



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 46 OF 2013

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

IN THE MATTER OF MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

HN.....APPLICANT

VERSUS

JNM.....RESPONDENT

JUDGMENT

1. On 31st July 2013, the applicant herein filed an Originating summons dated 29th July, 2013 and amended on 18th July 2017 seeking that the court issues declarations as follows:

(a) That the property known as Gatamaiyu/Kagwe/[xxxx] with all the buildings and developments thereon are owned jointly by the Applicant and the Respondent.

(b) That the property known as Gatamaiyu/Kagwe/[xxxx] with all the buildings and improvements therein, and acquired during marriage, in the names of the Respondent is matrimonial property held in trust for the Applicant and owned jointly and or equally by the Applicant and Respondent herein.

(c) That the Applicant has a beneficial interest in the matrimonial property being equal to that of the Respondent and which should be settled for the benefit of the Applicant in such manner and proportions as the court may deem fit.

(d) That the Respondent, his agents and or servants be restrained from alienating, encumbering or in any other way disposing of the said property.

(e) That the Respondent be condemned to pay the costs of this application and the incidental costs.

2. The summons was supported by an affidavit sworn by the Applicant on 18th July 2017 in which she stated that she and the Respondent got married under kikuyu customary law sometime in 1991 and later on 20th November 1999 formalized the same into a monogamous marriage at [Particulars withheld] Catholic Church in Kiambu. A certificate of marriage s/number [xxxx] was produced in court as proof of the existence of the said marriage. Subsequently, the couple settled and continued cohabiting as husband and wife at their jointly established matrimonial home within [Particulars withheld] village Kiambu County in L.R. No. Gatamaiyu/Kagwe/xxxx].

3. Their marriage was blessed with four issues namely: FW1, FW2, EM and SW all of whom have since attained the age of majority. The marriage however turned sour and was marred with allegations of cruelty by the respondent against the applicant and their children.

4. The marriage irretrievably broke down in February 2013 after which the Respondent evicted the Applicant from their matrimonial home (L.R.No. Gatamaiyu/Kagwe/ [xxxx]). She stated that the property was a joint gift from her father in-law given to her and the respondent and was registered in the Respondent's name to hold in trust for her and their children. The marriage was dissolved on 8th June, 2016 by an order issued by the Chief Magistrate's Court at Kiambu in Divorce Cause No. 6 of 2015, and the decree nisi made absolute on 22nd February, 2017

5. The Respondent failed to enter appearance in this matter despite being served as evidenced by the affidavit of service on record. On 26th July 2018 the court granted an order for the hearing of the matter to proceed *ex parte*.

6. The Applicant asserted that the property known as Gatamaiyu/Kagwe/[xxxx] which is the subject of this suit was given to them by her father in-law. A copy of the green card produced in court indicates that the property is registered in the Respondent's name having been so

registered on 1st September, 2006. The Applicant contends that she and the Respondent built a three bedroomed house on the property which they used as their matrimonial home during the subsistence of their marriage. She urged the court to order for division of the property equally on account that it was developed by their joint effort.

7. During the hearing, the Applicant entirely adopted the particulars and grounds contained in her originating summons and supporting affidavit urging the court to either allow her go back and occupy the house which is not occupied currently and continue farming or share the same equally. She claimed that she made great and direct monetary contribution towards the construction of their matrimonial house out of funds raised jointly through farming activities such as growing vegetables, maize and tomatoes. She further claimed making indirect contribution by supervising the construction works of their house till completion.

8. She presented two witnesses in support of her case namely; John Wango who testified as PW2 and Boniface Mathu who testified as PW3. Mr. Wango (PW2) testified that he is a mason who was contracted by the Applicant and the Respondent herein to construct for them a bungalow house on the property known as Gatamaiyu/Kagwe/[xxxx]. He stated that he built the house halfway and left for another job with better pay before he could complete it. He however stated that during the period when he built the house, he would issue the Applicant with a list of the building items which the Applicant would purchase and issue him with.

9. Mr. Mathu PW3 on the other hand testified that he is a carpenter and that it was the Applicant who contracted him to fit flash doors on the house built on the suit property. That the Applicant even accompanied him to buy the doors, which she paid for and was issued with receipts. The two witnesses corroborated the testimony of the Applicant that she was the supervisor of the construction works of the said house.

10. I have carefully analyzed the pleadings filed hereto and the oral testimonies of the witnesses presented in support of the Applicant's case. The issues that render for determination are; whether the property known as Gatamaiyu/Kagwe/[xxxx] was acquired during the subsistence of the marriage; whether the property constitutes matrimonial property and; whether there was contribution by either party direct or indirect towards the acquisition of the said property and development of the same.

11. Matrimonial property is defined under **section 6(1)** of the **Matrimonial Property Act, 2013** to mean:

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 marriage.

12. **Section 14** of the **Act** further states that where matrimonial property is acquired during marriage in the name of one spouse, there is a rebuttable presumption that the property is held in trust for the other spouse; and if in the joint names of the spouses, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.

13. A copy of the Title Deed presented before the court in respect of the property known as Gatamaiyu/Kagwe/[xxxx] shows that the property is registered in the name of J N M, the Respondent herein. It further indicates that the registration was effected on 1st September, 2006 during the subsistence of the marriage of the parties herein.

14. The Applicant insisted that the suit property was a gift from her father in-law and that it was registered in the name of the Respondent to hold in trust for their joint benefit and that of their children. Further, she asserted that they jointly improved the suit property and constructed their matrimonial home thereon in which they lived during the subsistence of their marriage. It is therefore important to interrogate whether the house erected on the suit property qualifies as a matrimonial home.

15. A matrimonial home is defined under **section 2** of the **Matrimonial Property Act** to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property. From this definition, it is evident that the suit property herein qualifies as a matrimonial home because it was occupied by both the parties herein and their children and utilized as their matrimonial home during coverture. This fact has not been controverted by the respondent or any other person interested on the same property.

16. According to the applicant, the property was gifted to her and the husband by her father in-law who is also a father to the respondent. There is no evidence to show whether the land was ancestral land to or inherited by the respondent from his father. To that extent Section 11 of the matrimonial property Act 2013 regarding application of customary law on ancestral land to safe guard future generations' interest does not arise. Had the respondent filed response, this aspect of ownership would have been fully articulated. In the absence of any evidence to the contrary, I will take the version advanced by the applicant that the land was given to the two jointly as a gift by her father in-law but registered in the name of the respondent for their benefit hence the reason for undertaking joint development on the same property.

17. It is my holding that the property was gifted to the applicant and the respondent her former husband by the father in-law and father respectively but registered in the respondent's name to hold in trust for their joint benefit. There is a rebuttable presumption under section 14 of the matrimonial property Act that the property was acquired during the subsistence of the marriage and registered in the name of one spouse for their joint benefit. Besides, the applicant did contribute towards the improvement of the property by constructing a house jointly in the said property hence entitled to a share to the extent of her contribution. **See NNN VS SNM[2017] eKLR and Karanja vs Karanja [1976] KLR307.**

18. Regarding children's beneficial interest in the said property as adverted by the applicant, I wish to state that, in determining division of matrimonial property, children have no locus unless proved that the property is ancestral land to which they are beneficially entitled as a future generation. This court cannot therefore bring children on board as urged by the applicant. **(see PNN vs ZWN(2017)eKLR.**

19. Having held that the property is held by the applicant in trust for the benefit of the applicant, the question that follows then is, how should this court proceed to distribute the suit property bearing in mind the contribution of each of the parties. Contribution is defined under **section 2** of the **Matrimonial Property Act** to include both monetary and non-monetary contribution. According to the definition, non-monetary contribution includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.

20. In her testimony, the Applicant argued that she contributed directly towards the construction of their matrimonial home a claim which was supported by the two witnesses who testified in support of her case. The court did not however have the benefit of hearing the Respondent's view or argument in that respect since the Respondent never entered appearance nor did he file any reply to the Applicant's Originating summons. The evidence of the applicant is unchallenged. Although the applicant did not produce any receipts to prove contribution, it is common knowledge that she had not anticipated divorce so as to keep such exhibits.

21. I am alive to the fact that, It is not possible to keep evidence of sales of or for every farm produce sold in an open market. It is also not possible to keep cash sale receipts for construction works that took place several years ago. Proof of contribution is not necessarily accurate submission of statistical analysis of money spent with mathematical precision in acquiring or developing property. **See Francis Njoroge vs Virginia Wanjiku Njoroge Nairobi civil Appeal no 179 of 2009 where the court stated that**

“...a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the court of Singapore in LOCK YENG FUN VS CHUA HOCK CHYE (2007) SGCA 33;

“It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be - e precise mathematical exercise”.

22. Proof of contribution can be based on prima facie evidence such as 3rd party witnesses who may confirm participation by way of contract award towards the development or improvement of the property in question.

23. It is incumbent upon the court to determine the manner in which to distribute the property known as Gatamaiyu/Kagwe/[xxxx]. She stated that the property was a joint gift from her father in-law given to her and the respondent and was registered in the Respondent's name to hold in trust for her and their children. The marriage was dissolved on 8in the present circumstances. In **Civil Suit No. 11 of 2001 E.N.K vs. J.N.K [2015] eKLR**, Musyoka J while dealing on a similar issue observed thus:

“When parties get into a marriage arrangement, they usually intend the arrangement to be for life. Divorce is not in their minds. This is the position regardless of the system of law under which the parties contract marriage...The parties to a marriage live their lives according to that concept, the permanence of their marriage. They beget children and acquire property believing that they would be together for life. This then creates the presumption that whatever property is acquired by the parties during their marriage must have been intended to be for the benefit of the family...

...The Christian notion of marriage, the type of marriage the parties before me got into, is that upon celebration thereof the man and the woman become one unit, one flesh. Whatever the man does, he does for the woman; and vice versa. This would mean that whatever property he acquires during the marriage, he acquires for himself and for the woman, for the two are one. Therein too should lie the answer to the question, what should happen to property acquired by parties to a Christian marriage upon divorce.”

24. The Christian notion of marriage as outlined above envisages equality in ownership of property. This notion of equality is enshrined in the Constitution of Kenya whose **Article 45(3)** provides thus:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

It is clear from this constitutional provision that the applicant cannot lose or forfeit her proprietary rights simply because she has divorced.

25. Once the presumption under **section 14(a)** arises, the Respondent is bound to provide evidence to rebut the presumption. It is then for the court to determine whether the evidence so provided is sufficient as to displace the presumption. The Respondent herein has not done so since he did not file any pleadings in rebuttal to the Applicant's allegations.

26. Whereas the court did not have the benefit of the Respondent's testimony since he did not file any pleadings or enter an appearance in these proceedings, the suit property is registered in his name, it is safe to imply that it was jointly acquired during the subsistence of their marriage and joint development equally undertaken.

27. Taking into account the evidence tendered by the Applicant herein, and in the absence of any evidence to the contrary, I am convinced that the property known as Gatamaiyu/Kagwe/[xxxx] was acquired during coverture and held by the Respondent in trust for the Applicant on a 50-50 percent.

28. In the premise therefore, and taking into account that the issues of the marriage have attained the age of majority and none of them is staying with either parent as they are all working, there will be minimal disruption of the family affairs in so far as it relates to children's accommodation and welfare.

29. Accordingly, I am satisfied that the applicant has proved her case on a balance of probability and therefore enter judgment in her favour with orders as follows :

(a) That the property known as Gatamaiyu/Kagwe/[xxxx] was acquired by the Applicant and Respondent during coverture and although registered solely in the Respondent's name, it is held in trust for the Applicant.

(b) That the property shall be shared equally between the Applicant and the Respondent in a 50:50 ratio.

(c) That both parties shall engage a mutually agreed joint valuer within 45 days from the date of delivery of this judgment for purposes of ascertaining the actual value of the property.

(d) That either party shall have the option of buying the beneficial interest of the other and in default the property shall be sold and proceeds realized therefrom shared out equally.

(e) That the costs shall be borne by the Respondent.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2019.

J.N. ONYIEGO

JUDGE