



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MATRIMONIAL CAUSE NO 3 OF 2017

NWK.....APPLICANT

VERSUS

PKN.....RESPONDENT

JUDGMENT

1. The undisputed background to this cause is that the Applicant, **NMK** and the Respondent **PKN** got married under customary law in 1985. They subsequently cohabited in their matrimonial home developed on land parcel **LR No. Ng'enda/Githunguchu/xxxx** which the parties had acquired registered in their joint names. They have three children, all of them adults. It seems that following misunderstanding in or about the year 2008, the couple had become estranged, the Applicant leaving the matrimonial home which is currently occupied by the Respondent. The circumstances of her departure are in dispute but not relevant to this cause. In 2017 the Applicant filed the present cause and Divorce Cause No.3 of 2017 in the CM's court at Gatundu. At the time of the hearing of this cause, the divorce case had not yet been finalized.

2. The Originating Summons (OS) herein seeks a declaration that the property described as **LR No Ngenda/Githunguchu/xxxx** and **Ngenda/Githunguchu/xxxx** is held in trust by the Respondent for the benefit of the Applicant and Respondent. A further prayer seeking a declaration that the properties are jointly owned in equal shares by the parties cannot be entertained at this stage. The key grounds supporting the Originating Summons and contained in the Applicant's affidavit and oral evidence are that the parties contracted a customary marriage in 1986 and that during the substance of the marriage, acquired the two properties above, hereafter the suit properties. The Applicant asserts that she was employed by the Ministry of Health in the material period and contributed to the acquisition of the properties. Hence the registration of the parcel No. xxxx in the parties' joint names. Replying on the agreement for sale in respect of parcel No. xxxx dated 1999, she asserted that although the title subsequently issued in the Respondent's name, she had contributed earlier to its acquisition.

3. For his part, the Respondent took the position that he was gainfully employed during the subsistence of the marriage and that although he is the one who purchased the parcel No.xxxx, he had caused it to be registered in the couple's joint names. He had no objection to sharing that parcel with the Applicant. However, with regard to parcel No. xxxx he claimed to have acquired it in 2014 through his sole efforts while the parties were estranged, and that the Applicant did not contribute thereto. He relied on the copies of title deed and transfer documents in respect of the parcel No.xxxx. He dismissed as false the agreement in respect of the parcel as exhibited by the Applicant asserting that it did not relate to parcel No.xxxx. He admitted that the said plot and parcel No.xxxx abutted each other and were purchased from the same vendor **FKN**. He claimed that no sale agreement was executed between him and the vendor in respect of parcel No. xxxx and that upon receipt of the purchase price, the vendor had transferred the property to him.

4. In written submissions, the parties reiterated their evidence. On the applicable law, counsel for the Applicant relied on the provisions of Article 45(3) of the Constitution as to the equality of parties to a marriage, and Article 60(1) of the Constitution as regards the principle of non-discrimination in matters related to land and property in land. He also highlighted provisions of Section 3(2) of the Marriage Act. He asserted that Sections 2 and 9 of the Matrimonial Property Act envisage monetary and non-monetary contribution by spouses in the acquisition of property during coverture. He further placed reliance on the provisions of Section 14 of the Matrimonial Property Act as to the rebuttable presumption of a trust in favour of the other spouse in cases where property is acquired and registered in the name of one spouse only during the subsistence of marriage between such spouses. With respect to parcel No. xxxx he pointed out that the Applicant was a witness to the sale agreement. He urged the court to find that the Applicant is entitled to a half share of the suit properties.

5. The Respondent's counsel submitted that the key issue for determination was the what property comprised the matrimonial property in this case. Citing the definition of matrimonial property in Section 6 of the Matrimonial Property Act, and the provisions of Article 45(3) of the Constitution, counsel sought to draw out the application of equal rights in the division of matrimonial property from the judgment of **Kiage JA in PNN v ZWN [2017] e KLR**. He contended that on the available evidence, only parcel No.1680 is matrimonial property available for the purpose of this cause, as the parcel No.xxxx was not acquired during the subsistence of the marriage and, or through the parties' joint efforts.

6. The court, having considered all the material canvassed takes the following view of the matter. First, the originating Summons before the court cannot be about the division of matrimonial property as envisaged under Section 7 of the Matrimonial Property Act (hereafter the Act) because the marriage between the parties herein has not been dissolved. The parties' submissions appeared to be consumed with the question of distribution under Section 7 of the Act. Though not expressly invoked in the Originating Summons, it is evident that the instant cause is brought under Section 17 of the Act. The Section is headed "Action for declaration of rights to property" and provides that:

“(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

4) The reversal of a decree for judicial separation shall not affect the rights or remedies which any other person would have had if the decree had not been reversed in respect of any debts, contracts or acts of the wife incurred, entered into or done between the date of the decree and of the reversal thereof.”

7. This section may be invoked whether or not a petition for divorce has been filed. However, under Section 7 of the Act division of matrimonial property is only possible after a marriage between the parties is dissolved. Such division is based on the contribution of the spouses towards the acquisition of the property. In the instant case and for purposes of Section 17 of the Act, there is no dispute as regards the land parcel **LR No. Ng'enda/Githunguchu/xxxx** which the Respondent all but admits is matrimonial property and is willing to acknowledge the Applicant's right thereto. Which fact is in any event evidenced by the joint ownership in the title document.

8. The bone of contention is with regard to the land parcel **LR No. Ng'enda/Githunguchu/xxxx**. Undoubtedly, this property was registered in the name of the Respondent in 2015. However, the Applicant asserts that the property was acquired during coverture and has tendered an agreement for sale between the Respondent and one FKN the vendor. Though the Respondent readily admits having bought the property from the said vendor, he has claimed that the said agreement is false, and asserted that he entered into an oral agreement with the vendor. That is not a good answer. The law requires that to be valid, contracts for sale of land must be in writing, and it would be strange that the Land Control Board gave consent on the basis of an oral agreement as implied by the Respondent. The agreement in question is signed not only by the transacting parties but also their spouses, including the Applicant herein. See clauses 4 and 10 of the agreement.

9. The Respondent did not demonstrate to the court how the sale document is false and did not even deny his signature on the said document. Evidently this document represents to the Respondent an uncomfortable truth, namely, that the land parcel No.xxxx was purchased prior to the estrangement of the parties but only transferred in 2015. According to Part B – Proprietorship Section of the copy of title in respect of parcel No. xxxx annexed to the Respondent's Replying affidavit, parcel No.xxxx was a subdivision of a larger parcel i.e. **Ngenda/Guthunguchu/No.xxxx**. Under the sale agreement tendered by the Applicant the parcel to be purchased was a subdivision of parcel No. Ng'enda/Guthunguchu/xxxx. A sketch map is included in clause 1 of the agreement and clause 2 states that:

“That the plot marked “B” in the above sketch map is the one which measures 10,000 square feet and also referred to in this sale agreement and full consent has been given by the Vendor's wife by way of signing below this paragraph.”

10. Section 14 of the Act is in the following terms:

“Presumptions as to property acquired during marriage.

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”.

11. The presumption in this case, in respect of the parcel No.2443 has not been rebutted. I find that the Applicant has made out her case and balance of probabilities. The court is satisfied, on the evidence before it that the sale agreement in question relates to the parcel No. xxxx and that even though the title was obtained in 2014, the parcel had been acquired during the subsistence and the of the parties' marriage . It is admitted that the Applicant was always gainfully employed, as was the Respondent. The Applicant must have made some contribution to the acquisition and development of the assets whether monetary or non-monetary. The exact contribution will be determined during proceedings for division of property if and when the parties' marriage is dissolved.

12. In the circumstances, the court will grant a declaration to the effect that the property described as **LR.No. Ng'enda/Githunguchu/xxxx**

and **LR. No. Ng'enda/Githunguchu/ xxxx** are held by the Respondent for the benefit of both the Applicant and the Respondent. Parties will bear own costs in view of the nature of the dispute.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 7TH DAY OF AUGUST 2020.

C. MEOLI

JUDGE