Chebii v Kibor (Originating Summons E001 of 2023)
[2024] KEHC 12913 (KLR) (28 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12913 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

ORIGINATING SUMMONS E001 OF 2023

PN GICHOHI, J

OCTOBER 28, 2024

BETWEEN

ROSE JEBIWOT CHEBII ..... PLAINTIFF

AND

DANIEL KANGOGO KIBOR ..... DEFENDANT

JUDGMENT

1. The matter before this court is distribution of properties between R.J.C (Plaintiff) and D.K.K (Defendant) allegedly acquired before and during their marriage. The marriage has since been dissolved through a court process. As a consequence, the Plaintiff has moved this Court by an Originating Summons dated 12/01/2023 where she urges the Court to determine: -

   Whether the Plaintiff and Defendant being husband and wife acquired the following properties: -

   a. One-eighth (1/8) acre Plot at Kitengela in Kajiado County.

   b. One Quarter (¼) Plot at Westland in Mogotio Sub-County within Baringo County.

   c. A family M/V Reg. No. KAV 512 U.

   Whether the Plaintiff had acquired alone and/or individually the following properties: -

   a. One quarter (1/4) Plot No. Athinai/ Nakuru/ 482/3/350 at Nakuru County.

   b. A 5-acre parcel of land subdivided from known as Kakamor /Rosoga /79.

2. She pleaded that at all times, the relationship between her and the Defendant was on trust. That she hoped the marriage between them would be solid and that was the reason all the properties they acquired together were in his name. That she worked and made material and non-material contribution to the acquisition and subsequently building of the matrimonial home at Westland Plot in Mogotio where the Defendant holds all properties documents.

3. She further averred that when the Defendant started working, his attitude changed. He at times became drunkard, unfaithful, abusive, violent and uncontrollable leading to their divorce.

4. That before the union, she had acquired some two parcels of land and other personal belongings including household items which she left behind after the Defendant chased her away from their matrimonial home where they were living together as husband and wife.

5. She pleaded that she is entitled to a share of the properties acquired by her and the Defendant during the marriage be shared between them.

6. Further, she averred that she was aware that under common law, a married woman has the right to retain the matrimonial home and the same is never available for distribution as a matrimonial property.

The Plaintiff's case

7. While relying on the contents of the Originating Summons, the Plaintiff testified she got married to the Defendant herein at the District Commissioner's Office Eldama Ravine Sub- County Baringo County on 3rd September 2011. They were not blessed with any children and they have since been divorced and a Decree Nisi issued on 11/1/2023 in SPM'S Court at Eldama Ravine Divorce Cause No. E005 of 2021.

8. She explained that before they got married, she had personally acquired the following: -One quarter (1/4) Plot No. Athinai/ Nakuru/ 482/3/350 at Nakuru County.A 5-acre parcel of land subdivided from known as Kakamor /Rosoga /79.

9. That during the marriage, they acquired the following properties:One-eighth (1/8) acre Plot at Kitengela in Kajiado CountyOne Quarter (¼) acre plot at Westland in Mogotio Sub-County within Baringo County.A family M/V Reg. No. KAV 512 U.

10. She testified that she was not served with any response by the Defendant and he never attended court despite being served. She therefore prayed that the property she and the Defendant acquired together be subdivided between the two of them.

DETERMINATION

11. From the court record, it is noted that the Plaintiff is acting in person. It is also noted that the Defendant never entered appearance and did not file defence to this claim despite being served.

12. However, there is a handwritten document in form of a letter addressed to the Registrar Nakuru High Court bearing the name of the Defendant. It is purportedly signed by the Defendant and filed on 15th February, 2023. It also bears a cell phone number 0720409023 against the name Daniel Kangogo Kibor and a signature.

13. Further, another typed document was filed on 3rd July 2023 said to be "Drafted by Daniel Kangogo Kibor Tel 254 720 409 023 Issued and delivered to High Court of Kenya Nakuru."

14. These two documents are unintelligible and do not respond to the Originating Summons before this Court. When this Court brought it to the attention of the Plaintiff during hearing, she responded that she was not served with any documents by the Defendant. As a consequence, these documents are of no value in this matter.

15. From the evidence on record, there is no doubt that the Plaintiff and the Defendant were married on 3rd September 2011 as per the copy of the marriage certificate produced herein and that the marriage was dissolved by the court on 10th January 2023 as shown by the copy of the Decree availed.

16. The issue for determination is whether the properties mentioned in the Originating Summons are Matrimonial Properties within the definition provided for in the *Matrimonial Property Act* 2013 which is the applicable law in this matter.

17. Section 6 of the Act provides that: -

    (1) For the purposes of this Act, matrimonial property means—

        (a) the matrimonial home or homes;

        (b) household goods and effects in the matrimonial home or homes; or

        (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

    (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

    (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

    (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

18. In this case, the Plaintiff makes no reference to any agreement meaning entered into between her and the Defendant prior to the marriage to determine their property rights as envisaged under Section 6 (3) of the Act.

19. The Plaintiff claims that before she entered into the marriage with the Defendant, she had acquired one quarter (1/4) Plot No. Athinai/ Nakuru/ 482/3/350 at Nakuru County and a 5-acre parcel of land subdivided from known as Kakamor /Rosoga /79.

20. In support of her claim on one quarter (1/4) Plot No. Athinai/ Nakuru/ 482/3/350 at Nakuru County, she relies on the copy of allotment letter dated 20/ 8/2019 and a deposit slip dated 20/2/2018.

21. The letter of allotment was a letter of offer refers to Plot No. LR482/3/530 subject to formal signed acceptance of the conditions and to the payment charges as stated therein and those were:

    1. Subject to survey work-but there is no claim for reduction expansion in the acre on survey.

    2. Survey fees Kshs. 4,000.

    3. Allotment Kshs 1,000.

22. There is no document to show that the Plaintiff accepted the offer. The deposit slip does not show the purpose for which the Plaintiff deposited Kshs. 175,000/= to the account belonging to Kinyoto Self-Help Group. It cannot be assumed that that the said sum of Kshs. 175,000/= was paid towards the acquisition of the said plot.

23. Regarding the 5-acre parcel of land allegedly subdivided from property known as Kakamor / Rosoga /79, the copy of the title deed for property namely Kakamor/ Rosaga /79 measuring 7.6 HA is in the name of James K. Chebii Sergon ID /6528582 and was issued on18/11/2021.That document is not complete. It and does not have the second page which ordinarily bears vital information and history of registration.

24. The Plaintiff pleaded that she lived with the Defendant as husband and wife in their matrimonial home until 1/4/2020 when the Defendant chased her away. The marriage between them was dissolved on 10/1/2023 but the date it was filed is not disclosed. It is only discerned from the decree before Court that the Divorce Cause was filed in 2021.

25. If she acquired the said property before marriage yet the title was issued in 2021 in the name of the Defendant, then there is no evidence of the circumstances it was so registered. Her personal acquisition, material or non- material contribution of the said property has not been established.

26. Regarding 1/8) acre Plot at Kitengela in Kajiado County and one quarter (1/4) Plot at Westland in Mogotio Sub-County within Baringo County, the Plaintiff never availed any material including a copy of the letters of allotment. She does not know the name of the properties. It is not for this court to imagine existence of such properties so as to make a decision on the same.

27. In regard to M/V Reg. No. KAV 512 U alleged to have been bought during the existence of the marriage, there is no document to show its existence and the person under who it is registered whether the Defendant or any other person.

28. From the above analysis, it is clear that this is a shallow case devoid of proper particulars to support the claim. It is not material that the Defendant did not defend this suit so to peak.

29. The evidential burden lay on the Plaintiff to place sufficient material before this Court to enable it decide on the sharing or otherwise of any of the properties. She failed to discharge burden. This Court cannot issue orders in vacuum.

30. In the upshot, this Court makes the following orders: -

    1. The Originating Summons dated 12th January 2023 is not only incompetent but also lacking in merit.

    2. It is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF OCTOBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of

Rose Jebiwot Chebii - Applicant

N/A for the Respondent

Ruto, Court Assistant