



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 208 of 2012**

**C.M.N .....PLAINTIFF**

**VERSUS**

**A.W.M.....DEFENDANT**

**JUDGMENT**

The Plaintiff filed suit by way of a Plaint dated 23<sup>rd</sup> April, 2012 in which he sought for Judgment to be entered in his favour as follows:-

- a) A declaration that the property known as Nairobi /Block **[particulars withheld]** (hereinafter referred to as the “Suit Property”) was acquired and developed through the Plaintiff’s sole effort.
- b) A declaration that the Defendant did not make any contribution financial or otherwise to the acquisition and development of the Suit Property and is not entitled to a share of the Suit Property.
- c) An order that the entry at the Nairobi Lands Office relating to the Suit Property be amended to remove, alter, amend and exclude the name of the Defendant herein.
- d) Costs of this Suit
- e) Any other or further relief that this Honourable Court may deem fit and just to grant.

**FACTS**

The Plaintiff purchased the Suit Property from Continental Developers Limited in the year 1989. Continental Developers Limited informed him that they could build him a house on the Suit Property at a total cost of Ksh. 520,000/-. The Plaintiff was asked to pay 25% of the purchase price as deposit. At this time, the Plaintiff was working for **[particulars withheld]** East Africa Limited. He had just joined this Company from **[particulars withheld]** where he had a sum of Ksh. 130,000/- being his provident funds dues. He collected his provident fund dues amounting to Ksh. 130,000/- and paid the same to Continental Developers Limited as the deposit for the Suit Property. All this while, the Plaintiff was married to the Defendant, their Marriage having been solemnized on 3<sup>rd</sup> September 1988. Thereafter, the Plaintiff approached Housing Finance Company of Kenya Limited (“HFCK”) for a mortgage of the remaining balance of Ksh. 390,000/-.

To qualify for the said mortgage, the Plaintiff had to show that he was earning more than Ksh. 10,000/- per month in salary. The Plaintiff qualified. His loan application was duly approved by Housing Finance Company of Kenya Limited to be repaid through monthly deductions from his salary earned from his employment with **[particulars withheld]** Brothers East Africa Limited. The Loan was to be repaid within

a period of 18 years. When the Plaintiff applied for the mortgage facility at Housing Finance Company of Kenya Limited, the manager there advised him that it was wise to include the name of his wife in the Suit Property which advice he complied with. The Loan facility was then Utilized by Continental Developers Limited in the construction of a three bed roomed residential house known as House Number *[particulars withheld]* DonholmTena Estate and upon completion, the Plaintiff and his family took possession and started living there from the year 1991. In 1996, the Defendant left the Plaintiff and got married to one P.M.K. The Plaintiff then filed for divorce which proceedings culminated in dissolution of their marriage on 8<sup>th</sup> October, 1998. By this time, the Plaintiff had four children being the issues from his marriage with Defendant. After dissolution of their marriage, the Plaintiff continued to pay the mortgage on the Suit Property until November 2005 when the last payment was made.

The Plaintiff also ensured he paid all the Land Rents, Land Rates and all other requisite payments on water, electricity, insurance, and security relating to the Suit Property. For the entire period the Plaintiff went through the process of paying the mortgage, the Defendant did not offer him any financial contribution to the same. The Plaintiff was also solely responsible to take care of the upbringing of his four children after the Defendant departed.

Arising from these facts, the Plaintiff is of the opinion that it is only right and fair that the ownership of the Suit property that currently reflects joint ownership be amended and reviewed to reflect the correct and true position that he is the sole and absolute owner of the Suit Property.

The Defendant filed her Defence and Counterclaim dated 8<sup>th</sup> June 2012 in which she stated that the Plaintiff agreed with her to purchase the Suit Property jointly and for the same to be registered in both their names. She stated that the Purchase of the Suit Property was made possible through their joint efforts. She also stated that the Plaintiff threw her out of the matrimonial home after getting good jobs in order to get a ground for divorce leading to the dissolution of the marriage. She also stated that all communications pertaining to the Suit Property was always addressed to both herself and the Plaintiff. In her Counterclaim she asserted that she is a lawful and *bona fide* joint owner of the Suit Property as the Suit Property was jointly purchased by her and the Plaintiff and registered in their joint names. She also claimed that it was unconstitutional for the Plaintiff to deny her property rights contained in Article 40 (C) of the Constitution reasons wherefore she prayed as follows:

- a) The Suit property be shared equally between the Plaintiff and the Defendant.
- b) In the Premises this suit as against the Defendant is incompetent, bad in law, unmaintainable and does not lie and should therefore stand dismissed with costs.
- c) That this Honourable court do order the Plaintiff to render the Defendant a true, full and comprehensive account on rent income derived from the suit property dating back to January 2011.
- d) That the Plaintiff's suit against the Defendant be dismissed with costs to the Defendant for such period of time and at such rates as the court may determine.
- e) That the Defendant be awarded the costs of the Counterclaim together with Interest thereon at such rate and for such period of time as this Honourable court may deem fit to order.
- f) That any such other or further relief that this Honourable Court may deem appropriate to be made.

Both the Plaintiff and the Defendant filed written submissions which have been read and considered by this court.

#### LAW

The Constitution of Kenya 2010 provides as follows in Article 45 (3):-

***“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”***

Further, Article 2 (5) of the Constitution of Kenya 2010 provides as follows:-

***“The general rules of international law shall form part of the Law of Kenya”***

Article 16 (1) of the Universal Declaration of Human Rights to which Kenya is a signatory states as follows:-

***“Married Women of full age without any limitation due to race, nationality or religion have the right to marry and to found a family. They are entitled to equal rights as to marriage during marriage and at its dissolution”***

Further, Article 7 (d) of the Protocol to the African Charter on Human and Peoples Rights states:-

***“In cases of Separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the property deriving from the marriage”***

Article 6 (1) (h) of the International Convention on the Elimination of All forms of Discrimination Against Women provides that State Parties are enjoined:-

***“To ensure on the basis of equality the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration.”***

The cited provisions of international law are part of the laws of Kenya by Virtue of Article 2 (5) of the Constitution and augment the cited Section 45(3) of the Constitution of Kenya.

All these laws point to the equality of both a man and his wife or if divorced, ex-wife and require that the principle of equality be applied when it comes to the division of matrimonial property. This principle of equality was applied in the case of ***Z.W.N. v. P.N.N. Civil suit No. 10 of 2004*** wherein the court observed that:

***“This court notes and appreciates that the principle of law set by the Court in Echariav.Echaria stems from provisions of the legislation subordinate to constitutional provisions, meaning that the constitutional provisions enshrining the principle of equality when it comes to distribution of matrimonial property have primacy over the principle of law enunciated by the decision in Echaria v. Echaria which stems from an ordinary legislation”***

In this case, plenty of effort has been expended to demonstrate that in fact, the Plaintiff is the one who made all the contributions to purchase the suit property and that the Defendant was just a joy rider. In fact, this has been established through the various evidence that has been adduced before this court. It has been established without a doubt that the Plaintiff is the one who met all the financial requirements towards the acquisition of the Suit Property. However, the legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the purchase of a matrimonial property which matters. The foregoing legal provisions spell a different legal landscape.

Essentially, the foregoing legal provisions seek to change the position previously prevailing in which the court considered the level of financial contribution made by each spouse in deciding what percentage to apportion to them. The legal provision in force now requires this court to apply the principle of equality instead. This court is duty bound to share the Suit Property equally between the Plaintiff and the Defendant.

This position is further buttressed by the provisions of the Land Registration Act, Specifically Section 24(a) which provides as follows:-

***“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.***

Clearly, by registering the Defendant as the joint owner of the Suit Property, the Defendant acquired, jointly with the Plaintiff, absolute ownership in the Suit Property that cannot be challenged or simply wished away. It can be said that the Plaintiff gifted the Defendant a half share in the Suit Property. That gift cannot be taken away from her.

Accordingly, I rule that this suit is hereby dismissed and the counter-claim allowed save that each party shall bear their own costs.

**SIGNED AND DELIVERED AT NAIROBI ON THE 10<sup>TH</sup> DAY OF MAY 2013**

**MARY M. GITUMBI**

**JUDGE**