



REPUBLIC OF KENYA



FN v PKM (Civil Case 21 of 2019) [2022] KEHC 3173 (KLR) (19 May 2022) (Judgment)

Neutral citation: [2022] KEHC 3173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE 21 OF 2019
TW CHERERE, J
MAY 19, 2022**

BETWEEN

FN PLAINTIFF

AND

PKM DEFENDANT

JUDGMENT

1. The subject matter in this suit resolves around acquisition and distribution of the following properties:
 - a. Nkuene/Taita/xxx measuring approximately 0.101 Ha
 - b. Nkuene/Taita/xxx measuring approximately 0.053Ha
2. FN (Plaintiff) took out an Originating Summons dated 17th June, 2019 filed July 18, 2019 under Section 6, 7 and 17 of the *Matrimonial Property Act*, 2013 seeking orders That:
 - a. A declaration that the following properties are matrimonial property:
 - i. Nkuene/Taita/xxx
 - ii. Nkuene/Taita/xxx
 - b. Costs be borne by Defendant
3. The summons is supported by an affidavit sworn by the Plaintiff on by the Plaintiff on July 17, 2019 in which she avers that the two properties named hereinabove were acquired during the subsistence of the marriage between him and the Respondent which lasted from December 22, 1990 until January 18, 2018 when the parties were divorced.
4. Annexed to the supporting affidavit is a certificate of marriage between the parties herein dated December 22, 1990; Decree Absolute given on January 18, 2018 in Nkubu Divorce Cause No xx



of 2015; extracts of title for LR No Nkuene/Taita/935 and LR No Nkuene/Taita/xxx which were registered in the name of Defendant on 21st September, 1992 and 05th July, 1991 respectively.

5. It is the Plaintiff's case that both her and Defendant were in the business of selling clothes when the two properties were acquired. That they established their matrimonial home on LR No Nkuene/Taita/XXX until 2013 when Defendant deserted. She urged the court to declare that she is entitled to LR No Nkuene/Taita/935 where she has settled.
6. By a replying affidavit sworn on November 7, 2019 and filed on even date, PKM (Defendant) confirmed that he was married to the Plaintiff but stated that they cohabited only between 1990 and 1994 when he moved out and remarried. He denies that the Plaintiff contributed to the acquisition of the suit properties and contends that he had singlehandedly bought the properties from bank loans. He stated that Plaintiff had moved into LR No Nkuene/Taita/xxx and settled on 4 of the residential single houses thereon while he collects rent for the remaining 40.

Analysis and determination

7. I have considered the oral evidence, submissions on record and the applicable law. In this case, the suit properties are registered in the name of the Defendant.
8. Section 14 of the Act which deals with Presumptions as to property acquired during marriage provides as follows:
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
9. Defendant who contends that the Plaintiff did not contribute to the acquisition of the suit properties had the sole duty to rebut the presumption.
10. The *Matrimonial Property Act* defines with clarity what constitutes “contribution” to mean “monetary and non-monetary contributions and 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.
11. As much it is not disputed that the parties herein were not blessed with any issue, the Defendant's contention that Plaintiff could not have contributed to the acquisition of the property only because there was no issue is in my considered view misplaced. It cannot be denied that Plaintiff performed domestic work and gave companionship to Defendant. Further to the foregoing, there is evidence that the parties herein were engaged in the businesses of selling clothes.
12. From the foregoing, I find that Plaintiff contributed to the acquisition of LR No Nkuene/Taita/xxx and LR No Nkuene/Taita/XXX during the subsistence of her marriage to Defendant between 1990 and 2018 and declare that the two properties are matrimonial property.



13. I have considered the provisions of *the Constitution* on Article 45(3) which provides that:
- “Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage”.
14. Although this provision grants equal rights to parties to a marriage as stipulated, this does not mean that a party to a marriage is entitled to equal share of the property acquired during marriage unless his or her contribution is ascertained to have been equal to that of the other spouse.
15. The view that the provisions of Article 45(3) of *the Constitution* does not entitle parties to equal distribution of matrimonial property was taken by the Court of Appeal (Kiage, JA) in *PNN v ZWN* [2017] eKLR where the learned judge had this to say:
- “Thus it is that *the Constitution*, thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the *Matrimonial Property Act*, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.”
16. The share of each party to a marriage is pegged on the contribution made by each party and there being no evidence from either party concerning their respective contributions, an inference is hereby drawn that the parties made equal contributions.
17. I have considered the issue concerning LR Nkuene/ Mikumbune/661 and the extract of title for the same demonstrates that it was registered in the name of the Plaintiff on May 27, 2011 long after the parties were divorced. In the absence that it was acquired from proceeds from the matrimonial property, I find that it is not part of matrimonial property.
18. Concerning distribution, I find that it would be in the interest of justice to determine the value of the property so that the court can make an informed decision.
19. From the foregoing analysis, the orders which commends to me and which I hereby issue are That:
1. A declaration is hereby issued that LR No Nkuene/Taita/935 and LR No Nkuene/Taita/XX and improvements thereon form part of Matrimonial Property
 2. LR Nkuene/ Mikumbune/xxx is not matrimonial property
 3. Both parties made an equal contribution to the acquisition of LR No Nkuene/Taita/xx and LR No Nkuene/Taita/xxx
 4. LR No Nkuene/Taita/xxx and LR No Nkuene/Taita/XXX shall be valued at the cost to be paid equally by both parties to determine their value
 5. Mention on June 28, 2022 to receive the valuation report and for further orders
 6. Each party shall bear its own costs of this suit

DATED IN MERU THIS 19TH DAY OF MAY 2022

WAMAE. TW. CHERERE

JUDGE

Appearances



Court Assistant - Morris Kinoti

For Plaintiff - Ms. Mukaburu for M/S Kiogora Arithi & Associates

For Defendant - Ms. Gikundi for M/S Charles Kariuki & Kiome Advocates

