



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL CASE NO. 1 OF 2016

LWN.....PLAINTIFF

V E R S U S

JNG..... RESPONDENT

JUDGMENT

1. The Petitioner LWN vide originating Summons dated 15/1/2016 seeks the following orders:-

a) A declaration that Land parcel No. Baragwi/Karuri/[...] & [...] were acquired by the joint funds and efforts of both the applicant and the respondent.

b) The petitioner is entitled to her share of the matrimonial property acquired jointly by her and the respondent.

2. The application is supported by the affidavit of LWN (to be referred to as “the applicant.) She claims that she got married to the respondent in 1978 under the African Christian Marriage and Divorce Act (Cap 151 Laws of Kenya) as evidenced by the marriage certificate annexeture LWN-1-. Thereafter the marriage broke down and was dissolved by the Senior Resident Magistrate at Gichugu and a decree nisi was issued on 7/12/2015, Annexeture LWN-2-. She further depones that during the subsistence of the said marriage the couple acquired land parcel Number Baragwe/Karuru/[...] & [...] on which stands a permanent house annexeture LWN 3, Coffee pulping station licence.

3. It is the contention by the applicant that the properties were registered in the name of the respondent who has since issued her with a demand notice to vacate the properties annexetures LWN-4-. The respondent has also destroyed coffee plantation on the parcels of land. She prays that her application be allowed.

4. The respondent opposed the application and filed a replying affidavit confirms that the applicant is his former wife as they are not divorced. That land parcel No. Baragwi/Karuru/[...] is the subject of a land dispute which is now on appeal in the High Court E.L.C Appeal No. 27/2014 between him and Muriithi Mairi and is not available for distribution. Annexeture JNG 1 he claims that he is the one who purchased land parcels No. Baragwi/Karuru/[...] & [...] which he started buying in 1983 though he got registered as the owner in 1985 and 1989 as shown on the green card Annexeture JNG 2a & 2b. He asserts that he is the one who contributed towards the purchase of the plot using his own resources and loans and that the applicant did not contribute anything. That at the time he bought the properties, the applicant had left the matrimonial home. He further depones that the applicant left the matrimonial home in 1982 to 1988 and it is the year 1986 to 1987 that he constructed the permanent house using his own resources.

5. The respondent gave a list of issues for determination which can be summarized into three as follows:-

i) Whether the properties Baragwi/Karuru/[...] & [...] are matrimonial properties.

ii) Whether the applicant contributed to the acquisition of the properties.

iii) Whether the applicant should get quarter of an acre to be carved out of the portion where the permanent house rests together with the house worth Kshs 2 million on Baragwi/Karuru/[...].

6. The applicant had raised similar issues. The Originating Summons proceeded ex parte on 23/7/2019 as the respondent who was duly served did not turn up for trial.

7. I have considered the Originating Summons. On issue whether the properties are matrimonial properties, the applicant testified that the properties were bought during the subsistence of the marriage. From what was deponed by the respondent, there is no dispute that the applicant and respondent were legally married. The marriage was dissolved by a decree of the court issued on 7/12/2015. The respondent in his affidavit deponed that he started buying the properties in between 1982 – 1985 when the applicant had deserted the matrimonial home.

However in her undisputed evidence in court, the applicant testified that she contributed to the acquisition of the properties as she was working as a teacher. She testified that she was taking loans to contribute to the purchase of the properties and also used to take care of the children.

8. There is no dispute that the applicant was a teacher. The marriage certificate testifies to the fact that she was a teacher at the time she got married. The applicant annexed documents prove that she took loans at Ollins Sacco and gave it to the respondent.

The matrimonial property Act defines contribution as follows:-

“contribution” means monetary and non-monetary contribution 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;**

The Act defines to mean both monetary and none monetary. Under **Section 7 of the Matrimonial Property Act** it is provided:-

“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.”

9. On the first issue whether the properties are matrimonial properties, I have to consider what is matrimonial property as defined under Section 6 of the Matrimonial Property Act. Matrimonial property includes homes or homes any household goods in the matrimonial home or any other property jointly owned and acquired during the subsistence of the marriage. The condition precedent to for property to qualify as matrimonial is that it ought to have been acquired during the subsistence of a valid marriage between the parties.

10. In this case the properties were acquired during the subsistence of the marriage which was contracted by the parties in 1978. The respondent went on to put up the matrimonial home on Baragwi/Kariru/[...]. The applicant took loans and contributed to the establishment of the matrimonial home. The respondent did not attach any document on his pleadings to prove that he solely contributed to the acquisition of the property. He did not attach documents to show he was doing business or Bank statements to demonstrate that he had money in his accounts. The applicant who was a teacher earning a salary has proved on a balance of probabilities that she could contribute to the acquisition of the properties. There is no doubt that the applicant contributed to the acquisition of the properties and the construction of the matrimonial home. The properties are therefore matrimonial properties as defined under the Act. Under **Section -7-** cited above, ownership of matrimonial property vests in the husband and the wife according to the contribution by each party. The provision brings in the aspect of contribution by each party, meaning that the ownership is not on equal basis but to the extent that a party has contributed towards its acquisition. So, when it comes to the distribution of the property, the court is to consider the share of contribution by each party.

11. In this case the properties in dispute are in the name of the respondent. This in itself does not mean that they are not matrimonial properties or that he owns them absolutely. The **Act** has taken care of tis as under **Section 14 of the Matrimonial Property** it is provided:-

“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 spouse jointly there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.**

12. There is a rebuttable presumption that the property acquired in the name of one spouse is held in trust in **Njoroge –v- Ngari 1985 KLR 480**. The court held the view that where matrimonial property is being held in the name of one spouse, even if that property is registered in the name of one person but the other spouse made contribution towards its acquisition, then, each spouse has proprietary interests in that property.

13. Under the act, contribution need not only be monetary but other modes as provided under Section -2- as –

- a) Domestic work and management of matrimonial home.**
- b) Child care**
- c) Companionship**

d) Management of family business or property.

e) Farm work.

14. The court has therefore to consider both monetary and none monetary contribution. In this case the applicant maintains that she made monetary contribution as she had a salary and she used to borrow loans.

15. I find that the applicant has proved that she made monetary contribution in the acquisition of the properties. The properties are matrimonial properties as defined under the Act and though registered in the name of the respondent, he holds them in trust for the applicant.

16. Looking at the second issue raised by the respondent, in my view he has conceded that the applicant should get a share of the property. His proposal is that the applicant get quarter of an acre to be curved out from the are occupied by the house. The constitution gives spouses equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. No party should therefore be discriminated at any stage of the marriage. **Article 45(3) of the Constitution** states: -

“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.”

17. There are several decisions which have addressed the issue of distribution of the matrimonial property. In **Peter Mburu Edaria –v- Priscillar Njeri Edaria 2007 eKLR** the court stated that:-

“In all cases involving disputes between husband and wife over beneficial interest in property acquired during marriage which have come to this court, the court has invariably given the wife an equal share (see Essa –v- Essa, Nderitu –v- Nderitu, Civil Appeal No. 203 of 1997 (unreported) Kamore –v- Makore, Muthembwa –v- Muthebwa Civil Appeal No. 74/01 and Mereka –v- Mereka Civil Appeal No. 236/2001 (unreported). However a study of those cases shows that the decision on each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wives contribution as equal to that of the husband.”

In another decision on the same issue, **in the case of Francis Njoroge –v- Virginia Wanjiku Njoroge Civil Appeal No. 179/2009, Kiage J** it was observed:-

“-- a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated in the Court of Appeal of Singapore in Lock Teng Fung –v- Chua Hock Chye (2007) SGCA 33 it is exionatic that the division of matrimonial property under section 112 of the Act is not – and, by its very nature cannot be a precise mathematical exercise.”

18. What the court is saying that the constitutional provision cited above does not automatically entitle a party to a 50:50 share of the matrimonial property, the court retains the jurisdiction to determine what a party should get based on the contribution they have made towards its acquisition, otherwise referred as what a party has brought on the table. Further that each case must be decided on its own peculiar circumstances.

19. Considering the affidavits before this court, the properties in dispute are two Baragwe/Kariru[...] & [...]. The respondent has proposed that the applicant gets a portion from parcel No. 922. Parcel No. Baragwi/Kariru[...] is currently in the name of the respondent and measures 0.77 Hectares. Parcel No. Baragwi/Kariru[...] is in the name of the respondent and measures 0.81 Ha. It is also where the matrimonial house worth Kshs 2 Million is situated. Though the applicant has listed other properties which are owned by the respondent, they never formed the subject matters of her claim in the Originating Summons and I will therefore not consider them. The applicant will therefore have the advantage of the permanent house. In the circumstances. I will make an order that the applicant gets half share of land Parcel No. Baragwe/Kariru[...] to be curved out to include the portion where the matrimonial house is. The remaining half share to remain with the respondent as well as parcel No. [...].

20. I order as follows:-

- 1. The applicant to get half share of land parcel No. Baragwe/Kariru[...] curved out to include the permanent house.**
- 2. The half share of Baragwe/Kariru[...] to remain with the respondent.**
- 3. The respondent to retain ownership of land parcel, No. Baragwi/Kariru[...].**
- 4. Costs to the applicant.**

Dated at Kerugoya this 30th day of January 2020.

L. W. GITARI

JUDGE