



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL SUIT NO.39 OF 2012

U M MPLAINTIFF

VERSUS

I M MDEFENDANT

J U D G M E N T

1. The proceedings before Court are brought under the now inapplicable The Married Women's Property Act, 1882 in which the Plaintiff (**hereinafter U**) seeks the sharing and division of some property now held or in the names of her former husband I M M (**I**).
2. I and U solemnized an Islamic marriage at Bungoma on 21st November 1990. That marriage lasted for 17 years or so. In a divorce cause (Divorce case No.12 of 2007) taken out before the Kadhis Court, the said marriage was dissolved on 21st February 2008 In subsequent proceedings before that Court in which the Kadhi was asked to settle the issue of matrimonial property, The Kadhi ruled,

“In regards to the above mentioned verses, this court grants Mrs u M plot at [particulars withheld] No.[particulars withheld] undeveloped for her send off and thereof the petitioner shall immediately transfer the said plot to her in documentation.”

3. It is however doubtful that at that time the Kadhi's Court had the jurisdiction to determine a dispute in respect to division and sharing of property on divorce given the provisions of Section 5 of The Kadhis Courts Act (Chapter 11) as read with Section 66(5) of the old Constitution.
4. Perhaps recognizing that the Khadhis Court had overstepped its powers, U has included the property ([particulars withheld]) purportedly granted to her by that Court as one of those whose fate this Court must decide. The others are:

- a. [particulars withheld]
- b. [particulars withheld]
- c. [particulars withheld]
- d. [particulars withheld]
- e. [particulars withheld]

5. I received viva voce evidence from both sides. The evidence of U was that she got married to I when she was 18 years old and, not surprisingly, did not bring any money into the marriage. She joined her husband in an ongoing business. That business was a well stocked Auto spares shop. It was also her testimony that at the time of marriage I already owned property known as

[particulars withheld]. That property has since been subdivided to plot numbers [particulars withheld] – [particulars withheld].

6. During her coverture to I, she says that they jointly bought property known as Bungoma Municipality [particulars withheld] (**herein plot No.[particulars withheld]**). This, she testified, was in 1994 – 1995 and bought from the proceeds of their joint business. She conceded that she was not party to the sale agreement. She gave not a dissimilar story of how [particulars withheld](**hereinafter plot No.[particulars withheld]**) and [particulars withheld] (**hereinafter plot No.[particulars withheld]**) were bought. In respect to plot No.[particulars withheld] she alleged that she contributed ksh.400,000/= out of the total purchase price of ksh.600,000/=.
7. Then there is Mumias Township Block [particulars withheld] (**hereinafter plot No.[particulars withheld]**). Her position is that it was purchased and not gifted to I by the former owner Hon. E.W. W. That it was her who paid the entire purchase price of ksh.350,000/=.
8. I stated that before having difficulties in their marriage U was a good and hardworking wife. She managed some of his business. He had two spare shops, one at Mumias and another at Bungoma. They interchanged in the management of the shops. It was his testimony that properties [particulars withheld], [particulars withheld], [particulars withheld], [particulars withheld] were all acquired in the course of his marriage to the U. While plot No.[particulars withheld] which he acquired prior to the marriage was subdivided in the course of the union.
9. I gave detailed evidence of how he acquired each property. He bought plot No.[particulars withheld] from one J W T and transfer effected in his favour on 12th August 1988. This was two years before he married U. This was then subdivided into 6 sub plots ([particulars withheld] – [particulars withheld]) which are all registered in his name.
10. As for plot No.[particulars withheld], he bought it from one M W. This was, partly, in settlement of a debt owed to him by the seller. The sale agreement in respect of the transaction is dated 4th November 1979. The purchaser is I. U does not feature and it was the evidence of I that she did not make any financial contribution towards the purchase.
11. Within Bungoma Municipality, I owns plot No.[particulars withheld]. He bought this from J J.M. W on 13/11/1991 at a consideration of ksh.66,000/= . He produced a sale agreement in proof hereof. The property is registered in his name. Again he asserts that the U did not contribute a cent.
12. The late Dr W is an uncle to I. In the course of his lifetime Dr. W gave him plot No.[particulars withheld] as a gift. Dr. W wrote to the Town Clerk Mumias Municipal Council (Exhibit [particulars withheld]) requesting the Council to transfer that property to I.
13. Then there is plot No.[particulars withheld]. It was acquired by I on 14/11/1990. His marriage to U was just two weeks old. It is registered in the name of I but he is willing to abide by the decision of the Kadhi and is ready to transfer this property to U.
14. I also made the point that he already gifted U with motor vehicle Isuzu [particulars withheld]. In addition, he left her the Bungoma Shop which is now registered as [particulars withheld] in the names of U and her sister. Lastly, that he gave her [particulars withheld] which is registered in her names. These evidence was not controverted.
15. At the close of the taking of evidence parties herein filed written submissions. For the Plaintiff the Court was urged that Article 45(3) of The Constitution required that the principle of equality be applied to the division of Matrimonial Property. Article 45(3) provides as follows:-

“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.”

16. Counsel further submitted that I be persuaded by the decision of my sister Mary M. Gitumbi J in Exh No.208 of 2012 **MCN -vs- A.W.M** [2013] e KLR where she observed that:-

“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.”

17. In the Defendants view the law governing division of matrimonial property was settled in the famous decision of Nairobi Civil Appeal No.75 of 2001 **Peter Mburu Echaria –vs- Priscilla Njeri Echaria** [2007] e KLR. The significant holding in that decision is that for a wife to prove entitlement to property acquired in the course of coverture she needs to prove her contribution towards the acquisition of the property. That contribution being of a monetary nature.
18. Counsel for the Defendant submitted that the provisions of Article 45(3) did not debunk the force of the holding in **Echaria** (supra). Arguing that it would be to overstretch the provisions of that Article to define equality in terms of property ownership rights.
19. In resolving the rival views taken by parties my work is made somewhat lighter by two recent developments. First, the Court of Appeal has recently given its views as to the place of Echaria (supra) in the context of Article 45(3) of The Constitution. In Civil Appeal No.127 of 2011 **Agnes Nanjala William –vs- Jacob Petrus Nicolas Vander Goes**, the Court observed that **Echaria** (supra) may no longer be good law, and then held,

“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.”

20. The Legislation hoped for by the Court of Appeal is The Matrimonial Property Act, 2013 which received assent on 24th December 2013 and commenced on 16th January 2014. That is an important development in the law of Matrimonial Property for this country. Section 7 is of paramount significance. It provides:-

“7. 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.”

Contribution is defined by Section 2 to mean monetary and non-monetary contribution. And non-monetary contribution 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;**

“Family business” means any business which-

- a) is run for the benefit of the family by both spouses or either spouse; and**
- b) generates income or other resources wholly or part of which are for the benefit of the family;”**

21 The provisions of that Statute ameliorates the harshness that was associated with **Echaria** (supra). Statute now recognizes the non- monetary contribution of a spouse. It however does not go as far as what the Court of Appeal had suggested in **Nanjala William** where it argued that Article 45(3) was perhaps **“a Constitutional Statement of the principle that marital property is shared 50-50 in the event that a marriage ends.”** As far as I can see it is the provisions of Sections 2,6 and 7 of The Matrimonial property Act, 2013 fleshes out the right provided by Article 45(3). By recognizing that both monetary and non-monetary contribution must be taken into account, it is congruent with the Constitutional provisions of Article 45 (3) of The Constitution 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. I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by Article 45(3).

22. So should this Court apply the provisions of Article 45(3) in resolving this dispute" The disputed properties were all acquired before the promulgation of The Constitution, 2010. The marriage between the Plaintiff and the Defendant was contracted on 21st November 1990 and dissolved on 21st February 2002. Although this suit was filed post the Constitution 2010, it relates to a dispute over property acquired before the coming into force of the new Constitution. If this Court were to apply the provisions Constitution 2010 then it would be doing so retroactively. Is this the way to go" On this I again turn to the decision of AGNES NANJALA WILLIAM (supra) where the Court of Appeal applied the provisions of Article 45(3) of the current Constitution to a cause of action accruing before the promulgation of the Constitution 2010. The Court of Appeal observed;

“Having found that the right to equality as inherent and infeasible to all human beings, it matters not that the cause of action accrued before the current constitutional dispensation. We therefore do not find favour with the respondent’s submissions to the contrary.”

23. As I turn to resolve the dispute before me, I recap the principle that will guide my hand. Article 45(3) of The Constitution 2010 requires 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. In Division of matrimonial property that right is safeguarded by vesting in each spouse ownership according to their respective contributions be it monetary or non-monetary. For this reason I shall strive to

give effect to any monetary or non-monetary contribution that U will have proved in the acquisition or improvement of the properties in dispute.

24. I acquired [particulars withheld] on 10/02/1988. This was before he contracted the marriage with U. That property was subsequently subdivided into 6 subplots, numbers [particulars withheld]-[particulars withheld]. Subdivision was formalized on 21/1/94. This was in the course of coverture. U stakes a claim on the subdivided portions because she made contribution towards the improvement of the subdivided portions. That the subdivisions enabled them take loans to finance their spare parts shop. On one of the subdivided portions being plot [particulars withheld] lies a residential house in which U and the issues of marriage reside.
25. In the course of his testimony Defendant said this about the developments to the subplots.

“The Plaintiff was my supervisor at the time of development but all the funding was from me.”

Elsewhere he testified,

“Before my divorce the Plaintiff was a good wife and hardworking. She was like a manager for my business.”

The statements by I is that U made some non-monetary contribution towards the developments on the subdivided plots. The contribution made towards the improvement of the property would entitle her to a beneficial interest therein equal to the contribution she made.

26. There is then plot No.[particulars withheld]. This property is not developed. It is registered in the name of I. It was bought on 14/11/1990. This would be about 14 days into the marriage. The Plaintiff did not give evidence of any financial contribution towards its purchase. It seems to me that, although acquired during the coverture, it was acquired in the very nascent days of the union and in the absence of proof of monetary contribution by U, it would be inequitable to hold otherwise than that the property was acquired wholly by I. The paradox is that I is willing to give this property to U in deference to the holding of the Kadhi’s Court.
27. There was evidence that Dr. W who was an uncle to I gave him plot [particulars withheld] as a gift. U was unable to prove an allegation that she contributed the whole of the purchase price of ksh.350,000/=. There was no evidence as to whether there has been any improvements made to the plot. My view is that this property being a gift solely to I does not form part of matrimonial property.
28. I turn to the acquisition of plot No.[particulars withheld]. This was purchased on 4th November 1999 by I from one M W W. It was the testimony of I that he got it for a song as the seller was his cousin. In the sale agreement the purchase price is ksh.562,500/=. There was no evidence of the prevailing market prices then. There is no basis for me to believe that the purchase price was a bargain. On her side U was very categorical about her contribution. She says that she made a financial contribution of ksh.400,000/=. This is her testimony.

“The purchase price was ksh.600,000/= (six hundred thousand) I contributed ksh.400,000/= (four hundred thousand) at the time we bought the property in 2002. There is in the bank statement but I do not have it here.” (my emphasis)

But she failed to avail that critical bank document. On a balance, I do not find that she made a monetary contribution towards the acquisition of this property. As the basis of her claim in the property was solely on account of monetary contribution, then I am unable to hold that she made any contribution whatsoever in its acquisition.

- 29. Another property acquired during the subsistence of the marriage was plot No.[particulars withheld]. This was purchased in the name of I from J J M W on 13th November 1991. It was the evidence of U that the property was bought and developed from the proceeds of the family business. But she did not prove any proof of this. She was in charge of one of the family businesses and she should have been able to prove payment made out of that business.
- 30. There was evidence that after the dissolution of the marriage I surrendered ownership of m/v [particulars withheld] and [particulars withheld] to U. In addition she took over the ownership of Bungoma Spares Shop which she now runs as [particulars withheld]. I thought that this, in addition to Plot No.[particulars withheld], was all the Plaintiff deserved.
- 31. This Court after weighing all evidence reaches a decision that U made a non-monetary contribution to the development of plots [particulars withheld]-[particulars withheld]. Of significance is that one of them (Plot [particulars withheld]) houses the matrimonial home in which she resides. The offer made by I is that Plot No.[particulars withheld] would be sufficient to settle this matter. On my part, I have no doubt that U's contribution towards the improvement of plots [particulars withheld]-[particulars withheld] deserves acknowledgement. I cannot be sure that an offer of plot No.[particulars withheld] is good enough. To enable this Court make an informed decision herein I now order that separate valuations be conducted of each of the plots (plot No.[particulars withheld] – particulars withheld) and plot No.[particulars withheld] within 14 days hereof. The costs of valuation shall be shared equally by the parties. The Court shall after receiving the valuation Reports give its final orders.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 12TH DAY OF FEBRUARY 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR PLAINTIFF

.....FOR DEFENDANT



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