



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL SUIT 18 OF 2007(O.S)

RUTH WANGARI NGANGA APPLICANT

VERSUS

PAUL NAJU NJENGA RESPONDENT

JUDGMENT

The applicant Ruth Wangari Nganga by an Originating Summons dated 5.4.2007, sought that this court do declare certain properties therein named as jointly owned property with her husband Paul Njau Njenga and that the same be divided between them as the court may find fair and just. She also sought other remedies of which the main one is that a motor vehicle registration No. KAN 393F, and valued Kshs.110,000/= be declared solely hers and be ordered transferred to her name. The properties she wanted divided included

- (a) Two Rental Houses at Gachui T.44 in Ruthimutu, fetching a total of monthly rent of Kshs.15000/=
- (b) A camera valued Kshs. 40,000/=.

The applicant's case is that although the respondent is her husband and they have children of the marriage, he did not assist much to purchase the properties in dispute. She said that she was at all material times fully employed and receiving a monthly salary, while her husband had no permanent employment although he from time to time carried on the business of a free-lance photographer. She claimed that she had contributed to the purchase of a camera costing Kshs.40,000/= to enable him start photography as a business. She averred further that she assisted him to construct certain two permanent premises on the plot allocated to him by his late father although the father had not transferred the same to him. That they owned one plot consisting three shops, from which rent of Kshs.7500/= was being collected, while a residential building fetched Kshs.10,000/=

As touching the motor vehicle registration No. KAN 393F, the applicant deponed that she took a loan from the bank amounting to Kshs.570,000/= to which she added Kshs.30,000/= to make a total of Kshs.600,000/= which she gave her husband. She claimed that there was a written agreement exhibited in this court which stated that the motor vehicle would be registered in the name of the applicant. That however, to her dismay and with a clear purpose to deceive her, he registered the motor vehicle in his own sole name. She further deponed that although the respondent day to day, managed the motor vehicle, he generally failed to account for the income received from the business. The result was that the bank loan remains majorly unpaid and she is under obligation to pay it herself. For the above reasons, she argued that the motor vehicle should be declared solely hers so that she can repay the loan.

In the replying affidavit the marriage between the parties was not disputed. Nor was the fact that the marriage is broken down and is subject of a divorce court case, denied. The respondent denied most of the facts deposed by his wife. On the construction of the two buildings on the plot which his father had allocated to him, he simply argued that the plot is not his as the father had not transferred the land to him before his death. Respondent also argued that the succession proceedings are not over yet. He states that the rent from them is not Kshs.15000/= per months but only Kshs.5000/=.

About the camera he said that its value was not Kshs.40,000/= but only Kshs.7,000/= and that it was bought before marriage. He said that he had sold it to raise money for the motor vehicle purchase. He also said that the motor vehicle cost Kshs.750,000/= not Kshs.600,000/= but he could not however, produce evidence to that effect. He said that the household goods listed in long hand list and valued at Kshs.430,000/= were taken away by the applicant, but he did not originally want to claim division thereof in his affidavit although he sought dismissal of the applicant's application. He however, orally in court, sought such division. The respondent also claimed that he contributed Kshs.200,000/= towards the motor vehicle purchase, although he produced no evidence to support his claim.

As to the fact that he signed an agreement to return the motor vehicle to the applicant on the basis that it was solely hers, he argued that he did so under police intimidation. On the claim that he failed to bank into applicant's account, the daily matatu proceed from the motor vehicle, he claimed that he used to bank regularly.

I have carefully considered the deposed evidence before me. The parties agree that there should be division of the property acquired during the subsistence of their marriage. Both parties agree of the existence of the motor vehicle KAN 393F but differ as to who really bought it. In my view there is clear evidence that the motor vehicle was purchased by the applicant on loan which still is majorly outstanding. The fact that a major part of the loan is still unpaid and will have to be paid by the applicant is vital. It is now an accepted principle of law in Kenya that a property bought during a valid marriage is apportionable to both spouses unless there is evidence showing that it was intended to belong to one only.

In this case the motor vehicle herein was bought by the applicant for the family as a whole. Its value will therefore be divided in the shares contributed by each. The respondent claimed to have chipped in Kshs.200,000/= but produced no evidence to that end. On the other hand, applicant produced evidence that she got a loan of Kshs.570,000/= from the bank. It was not denied that she still stands to recoup the bank. In these circumstances, in my findings, it will be unfair and unjust to apportion value unless the respondent undertakes to pay half of the outstanding loan as at the time of separation plus interests. The just way therefore is to give motor vehicle wholly to the applicant together with the burden to repay the balance of the loan.

I also find as a fact that the respondent was not banking the proceeds of business from the motor vehicle while he managed it. This means he was harvesting where he never planted. The bank statement confirms his failure to regularly bank and his claim otherwise, is not taken seriously and is not credible.

Touching on the construction of two houses, the respondent appeared not to really deny construction. All he said is that the land was his father's as it has not been transferred to his name, which is indeed correct. But he did not deny the fact that it had been allocated to him by his father before his death which means that it will soon be in his names when succession is concluded and that the two houses constructed by both, will still be there since they are permanent. The respondent admitted that the houses are presently rented but disputed the actual monthly rent.

I have considered the issue. I am satisfied that the houses are rented and that the rent should be apportioned. In my view, of the Kshs.15,000/= rent receivable, the same should be divided at a proportion of 10:5 with the respondent, who will be the owner of the land, receiving the 10 parts to applicant's 5 parts. If the spouses cannot themselves peacefully apportion the rent, the premises should be handled by an independent agent or the two constructions can be given one to each of the parties for the purpose of rent collections only.

Touching on the camera, the court does not make much of it and gives no orders about it.

Finally concerning household utensils, little concrete evidence was placed before me to prove their actual individual existence and value. The claim for apportionment was not pleaded by the respondent who merely changed his mind during the oral submissions and sought division. The applicant said nothing to the handwritten list of such goods whose values were clearly heavily exaggerated. As the respondent showed no enthusiasm to claim apportionment over them from the beginning, the court finds itself in an awkward position to make orders without proofs.

In the circumstances, the court doing its best in these hard situation will give a valuation of Kshs.100,000/= to all the used domestic goods of which Kshs.30,000/= should in the court's opinion, be returnable by the applicant to the respondent. This sum can be recovered from the receivable rents.

To the above extent, this application succeeds with half taxed cost to the applicant. Orders accordingly.

Dated and delivered at Nairobi this 2nd of October, 2008

D.A. ONYANCHA

JUDGE