



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 150 OF 2013

JAPHETH ASAVA MUDASHA.....PLAINTIFF/APPLICANT

VERSUS

HELLEN MUTAVANE ASAVA.....DEFENDANT/RESPONDENT

JUDGMENT

This suit was commenced by way of an Originating Summons dated 17th December 2012 in which the Applicant, Japheth Asava Mudasha, sought for orders that:

1. The property known as Nairobi/ Block 78/808 (hereinafter referred to as the “suit property”) be declared as having been matrimonial property.
2. That the suit property be vested in to the name of the Applicant solely and an order be directed to the District Lands Registrar Nairobi to rectify the title deed accordingly.
3. That the Applicant be granted sole possession of the suit property, and,
4. The costs of this suit be borne by the Respondent.

The Originating Summons was premised on the Applicant’s Supporting Affidavit sworn on 17th December 2012 in which he averred that on 9th February 1974, he married the Respondent, Hellen Mutavane Asava, and thereafter lived with her as husband and wife at the suit property in House No. 808 Buru Buru Estate. He further averred that the marriage was blessed with seven children. He stated that the said matrimonial house was acquired in the year 1979 and registered in the joint names of himself and the Respondent. He annexed a copy of the title deed to support this assertion. He added that he is the one who purchased the suit property but only registered it in their joint names with the Respondent because it was intended and contemplated as a matrimonial home. He indicated further that the Respondent deserted the matrimonial home and moved to the United States of America where she has been residing since the year 2003. He further stated that he still resides in the matrimonial home with some of his children. He further averred that on 28th September 2012, a Decree Absolute of Divorce was made by this court in **Divorce Cause No. 29 of 2009** dissolving the said marriage on his petition based on the Respondent’s desertion. He stated that the Respondent having deserted the matrimonial home has no intention of ever returning more so now that they are divorced and that it is only fair and just that he be vested with the suit property in his sole name.

In response thereto the Respondent filed her Replying Affidavit sworn on 2nd May 2013 in which she averred that it is not true that the Applicant acquired the suit property alone and that in fact she is the one who acquired it while she was an employee of Savings and Loan (Kenya) Limited. She stated that while in that employment, she applied for allocation of a house from the Industrial & Commercial Development Corporation (ICDC) through her employer in the year 1980. She stated that she was allocated a house being House No. 808 at the suit property at a purchase price of Kshs. 220,000/-. She stated that she was required to pay a deposit of Kshs. 20,000/- to ICDC but did not have sufficient funds prompting her to apply for a loan from the Bankers Co-operative Society. She stated that she was loaned Kshs. 15,000/- which she added to Kshs. 5,000/- and made the payment. She stated that she commenced paying the two loans in 1981, a fact which she stated was clearly demonstrated in her pay slip and earnings records which she annexed. She pointed out that at the time she bought the house, the Applicant did not have a job having been laid off by his former employer, Cadbury Schweppes, in 1980. She also stated that she continued to repay the loans and charged the suit property to various financial institutions which she serviced through deductions to her salary by her employer. She attached copies of the charges. She pointed out that she was married to the Applicant when she bought the suit property and was still married to him in 2001 when she finished paying off the loans and the suit property was discharged. In support of that assertion, she annexed a copy of the Discharge of Charge. She then said that even though the suit property is matrimonial, she is the one who acquired it and therefore the Applicant cannot purport to claim any sole right over it nor can he be granted orders to be registered as the sole owner of it. She stated that the suit property should be treated as a matrimonial property jointly owned by the Applicant and herself and should be treated as such even for purposes of distribution of the matrimonial property.

The Respondent filed her written submissions dated 18th March 2014. I should mention here that the **Married Women Property Act 1882** which was relied upon by parties in bringing this suit has since been repealed and replaced by the **Matrimonial Property Act, 2013**.

There are two issues emerging out of this suit falling for my determination. The first issue is whether the suit property is matrimonial property and the second is whether the Applicant is entitled to be registered as the sole proprietor of the suit property. To the first issue, it has been admitted by both parties that the suit property is matrimonial property. That leaves the issue whether or not this court should order that the suit property be registered in the name of the Applicant as the sole proprietor thereof. I believe that the instructive legal provision on this issue is **section 14 (b)** of the **Matrimonial Property Act, 2013** which provides as follows:

“Where matrimonial property is acquired during marriage-

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

I have to say that the Applicant has demonstrated quite convincingly that she is the one who purchased the suit property through the assistance of her employer through deductions made from her salary. However, the Applicant’s assertion that he is the one who purchased the suit property remains just that, a mere assertion with no proof to back it up. The suit property is registered in the joint names of the Applicant and the Respondent and I find that the Applicant has not rebutted the presumption that their beneficial interests in the suit property are equal. This position is supported by the Respondent who has categorically stated that the suit property remain in their joint names be treated as such even for purposes of distribution now that they are divorced. This position finds further support in the provision of **Article 45 (3) of the Constitution of Kenya 2010** which provides as follows:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”

In light of the foregoing, I have no difficulty in finding that the Applicant is not entitled to be registered as the sole proprietor of the suit property and shall remain a joint owner with the Respondent. Should they both wish to dispose off the suit property, they are bound to share the proceeds therefrom in equal shares.

Arising from the foregoing, the Originating Summons is hereby dismissed. Each party shall bear their own costs.

DELIVERED AND SIGNED IN NAIROBI THIS 22ND DAY OF MAY 2015.

MARY M. GITUMBI

JUDGE