



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 7 OF 2020 (OS)

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013

PWN..... APPLICANT

-VERSUS-

JHOM..... RESPONDENT

JUDGMENT

1. **PWN**, the plaintiff, took out an **Originating Summons** dated 25th February 2020 against **JHOM**, the defendant, seeking a declaration that Plot No. [xxxx] in Ongata Rongai (also known as Plot No. [xxxx]), is matrimonial property. The plaintiff also sought an order restraining the defendant from selling, transferring, disposing of, evicting the plaintiff and or in any other manner dealing with that property.
2. The grounds upon which the Originating Summons is premised are that the applicant and respondent are husband and wife; that the applicant has been residing on the plot for more than twenty years and is their matrimonial home, and that the defendant sold a portion of the plot without her consent or knowledge. The plaintiff further stated that the defendant is threatening to sell the remaining portion of land on which she resides.
3. In support of the Originating Summons, the plaintiff also swore an affidavit on 28th February 2020 and a further affidavit sworn on 16th September 2020 in support of the Originating Summons. She deposed that she and the defendant got married in August 1986 under Luo customary law and have since then lived together as husband and wife in various paces including Langata and Ongata Rongai. Their marriage subsists to date. They have one issue from that marriage.
4. The plaintiff further deposed that the suit property was acquired developed and maintained during the marriage though the letter of allotment is in the defendant's name. She stated that since marriage, she has supported the defendant as a wife and provided him with companionship, raised and educated their child, operated business and single handedly maintained the matrimonial home for the benefit of the family.
5. The plaintiff asserted that she operated a restaurant on the property and constructed rental houses single handedly without the defendant's assistance despite him demanding a share from the income thereof. According to the plaintiff, the defendant abandoned the matrimonial home in 2007 and retreated to the rural home in Kisumu leaving her in the suit property.
6. It is the plaintiff's case that the defendant came back in 2017 and sold a portion of the land without her knowledge, a fact she later came to know about after her co-wife visited her in the matrimonial home. Later in 2019, in one of his visits the defendant threatened to sell the remaining portion and evict her and her son which she has had to resist.
7. The defendant filed a replying affidavit sworn on 21st June 2020. He denied the plaintiff's claim that they were married either through customary or civil law. He deposed that the plaintiff went into his life in 1986 as a co-worker at Bomas of Kenya and ensnared him with her wits as an occasional on and off night stands companion. At the time, the plaintiff had another relationship and had a child then aged 13 years.
8. The defendant admitted that in the course of those on and off contacts with the plaintiff, they got a child in 1996. From thence, the plaintiff became demanding, abusive and intolerant, using the issue of relationship as the basis for making material demands and properties. These made the relationship untenable and could not qualify her to be a wife.
9. Regarding the suit property, the defendant deposed that he acquired it in 1978 and later registered it into his name and that of his wife JAM (DW2). He further deposed that he sold a portion of the land in 2010 to meet funeral expenses for his deceased daughter but the applicant did not object to the sale.

10. The defendant asserted that due to his love for the children, he and PW2 bequeathed the property to their three children including the son he had with the plaintiff. He blamed the plaintiff for continually disturbing the person who purchased the portion of property in 2010 and the children who want to develop the remainder of the plot. He maintained that the plaintiff did not put up developments on her own or through her contribution. He also denied the plaintiff's claims that he absconded the matrimonial home.
11. The Originating summons was disposed of by way of oral evidence.
12. The plaintiff testified that she and the defendant had been together since 7th August 1986 as husband and wife and they have one son out of that relationship. They established a matrimonial home at Ongata Rongai in 1990 on a piece of land that is in the respondent's name. She later set up a restaurant on the plot which did so well but was later converted into a church until this day. In 2015, she constructed rental houses on the land from which she gets rental income. The plaintiff further testified that she keeps goats and chicken on the plot and has planted banana thereon.
13. In 2018, the defendant informed her that they were moving out of the land to the rural home in Kisumu since he intended to sell the land prompting her to file the present suit. She told the court that that is the only land they have and it is their matrimonial home.
14. **PW2 Irene Njeri Kamau**, a neighbour, testified that she had been at Ongata Rongai since 1983; that she had known the plaintiff and defendant since they moved to Ongata Rongai in 1986. The two would go to borrow items from her and she knew them and their child well. She told the court that the plaintiff used to do business and they have built a house on the land. She also had a hotel where she sold tea and other items.
15. The defendant testified relying on his replying affidavit and witness statement, He told the court that on 23rd May 1978 he was allotted the suit property and it was in his name. In 1984, he put up a four-bedroom house and fenced the property after obtaining a loan from Kenya Tourist Development Co-operative Society. He developed the property together with his wife (DW2). They then put up poultry structures in 1995 at a cost of about 200,000/=.
16. In 2010, he sold part of the property to cater for hospital bills and funeral expenses for his daughter which the plaintiff did not object. He maintained that all developments on the land were done by him and DW2; that the plaintiff did not participate in any of the developments and the property still belonged to him and DW2.
17. In cross-examination, the defendant stated that he ordinarily resides in Kisumu but visits Ongata Rongai. He also stated that the plaintiff resides in the house at Ongata Rongai together with tenants; that the plaintiff had deserted the home in 2006 and that in 2010, the plaintiff was in the house and authorized the sale. He admitted that the plaintiff lives in the house and that they were cohabiting. He however maintained that he acquired and developed the property on his own.
18. **DW2 JAM** testified that she is the defendant's wife and relied on her written statement dated 8th June 2020. In the statement she stated that the defendant acquired the property in 1978 and they put up developments on the property. In 1986, she came to learn that the defendant was having an affair with the plaintiff which she strongly disapproved but she could not do anything. A child was born out of that relationship in 1996. She denied ever witnessing a marriage between the plaintiff and the defendant. A portion of the property was sold in 2010 to meet family commitments and the plaintiff never objected to it and by that time the respondent had relocated to their rural home in Kisumu. The remaining portion was to be shared amongst the three sons including the plaintiff's son.
19. In cross-examination, she stated that she is a co-owner of the suit property and she participated in its development. They initially lived in Langata but later moved to Ongata Rongai. She later went to live in Nyando. The witness admitted that she knew the plaintiff as the defendant's girlfriend and the two got a child. She had also visited the plaintiff at Ongata Rongai on several occasions. She even communicates with her.
20. DW3 JWOM, son to the defendant told the court that in 2010 a portion of the property was sold; that the plot was then undeveloped and that he learnt that it was jointly registered in the names of the defendant and PW2. According to this witness, the plaintiff did not object to that sale and the structures belong to the person who purchased the property.
21. The plaintiff filed written submissions dated 6th November 2020. It was submitted that the plaintiff and respondent had been cohabiting since 1986 and lived on the suit property openly and peacefully. It was also submitted that the two got a child out of that relationship and the defendant assumed responsibility over the child and that the union between the two as husband and wife was open, a fact that was confirmed by PW2.
22. According to the plaintiff even DW2, confirmed the relationship between her and the defendant. She (DW2) also confirmed that the she (plaintiff) had been living on the matrimonial property (suit property) and that she (DW2) visited her on several occasions in the property and they communicated regularly. The plaintiff relied on **section 119 of the Evidence Act** to argue that a court may presume existence of a fact which it thinks is likely to have happened with regard to common course of things. It was the plaintiff's case that by permitting her and her son to live on the suit premises for over thirty years she acquired spousal rights over the property.
23. The plaintiff also relied on *Nderi Gathambo & Samuel Muthui Munene v Samuel Muthui Munene* [2003] eKLR to argue that if a man and a woman cohabit and hold themselves out as husband and wife, this raises the presumption that they are legally married. She again cited *Phylis Njoki Karanja & 2 Others v Rosemary Mueni Karanja & Another* [2009] eKLR that presumption of marriage could be presumed from long cohabitation and acts of general repute.
24. On whether the property constituted matrimonial property, the plaintiff argued in the affirmative. She submitted that the property was registered in the sole name of the defendant and not the defendant and DW2 as defendant had argued. She also argued that she lives on the property; she uses it and had put up structures from which she earned income. According to the plaintiff, the defendant resides with her on

the property whenever he visits her.

25. The plaintiff relied on **section 2** of the **Matrimonial Property Act** on the definition of matrimonial home. In her view, DW2 admitted that she visited her on the property. She maintained that The property had served as matrimonial property since 1986 and that she had exercised all rights of an owner over it. She again relied on **section 6(1)** of the Act on the meaning of matrimonial property as well as section 12(3) of the Act.

26. The plaintiff further relied on *TMW v FMC* [2019] eKLR which cited *PWK v JKG* [2015] eKLR for the proposition that where the disputed property is not registered in the joint names of spouses but in one of them, the beneficial share of each spouse would depend on their proven respective proportions of financial contribution either direct or indirect.

27. On whether she had made any contributions, she submitted in the affirmative and relied on her evidence on record that she had contributed and even operated a restaurant on the property. She again relied on **section 9** of the **Matrimonial Property Act**. According to the applicant the defendant did not show how he solely developed the property.

28. The defendant filed his submissions dated 16th November 2020. He argued that the plaintiff was never married to him and that there was no evidence for such marriage. The defendant relied on **section 96** of the **Marriage Act, 2014** to argue that parties had been notified to register their marriage by Gazette Notice No. 5345 of 9th June 2017 which the plaintiff did not take advantage of.

29. The defendant submitted that he had demonstrated through evidence that the property was never meant to be a matrimonial home to himself and the applicant, given that he was allotted the property in 1978 and put up a building on the property. He also relied on the evidence of DW2 that he and DW2 put up the main house on the property and furnished it.

30. The defendant relied on **section 7** of the **Matrimonial Property Act** that ownership of matrimonial property vests on spouses according to their contribution. He also relied on **section 9** of the Act that where a property is acquired prior to marriage but the other spouse makes contribution towards its improvement, the second spouse is entitled to a beneficial interest equal to his/her contribution.

31. According to the respondent, there was no evidence that the plaintiff acquired any rights over the property since there was no documentary evidence of contribution; that the evidence of cohabitation was weak and getting a child together was not qualification or confirmation of property rights. It was the defendant's case that he acquired the property before the plaintiff came into his life, and she had not stated what her occupation was for purposes of income. He maintained that the prayers she had sought in the Originating Summons were unenforceable.

32. The defendant relied on *AKM v NNN* (2/2015-Chuka) [2019] eKLR; *PKI v PK2* (Meru HCCC No. 4 of 2019) [2019] eKLR and *TWW v FMAC* [2018] eKLR, that there must be evidence of contribution; that the relationship must be cordial and harmonious and sanctity of marriage between the parties.

33. The defendant also relied on **Article 45** of the **Constitution** that the family is the natural and fundamental unit of society. He argued that his rights and those of DW2 should be respected. He urged the court to dismiss the Originating Summons with costs.

34. I have considered this Originating Summons, the response thereto and submissions made on behalf of respective parties. I have also considered the authorities relied on. Two issues arise for determination in this matter. First, whether parties are wife and husband and, second; whether the suit property is a matrimonial property.

Whether parties are wife and husband

35. The plaintiff has argued that she and the defendant are wife and husband which the defendant denies. The defendant however admitted that he knew the plaintiff who came into his life as an "on and off friend." They got a child out of that relationship which the defendant admits. DW2 told the court that the plaintiff and defendant moved to Ongata Rongai in 1983 and settled near her home. She knew them as husband and wife and they got a child while living in the house that they put up near her home. The plaintiff still lives in that house.

36. DW2, the defendant's wife admitted that the plaintiff is the defendant's "girlfriend" and that she lives in the house. He admitted to communicating with the plaintiff quite often and she even visits her in the house. The defendants did not deny that he stays with the plaintiff in that house when he comes to Nairobi.

37. There was no evidence that a formal marriage took place before the parties. The plaintiff urged the court to presume that the long cohabitation and general conduct of the parties showed that they intended to be husband and wife.

38. Presumption of marriage is part of the law in this country. Courts have long held that long cohabitation and the general reputation of parties can give rise to a presumption of marriage for the party asserting it. In *Hortensiah Wanjiku Yawe v Public Trustee (CA Civil Appeal No.13 of 1976 (UR))* where the appellant had cohabited with the man for 9 years before the man's death, the Court of Appeal for East Africa held that a long period of cohabitation between a man and woman who hold themselves out as husband and wife may give rise to a presumption of marriage in favour of the party asserting it. **Mustafa JA.**, stated:

By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for over 9 years before the deceased died...and during that time the appellant bore him four children...long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant only cogent evidence to the contrary can rebut such a presumption...such a presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance into the appellant's favour the scale must tilt in the direction...Even if the proper ceremonial rituals were not carried out that would not

invalidate the marriage.

39. In *Mary Wanjiku Githatu v Esther Wanjiru Kiarie* [2010] eKLR, Bosire, JA., put the position thus:

The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

40. The Court of Appeal again stated in *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another* [2009] eKLR:

Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.

41. It is clear from the evidence of both sides that the plaintiff and the defendant have been together since 1980s and have lived together in the same house as a couple. They behave as husband and wife and neighbours perceived them as such. PW2 testified to the fact that they were to them husband and wife. The plaintiff even testified to having gone to the defendant's rural home and at one time the defendant told him that they were to relocate to the rural home. This could not happen to someone who was not a wife. DW2 was also clear in her testimony that the plaintiff was related to the defendant though she called her a "girlfriend." I do not think DW2 could have just been visiting and communicating with the plaintiff merely as the defendant's girlfriend. The relationship was much more than that and DW2 did not simply want to tell the truth.

42. Looking at the length of the period the parties were together, their general conduct and reputation and how they held themselves out and were perceived, I am satisfied that they intended to be and indeed were husband and wife and I so hold.

Whether this is a matrimonial property

43. The plaintiff has argued that the property (**Plot No. [xxxx]** also known as **Plot No.[xxxx]**) was acquired during the marriage though it is in the defendant's sole name. She also argued that the property was developed with her contribution and that she even put up some structures on her own that are still on the property and she derives income from the structures. She maintained that she contributed towards its development and improvement. It was also her argument that the defendant left and went to stay in the rural home and only returned occasionally. She contended that during that period, she was the only one developing the property and taking care of the family.

44. The respondent argued he acquired the property in 1978 and that he developed it alone together with PW2 after obtaining a loan. He also asserted that the property is owned by him and PW2. He denied that the plaintiff contributed towards acquisition and or development of the property.

45. From the above contestations, the question that arises for determination is whether the suit property is matrimonial property. There is no doubt that the property was acquired in 1978 according to the allotment letter. This according to evidence on record, was clearly before the parties came together. There was also no clear evidence when the property was developed. The defendant and PW2 stated that it was in 1980s and that they moved into the house thereafter.

46. The property was allotted to the defendant. There was no evidence that he purchased it. In that regard, there would be no requirement for contribution towards its acquisition. The only question then is whether the plaintiff contributed towards its development.

47. The law applicable to this dispute is the Constitution and the Matrimonial Property Act, 2013. 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.**" These rights include the right of either spouse to acquire and own property.

48. The Matrimonial Property Act is also clear on the right of equality between marriage partners. It includes the right to share matrimonial property. Section 6(1) of the Act defines matrimonial property as follows:

(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.

49. The dispute herein involves immovable property which though acquired before marriage between the plaintiff and the defendant and was registered in the name of the defendant, was substantially developed during the marriage. In that respect, section 7 which relates to ownership of matrimonial property provides:

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.

The import of this section is that matrimonial property is to be shared according to each spouse's level of contribution towards its acquisition and development.

50. The plaintiff has argued that she contributed towards the development of the property. The defendant has on his part contended that he acquired and developed the property with DW2. He held the view that the property belonged to him and PW2 jointly.

51. The property was indeed acquired marriage between the plaintiff and the defendant and was registered in the defendant's name. There was evidence from PW2 that the plaintiff and the defendant developed the property and lived in the house together. There was further evidence that the plaintiff carried further developments on the property and derived income therefrom.

52. The defendant stated that he sold a portion of the property to meet financial needs a fact the plaintiff admits. She however argued that this was done without her knowledge. The defendant contended that the plaintiff did not raise any objection to the sale. The defendant would not have expected the plaintiff to raise objection to the sale if she had no interest in the property. This is a vague admission on the part of the defendant that the plaintiff had a stake in the property.

53. In *PNN v ZWN* [2017] eKLR, the Court of Appeal held that where there was both direct and indirect contribution by parties towards acquisition of the properties that makes them matrimonial property and a spouse would get a share of some of those properties even though they had been registered in the name of only one party.

54. Similarly, in *MBO v JOO* [2018] eKLR, the same court held that the appellant was in gainful employment; that she constantly took loans and that the property had been acquired with joint efforts of the parties and was therefore matrimonial property.

55. And in *PWK V JKG* [2015] eKLR it was held that where the disputed property is not registered in joint names of spouses but in one spouse's name, beneficial share of each spouse would depend on their proven proportions of financial contribution either direct or indirect towards acquisition of the property.

56. The principle running through in these decisions is that a spouse has to demonstrate through evidence that he/she contributed directly or indirectly towards acquisition of the property in dispute. Contribution towards acquisition should be taken to include contribution towards development of the disputed property. And in line with section 7 of the Matrimonial Property Act, ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition or development and should be divided between the spouses if they divorce or their marriage is otherwise dissolved based on such contribution.

57. The question therefore, is whether this particular property is matrimonial property. The uncontroverted evidence is that the property was acquired before marriage and is in the respondent's sole name. The plaintiff did however show the plaintiff contributed to its development. The defendant did not give a plausible explanation why the plaintiff has all along lived and continues to live on the property if she had no interest on it.

58. On the evidence on record, I have no doubt that the property though acquired by the defendant, the plaintiff contributed towards its development. It is instructive to note that the defendant admitted that the plaintiff was working at Bomas of Kenya when got together. It is also clear that the parties were residing on the property until the defendant moved to the rural home leaving the plaintiff on the land. In my view, the plaintiff satisfied the court on the balance of probability that she contributed towards the developed the property. This court is not by the respondent claim that she did not contribute in any way towards development of property since she played a role in its development and continues to take care of the property. This contribution conferred on the plaintiff matrimonial propriety rights over the property.

59. From the evidence on record, it is not clear the level of each party's contribution towards the development of the property. Whereas the respondent stated that he took a loan to construct the home and Kshs. 200,000 to construct a poultry house, no documentary evidence was produced to show the amount spent. Similarly, the plaintiff did not show the actual amount she put in though it is clear that she played a significant role in its development. There can be no greater contribution than the role the plaintiff has played in taking care of the property now that the defendant is away in the rural home and only visits the plaintiff occasionally.

60. That being the case, the conclusion I come to is that **Plot No. [xxxx]** also known as **Plot No. [xxxx]** is matrimonial property. Since the property was acquired during the marriage between the defendant and DW2 **JAM**, the three have shares over the property.

61. Having considered the originating Summons, the response there to, evidence, submissions by counsel for the parties and the decisions relied on, the originating summons dated 25th February 2020 succeeds and is hereby allowed. I make the following orders;

1. A declaration is hereby made that Plot No. [xxxx] also known as Plot No. [xxxx] is matrimonial property.

2. A declaration is hereby made that the defendant holds Plot No. [xxxx] also known as Plot No. [xxxx] in trust for himself, JAM and the plaintiff in equal shares

3. No order as to costs

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 25TH DAY OF JUNE 2021.

E. C. MWITA

JUDGE