



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 78 OF 2014 (O.S.)

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1982) OF ENGLAND

GWM.....APPLICANT

AND

SMK.....RESPONDENT

JUDGMENT

1. The Applicant **GWM** moved this court by way of an Originating Summons dated 14th August 2014 and filed in court on 16th December 2014 against her ex-husband **SMK** seeking to have property known as **Juja**/[Particulars Withheld] in [Particulars Withheld] declared Matrimonial property, acquired jointly during the subsistence of the marriage between the two and to have her share transferred to her name. She also sought for costs of the suit.
2. The application is based on grounds that the parties were married under Kikuyu Customary Law in 1969 and while still married they acquired the property above mentioned by joint effort. That they later separated and their marriage dissolved by court on 12th November, 2013.
3. In the affidavit in support, the Applicant states that the two sired 5 children, and with joint effort they acquired property **Juja**/[Particulars Withheld] **1.174 Hectares**.
4. Further the Applicant states that the Respondent was a civil servant and she a business person and both equally contributed to the purchase of the land, and that without her knowledge or consent the Respondent had the title issued in his name.
5. The Respondent entered appearance on the 18th of February 2015 and filed a replying affidavit dated 20th March 2015.
6. In the replying affidavit the Respondent denies that he was ever married to the Applicant. He refers to the applicant as his niece. Further he states that he was unaware of the divorce proceedings mentioned herein, prior to this suit.
6. The Respondent's case is that to date he remains married to one CNM whom he married in 1962.
7. Further he states that he solely acquired the property subject matter and title issued to him lawfully and he therefore does not hold the same in trust for the applicant.
8. All along the Respondent has been represented by counsel. On the 5th of July 2018 the matter came up for hearing, and though Counsel for the Applicant was ready to proceed Counsel for the Respondent sort for time to comply with **Order 11** of the **Civil Procedure Rules**. As a result, this court gave directions requiring the parties to file and exchange witness summons and documents within 14 days and for the matter to proceed by way of viva voce evidence at a date to be fixed at the registry.
9. The record shows that the Applicant's counsel invited the Respondent's counsel for fixing of a hearing date vide a letter dated 2nd October 2018. On 11th of October 2018 the day scheduled for fixing of a hearing date, representative of counsel for the Respondent failed to show up and a hearing date was fixed *ex-parte* for the 29th of November, 2018.

10. A hearing notice was served upon the respondent's counsel and received on 31st day of October 2018 at 1.43 p.m. a stamp acknowledging receipt of notice was affixed. On record is an Affidavit of service duly filed.

11. On the hearing date neither the Respondent nor his counsel were present and the matter proceeded their absence notwithstanding.

12. The Applicant gave her evidence. She called no witness. She informed the court that she was married to the Applicant for 20 years and they bought a shamba in Juja for a total of Kshs.220,000/=. That they paid for the same in instalments. The shamba was purchased from one Gitau Kingori. It was her case that for 8 years she paid the instalments with proceeds from her business as she had leased a shamba and would supply tomatoes to Kenyatta University. That on retirement her husband paid the balance of Kshs.100,000/= and had title issued in his name.

Later the husband married another wife and chased the applicant out of the matrimonial home. She now seeks for her share of the property and costs of the suit.

13. Although this matter was filed in the year 2014 under the **Married Women Property Act of 1882 of England** that law is not applicable in this country any longer. The applicable laws for now are **Article 45(3)** of the **Constitution 2010** which provides that:

“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.”

And the Matrimonial Property Act 2013 which was operationalized on the 16th of January, 2017. **Section 7** the said Act states that:

“subject to Section 6(3), ownership of the 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.”

14. All the averments and allegations in the Respondent's replying affidavit amount to naught in the absence of his evidence as proof of the averments and allegations therein. The court had directed parties to give *viva voce* evidence at the hearing. The Respondent failed to support his allegations, negate and/or challenge the evidence of the applicant. Secondly a divorce decree has been in place since 2013 as proof that the parties were once husband and wife. Even if one were to believe that the respondent was unaware of the divorce cause until he was served with the pleadings herein in 2015, he has since done nothing to reverse the situation.

15. Based on the evidence on record the court find that the parties herein were married under Kikuyu Customary Law in 1969 and during the subsistence of the marriage they jointly acquired property known as **L.R. No.** [Particulars Withheld]1.174 hectares.

16. Indeed, the evidence in court is that through her business the Applicant contributed to the purchase of the property. Notable also is that the parties were married for several years and apart from doing business the two had five children. The court therefore, takes note of the definition of contribution under Section 2 of the Matrimonial Property Act.

17. Consequently, the court finds that property land reference **Juja/[Particulars Withheld] 1.174 Hectares** is matrimonial property having been acquired by the parties herein during the subsistence of the marriage and by joint effort of the two.

18. Further the court finds and declares that the Respondent **SMK** holds half share of title **Juja/ [Particulars Withheld]** in trust for the Applicant **GWM**.

19. The parties are jointly, or singularly directed to cause the property to be surveyed and subdivided into two within the next 30 days. The share with the house to remain with the respondent since he has been in occupation of the same for a long time.

20. The Respondent is further directed to transfer the Applicant's ½ share of the said property to her name within the next 60 days.

21. Costs of the suit to the Applicant.

SIGNED DATED and DELIVERED in open court this 28TH day of MARCH 2019.

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ALI-ARONI

JUDGE