



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 51 OF 2006**

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

**BETWEEN**

**J N K ..... APPLICANT**

**AND**

**A W K .....RESPONDENT**

**JUDGMENT**

1. The Originating Summons dated 25<sup>th</sup> September 2006 was purportedly brought at the instance of the applicant, J N K. It seeks a declaration and decree that the property known as [*particulars withheld*] Tena Estate and registered in the joint names of the applicant and A W K, the respondent, is held in the ratio of 75:25 respectively. He prays that the said property be sold and the proceeds of sale apportioned in the above ratio as between the two parties.
2. The application is premised on the grounds set out on its face, as well as on the facts deposed in the affidavit in support sworn on 20<sup>th</sup> September 2006. Principally, he states that the marriage between the parties had broken down irretrievably forcing him to move out of the matrimonial home. It is the respondent who remained in the premises, and who solely derives benefit from it to his exclusion, yet he is the one who contributed the bulk of the resources for the acquisition of the property.
3. The respondent has refuted the allegations by the applicant. She swore an affidavit on 16<sup>th</sup> October 2006 to that effect. She asserts that she is in fact the person who contributed the bulk of the resources for the acquisition of the property and its development. She states that the same ought to be shared out in the ratio of 90% to herself and 10% to the respondent. She also lays claim to other assets that she says she acquired jointly with the applicant during the currency of their marriage.
4. In response to those allegations, the applicant swore a supplementary affidavit on 15<sup>th</sup> January 2007, which provoked a supplementary affidavit by the respondent, sworn on 21<sup>st</sup> June 2007.
5. Directions on the disposal of the matter were given on 1<sup>st</sup> February 2007. The same was to be disposed of by way of *viva voce* evidence. Parties were directed to file the issues for determination.
6. The hearing commenced on 19<sup>th</sup> March 2009. Both parties testified and were cross-examined. In their respective testimonies they gave vent to the allegations of fact made in their respective

affidavits.

7. Regarding Nairobi Block as *[particulars withheld]*, the applicant testified that although the same is registered in their joint names, he was the one who contributed the bulk of the money for its purchase. The respondent was said to have contributed Kshs. 300,000.00 for the deposit, but she contributed nothing else thereafter. It is his case that they obtained a loan from the financiers to the tune of Kshs. 600,000.00, which he alleges to have serviced singly and cleared in June 2007. He asserted that the money came from his salary. He put his total contribution at Kshs. 1,958,946.00. He also claimed that he spent huge sums of money to put up a perimeter wall, two shops and guest wing with two bedrooms.
8. On her part, the respondent claimed that she paid a deposit of Kshs. 450,000.00 for the property, even though she was only able to produce receipts showing a payment of Kshs. 400,000.00, although Kshs. 300,000.00 was in their joint names. She asserted that she was the one who constructed the extensions to the house from her savings. The extensions comprised of a small flat and a shop. She asserted that she used to give the applicant money from her salary for the deposit towards liquidating the loan advanced to them by the financier. She also claimed to have had paid the legal fees for the purchase of the property.
9. I have looked at the bundle of documents filed by the parties in respect of Nairobi/Block as *[particulars withheld]*. There is a Certificate of Lease dated 7<sup>th</sup> April 1993 showing that the property was registered in the joint names of the parties. There is an offer to advance a loan facility by the Housing Finance Company Ltd, dated 27<sup>th</sup> November 1992, made again to the two of them. There was a charge on Nairobi/Block as *[particulars withheld]* registered on 7<sup>th</sup> April 1993, where the two are referred to as the chargors, both of whom executed the said charge. There is a bundle of payslips for the applicant and statements of account in respect of the account of Nairobi/Block as *[particulars withheld]*. There is also a bundle of receipts in respect of the same account. The deposits were apparently all made by the applicant. That is evidence that the account was redeemed in 2007. There is also a bundle of receipts put in by the respondent as her evidence that she incurred expenses in developing the property in question. Her payslips are also exhibited and so is a document showing that she paid land rent for the property at some point.
10. From the evaluation of the material, I can say with certainty that there was payment of the deposit of Kshs. 300,000.00 by the respondent and Kshs. 100,000.00 by the applicant. The evidence on the payment of the balance is uncertain. It is said that the balance was financed by a loan from the Housing Finance. The account indicates the applicant and respondent as the holders. The loan was not settled by check-off system but rather by cash deposits. The bulk of these were made by the applicant with the respondent asserting that a portion was from money that she had given him as she was also working. The evidence on who put up the extensions on the property is also hazy. The applicant did not produce any receipts as evidence of payment by himself towards the construction, it is the respondent who furnished the court with such receipts. I am however alive to the family arrangements where no documentary records are kept of funds moving from one spouse to the other. So one spouse cannot assert effectively that the money they expended on some items was exclusively from their own resources.
11. Both parties were no doubt working at the material time; the applicant in the as *[particulars withheld]*, while the respondent was with the as *[particulars withheld]*. The applicant appeared to have at one time been away on duty in Eritrea. The respondent has asserted that she contributed, other than financially and materially, in caring for the family and looking after the home and the children.
12. The respondent has asked the court to also look at the other assets said to be matrimonial and to make a determination with regard to them. The property in question is Kayole Plot No. as *[particulars withheld]*; Donholm Plot; two plots in Othaya; a plot in Nakuru near Stem Hotel; a plot in Ruai; motor vehicles KAP as *[particulars withheld]*, KAP as *[particulars withheld]*, KAL as *[particulars withheld]*, KWA as *[particulars withheld]*, KAK as *[particulars withheld]* and

KAM as *[particulars withheld]*; and assorted household goods. That request is made in the affidavit sworn on 16<sup>th</sup> October 2006. Evidence was led by both sides on these assets.

13. The only pleading in this cause is the Originating Summons dated 25<sup>th</sup> September 2006 which was subsequently amended on 31<sup>st</sup> October 2007 pursuant to an order made by Aluoch J. on 25<sup>th</sup> October 2007. The said pleading only concerns the property known as Nairobi/Block as *[particulars withheld]*. There is no other pleading before me on the assets that are set out in paragraph 13 above. There is therefore no prayer upon which I can make orders on the said assets. I may mention that affidavits are not pleadings, and therefore they should not make prayers of any sort. Affidavits support the pleadings and provide a basis upon which the prayers sought in the pleadings can be granted. Prayers made in affidavits are clearly not for granting.

14. In making a determination to the application dated 25<sup>th</sup> September 2006, I am guided by the provisions of Sections 6 and 7 of the Matrimonial Property Act, No. 49 of 2013.

15. Having taken everything into account, I do hereby make the following final orders:-

- a. **That I declare that Nairobi/Block as *[particulars withheld]* Tena Estate and registered in the names of the applicant and the respondent is owned or held jointly by the said applicant and the respondent in the ratio of 50:50 respectively;**
- b. **That as the respondent is and has been in continuous occupation of the property since 2000, I order that she shall buy out the applicant at a value to be agreed upon or in default of agreement at value arrived at in a valuation to be done of the property by valuers to be mutually agreed on by the parties;**
- c. **That if after six (6) months of the valuation of the property as envisaged in (b) above the respondent will not have bought out the applicant, the property shall be sold and the proceeds of sale shared in the ratio mentioned in (a) above; and**
- d. **That each party shall bear their own costs.**

**DATED, SIGNED and DELIVERED at NAIROBI this 2<sup>ND</sup> DAY OF OCTOBER, 2015.**

**W. MUSYOKA**

**JUDGE**