenditure of the Respondent to the exclusion of the Applicant. The Applicant's time and labour expended in running the family business was never quantified and assigned monetary value. She therefore earned no salary for her work. It is my view that both parties contributed almost in equal measure to the acquisition and development of the matrimonial property. For that reason it is immaterial that the properties are registered in the name of the respondent solely.

23. In **Njoroge v Ngari [1985] KLR pg. 480**, the plaintiff applied to the High Court by way of originating summons under **section 17** of the **Married Women's Property Act 1882**, for a declaration that half the subject property registered in the name of her husband be declared to be held in trust beneficially for her. Butter Sloss J held *inter alia* that:-

**“if property is held in the name of one person, even if that property is registered in the name of one person, but another contributed towards acquisition of the property, then both persons have proprietary interest in that property. If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person.”**

It does not therefore, lie in the mouth of the Respondent to state that the Applicant was only contributing what belonged to him and that the matrimonial properties belong to him solely.

24. On the question of the entitlement of each party and in order to achieve equitable distribution of the matrimonial property herein, I have considered each spouses monetary contribution, non-monetary contribution and the efforts of each spouse during the marriage. I have also considered the length of the marriage which was contracted in 1984 and dissolved in 2012, although the parties stopped cohabiting after 19 years of marriage.

25. In the view of the foregoing I order as follows:

- a. I make a declaration that the following properties were acquired by the joint funds and efforts of the Applicant and the Respondent:-
  - i. Parcel of Land Title No. [Particulars Withheld] situated in Murang'a District comprising of Matrimonial home;
  - ii. Plot No. [Particulars Withheld] situated in Ithanga location, and
  - iii. [Particulars Withheld] Memorial Academy situated in Ithanga location
- b. Parcel No. [Particulars Withheld] which comprises the matrimonial home shall be divided into two parcels. One parcel measuring **2 acres** upon which the matrimonial home stands together with any grafted trees therein is awarded to the Applicant since she contributed to its construction and raised her children in it. It has been her home since it was built save for the brief period when she was said to have fled to live with her brother in Kayole Nairobi.
- c. The second parcel measuring **1 acre** upon which the smaller house stands, together with land measuring **1.5 acres** which the Respondent inherited from his father and upon which [Particulars Withheld] Academy stands are awarded to the Respondent. The two pieces of land making a total of **2.5 acres**.
- d. I find that [Particulars Withheld] is not available for distribution, since the Respondent sold it and expended the proceeds of sale towards paying school fees for the children of the marriage. The caveat placed upon it by the Applicant is therefore hereby lifted.

Each party to bear their own costs of the suit.

**SIGNED DATED and DELIVERED** in open court this **8<sup>th</sup> day of October 2015**.

.....

**L. A. ACHODE**

**JUDGE**