



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MATRIMONIAL CAUSE NO. 16 OF 2014

F.S.....PLAINTIFF

VERSUS

E.Z.....DEFENDANT

JUDGEMENT

In her Originating Summons dated 22.8.2014, the applicant is seeking the following orders: -

1. **THAT the Honourable Court be pleased to declare and issue a declaration that the listed immovable property set out in the schedule herein below and registered in the name of the applicant and respondent are the joint properties of the applicant and the respondent.**

SCHEDULE OF THE PROPERTIES

The indenture made on 23rd September 2011 between S R & C R AND E Z & F S

2. **THAT the Honourable Court be pleased to order that the said property be valued and sold and the net proceeds be divided equally between the applicant and the respondent herein.**
3. **THAT the Honourable Court do order that the respondent do provide and disclose comprehensive list of all properties, shares and Bank accounts he holds and owns both locally and outside the jurisdiction of this court and that upon the said disclosure of the properties, accounts and share, the same be shared equally between the applicant and the respondent.**
4. **THAT the respondent be ordered to pay the cost of this proceeding in any event.**

The summons are supported by applicant's affidavit sworn on 21.8.2014. The respondent filed a replying affidavit sworn on 17.11.2014. The suit proceeded to full hearing. The applicant informed the court that she got married to the respondent on 10.3.2004. The marriage was dissolved through petition number 6 of 2014.

There are three properties. One is motor vehicle registration number [particulars withheld]. It is her evidence that the vehicle was given to her by the respondent as her 31st birthday gift. It is registered in her name.

The second property is plot number 10496, Malindi. The plot is also registered in her name. This plot was bought in August 2004 after their marriage. The third property is plot number 2910, Malindi. This property was bought in 2011. When it was purchased the respondent was not in Kenya. The property is registered in their joint names. It is her further evidence that plot number 10496 and the vehicle were meant to be hers and not part of the matrimonial property. It is the respondent who used to send money and she processed the purchases. The respondent has never complained that one of the plots is registered in the applicant's names only. She gave the respondent companionship. She managed the workers and the properties. At one time the respondent was operated in Mombasa and she took care of him. In another incident, the respondent broke his hand and she also took care of him.

The applicant's proposal is that she takes all what is registered in her name, plus a share of the property registered in the joint names. The properties in her names were given to her as gifts. The respondent wanted her to be a housewife and did not want her to give birth. There is also a joint account at Barclays bank. The respondent used to send money through that account. When the vehicle was bought they went together to the show room. The respondent informed everyone that the vehicle was a birthday gift. She did not make any financial contribution to the properties. When they got married the respondent had already retired.

On his part, the respondent testified that when they got married in 2004 he told the applicant that he loves Malindi and told her to look for a property in Malindi. They wanted to have a house in Kenya. When the properties were being bought, he was not in Kenya. That is why the properties were registered in her name. None of the properties was meant to be a gift. He bought the applicant several vehicles and the one in dispute is the last vehicle. The applicant wanted a nice vehicle.

It is his further evidence that the applicant stayed in Spain for a short while then came back to Kenya. She is a professional teacher but never tried to get a job. He did not think that there was need to have the properties in both names. He is praying for a fair distribution of the properties.

Parties agreed to file written submissions. Mr. Gicheru, counsel for the applicant maintains that the applicant substantially contributed towards the purchase of the properties. It is further submitted that motor vehicle registration number [particulars withheld] and the matrimonial home on plot number L.R 28608 (portion No. 10496) were given to the applicant as gifts. Under Section 15 of the Matrimonial Property Act 2013, the presumption is that the two properties belong to the applicant. According to Mr. Gicheru, the respondent is estopped from claiming the two properties. The respondent has never indicated that the properties be registered in his names. Counsel relies on the case of **ANM V JTM**, Nairobi Judicial Separation Cause No. 45 of 2014 where the court made reference to Section 15 of the Matrimonial Property Act. Counsel also relies on the case of **UMM V IMM** Busia HCC 39 OF 2012.

Mr. Ndungu, counsel for the respondent submitted that the properties were registered in the names of the applicant as the respondent does not reside in Kenya. None of the properties were given out as a gift. The vehicle was registered on 29.10.2010 yet the applicant's birthday is 19th December. During the divorce hearing, the applicant portrayed the respondent as a very cruel man and hard to reconcile yet she now claims that the two properties were given out to her out of love and affection. The applicant did not prove that the two properties were given out as gifts to her.

Counsel further contends that the respondent had the intention of settling in Kenya and made several attempts to obtain a permit. The applicant deserted the respondent in Spain and the issue of providing companionship does not arise. The applicant came back to Kenya shortly after the marriage. The applicant pleaded desertion in her divorce case and cannot claim contribution by way of companionship.

According to Mr. Ndungu, each party's share should be subject to the extent of his/her contribution. The respondent is willing to give out the furnitures in the matrimonial house. Contribution is quite important in such disputes as opposed to who appears on the title documents.

From the pleadings and evidence on record, it is established that the parties lived together as a couple for a period of about ten (10) years. Unfortunately they did not have a child. It is the applicant's position that it is the respondent who didn't want to have a child. At the time of the marriage, the applicant was 23 years old while the respondent was 62 years and had already retired from employment. The main issues for determination are: -

1. Whether motor vehicle registration number [particulars withheld] were given to the applicant by the respondent as gifts.
2. Whether the registration of the two properties in the applicant's sole name entitles her to exclusive possession of the same.
3. Whether the applicant contributed towards the acquisition of the three properties.
4. How should the properties be dealt with or distributed.

Regarding the first issue, whereas the applicant maintains that the two properties were given to her as gifts, the respondent vehemently denied that position. The properties were bought at a time when the parties loved each other. That love has completely been eroded and the two are now divorced. The parties testified before me and I noticed that although divorced, their differences are not as extensive as one would expect. There is still some form of respect to each other.

The starting legal provision is Section 15 of the Matrimonial Property Act. Section 15 states as follows: -

Gifts between spouses

Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolute to the recipient.

It is crucial to note from the above provision that there is a “**rebuttable**” presumption. The blacks law dictionary defines rebuttable presumption as follows: -

“An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.”

The Black's law dictionary defines a gift as **the voluntary transfer of property to another without compensation.**

The applicant herein contends that the two properties were given to her as gifts. On his part, the respondent denies that allegation. The motor vehicle was bought while the respondent was in Kenya while the property was bought when he was out of the country. There is no written document to show that indeed the properties were given to the applicant as gifts. There is no independent witness to corroborate the applicant's position. In her evidence, she testified that the respondent used to tell everyone that the vehicle was her 31st birthday gift. No one came to testify to that effect.

Given the evidence on record, it is the applicant's word against that of the respondent. The dispute involves the distribution of property and each party would do his or her best to get most of the

properties. It is the respondent's position that he told the applicant to look for a house in Malindi since he loves Malindi. The marriage was solemnized in Nairobi. The house was bought within the same year of the marriage. That is where the parties have been living. I am satisfied that all the two properties were meant for the common use of the parties. In short, none of the two properties was given to the applicant as a gift.

The second issue relates to the registration of the properties in the names of the applicant. Did the registration of the vehicle and the matrimonial house in her name confer exclusive rights to the applicant. Section 14 of the Matrimonial Property Act states as follows: -

Presumptions as to property acquired during marriage Where matrimonial property is acquired during marriage -

- a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and**
- b. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.**

The above provision indicates that there is a rebuttable presumption that the property acquired in the name of one spouse is being held in trust for the other spouse. In the case of **NJOROGE -V- NGARI [1985] KLR, 480**, the court held that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property. That decision was made way before our Matrimonial Property Act was enacted. The decision is in line with Section 14 of the Matrimonial Property Act, 2013.

It should not be lost that when properties are acquired during the subsistence of the marriage, both parties are happy and have trust on each other. There is no suspicion at that time. It is unfortunate that when the marriage hits rock bottom, the registered party strives to have the property registered in his/her name be declared as exclusively his/hers. In this case, the applicant concedes that it is the respondent who made the financial payments towards the purchase of the properties. The respondent is a foreigner and was not in Kenya when the properties were bought. The matrimonial property was bought in 2004 soon after the marriage. All the monies were provided by the respondent. The presumption is that the applicant held the properties in trust for the respondent. The applicant's contention that she has held the properties for ten (10) years and the respondent has not asked the properties to be transferred to his name cannot hold. The respondent trusted her and there was no warning at that time that the marriage would not last. I do find and hold that the properties were being held in trust for the benefit of both parties.

Thirdly, Did the applicant contribute towards the acquisition of the properties" The applicant maintains that the respondent asked her not to engage in any gainful employment. In her supporting affidavit, paragraph 14 thereof calls for equal sharing of the properties but her testimony in court is that only the property in joint names should be shared while the other properties were given to her as gifts.

Section 2 of the Matrimonial Property Act defines contribution to be both monetary and non monetary. It 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;

All along the applicant has never been employed. She used to operate a curio shop from the matrimonial house as per the pleadings. Currently, she keeps chicken at their matrimonial home. It is the respondent's position that the applicant could have worked in Spain and that he never objected to her engaging in gainful employment. As it is now, all the financial payments for the purchase of the properties were done by the respondent.

The parties herein have been married for about 10 years. The applicant dedicated all this period to her marriage. Although she never made any financial payments towards the purchase of the properties, she also indirectly contributed to the acquisition of the properties. The respondent maintains that the companionship was quite intermittent. That is true as the respondent is not a resident of Kenya. However, still there was companionship whenever the respondent came to Kenya. The applicant oversaw the purchase of the properties. She could have inflated the prices if she had any ill intention. She was honest enough and followed all the lawful procedures towards the acquisition of the properties. That amounts to indirect non-monetary contribution.

Section 7 of the Matrimonial Property Act recognises ownership of matrimonial property according to the contribution of either spouse towards its acquisition. Section 7 states as follows: -

Ownership of matrimonial property Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

The respondent was out of the country while the applicant took care of the properties. Nothing was wasted. That amount to contribution. The applicant was taking care of the properties knowing that she had a recognisable stake over them. The applicant indirectly contributed towards the acquisition of the property. The respondent had faith in her and that is why he allowed some of the properties to be in her name only. I therefore hold that there was non-monetary contribution by the applicant. She oversaw the purchases and managed the properties.

The last issue is how to distribute the properties: There are only three properties. The distribution poses a great challenge as two properties are of almost equal value. Plot number CR [particulars withheld] measuring 0.200 Hectares is registered in the names of the applicant. The cost price for this property has not been given. It is a two bedroomed bungalow with servant quarters. The property fronts the Indian ocean. Liaison Valuers Ltd gave a value of Kshs. Thirty two (Kshs.32,000,000/=) Million.

The second property, portion [particulars withheld] is 0.1727 Hectares. It is not located at the beach front. It comprises an incomplete structure made of six bedrooms. The structure is 80% complete. Liaison Valuers returned a value of Kshs. Thirty eight Million, Five Hundred Thousand (Kshs.38,500,000/=) as per their report dated 14.12.2015. The property was bought in 2011 for Kshs.6,000,000/=.

The last property is motor vehicle registration number [particulars withheld]. It is valued at Kshs.1,400,000/=.

The applicant's position is that the property be sold and the proceeds be shared equally. On his part, the respondent told the court that he seeks a fair distribution of the properties. Unfortunately, none of the parties made any preference to a particular property. The respondent is willing to have the

applicant take all the household goods in the beach property which served as the matrimonial home.

As indicated herein, the fact that the applicant is the sole registered owner of the vehicle and the beach property does not make her the absolute owner of those properties. In the case of **CWN V BN**: Nairobi Court of Appeal Civil Appeal No. 236 of 2009, the court held that distribution of matrimonial property does not depend on whose name the property is registered.

The distribution herein is based on the applicant's non-monetary contribution on the one part and the financial contribution of the respondent on the other. The task of distributing matrimonial property is based on judicial discretion and what the trial court would consider to be just in each particular case. Unlike disputes involving award of damages where there are precedents to guide the court, disputes relating to distribution of matrimonial properties are unique in the sense that at times it is difficult to determine the level of contribution of each party. Spouses would usually not keep records of individual contribution wherever acquiring properties during their happy lives.

Article 45 of the Constitution stipulates that 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. My interpretation of Article 45 of the Constitution is that it does not call for 50:50 sharing of matrimonial properties after a marriage is dissolved. If that were to be the case, then marriages would be converted to economic traps whereby an individual would lure a rich man or woman, get married to them and soon thereafter seek divorce. Such a person can repeat the same process with another spouse and enrich himself or herself without making any monetary contribution.

In the case of **VWN V F.N.**, Nairobi Court of Appeal Civil Appeal No. 3 of 2014, the Court of Appeal distributed a matrimonial property in Karen at 70% and 30% and reversed a High Court decision to have the property shared equally.

It is important to note that there are certain past decisions which are of the view that matrimonial properties should be shared equally. Most of those decisions were made before the coming into force of the Matrimonial Property Act, 2013. In the case of **MK V SK [2008] 1 KLR 204** where the Court of Appeal held that where a property is registered in the joint names of husband and wife, it means that each party owns an individual equal share in the property: Such decisions may not represent the current Kenyan status under Section 14 of the Matrimonial Property Act, there is a rebuttable presumption that there is an equal beneficial interest. This means that evidence can be adduced to rebut and defeat the presumption that the interest on the property is equal. It is not a fixed presumption. One spouse can buy a property and have it registered in the names of the other spouse. Whenever an issue of distribution arises, what would count will be the level of contribution by each party, whether monetary or non-monetary contribution.

One of the properties is still incomplete although it is of the highest value. I do find that since the respondent made the entire monetary contribution, he should get a bigger share than that of the applicant. I also observe that the applicant has been living in the matrimonial home from the year of their marriage to date.

I do proceed and distribute the estate as follows: -

- i. Motor vehicle registration number [particulars withheld]– to the respondent.
- ii. Plot portion [particulars withheld] (0.1727 Ha) – to the respondent.
- iii. Plot [particulars withheld] (0.200 Ha) – to the applicant

The originating summons referred to the other properties being owned by the respondent and being held out of the country. No evidence was adduced as to those alleged properties and when they were acquired. I do find that that claim has not been proved.

The applicant shall have plot 10496 together with all the household goods in that house except the respondent's personal belongings. Any money in the joint account at Barclays Bank in Kenya shall be shared equally. Each party shall meet their own costs.

Dated and delivered in Malindi this 28th day of April, 2016.

S.J. CHITEMBWE

JUDGE



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