



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**MATRIMONIAL NO.1 OF 2018**

**DCK.....PLAINTIFF**

**- V E R S U S -**

**GKM.....DEFENDANT**

**RNM.....INTERESTED PARTY**

**JUDGMENT**

The Originating Summons dated 13/4/2018 is filed by DCK against GKM and RNM.

The plaintiff seeks the following orders:

1. That there be a declaration that the properties listed hereunder together with the improvements therein are matrimonial properties acquired during the subsistence of the marriage between the plaintiff and the 1st defendant which was celebrated in 2014 under the Kalenjin Customary law and the plaintiff is entitled to 50% share thereof:

- a. Laikipia/Marmanet South Rumuruti Block [xxxx] measuring 0.04 HA;
- b. Laikipia/Marmanet South Rumuruti Block [xxxx] measuring 0.04 HA;
- c. Motor vehicle Reg.No.[xxxx] Station Wagon;
- d. [particulars withheld] Agrovet.

2. That Laikipia/Marmanet South Rumuruti Block [particulars withheld] and a 53 with all improvements thereon be shared equally and the defendant and the Interested Party herein do execute all the necessary documents to facilitate transfer in favour of the plaintiff and in default the Deputy Registrar of this court be authorized to execute the same;

3. The motor vehicle Registration No.[xxxx] be sold and the proceeds be used to offset the loan account of the plaintiff in Tower Savings and Audit Ltd;

4. That the court to appoint Providence Auctioneers for purposes of selling motor vehicle Reg.[xxxx].

The Originating Summons is supported by the affidavit of the plaintiff dated 13/4/2018. Despite service, the defendant and Interested Party did not enter appearance and the matter proceeded undefended. The plaintiff testified on oath as PW1.

PW1 testified that she got married to the 1st defendant in 2014 in accordance with Kalenjin Customary Law and they were blessed with one child, BWK who is aged 4 years. They moved to live at [particulars withheld] Centre where they own a business, [particulars withheld] Agrovet which they opened in 2014. Whereas the 1st defendant worked as a veterinary officer, PW1 would remain working in the Agrovet; that though the agrovet business had been started by the 1st defendant, PW1 got money to expand the business.

They also acquired the plots No.[xxx] and [xxx] at Salama, each measuring 0.04 HA in 2016 from RNM on 19/7/2016 as evidenced by the agreement P.Ex.no.1. PW1 produced a search certificate (P.Ex.No.2(a) & (b) indicating that the plots are still registered in the names of RN; that PW1 and the defendant separated in 2018 before the transfers were made.

PW1 also testified that on 5/8/2017, they bought motor vehicle [xxx] from a loan she obtained from Tower Sacco which they used to transport goods for the Agrovet. A copy of the sale agreement for the vehicle is dated 5/8/2017 (P.Exh.3). PW1 produced a statement from Tower Sacco where she took two loans of Kshs.130,000/= to pay for the plots and Kshs.230,000/= which was used to build a semi-permanent house on plot [xxx] (P.Exh.5). PW1 also claimed to have contributed to the purchase of the vehicle from a loan of Kshs.300,000/= which she took with Tower Sacco on 4/8/2017 (P.Exh.6), though the sale agreement is in the names of the defendant alone.

PW1 said that after the separation, she went back to her parent's home in Salama while the respondent moved to Manguo and they closed the agrovet, whereas the vehicle is parked at their plot at [particulars withheld].

PW1 also stated that when she defaulted in repayment of the loan, the guarantors had to repay the loan. That is why the plaintiff has come to court seeking the distribution of the matrimonial property equally between the plaintiff and 1st defendant.

Mr. Chege, counsel for the plaintiff filed submissions on 25/9/2019. The 1st defendant did not enter appearance nor did he file defence. The Originating Summons proceeded to formal proof.

The issues for determination are as set out by counsel:

1. Whether the plaintiff and the defendant were married;
2. Whether the properties listed in the Originating Summons are matrimonial property;
3. Whether the plaintiff is entitled to 50% of the said property?

*Whether the plaintiff was married to the defendant:*

The plaintiff did not adduce any evidence to prove a marriage between her and the defendant. She pleaded that they contracted a customary marriage under Kalenjin Customary Law in 2014. One would have expected a document to show payment of dowry or a witness to confirm that indeed the plaintiff and the defendant cohabited as husband and wife between 2014 and 2018 but none was availed.

The plaintiff testified that they have one issue of the marriage. But again, the plaintiff did not attach a birth certificate of the child as proof that the two had a child together. It was incumbent upon the plaintiff to prove on a balance of probability that she was indeed married to the defendant under Kalenjin customary law. In *Gituanja v Gituanja [1983] KLR 575*, the Court of Appeal held that the existence of a customary marriage is a matter of fact which must be proved by evidence. In that case, the court found a valid marriage under Kikuyu Customary law to have been proved by slaughtering of 'ngurario' a ram. See *Hottensia Wanjiku Yawe v The Public Trustee CA 13 of 1976*. J. Kwach set out three important principles regarding proof of customary marriage which are:

- i. The onus of proving customary law marriage is generally on the party who claims it;
- ii. The standard of proof is the usual one for a civil action namely one on a balance of probabilities;
- iii. Evidence as to the formalities required a customary law marriage must be proved to that evidential standard.

In the instant case, no attempt was made to prove a marriage between the plaintiff and defendant. Even if the cause is undefended, the plaintiff should have demonstrated in her pleadings and formal proof that there existed a marriage. The plaintiff was so vague in claiming that they contracted a Kalenjin Customary marriage. Within the Kalenjin, there are so many sub tribes, that is, the Keiyo, Nandi, Kipsigis, Tugen, etc and each sub tribe seems to have their own different customary practices relating to marriage.

Although the court had noted in its ruling dated 31/10/2018 in which the plaintiff sought interim orders to preserve the properties, this court observed that failure by the respondent to appear or file a defence in this matter amounts to an admission of a marriage, the said observation was made in error because at the said stage, the court is not required to make any final findings. The plaintiff should have made an effort to give even basic evidence that there was a valid marriage between her and the respondent before the court could arrive at such observation. Despite failure by the respondent to appear, it is upon the plaintiff to prove her case to the required standard.

The law regarding matrimonial property is stipulated under Section 6 of the Matrimonial Property Act, 2014. Matrimonial properties constitute the matrimonial home, household goods and effects in the matrimonial home and any other immovable and movable property jointly owned.

Section 7 of the Matrimonial Property Act provides for how matrimonial property should be shared between the spouses. It reads:

“Subject to Section 6(3), ownership of matrimonial property rests in the spouses according to the contribution of either spouse towards the acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. Under article 45(3) of the Constitution, parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of the marriage.”

In this case, I have found that there is no proof of marriage between the plaintiff and the defendant and hence the court cannot be able to make a finding that the plaintiff is entitled to 50% of the property. The agreements of the subject properties are recorded in the defendant's names. This court cannot make a determination on whether the plaintiff owns 50% of the properties named in the Originating Summons at this stage.

In the end, the Originating Summons is dismissed with the applicant bearing the costs.

**Dated, Signed and Delivered at NYAHURURU this 27th day of February, 2020.**

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**R.P.V. Wendoh**

**JUDGE**

PRESENT:

Ms. Ndegwa for the plaintiff

Eric – court assistant