



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CIVIL CASE NO 24 OF 2019(O.S)**

**NNM.....PLAINTIFF**

**VERSUS**

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

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff **NNM** filed this Originating Summons against **JM** and the **National Land Commission**. She sought an interim order to restrain the 2<sup>nd</sup> defendant from releasing compensation funds for parcel **No. Ngong/Ngong/[.....]** to the 1<sup>st</sup> defendant pending the hearing and determination of the Originating Summons.
2. Regarding the 1<sup>st</sup> Respondent, the Plaintiff sought four Principle Orders. First, a declaration that she is entitled to half share of the property acquired through joint funds and effort of both the Plaintiff and the 1<sup>st</sup> defendant during marriage and that the proceeds for compensation from the 2<sup>nd</sup> respondent for **LR Ngong/Ngong/[.....]** be apportioned to enable her acquire a home similar to the one demolished for the construction of Standard Gauge Railway (SGR) and for the maintenance of the child.
3. The second relief was for an order restraining the 1<sup>st</sup> respondent from taking away, selling or in any way interfering with the plaintiff's use of the family car, tourist motor vehicle registration **KBQ [...]** **Y a Mazda**.
4. The plaintiff's case is that she contributed towards the home and other properties; that the defendant is polygamous with two other wives, one in **Kisii** and the other in the **USA** and that she has been staying in the matrimonial home **Ngong/Ngong/[.....]**.
5. The plaintiff averred that after the 1<sup>st</sup> defendant surrendered the title document for the land; moved to the USA and instructed that the money be deposited into his account. She stated that her effort to have the matter resolved amicably was not successful because the 1<sup>st</sup> defendant refused. She also stated that since the 1<sup>st</sup> defendant relocated to the USA, he has refused to provide for the family.
6. According to the applicant, she fears that the compensation money will be paid to the 1<sup>st</sup> defendant even though she contributed towards the acquisition of the property.
7. The 1<sup>st</sup> defendant filed a replying affidavit to the Originating Summons, notarized in Jersey City, New Jersey USA and filed in court on 4<sup>th</sup> February 2020. He deposed that the plaintiff had filed a case before an ELC case at the Principal Magistrate's court at Ngong over the same issue which is still pending.
8. Regarding his relationship with the plaintiff, the 1<sup>st</sup> defendant denied that the plaintiff is his wife and also denied that he ever lived with her as husband and wife. He stated that the plaintiff was merely a friend and a tenant in his house.
9. The 1<sup>st</sup> defendant stated that he and the plaintiff hail from the same community but no marriage took place between them and, therefore, the plaintiff's claim that she is his wife is false. He further denied that he has sired a child with the plaintiff and as such there is no justification for the plaintiff's claim over a share of his property.
10. On the ELC case in Ngong (**ELC No. 27 of 2019**), the 1<sup>st</sup> defendant stated that he has denied the plaintiff's claim in that case and fully defended that case.

11. Regarding the plaintiff's claim that she contributed towards the acquisition of the property, the 1<sup>st</sup> defendant averred that he solely purchased the property in January 2013 and the title deed was issued on 15<sup>th</sup> January 2013. According to him, he borrowed Kshs. 1,680,000/= from Kenya Commercial Bank to finance the purchase of the property and that a charge registered was against the property on 15<sup>th</sup> January 2013. He stated that he thereafter repaid the loan without the plaintiff's contribution.

12. It is the 1<sup>st</sup> defendant's case that the plaintiff is involved in a fraudulent scheme to benefit from his property by pretending to be his wife. According to him, the property does not constitute matrimonial property and therefore the plaintiff is not entitled to a share thereof.

### **Evidence**

13. The applicant testified that she knew the 1<sup>st</sup> defendant in 2009 and met him in the course of 2010 but that they got married officially in 2016 when he invited her to his home and thereafter they visited her parents in 2018. It was her testimony that she lived with the 1<sup>st</sup> defendant on **Ngong/Ngong/[.....]** which was registered in 1<sup>st</sup> defendant's name but the building was not complete.

14. She testified that they planted trees; put up rental rooms within the compound; that the 1<sup>st</sup> defendant told her that the house was on mortgage and that she contributed towards settling the loan. According to the plaintiff, she gave the 1<sup>st</sup> defendant money through M-pesa and that they lived together until 30<sup>th</sup> September 2018 when the 1<sup>st</sup> defendant moved out of the country.

15. The plaintiff told the court that apart from giving the 1<sup>st</sup> defendant money, she did everything since he was away and he even gave her the title deed for the property to keep until she surrendered it to the 2<sup>nd</sup> defendant. According to the plaintiff, she gave the 1<sup>st</sup> defendant up to Kshs. 840,000/= which he used to service the loan; that the 1<sup>st</sup> defendant went to her home in 2017 to attend a relative's funeral, met her parents and gave her father Kshs. 100,000/=. She said that he also visited her father in 2017 before the further died and even attended his burial. She testified that they never had problems until when the issue of compensation came up.

16. It is the plaintiff's testimony, that she had filed the suit because they acquired the property jointly and she is therefore entitled to half share. In cross-examination, she told the court that when she met the 1<sup>st</sup> defendant in 2009, she was single but he was married; that their marriage was customary; that she then lived in a rental house but moved in with the 1<sup>st</sup> defendant in 2016. She told the court that she had a child born on 28<sup>th</sup> January 2011 but the 1<sup>st</sup> defendant is not the biological father to the child but she said she was asking for the child's maintenance.

17. She told the court that by the time she met the 1<sup>st</sup> defendant; he had already taken a loan and purchased the property. She admitted that she had no evidence that he used the money she gave him to pay for the loan. Shown the bank statements attached on her notice of motion dated 12<sup>th</sup> February 2020, the plaintiff again admitted that there was no evidence that she gave the 1<sup>st</sup> defendant money on 17<sup>th</sup> January 2017 or 1<sup>st</sup> April 2017. She denied that she was a tenant to the 1<sup>st</sup> defendant, maintaining that she contributed towards acquisition of the property and should therefore have a share.

**18. PW2 JM**, a brother to the plaintiff, told the court that he knew the 1<sup>st</sup> defendant in 2016, a close friend he had met in social places. The plaintiff later introduced the 1<sup>st</sup> defendant to him as her husband. The plaintiff later moved in to stay with the 1<sup>st</sup> defendant in Ongata Rongai and that he even visited them in the house. He therefore told the court that the plaintiff was the 1<sup>st</sup> respondent's wife.

**19. PW3 HPM**, a brother in law to the plaintiff, testified that he knew the 1<sup>st</sup> defendant in 2017 when they met at a hospital where they had gone to see the father in-law who was sick. According to this witness, he knew the 1<sup>st</sup> defendant as husband to the plaintiff. He therefore testified that the 1<sup>st</sup> defendant and the plaintiff are husband and wife and that the 1<sup>st</sup> defendant even attended the funeral of the plaintiff's father as son-in-law.

20. The 1<sup>st</sup> defendant testified and told the court that he is a citizen of both Kenya and the USA and is a resident of New Jersey, USA where he works as a health professional. He fully relied on his replying affidavit filed on 4<sup>th</sup> February 2020 as his testimony and response to the plaintiff's claim.

21. In cross-examination, he denied the plaintiff's claim and maintained that she was not his wife and did not contribute towards acquisition of the property. He stated that the plaintiff was a casual friend and that he attended her father's funeral as a friend. He maintained that the plaintiff had no genuine claim over his property.

22. He also denied that the plaintiff contributed towards repayment of the loan, maintaining that the plaintiff was his tenant in the premises since he was away in the USA.

### **Determination**

23. I have considered the Originating summons; the response; evidence and submissions made on behalf of the parties. I have also considered the authorities relied on.

24. The Plaintiff's case is that she is wife to the defendant through Kisii customary law. Indeed, the plaintiff spent a significant part of her time to show that she married the defendant through customary law. This court is not dealing with a marriage dispute. The alleged relationship being a customary claim of marriage, the proper court to decide that issue is the Magistrate Court in a case properly pleaded for that purpose.

25. As it is, there is no claim before this court to determine whether the plaintiff and 1<sup>st</sup> defendant are wife and husband or not. What is before this court is claim for determination whether **Ngong/Ngong/[.....]** is matrimonial property under the Matrimonial Property Act, 2013. That being the case, this court will not deal with the issue of marriage between the parties herein. That is a matter they should pursue before the lower court if they wish.

26. Turning to the main issue in this case, the plaintiff avers that the property is matrimonial property and that she contributed towards its development. The plaintiff's case is that she knew the defendant in 2009 but moved in with him 2016. The property had been acquired in January 2013 before then and had been developed though according to her, it was not complete. She therefore stated that she contributed towards its development. The defendant on the other hand denies that the plaintiff contributes towards acquisition or development of the property.

27. Article 45(3) of the Constitution entitles parties to a marriage to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. This includes the right of either spouse to acquire and own property. The Matrimonial property Act emphasizes on the equality of marriage partners to share matrimonial property.

28. Section 6(1) of the Act defines matrimonial property in the following terms:

**(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.**

29. Further, section 7 which relates to ownership of matrimonial property provides that:

**“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.**

30. The section is clear that matrimonial property is to be shared according to each spouse's level of contribution towards its acquisition and or development.

31. I have considered the evidence and arguments from both parties. What is clear is that the property in issue is registered in the 1<sup>st</sup> defendant's sole name. It was acquired by the 1<sup>st</sup> defendant through a loan and a charge was duly registered against the property. The 1<sup>st</sup> defendant was servicing that loan even before the time the plaintiff says she moved in with him.

32. In that regard, there is no evidence that the property was acquired with the contribution from the plaintiff. The property was acquired by the sole effort of the 1<sup>st</sup> respondent. That leaves the question whether the plaintiff contributed towards the development of the property.

33. The plaintiff argues that when she moved in with the 1<sup>st</sup> defendant, the property was not fully developed. She stated that she contributed towards development of rental houses and also assisted in repaying the loan. She told the court that she sent money to the 1<sup>st</sup> defendant though M pesa. According to her, she gave the 1<sup>st</sup> defendant over Kshs. 800,000/= part of which money the 1<sup>st</sup> defendant used to repay the loan for the property.

34. The 1<sup>st</sup> defendant denied that the plaintiff contributed towards either development of the property or repayment of the loan. According to him, the plaintiff was a tenant in the premises and for that reason, she could not contribute towards development of his property or repayment of the loan.

35. I have considered the arguments on both sides. As already adverted to, the 1<sup>st</sup> respondent acquired the property before the plaintiff allegedly moved in with him. Her claim that they jointly developed rental houses on the property was not substantiated. The plaintiff did not categorically state what kind of rental houses they put up, how much they cost and what her contribution was towards this adventure. The law as it stands is that a party has to prove through evidence that he/she contributed either directly or indirectly towards development of the property.

36. As it emerges from the evidence, the plaintiff stated plainly that she moved in with the 1<sup>st</sup> defendant in 2016. She did not say when they started developing the rental houses and her actual contribution. There is therefore no evidence of actual contribution towards the development of the property. On indirect contribution, if the plaintiff's case is that she moved in with the 1<sup>st</sup> defendant in 2016, there is no evidence on what indirect contribution she may have made to entitle her to a share of the property.

37. The law places the burden on the person who alleges the existence of certain facts that the court should take into account if it is to find in favour of that person. sections 107,108 and 109 of the Evidence Act place the burden on the plaintiff to prove her case against the 1<sup>st</sup> defendant. On the evidence on record, I do not think she discharged this burden.

38. As is clear from section 7 of the Matrimonial Property Act, ownership of matrimonial property vests in the spouses according to the

contribution of either spouse towards its acquisition, and should be divided as such between the spouses if they divorce or their marriage is otherwise dissolved.

39. In ***PNN v ZWN***, [2017] eKLR (CA No. 128 of 2014) the Court of Appeal held that both direct and indirect contribution by parties towards acquisition of properties that makes them matrimonial property and a spouse would get a share of some property even though it had been registered in the sole name of only one party.

40. The plaintiff was required to prove through credible evidence that she directly contributed towards the development of the property and to what extent, or that she did so indirectly and how. That she was not able to do on a balance of probability. Her contention that the 1<sup>st</sup> defendant left the title documents to her, if true, could not, on its own, be sufficient evidence for this court to conclude that she contributed towards development of the property.

41. It is clear to this court that the plaintiff made a faint attempt to get from the defendant what she was not entitled to. She failed to prove any of her claims that either directly contributed towards purchase or development of the property or that she did so indirectly. There was no claim against the 2<sup>nd</sup> defendant.

42. The conclusion I come to is that the suit has not been proved as required by law. It is declined and dismissed with costs to the 1<sup>st</sup> defendant.

**Dated, Signed and Delivered at Kajado this 18<sup>th</sup> September 2020.**

**E. C. MWITA**

**JUDGE**