



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NUMBER 23 OF 2016

KNG.....PETITIONER

VERSUS

GKK.....RESPONDENT

J U D G M E N T (OS)

1. KNG (plaintiff) and GKK (defendant) married in 1962 under Kikuyu Customary Law. They had six (6) children born between 1965 and 1972 both years inclusive.
2. In 2001 the plaintiff filed for divorce in **Naivasha Senior Principal Magistrate Civil Case Number 209 of 2011** for the dissolution of the marriage. She also sought a share of the matrimonial property described therein as [particulars withheld] measuring 20.3 acres.
3. The marriage was dissolved on 16th May, 2002 and the magistrate erroneously awarded her six (6) acres out of the said matrimonial property a decision that was overturned by the **High Court in High Court Civil Appeal Number 92 of 2002** where the court found that the learned magistrate had no jurisdiction to distribute matrimonial property.
4. On 13th February, 2014 the plaintiff filed this Originating Summons seeking an order, declaration that [particulars withheld] belonging to the defendant was acquired and developed by joint efforts and funds of both parties during the subsistence of their marriage. The Originating Summons was supported by her affidavit sworn on even date.
5. The defendant filed a Replying Affidavit sworn on 22nd April, 2014 demonstrating that he and the plaintiff had ceased to live together in 1972 as per the divorce proceedings and judgment. That he had married another wife, LWK in 1971 and they had between then ten (10) children born between 1971 and 1996. In addition that the land number 224 had been bought by his and L efforts in 1997 as evidenced by the title documents; which he had already subdivided and now had other numbers.
6. That the plaintiff had sought number [particulars withheld] and had now changed her mind. That in addition her efforts to have the land 224 renamed 600 was refused by this court on a finding that 224 was always 224 and had never at any time been 600.
7. Following the passing of the **Matrimonial Property Act of 2013**, the plaintiff filed an Amended Originating Summons on 19th June, 2015 with leave of court but seeking the same order.
8. The defendant and his wife L each filed a Supplementary Affidavit sworn on 1st November, 2017.
9. The gist of their affidavits was that the plaintiff had left the home in 1971 – 1972 thereabouts but they had cohabited as husband and wife from 1971. That the land number 224 was purchased on or around 1979 and the loan paid up to 1989. The title deed was issued in 1997, 25 years after the plaintiff had left. They annexed the documents.
10. Parties chose to proceed by way of written submissions.
11. For the plaintiff it was argued by the firm of Ochwari Ngamate & Company that the plaintiff and the defendant had bought the land and utilized it together up to 1992 when they parted company.
12. For the defendant it was argued by the firm of Gatheru Gathemia & Company that;

1) There were four (4) issues for determination.

1. Whether the [particulars withheld] (sic) forms part of matrimonial property?
2. Whether the Plaintiff contributed to acquisition of [particulars withheld] (sic) ?
3. Whether the suit is merited?
4. Who should bear costs of the suit?

13. On the first issue counsel submitted on a property erroneously described as 2245. Citing **Sections 6,7,8, of Matrimonial Causes Act and Article 45 (3) of the Constitution** he submitted that the two (2) parties were married, their marriage dissolved and the evidence was that they had ceased to live together in the early 70s yet the property the plaintiff was seeking a share of was purchased in 1997 long after she had left the home; that the evidence placed before court showed that the property was not matrimonial property as between the plaintiff and the defendant and the plaintiff had not contributed in any way to its purchase/acquisition.

14. On the second issue that the plaintiff was estopped by having laid claim to land parcel number 600 in the divorce proceedings, she could not now begin to claim a different property. For this defendants counsel relied on **748 Air Services Limited vs Theuri Munyi [2017] eKLR** which cited **McIlkenny vs Chief Constable of West Midlands, [1980] All ER 227**

“...We have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying ‘estoppel’ is only a rule of evidence. If you go into another room you will find a different notice: ‘estoppel can give rise to a cause of action’. Each room has its own separate notice. It is a mistake to suppose that what you find in one room, you will find in the others.”

15. On the above arguments the defendant sought dismissal of the Originating Summons with costs arguing that costs follow the event, unless the court had reasons not to award costs.

16. I have carefully considered the evidence on record, the submissions by counsel. The only issue is whether the plaintiff has established that LR 224 was matrimonial property and established a basis for why she ought to get a share of the same. Her own divorce proceedings show that it was an established fact that the two herself and the defendant ceased to cohabit as husband and wife in 1992.

17. It has also been established that the land number 600 and the land number 224 are two (2) different parcels of land.

18. That the parcel number 224 was acquired in 1997 when the title deed was registered in the name of the defendant twenty five (25) years after the plaintiff had left the home.

19. The plaintiff has not placed before the court any evidence that the property [particulars withheld] was matrimonial property. On the contrary the defendant has shown that the property is his and Lucia’s, that even the number 224 does not exist anymore. Hence clearly the plaintiff has failed to prove her claim.

20. The Originating Summons is dismissed with costs to the defendant.

Dated, delivered and signed at Nakuru this 27th day of February, 2020.

Mumbua Matheka

Judge

In the presence of

Edna Court Assistant

For Petitioner Mr. Bosire also holding brief for Respondent

Mr. Gatheru Gathemia N/A

Mr. Bosire: He asked me to hold his brief.

Mumbua T. Matheka

Judge

27/02/2020