



Mbaka v Francis (Civil Case E006 of 2021) [2024] KEHC 10115 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL CASE E006 OF 2021**

LW GITARI, J

JULY 30, 2024

BETWEEN

FRANCIS MBAKA APPLICANT

AND

AGNES WANJA FRANCIS RESPONDENT

JUDGMENT

This is a dispute under the *Matrimonial Property Act* No. 49/2013 and is a claim for sharing the matrimonial property acquired by the parties during the subsistence of the marriage. The applicant filed the originating summons claiming to be entitled to Land Parcel No. Karingani/Gitareni/2206, 2774 and 2343, by virtue of being the legal husband of the respondent and therefore having spousal rights over the land.

1. The applicant also seeks an order as to whether the respondent should be compelled to cease from interfering with Land Parcel No. Karingani/Gitareni/2206 and 2342. He also sought an order of inhibition restraining any dealings with Land Parcel No. Karingani/Gitareni/2206 and 2342 pending hearing and finalization of the Divorce Cause No.E005/2021 in the Chief Magistrate’s Court at Chuka and these proceedings. The applicant was also seeking a determination as to whether the parties had been cohabiting as husband and wife since 21/9/1991 and had issues of the marriage who are all adults. The applicant seeks a determination as to whether the above listed properties were acquired through joint efforts of the parties during the subsistence of the marriage. The applicant seeks a determination as to whether he is entitled to be given half of matrimonial properties despite the defendant being registered as the owner. He further prays that costs be provided for.
2. The respondent filed an answer to the summons dated 24/8/2021. She denies the allegations by the applicant and avers that she is the sole owner of the aforementioned property having acquired them through her own labour and the applicant did not contribute not even a dime towards the purchase of the properties. She further contends that the applicant has failed to disclose that he eloped with another woman and has come back thirty years later to claim properties which he did not contribute



in any way to their acquisition. She pleads with the court to dismiss the summons with costs. The court issued an order of injunction restraining the respondent from alienating, disposing, interfering in any manner with Parcel No. Karingani/Gitareni/2206, Karingani/Gitareni/2774, & Karingani/Gitareni/2342 pending the hearing and determination of the Divorce Cause No. 05/2021 at the Chief Magistrate's Court Chuka. The matter then proceeded to hearing and parties adduced evidence and filed submissions.

The applicant's Case:

He relied on the affidavit sworn on 8/5/2023 and the annexed documents. He avers that the parties solemnized their marriage on 21/9/1991 at Chuka Catholic Church under the African Christian Marriage and Divorce Act (Cap 150 Laws of Kenya) now repealed and were blessed with four children, namely; Nicholas Muthomi, John Mugendi, Martin Mawira, Morris Munene, who are all adults.

The marriage did not work out and was dissolved in Chuka Chief Magistrate's Court on 28/11/2022 and the Decree Nisi was made absolute on 14/12/2022.

3. He contends that he used to operate a business in both Chuka and Nairobi and used the money for sustenance of his family. That he bought Land Parcel No. Karingani/Gitareni/2206 in 1998. They also acquired parcels No. Karingani/Gitareni/2342 and 2774 during the subsistence of the marriage and registered in the name of the respondent. He avers that the parcels are matrimonial properties having been brought during the course of marriage and should be divided respectively based on contribution of each party. He contends that the respondent should get Karingani/Gitareni/2374 and 2774 which are in her name. He contends that he should get land parcel number Karingani/Gitareni/2206 which he bought and the parcel was registered in his name. He also claims Karingani/Gitareni/1913 which he claims to be ancestral land obtained through the succession of his late father. That plot No.4A in Kamuguongo Market does not form matrimonial property as he was holding the plot in trust for the benefit of Lawrence Muthomi and he has transferred the plot. The respondent confirms that the marriage between her and the applicant has been dissolved. She contends that she bought land parcel No. Karingani/Gitareni/2206 and had it registered in the name of the applicant. That she also purchased Land Parcel No. Karingani/Gitareni/2206, 2342, 2774 and plot No. 4A. The matter was listed for hearing but before the hearing, the parties were referred to Court Annexed Mediation. The parties failed to agree and the matter was heard in court.

I have considered the evidence. The applicant reiterated that Parcels No.2774 & 2342 belongs to the respondent. The respondent claims plot No.2206. (The applicant abandoned the claim on this plot.)

Based on the affidavits and the evidence adduced in court; there is consensus on the following:

Respondent:

1. Karingani/Gitareni/2774
2. Karingani/Gitareni/2374
3. Karingani/Gitareni/2206

Applicant:

Karingani/Gitareni/1913

Plot No. 4A Kamuguongo.

The respondent lays claim on plot No. Karingani/1913 as it is the matrimonial home where they live with their children.

The issue that the court has to determine is the division of matrimonial property.



In considering the Division of matrimonial property the court has to determine the issue as to what constitutes matrimonial property. Section 6 of the Matrimonial Properties Act defines Matrimonial Property as follows:-

- a. “The matrimonial home
- b. household good and effects in the matrimonial home or homes
- c. any other immovable property jointly owned and acquired during the subsistence of the marriage.”

For any property to qualify as matrimonial property, it must fall under the above definition. There is no dispute that the applicant and the respondent were lawfully married but the marriage irretrievably broke down and was dissolved by the court. This now brings their dispute under the Matrimonial Property Act of 2013. The respondent has submitted that they have lived on Parcel No. Karingani/Gitareni/1913 as the matrimonial home. The respondent claims the said parcel as ancestral land. For a property to be considered as matrimonial property it ought to have been acquired during the subsistence of the marriage between the applicant and the respondent unless otherwise agreed by the parties that such property would not form matrimonial property. With regard to Karingani/Gitareni/1913, it was acquired during the subsistence of the marriage and it is where the parties put up their matrimonial home. The respondent has adduced evidence that she has developed the property and put up the matrimonial home. She contends that she has lived on this property Karingani/Gitareni/1913 and has put up all the developments on the property. She contends that the applicant has been living away from home a fact which the applicant admitted. He confirmed that he had been living away from home with his brother. As per the green card attached to the applicant’s affidavit as FM6. The property was registered in the name of the applicant on 1/1/1997. It is therefore property which was acquired during the subsistence of the marriage and the parties lived on the property and where they established their matrimonial home. The properties fits in the definition of Matrimonial Property under Section 6 of the Matrimonial Property Act. What brings the property under the definition is the fact that it is where the parties established their matrimonial home. Ancestral Property as claimed which is acquired during the subsistence of the marriage and parties settle on it as their matrimonial property for the benefit of the two, is therefore matrimonial property for the purpose of the Act. The applicant does not deny that the property was extensively developed by the respondent during the subsistence of the marriage. The respondent has adduced evidence that she took her responsibility of bringing up the children and education through doing cultivation on LR No. Karingani/Gitareni 1913. I find that the property is matrimonial property. The applicant acquired the property through inheritance and the respondent developed. It is now settled that ownership of the Matrimonial Property rests in the spouses according to the contribution of either spouse. In the case of Joseph Ogentoto –v- Martha Ogentoto and FIDA Kenya (1st Amicus Curiae Law Society of Kenya 2nd Amicus Curiae) Supreme Court of Kenya. It was held that:

Contribution could either be a direct or an indirect contribution. Actions that amount to direct contribution include;Paying a part of or the full purchase price of the propertyTaking a mortgage or a loan to settle the purchase price of such propertyContributing regularly to monthly payment towards the settlement of the purchase price. Actions that amount to indirect contribution include-

Making substantial financial contributions to family expenses to enable the other spouse to settle the purchase price of the property.

Contributing to the running of the welfare of the home and children and easing the burden of the spouse.Caring for the children and family at large, growing food to feed the family



and generally taking care of the household creating an environment for the other spouse to earn income for the family.”

Guided by this decision and considering the evidence by the respondent that she contributed to the developments of the matrimonial home, she is entitled to a share of the matrimonial home which is on Land Parcel No. Karingani/Gitareni/1913. Article 45(3) of *the Constitution* states 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.”

Section 7 of the Matrimonial Property Act provides that ownership of the property rests 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 divorced. The respondents testified that the Status Quo on plot No. Karingani/Gitareni/1913 be maintained. With regard to plot No.4A, the respondent testified that she is the one who bought the plot and had it registered in the name of the applicant. The applicant has not adduced any evidence to prove that he is the one who bought plot No. 4A or that he contributed towards its purchase. Paragraph 13 of the Applicants Affidavit he depones that Plot No.4A located in Kamuguongo Market was given to him by his late father to hold in trust for the benefit of Lawrence Muthomi Njima who is his nephew and has since been transferred it in his name. The respondent in her affidavit at paragraph 9 deponed that she purchased the Plot No.4A Kamuguongo Market from one Marina and started paying rent for the plot. She did not annex any documents showing how she bought the plot. There is no further evidence she annexed on how she bought the plot. In the case of Joseph Ogentoto –v- Martha Ogentoto and Fida Kenya & Law Society of Kenya (1st & 2nd Amicus Curiae.) (supra) the Supreme Court stated:-

the equality provision in Article 45(3) of *the Constitution* does not entitle any court to vary existing parties rights by taking away what belongs to one spouse and awarding half of it to the other spouse who has not contributed towards its acquisition.” The court further stated Article 45 (3) deals with the equality of the rights of spouses before during and at the dissolution of the marriage. It does not award spouses equal portions the matrimonial properties.....”

The court was reiterating that a claim on matrimonial properties must be proved by the party showing the contribution he made towards acquisition of the property. It is not obvious that the property be distributed equally. With regard to plot No. 4A Kamuguongo, as matters stand, is not registered in the name of either the applicant or the respondent. This takes away the jurisdiction of this court to arbitrate on the plot as it has been shown that it is now registered in the name of a 3rd party. The jurisdiction to arbitrate on that now lies elsewhere.

In conclusion:

It is clear from the record that the applicant conceded that the respondent should get Parcels No.Karingani/Gitareni/2374,Karingani/Gitareni/2774, Karingani/Gitareni/2342. I therefore award this properties to the respondent Agnes Wanja Francis.

For Plot No. Karingani/Gitareni/1913 it will be for the applicant and his children. The respondent lives on this plot and as per deliberation of the Mugere & Igankinda clan she is supposed to remain on the plot. The Status Quo with regard to the respondent shall be maintained with an order for her to remain in occupation of the plot where her house occupies.



I make no orders on Plot No. 4A Kamugongo which is claimed by the respondent and is in the name of a 3rd party.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH DAY OF JULY 2024.

L.W. GITARI

JUDGE

