REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MATRIMONIAL CAUSE NO. 3 OF 2018(O.S)

IN THE MATTER OF SECTIONS 2, 7, 12 AND 17 OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

T M W.....APPLICANT

VERSUS

F M C.....RESPONDENT

JUDGEMENT

The matter before me is a matrimonial cause by way of Originating Summons dated 14th February 2018 relating to distribution of matrimonial property. The Petitioner is seeking the following prayers;

a) That the national land commission be barred from compensating the respondent for the compulsory acquisition of the land parcel KJD/KITENGELA/[particulars withheld], pending the hearing and determination of this suit.

b) That a declaration be issued that the suit property was acquired by the joint funds and efforts of the parties herein during the subsistence of their marriage and registered in the name of or in the position of the respondent and the same is jointly owned by the applicant and the respondent.

c) That the said property be settled for the benefit of the applicant in such a manner and proportions as this Honorable court deems fit and just

d) That the respondent himself, his agents and or servants be restrained form alienating, encumbering or in any other way disposing of the suit property.

e) That the respondent be condemned to pay the costs of this application and incidentals thereto.

BACKGROUND OF THE CASE

The parties herein started cohabiting together in July 1993 and officiated their marriage through Kikuyu customary law in August 2001. They were blessed with three issues. During the subsistence of their marriage the respondent has been the breadwinner of the family while the petitioner under the instructions of the respondent was a stay at home mother and wife and she took care of their children and management of the home. Over the years, the respondent has been engaged in small businesses from which he earned money that went towards maintenance of the family, a venture of which the petitioner also claimed to have been engaging in from time to time when their children started going to school. The petitioner and the respondent are currently separated and live apart with effect from 20.4,2017 on grounds of alleged persistent acts of assault from the respondent. It's in the course of this arrangement the petitioner has deponed that the government is set to compensate them in respect with one of the properties referenced as L.R. KAJIADO/KITENGELA[particulars withheld],.According to her affidavit its apparent that the payment would be made to the respondent being the registered owner without factoring her share of the property. This affidavit also formed the

basis of her viva voce evidence at the trial.

The respondent case was primarily based on the replying affidavit filed in court on 27.2. 2018. In his testimony in court the respondent stated that indeed they have married with the petitioner since July 1993 which marriage was solemnized under Kikuyu Customary Law. It is also not disputed that their union was blessed with three children aged between 12 ,18 and 24 years respectively. With regard to the maintenance and upkeep of the entire family unit the respondent told this court that he has not been supported by the petitioner as alleged in her evidence.

Further On or about 11th January 2010 the respondent entered into a sale agreement with KARIUKI KINUTHIA for the purchase of the suit property measuring 0.205 HA for a consideration of KSH 375,000/=. The said property was registered in the name of the respondent only and that is where the parties herein built their matrimonial home. On or about 2016, the government of Kenya announced that it will commence construction of phase 2 of the standard gauge railway which would run from Nairobi to Naivasha and would affect Kiambu, Kajiado, Nakuru and Narok counties. The said construction affects the suit property as part of the land marked for compulsory acquisition. The Government through National Land Commission conducted a valuation in respect of the suit property. According to the respondent the money used to construct the building on the property was sourced from Equity bank which amounted to Ksh 600,000. The respondent further stated that on or around July 2013 he applied and did obtain another loan advanced by Equity Bank for sum of Ksh. 9,000,000. With suit title as security for the loan. On the notion that the petitioner contributed to the purchase of the suit land the respondent denied any financial resources in the form of grant or loan ever paid towards acquisition of the asset as asserted by the petitioner. He further told the court that in respect to Juja property he is the one who provided the money to the petitioner to ballot but at the time of registration she only gave only her name which appears in the registry. Of ownership. This clearly to the respondents mind the petitioner is interested to have a second bite on the cherry on this suit property set to be compensated by National Land Commission.

ISSUES FOR DETERMINATION

In reappraising the facts of this case towards the final determination I will take into account the written submissions by both Ms. Maina for the respondent and Ms. Makori for the petitioner together with the evidential material by the disputants to the originating summons.

The parties herein filed the issues to be determined by this Honorable Court which are couched in the statement of agreed issues in their respective list of documents exchanged. The same reads as follows;

1. Whether the petitioner contributed towards the acquisition and the development of the suit property.

2. Whether the suit properties constitute matrimonial property and whether the Petitioner is entitled to an equal share of the property and therefore for the compulsory acquisition of the suit property.

3. Whether the petitioner contributed towards the servicing of the outstanding loan owed by the respondent to Equity Bank of Kenya.

4. Whether the JUJA property registered in the names of the matrimonial property.

5. Whether the petitioner is entitled to the compensation from the National Land Commission for the compulsory acquisition of the property.

ANALYSIS AND DTERMINATION.

Whether the petitioner contributed towards the acquisition and the development of the suit property.

As regards the issue of contribution towards the acquisition of the suit property, the petitioner submitted that they bought the suit property so that they could built a family home. The petitioner resorted to section 6 of the Matrimonial Property Act of 2013 in support of her claim. During the hearing of this matter the petitioner stated that she was a house wife and that status (housewife) was as a result of the direction of the respondent. The petitioner further testified that she sometimes conducted small businesses for the purposes of assisting her husband to take care of the family. It was her testimony that she kept farm animals at their matrimonial

home. Further that at all times she was living with the respondent and taking care of the children and household. The petitioner relied on section 2 of the Matrimonial Property Act which defines the term contribution to mean both monetary and non-monetary to support her argument. She further relied on **MWM VS KNM (2014) eKLR** to further support the argument that contribution must be seen in the lens of monetary and non-monetary contribution and therefore urged this court to find as such.

In opposition to the above arguments, the Respondent resorted to section 6(3) of the Matrimonial Property Act which states that:

"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."

Further reliance was placed **on PNN vs ZWN (2017) eKLR, Federation of Women Lawyers (FIDA) v Attorney General and Another (2018) eKLR, Peter Mburu Echaria vs Priscilla Njeri Echaria Civil No. 75 of 2001** in support of his argument that matrimonial property ought to be distributed according the contribution of each party towards its acquisition. The Respondent therefore pointed out that the petitioners alleged food business that she claimed to have run was not proved since the Petitioner did not provide documentary evidence before court to support her claim. He further provided the court with details of payments made to the previous owner of the suit property to show that he was the sole contributor in the acquisition of the suit property. He also denied indirect contribution towards the suit property on the part of the Petitioner saying that she admitted during the hearing of the case that she does not live with the Respondent nor the children. That the Petitioner has deserted the matrimonial home on several occasions ever since they got married without his connivance. Further that currently the Petitioner has been away from home for a period of one year and four months and the entire time she has not bothered to check on the children despite the fact that they are two minors that need her care and attention. Counsel for the Respondent reiterated that the allegations that she has contributed indirect are not true and baseless for the reasons aforementioned. It was also contended that instead of filing for divorce, maintenance and custody of the minors, she chooses to file for a share of the compensation from the suit property. It was therefore argued that the Petitioner made no indirect contribution towards the acquisition of the suit property hence she should not get share.

Firstly, I shall determine whether the suit property falls in the category of matrimonial property. Turning the provisions of the Matrimonial Property Act, Section 6 of the Matrimonial Property Act, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Basically for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property. In the instant case, the marriage between parties herein commenced 1993 and was officiated through Kikuyu Customary Law in 2001. The property in question was acquired in 2010 and the same was acquired during the subsistence of the marriage between the parties herein. There is also evidence that the suit property was acquired for purposes of building a family home. As a result, there is no doubt whatsoever that the suit property including the Juja farm forms part of matrimonial property as far as the parties herein are concerned.

As regards ownership of matrimonial property, Section 7 states as follows: -

"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 above provision of law entails that ownership of matrimonial property vests with the husband and wife/wives according to what each party contributed towards the acquisition of the same. This section introduces yet another aspect as far as ownership of property by spouses is concerned, that is the aspect of contribution of each party towards the acquisition of such property. In my view, what this provision of law entails is that it is possible for spouses to own certain properties but not in equal shares. Thus in case of divorce, the court would look at what each party brought to the table for the purposes of the distribution of such properties if any dispute concerning distribution of matrimonial property arise. Further, section 9 of the Act also provides as follows: -

"Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in property equal to the contribution made."

This above provisions raises the question of contribution. What the court is left to determine is the kind of contribution applicable in the instant case which can be either the one envisaged under section 7 of that in section 9. There is no evidence that the Petitioner made contribution towards the improvement of the suit property and therefore section 9 is not applicable herein. Section 2 of the

Matrimonial Property Act defines contribution to include: -

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

Further, section 14 of the Act provides that:

"***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. Thus, it is important to mention that the Act takes into account non-monetary contribution and provides that a party may acquire beneficial interest in property by contribution towards the improvement of the property equal to the contribution. In the same respect, it was stated in the case of ***NWM v KNM (2014) eKLR*** stated that the court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property. The Petitioner herein stated in her supporting affidavit that she sometimes ventured into small businesses for the purposes of helping her husband to take of the family but however no proof of the existence of such endeavors was produced before. I therefore find that the Petitioner's contribution cannot be said to have been in the realm of monetary contribution since the same was not proved on a balance of probability.

Furthermore, the Petitioner in the aforementioned affidavit gave evidence regarding child care since her marriage with the Respondent was blessed with three issues. She also stated that she kept farm animals and provided companionship to the Respondent. There is also uncontroverted evidence that that the Petitioner hold the status of a house wife as per the instructions of the Respondent. As regards non-financial contribution I wish to rely on The House of Lords decision ***in White vs White (200}UKHL 54*** in which the Court cited the greater awareness of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills, a position that was reiterated in subsequent decisions of the House of Lords in ***Miller vs Miller & McFarlane {2006}UKHL 24*** with courts endorsing the jurisprudence of equality. She argued that any law that advocates for the division of matrimonial property on the basis of proved contributions alone, runs counter to the spirit embodied in the Maputo Protocol and that the division of matrimonial property must be effected having due regard to the principle of equality.

In the foregoing, even though the Petitioners monetary contribution was not proved on a balance of probability, this court takes the view that the plaintiff's efforts and contribution in the family cannot go unnoticed. Despite the fact that the marriage between the parties was fraught with challenges, the plaintiff dutifully took care of the family. She worked for many years for the family through her participation in domestic work and management of matrimonial home, and taking care of the children which in my view is a worth contribution. The question to ponder is whether the Petitioner is entitled to fifty percent share of the suit property. Section 45 of the constitution of Kenya 2010 provides 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."

As quoted in the case of ***PNN vs ZWN (2017) eKLR,*** "One of the earliest opportunities to interpret the provisions of ***Article 45 (3)*** came one year after the promulgation in the case of ***Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes, (Civil Appeal No. 127 of 2011),*** where this Court stated as follows: -

"Article 45 (3) of the Constitution provides 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. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day."

In the case of **PWK vs JKG 2015** eKLR the Court said;

"Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788."

After analyzing English authorities, this Court in ***Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR*** stated in part as follows:

"***It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in Pettit are those of English law of trusts. The House of Lords specifically decided so in Gissing vs. Gissing. According to the English law of trusts it is only through the wife's financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property."***

11. The Court also examined local decisions and came to the following conclusion:

"In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see Essa vs. Essa (supra); Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported), Kamore vs. Kamore (supra); Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband."

In ***FRANCIS NJOROGE vs. VIRGINIA WANJIKU NJOROGE,*** Nairobi Civil Appeal No. 179 of 2009; Kiage J. stated that:

"… a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in LOCK YENG FUN v CHUA HOCK CHYE [2007] SGCA 33; *'It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – a precise mathematical exercise'."*

In PNN vs ZWN (2017) eKLR, Justice Kiage; expressed himself as follows:

"I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."

The nub of the above cited judicial precedence is that the Trial Court is mandated to scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties so as to inform the division of matrimonial properties after dissolution of the marriage. It's not in dispute as of now the court of appeal decision embodies that when applying the principle of equal ownership share the courts shall take into account a range of factors with no single consideration bearing a greater weight than the other in a case requiring the halving step formulae.

For the purposes of this originating summons the affidavits evidence and their testimony in court speaks for itself. It's clear that the couples have in their asset portfolio two properties one located in Juja in Kiambu county and the rest in Kitengela at Kajiado. I reiterate that with respect to other movable properties there was no pleading to support any existence of such property owned by both parties during the subsistence of the marriage.

However, it makes sense to state that the Bank accounts presented contain records of the respondents. The account in question was in the name of the respondent with no evidence of any deposits being made by the petitioner at any given time. When it comes to mortgage repayments which has already been alluded to elsewhere in the evidence by the parties only the respondent has been responsible in liquidating the debt. It follows therefore that the petitioners share would be assessed in terms of non – financial contribution parameters and other factors in the event this court was to reach its logical conclusion in the cause. On the other hand, it is not lost in the mind of this court that when the marriage takes place between two people as recognized in the law of the Republic the property acquired during the marriage becomes an asset belonging to both of them. In a trusteeship relationship it does not matter who has the legal title as opposed to the beneficial interest. They each approach the alter of justice as equal partners for the court to apply the legal tools and solomonic skills of adjudication to settle for a property distribution model suited to each specific case. From what has been brought to my attention during the hearing of this claim there appears to be some discordant and straining in the marriage relationship between the petitioner and the respondent. It's also noteworthy that despite having such sour relationship none has taken a step to apply for judicial separation or ultimate divorce. As a result, the right to distribute matrimonial property under the Act has not crystallized in favour of the petitioner.

In view of the circumstances of this originating summons and status of each party as of now and what I am about to state I do not consider it just and equitable to make the order for distribution of matrimonial property between the two couples.

In the foregoing and in view circumstances of the case at hand, the evidence on record shows that the marriage between the parties herein is still alive and subsisting. The fact that the petitioner seems to have taken a gap period or what I can refer to as sabbatical leave out of the matrimonial home by itself cannot be equated with divorce or dissolution of the marriage. It is very clear from the provisions of the matrimonial property that matrimonial property can only be distributed where the parties to a marriage have officially divorced. I have not seen proof of divorce in form of a decree declaring the marriage between the parties dissolved. As to the document to proof divorce the law recognizes decree Nisi or decree absolute. So far as the language of the matrimonial property Act is concerned it must be obvious that the parties have terminated their cohabitation and there is no likelihood of reconciliation. The court is not a vehicle that encourages the breaking up marriages or setting them asunder. I cannot find better words rather than stating that the family is one of nature's masterpieces. That is the spirit of the constitution of Kenya under Article 45 of the constitution which provides that:

"45. (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

This entails that the state has an obligation to protect the sanctity of marriages. In that regard, no court in its right mind may encourage destruction of families. Thus if families are not protected or if courts are to give a blind eye on the mischief divorce, the spirit of section 45(1) of the constitution aforementioned will be defeated. I agree with the assertions of my brother ***W.M. Musyoka. J in MNW v WNM & 3 Others*** where he stated that it is against public notice to entertain matrimonial disputes as it would accelerate the break-up of the family involved and that public police favour family unity and should foster peace and reconciliation.

Alienation of lands between spouses during unbroken coverture does not augur well for the well-being of the family as a unit.

In the premises, I'm of the view that the Petitioner herein is entitled to a share which may not be equal to that of the Respondent if at all the matrimonial property is to be distributed. The suit property herein cannot be subject to distribution without proof of divorce. Concerning Land reference KJD/KITENGELA28503 at the moment under compulsory acquisition order by the government with legitimate expectation of compensation on quantum to be released to the registered owner, the same be deposited in the joint earning interest account of both the petitioner and the respondent. Each party to bear their own cost of this litigation.

It is so ordered.

Dated, Delivered and Signed in open court at Kajiado this day of 9th November, 2018.

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R. NYAKUNDI

JUDGE

Representation

Ms. Maina for the Respondent – present

Ms. Fosah for Applicant – absent

Petitioner – present

Respondent - present