



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL SUIT NO. 36 OF 2018**

**IN THE MATTER OF SECTION 28 OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF LAND PARCEL NO. ATHIRUNE RUUJINE/xxxx**

**AND**

**IN THE MATTER OF MATRIMONIA PROPERTY UNDER THE MARRIAGE ACT 2014**

**BETWEEN**

**PKM.....PLAINTIFF**

**VERSUS**

**JNK.....1<sup>ST</sup> DEFENDANT**

**HM .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was instituted by way of originating summons dated 11/12/2018 brought pursuant to **Section 93 (2) of the Land Registration Act 2012, Section 28 of the Land Registration Act No. 3 of 2012, Order 37 Rule 8 of the Civil Procedure Rules 2010** and all other enabling provisions of the Laws of Kenya. The plaintiff seeks the determination of the several legal questions and to be granted the following reliefs:

*a) A declaration that Parcel No. L.R ATHIRU/RUUJINE/xxxx and xxxx is matrimonial property.*

*b) A declaration that transfer of Parcel No. ATHIRU/RUUJINE/xxxx to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant was null and void ab initio.*

*c) A declaration that Parcel No. No. L.R ATHIRU/RUUJINE/xxxx and xxxx be registered exclusively in favour of the plaintiff*

2. The plaintiff claimed that, she and the 1<sup>st</sup> defendant got married on 22/11/2006 at Catholic Church. She exhibited marriage certificate serial No. [particulars withheld]. She stated that she took a loan of Kshs. 400,000/- from Mwalimu Sacco Jisaidie Loan and used part of the money to acquire LR ATHIRU/RUUJINE/xxxx which was registered in the name of the 1<sup>st</sup> defendant. The rest she used to finance the building of the house at his father's homestead where the 1<sup>st</sup> defendant now stays with his second wife.

3. In 2010, she took another loan to finance the purchase of L. R. No. ATHIRU/RUUJINE/ xxxx while the 1<sup>st</sup> defendant only contributed Kshs. 55,000/- and it was registered in his name. They agreed to sell L.R No. ATHIRU/RUUJINE xxxx, which she was given by her own father. The proceeds were used to develop part of the structures in L. R. No. ATHIRU/RUUJINE/ xxxx. They then moved to the latter land parcel and that is where she stays up to date. When the 1<sup>st</sup> defendant was selling the said land parcel to the 2<sup>nd</sup> defendant they were not staying together as he had disappeared from their matrimonial home. The 1<sup>st</sup> defendant's intent to sell the land without her knowledge or consent was ill motivated and illegal.

4. It is the defendants' case that it is not true that the plaintiff is the one who single- handedly used her money to purchase or develop any of the suit properties. Land Parcel L. R. NO. ATHIRU/RUUJINE/xxxx was sold to the 1<sup>st</sup> defendant by one Jediel Mwithalie for Kshs.

200,000/- . The same was never transferred to him but instead transferred to the seller's mother's name. The transaction was never completed. He neither took possession of the property nor was his money refunded.

5. On or before 2016 the 1<sup>st</sup> defendant wanted to further his studies. He approached the plaintiff in a plea to sell Parcel No. 9182 and he proceeded to sell to the 2<sup>nd</sup> defendant at Kshs. 500,000/-. The 2<sup>nd</sup> defendant did due diligence and discovered that it belonged to the 1<sup>st</sup> defendant entirely and that he had informed his wife. In April 2017 the plaintiff had refused to vacate land leading to her being issued with a vacation notice dated 07/02/2017. Even assuming that Parcel Nos. xxxx and xxxx are matrimonial properties at no time has the plaintiff contributed to the purchase of them thus she cannot blame 1<sup>st</sup> defendant for selling them.

### Submissions

6. This matter was canvassed by way of written submissions. The plaintiff submitted that the sale by the 1<sup>st</sup> defendant of Parcel No. xxxx to the 2<sup>nd</sup> defendant is illegal for she gave no consent as required under **Section 12 (1) of the Matrimonial Property Act**. As for Parcel No. 5672 the 1<sup>st</sup> defendant who stated that he paid Kshs. 200,000/- for it may sue for refund of the purchase price as opposed to the property. She relied on the case of **P N N v Z W N [2017] eKLR** to support her submissions.

7. The defendants submitted that by reiterating what they had stated. They added that Parcel No. xxxx which was not registered in the name of the 1<sup>st</sup> defendant neither was possession taken does not constitute matrimonial property. The pay slips produced by the plaintiff may show that she took a loan but the same has not been shown that any such loan was expended in paying for the plot. Neither has she proved her contribution in purchase or development of any of the properties. Even if the court were to find that the Suit Lands are matrimonial properties the 2<sup>nd</sup> defendant is a bona fide purchaser for value without notice and his title to the property he holds is indefeasible. For the court to interfere with the title of the 2<sup>nd</sup> defendant there has to be establishment of fraud or collusion with the seller. They relied on **Katende v Haridas and Company Ltd [2008] EA173** to support their submissions.

### ANALYSIS AND DETERMINATION

8. The issues that fall for determination by the court are :

- a) *Whether Land Parcel Nos. ATHIRU/RUJJINE/xxxx and xxxx are matrimonial properties*
- b) *What contribution if any did the plaintiff make towards the purchase and or development of the suit properties herein;*
- c) *Whether the property should be registered exclusively to the plaintiff; and*
- d) *Whether transfer of land parcel No. ATHIRU/RUJJINE/ xxxx to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant was null and void ab initio*

9. Whereas parties have mentioned several properties in their arguments, from the pleadings that initiated these proceedings, the suit properties in question are No. ATHIRU/RUJJINE/xxxx and xxxx. I will therefore, determine whether these two properties are matrimonial property.

### Matrimonial property

10. **Section 6 (1) of the Matrimonial Property 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.”**

**(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.**

**(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.**

**(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.**

*Section 14 of the Matrimonial Property Act* raises a rebuttable presumption of trust in property acquired during marriage but registered in the name of one spouse. In particular, it provides;

### 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 interest in the matrimonial property are equal."**

Marriage

11. From the evidence adduced, the plaintiff and the 1<sup>st</sup> defendant got married on 22/11/2006. See the Certificate of Marriage produced. This was not disputed by the 1<sup>st</sup> defendant. The parties are not divorced or legally separated but it was stated that the 1<sup>st</sup> defendant left their matrimonial home in 2016 to live with his second wife. The plaintiff and the 1<sup>st</sup> defendant are still husband and wife. The first question is whether these properties were acquired during marriage?

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12. The plaintiff stated that she used part of a loan she secured towards the purchase of Parcel No. 5672. She produced a statement to show that she took out a loan. The 1<sup>st</sup> defendant stated that that land was sold to him by one Jediel Mwithale whom he paid Kshs. 200,000/- deposit. However, the land was never transferred to him instead it was transferred to the seller's mother's name. According to him, the transaction was never completed; he neither took possession of the land nor got a refund of his deposit. Although the plaintiff stated that this land was registered in the name of 1<sup>st</sup> defendant, no evidence was adduced to prove the allegation. The status of this land is obscure and in the absence of clear evidence that the property therein vested in one or both spouses, it becomes difficult to settle on whether or not it is matrimonial property or not. She did not deny the status of the property as narrated by the 1<sup>st</sup> defendant. I also do note that none of the parties claimed to be in use or occupation of this property. Consequently, the court will not tackle the issue as to whether this parcel of land is matrimonial property.

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13. Land Parcel No. xxxx is registered in the name of the 1<sup>st</sup> respondent and was acquired during the subsistence of marriage between the plaintiff and the 1<sup>st</sup> Defendant. See agreement dated 30<sup>th</sup> March 2010. *Prima facie*, it is presumed that the 1<sup>st</sup> respondent holds it in trust for the plaintiff unless otherwise rebutted. The onus lies on the person who seeks to rebut the presumption.

14. The plaintiff stated that she took out a loan and used part of it towards the purchase the land. She claimed that the 1<sup>st</sup> defendant only contributed Kshs. 55,000/- towards its purchase. The 1<sup>st</sup> defendant stated that he single-handedly financed the purchase of the property from his salary and miraa business. What does evidence show?

15. The plaintiff's evidence was that she took a loan and used part of it towards the purchase of this land. I will couple this with other evidence. The purchase agreement (marked as *JNK 3*) show that, the 1<sup>st</sup> defendant bought parcel No. 9182 measuring 0.15 Acre from Henry Kobia M'Imea on 30/03/2010 for Kshs. 140,000/-. The land was excised from Parcel No. xxx ATHIRU/RUUJINE ADJUDICATION SECTION. The plaintiff was a witness to the agreement. Consequently, I find and hold that land parcel No. ATHIRU/RUUJINE/ xxxx is matrimonial property and was held by the 1<sup>st</sup> defendant in trust for the plaintiff.

16. The second issue is what contribution, if any, the plaintiff made in the matrimonial property and whether the same should be registered exclusively to her. **Section 7** states:

**"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."**

17. Accordingly, subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition. In my considered view, declaration of ownership rights in matrimonial property may be applied for from and granted by this court as may be appropriate, even during the subsistence of the marriage. See Section 17 of the Matrimonial Property Act provides for: *Action for declaration of rights to property* as follows: -

**(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 in 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.**

18. The only thing the court may not do during the subsistence of marriage is division of the property.

19. Be that as it may, contribution determines the extent of ownership of matrimonial property. Contribution has been defined under **Section 2** as follows:

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

**includes—**

- (c) domestic work and management of the matrimonial home;**
- (d) child care;**
- (e) companionship;**
- (f) management of family business or property; and farm work;”**

20. The concept of contribution was considered in the case of **PWK vs JKG [2015] eKLR** where the Court of Appeal stated;

**“We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five-judge bench of this Court in ECHARIA –VS- ECHARIA (Supra)**

*Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788.*

...

**We are of the respectful view that the principles restated by ECHARIA–VS- ECHARIA are good law and contribution as the basis for distribution of matrimonial property remains valid. ”**

21. It bears repeating that Land Parcel No. xxxx is registered in the name of the 1<sup>st</sup> defendant. The plaintiff stated that she took out a loan and used part of it to purchase the land. She also stated that she sold Land Parcel No. xxxx which was given to her by her father and used the proceeds to develop the property where she lives up to date. They moved to the suit land on 18/03/2011 from the 1<sup>st</sup> defendant’s father’s homestead because the latter’s brother and sister had threatened to kill her (**see OB reports PK-2A and PK-2A**). She averred that she used the proceeds of the sale of Parcel No.xxxx to develop the Suit Land.

22. The 1<sup>st</sup> defendant contended that he single-handedly bought the Suit Land on his own. He also stated that they did not agree to sell parcel number ATHIRU/RUUJINE xxxx as the plaintiff sold it without his knowledge.

23. Having in mind the provisions of **Section 14 of the Matrimonial Property Act**, the plaintiff’s evidence is believable. First, the evidence adduced show that she was a witness to the purchase agreement of the land by the 1<sup>st</sup> defendant. In addition, the 1<sup>st</sup> defendant stated that the plaintiff sold Land Parcel No. xxxx without his knowledge or consent. The 1<sup>st</sup> defendant produced the sale agreement (**JNK 5**) entered into on 26/11/2010 which show that he was a witness to the agreement. Therefore, he was aware of the sale.

24. One other important thing: the plaintiff has been on that property since 2011 and still lives there to date. On balance of probabilities, the plaintiff made some contribution towards the purchase as well as development of this land.

25. In determining the extent of contribution, I cite the Court of Appeal in **CWM v JPM [2017] eKLR** where it held as follows:

**“Some of these cases were cited in this appeal and we need not repeat them save to state that the inclusion of equal rights between parties in a marriage in the Constitution and under statute law was aimed at eliminating discrimination against women. Parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of the respondent at the time of such coverture. In our view, that contribution, be it domestic work and management of the matrimonial home, child care; or companionship falls within the definition of contribution under the Act.”**

26. Accordingly, given the evidence adduced, the plaintiff’s contribution is substantial and I peg it at 50%. I have already declared this property to be matrimonial property of the plaintiff and the 1<sup>st</sup> defendant.

27. The third issue is whether transfer of land parcel No. ATHIRU/RUUJINE/ xxxx to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant was null and void *ab initio*. **Section 12 (1) of the Matrimonial Property Act** states: -

**“(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and**

**without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.”**

28. The spousal rights over matrimonial property are proprietary rights. They are also overriding interest in land and is so recognized in our land laws. Therefore, any transaction done in violation of section 12 of the Matrimonial Property Act will be unlawful, and therefore, null and void. The 1<sup>st</sup> defendant entered into an agreement with the 2<sup>nd</sup> defendant on 13/09/2016 for the sale of the matrimonial property herein. This property being matrimonial property spousal consent is necessary. In the agreement, one Norah Kawira witnessed the agreement and it is stated that she is the vendor's wife. She is not the plaintiff in spite of the 2<sup>nd</sup> defendant stating that the 1<sup>st</sup> defendant's wife was aware of the sale. Notice may be constructive. No consent from the plaintiff to the sale that was produced in court. Accordingly, such is a prohibited transaction under section 12 of the Matrimonial Property Act. Some posit that this court cannot declare the sale herein to be null and void. Others hold the view that Matrimonial Property Act vests concurrent jurisdiction in this court over matrimonial property rights; declaration of proprietary rights and preservation thereof.

29. With the foregoing declarations, the plaintiff has proprietary rights in the matrimonial property that require protection in law. She lives in the matrimonial property and is under threat of eviction by the 2<sup>nd</sup> defendant. In the upshot, I issue the following declarations and protection orders:

- a) A declaration that Land Parcel No. ATHIRU/RUUJINE/ xxxx is matrimonial property. If the property is in the name of the 2<sup>nd</sup> defendant, an inhibition shall be registered in the land forthwith. I also order that the plaintiff shall not be evicted from the matrimonial property herein.
- b) The plaintiff's contribution to land parcel No. ATHIRU/RUUJINE/ xxxx is 50%.
- c) Costs to the plaintiff.

**Dated, signed and delivered at Meru this 29<sup>th</sup> day of September 2020**

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**F. GIKONYO**

JUDGE

**Representation**

Kimaita for Atheru for respondents

Mwiti for plaintiff - absent