



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MATRIMONIAL CAUSE NO. 2 OF 2019 (OS)

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT

AND

IN THE MARRIAGE ACT

AND

IN THE MATTER OF DISTRIBUTION OF MATRIMONIAL PROPERTY ACT

AND

IN THE MATTER OF

ALM.....PLAINTIFF/APPLICANT

VERSUS

JNN.....DEFENDANT/RESPONDENT

JUDGMENT

1. The Originating Summon under consideration herein is dated 06.03.2019 and is brought under the Marriage Act, Matrimonial Property Act and all enabling provisions of the law. The applicant seeks for a declaration that the parties herein jointly acquired the assets set out hereunder in the course of their marriage to one another, which is matrimonial property, and they are registered and/or held by the defendant in trust for the both of them as each of them has an equal interest to and/or in them:

- i. Plot No. GATURI/NEMBURE/xxxx approximate ¼ acres. Matrimonial homestead where plaintiff stays after defendant left matrimonial home.
- ii. Plot No. GATURI/NEMBURE/xxxx of approximate 0.05 Ha; the plaintiff constructed with proceeds from work.
- iii. Plot No. xxxx of approximately ¼ acres. Has small cow shed; plaintiff grows vegetables and napier grass and equally macadamia.
- iv. Plot No. xxxx of approximately 0.025 ha; renovated by plaintiff and further a banana plantation.
- v. Property known as GATURI/NEMBURE/xxxx approximately 0.6 ha where the plaintiff farms maize, napier and coffee.
- vi. Stall No. xx at Nairobi – Embu bus stage which allegedly was paid for by the plaintiff.
- vii. Plot No. KAGAARI/WERU/xxxx.
- viii. Ancestral land, GATURI/NEMBURE/xxxx was sub divided from GATURI/NEMBURE/xxxx vide mutation dated 24.08.2002.
- ix. Plot No. KAGAARI/WERU/xxxx.

x. Stall No. xx and xx at Nairobi – Embu Bus stage.

xi. Two motor vehicles KBA xxxx; Toyota Station Wagon and KAJ xxxx Toyota Starlet.

2. The summons is premised on the grounds on its face and further supported by the affidavit sworn by the applicant herein. The applicant's case is that she was married to the respondent on 20.04.1995 but they have since divorced. She stated that the marriage was blessed with three children, now adults and they used to stay in their matrimonial home known as Plot No. GATURI/NEMBURE/ xxxx until the defendant deserted her to start cohabiting with another woman. That they jointly acquired the properties listed above during the subsistence of the said marriage. It is her case that she contributed both directly and indirectly to the acquisition of the said properties and construction of the said matrimonial home.

3. The defendant filed a replying affidavit and wherein he does not deny having been married to the plaintiff/applicant but deposed that some of the listed properties do not form part of the matrimonial properties. He thus listed them as follows:

i. Land Parcel No. KAGAARI/WERU/ xxxx which was bought by the parties in the year 1985 and was sold in the year 1990 for Kshs. 90,000/=.

ii. Land Parcel No. KAGAARI/WERU/ xxxx which land they jointly owned and sold in the year 2011 to one 'Karura' which money they used to commence construction of the rental houses on Plot No. GATURI/NEMBURE / xxxx.

iii. Stalls No. xx, xx and xx at Embu town which they jointly sold in the year 2014 which money they used to construct their son's house and further rental houses on Plot No. GATURI/ NEMBURE / xxxx.

iv. Land Parcel No. GATURI/NEMBURE/ xxxx is not a matrimonial property as this land is still registered under the name of his father NM and so it does not belong to either of them.

4. He proceeded to state that the applicant omitted her stall number xx in Embu Town which is also matrimonial property and which should have formed items for distribution and so prayed that the same should be added to form the properties for distribution. That it is not true that the applicant contributed to acquisition of the properties acquired during the subsistence of the marriage despite both of them being teachers; that he solely purchased all the properties that are registered under his name. He further made a proposal on how he would prefer to have the properties distributed as follows;

i. Plot No. GATURI/NEMBURE/ xxxx measuring approximately 0.10 ha with a matrimonial house, a maisonette with one floor with a roof of mangrove tiles with 7 rooms and their son's M's house which is 2 bedroom house.

ii. Plot No. GATURI/NEMBURE/ xxxx measuring approximately 0.10 ha which has permanent cattle shed, 12 macadamia trees all estimated to cost Kshs. 1,042,000/=

iii. Stall No. xx in Embu Town under the applicant's name valued to an estimate of Kshs. 1,000,000/=.

iv. Motor vehicle registration No. KAJ xxxx which the applicant has been driving and in possession of since the year 2015 estimated at Kshs. 200,000/=.

5. That the respondent remains with the following property:

i. Plot No. GATURI/NEMBURE/ xxxx measuring 0.05 ha with 5 bedsitters connected with water and electricity with a concrete slab estimated to be Kshs. 3,500,000/=.

ii. Plot No. GATURI/NEMBURE/ xxxx measuring 0.10 ha with 12 macadamia trees and 10 banana stems estimated at Kshs. 1,048,000/=.

iii. Land Parcel No. GATURI/NEMBURE/ xxxx measuring 0.60 ha estimated to be 2,081,100/= and 30 avocado trees where he plans to build himself a home.

iv. Motor vehicle registration No. KBA xxxx of estimated value of Kshs.350,000/= which he has been driving all through.

6. The plaintiff submitted that they were blessed with three children who are all adults and that the plaintiff made immense contribution which was put in the purchase of the parcels of land, the construction of the matrimonial house, the purchase of the stalls, the construction of the rental home, payment of fees and medical bills for the children. In terms of non-monetary contribution, the applicant's contribution was said to be evident in child care, domestic work and management of the home. The plaintiff relied on the case of **NWM v KNM [2014] eKLR** where it was held; ***the court must give effect to both monetary and non-monetary contributions, that both the applicant and the respondent made during the occurrence of the marriage to acquire the matrimonial property.*** She further submitted that the defendant sold the rest of their properties and enjoyed the proceeds whereas she struggles single handedly to raise and educate the children while at the same time, financing their development projects. She thus urged this court to allow her prayers as indicated in the originating summons.

7. The defendant on the other hand submitted that the plaintiff never tendered evidence that the properties registered in the name of the defendant were jointly acquired and relied on the case of **PWK v JKG [2015] eKLR**. It was his case that the plaintiff failed to explain how the bank statements, receipts and payment vouchers presented by her are linked to the acquisition of the properties registered in the name of

the defendant. As such, he relied on the case of **MNH v FHM [2018] eKLR**. It was his prayer that this court adopts his proposal to the mode of distribution of the suit properties.

8. I have perused through the pleadings and taken time to appreciate the respective parties' positions as elucidated in the said pleadings and the rival submissions. It is not in dispute that the parties herein got married on 20.04.1995, the marriage brought three issues and that the marriage was dissolved on 5.10.2017. It is trite that where a marriage has been dissolved, matrimonial property (ies) ought to be shared between the parties to the dissolved marriage. It is my view, therefore, that the main issues which this court is invited to determine are; -

- i. Whether the suit properties as pleaded constitute matrimonial properties.
- ii. What ratio/percentage should the said properties (if any) be shared as between the parties herein.

9. As to whether the suit properties as pleaded constitute matrimonial properties, **Section 6(1) of the Matrimonial Property Act No. 49 of 2013** defines matrimonial property as:

The matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

10. **Section 7** provides 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.

11. It therefore means that any property acquired during the subsistence of the marriage and jointly owned is matrimonial property. However, there are situations where the property is acquired during the subsistence of the marriage and registered in the names of one of the spouses. The law provides that in such a case, the property will be presumed to be held in trust for the other spouse.

12. Section 2 defines matrimonial home as **any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property**. From the pleadings before me, it is clear that the applicant's claim is premised on the fact that she is entitled to a share of the properties by virtue of being a wife to the respondent and by virtue of having contributed to the acquisition of the said properties. The respondent on the other hand refutes that not all the pleaded properties form matrimonial properties but in the same breadth, proceeds to provide a proposal on how it should be shared. I will therefore start by determining whether all the properties in dispute are matrimonial property (ies).

13. **Article 45 (3)** 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.

In the case of **Agnes Williams v Jacob Vander** the Court of Appeal gave breath to the importance of observing the rights of the parties during and at the stage of dissolving the marriage.

(14) It is not in dispute that Plot No. GATURI/NEMBURE/ xxxx measuring approximately 0.10 ha is the matrimonial home. This property having been acquired during the subsistence of the marriage, forms part of the matrimonial property within the provisions of Section 6 (1) of the Matrimonial Property Act of 2013.

14. In reference to Plot No. GATURI/NEMBURE/ xxxx, the same having been acquired during the subsistence of the marriage even if registered under the name of the defendant, is matrimonial property within the provisions of Section 6 (1) of the Matrimonial Property Act of 2013.

15. In relation to Plot No. GATURI/NEMBURE/ xxxx, both parties agree that the same was bought jointly by them both. The same having been acquired during the subsistence of the marriage though registered under the name of the defendant, it is part of matrimonial property within the provisions of Section 6 (1) of the Matrimonial Property Act of 2013.

16. Plot No. GATURI/NEMBURE/ xxxx, both the parties agree that the same was bought jointly. In the same regard, it having been acquired during the subsistence of the marriage even if registered under the name of the defendant, it is matrimonial property within the provisions of Section 6 (1) of the Matrimonial Property Act of 2013.

17. In regards to Plot No. GATURI/NEMBURE/ xxxx, the plaintiff deposed that she solely bought the same from her brother-in-law. The respondent deposed that he purchased the same and that the agreement indicates that payments were made by the applicant on behalf of the couple. From the agreements and the certificate for the said plot, it is clear that the same was acquired during the subsistence of marriage. Further, the same is indicated registered in the name of the defendant. The same can only be said to be matrimonial property.

18. As for Plot No. GATURI/NEMBURE/ xxxx, the plaintiff deposed that the land was given to her by the father-in-law while the defendant deposed that the same is his ancestral land and thus does not form part of the matrimonial property, available for division. He who alleges must prove. The applicant in my view did not tender sufficient evidence to prove that the same is matrimonial property. The same is not registered in the names of the respondent so as to form part of matrimonial property. The applicant did not prove any contribution towards acquisition of the land parcel. It is trite that he who allege must proof (See Section 107 of the Evidence Act). She was obligated to place before this Court, cogent evidence that the defendant owns the said land or that it is matrimonial property. She therefore failed to discharge

the burden of proof placed on her by law.

19. In regard to the stalls Nos. xx, xx and xx; the plaintiff alleged that both contributed towards the purchase of the same. The defendant contends that the said properties were sold. In a twist of events, the plaintiff did depose that she never gave consent towards the sale of the stalls while the defendant deposed that the same were sold with her knowledge and consent. The plaintiff stated that upon carrying out a search, she found that the stalls are still registered in the name of the defendant. It was her further evidence that the stalls were sold in the year 2014 when the defendant walked out of the marriage after deserting her in the year 2013 and the proceeds were used to develop rental houses on plot number xxxx. It was also the Plaintiff's evidence that the Defendant sold plot number Kagaari/Weru/ xxxx and she does not know how he used the money. Plot number Kagaari/Weru/ xxxx was also sold in the year 2011. The two properties are thus not available for distribution. As for plot number xx the same is registered in the name of the Plaintiff and the Defendant has in any way alleged or shown that he contributed towards acquisition of the same.

20. In regard to the two motor vehicles, the parties agree that they jointly bought the motor vehicles and as such, they are matrimonial property within the provisions of Section 6 (1) of the Matrimonial Property Act of 2013.

21. The Court of Appeal in **Peter Mburu Echaria v Priscilla Njeri Echaria {2001} eKLR** was of the view that:

...in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim equality is equity.

22. It is trite that where there is admission, evidence ought not to be tendered to prove the admitted fact. Further, admission can either be *express or implied either from the pleadings or otherwise, e.g. in correspondences.* (See decision (*Madan JA*)'s decision in **Choitram v Nazari (1984) KLR 327**). **It is my view that in the instant case, the respondent in his replying affidavit indeed admitted as to the applicant herein having** contributed both directly and indirectly in the acquisition of the properties and in construction of the matrimonial home and other developments on the land. The defendant equally conceded that all properties were registered in his name save for stall number xx which is in the name of the plaintiff. In the same breadth, the plaintiff submitted that she was earning more in terms of salary and further doing business selling school uniforms, a fact that the defendant never controverted.

23. From the perusal of the pleadings and the evidence on record, both parties herein made contributions towards the acquisition of the properties herein. The parties deposed that they were employed by the Teachers' Service Commission and that they took loans which they used to construct the house. In addition, the Plaintiff stated that she had a business of supplying uniforms, she was running a Hotel and was earning more than the Defendant.

24. Under Section 14(b) of the Matrimonial Property Act, **where matrimonial property is acquired during marriage in the names of the spouses jointly, and the law creates a rebuttable presumption that their beneficial interests in the matrimonial property are equal.**

25. Further, Section 14(a) of the Act provides that where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. In the instant case, the suit properties being a matrimonial property as it was acquired during the subsistence of the marriage and being registered in the name of the defendant, it can only be said that the same was held in trust for the applicant. Though the defendant denied that the Plaintiff contributed to the acquisition of the properties, he made a proposal on how the property should be subdivided.

26. As such, I therefore make the following orders;

a. That the following properties; -

- i. Plot No. GATURI/NEMBURE/ xxxx
- ii. Plot No. GATURI/NEMBURE/ xxxx
- iii. Plot No. GATURI/NEMBURE/ xxxx
- iv. Plot No. GATURI/NEMBURE/ xxxx
- v. Plot No. GATURI/NEMBURE/ xxxx
- vi. Motor vehicles KAJ xxxx and KBA xxxx

Are matrimonial properties and the same should be shared as follows;

Plaintiff

1. Plot number Gaturi/Nembure / xxxx
2. Plot number Gaturi/Nembure/ xxxx
3. Motor Vehicle KAJ xxxx

Defendant

1. Plot Number Gatari/Nembure/ xxxx
2. Plot Number Gatari/Nembure/ xxxx
3. Motor vehicle KBA xxxx

b. As for Plot Number Gatari/Nembure / xxxx, the same should be shared equally on a 50:50 basis between the plaintiff and the defendant herein or in the alternative, each party shall buy out the beneficial interest of the other in the said property in monetary forms.

c. That each party to bear its own costs of the suit.

27. It is so hereby ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF FEBRUARY, 2022

L. NJUGUNA

JUDGE

.....**for the Applicant**

.....**for the Respondent**