



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL SUIT NO. 27 OF 2016(O.S)

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMENS PROPERTY ACT

AND

IN THE MATTER OF CHAPTER 4, ARTICLE 45(3) OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 3(1) OF THE JUDICATURE ACT CAP 8 OF THE LAWS OF KENYA

BETWEEN

PHYLLIS MUMBUA MUTUA.....PETITIONER/APPLICANT

VERSUS

TIMOTHY MUSAU MUTUA.....DEFENDANT/RESPONDENT

JUDGEMENT

1. The matter before me is an application by way of Originating Summons dated 16th September, 2016 where the Petitioner is seeking the following orders;

1) That a declaration do issue that property situate at Mlolongo with all the buildings and developments thereon was acquired by the joint funds and efforts of the Applicant and the Respondent during their subsistence of their marriage, and all registered in the name of or in the possession of the Respondent, are owned jointly by the Applicant and the Respondent

2) That a declaration do issue that the property known as BLOCK 78/740 Situate at Buruburu Phase 4, Nairobi with all the buildings and developments thereon was acquired by the joint funds and efforts of the Applicant and the Respondent during the subsistence of their marriage and registered in the name of or in the possession of the respondent and the same is jointly owned by the applicant and the respondent.

3) That a declaration do issue that all those shares held at Konza Farm in the Respondents' name and that all the properties situate at Mwala, Machakos County and at Nzaui in Makueni County in the Respondents' name with all the buildings and developments thereon was acquired by the joint funds and efforts of the Applicant and the Respondent during the subsistence of their marriage and registered in the name of or in the possession of the respondent and the same are jointly owned by the applicant and the respondent.

4) That the respondent be compelled by this Honorable court to produce all original title documents and share certificates in respect of all the properties and shares hereinabove stated.

5) A declaration that all the proceeds received by the respondent from Celtel Masts erected at the Mlolongo plot should be shared equally and that the Respondent be ordered to table proper and accurate accounts of all funds received therefrom.

6) That a declaration do issue that the respondent holds the said properties and shares in trust for the applicant.

7) That the said properties be settled for the benefit of the applicant in such a manner and proportions as this Honorable court deems

fit and just.

8) That the respondent himself, his agents and or servants be restrained from alienating, encumbering or in any manner whatsoever disposing or dealing with the said properties in whatsoever manner to the detriment of the Applicant.

9) That the respondent be condemned to pay the costs of this summons and other incidentals thereto.

2. The Grounds of the application as outlined on the face of the application are that the applicant and respondent were customarily married in 1972 and due to irreconcilable differences, they parted ways in 1992 and that the abovenamed properties were acquired during the subsistence of their marriage. It was further the applicant's case that the respondent did not provide for her as she is elderly, sick and in poverty despite having substantially contributed to the acquisition of the said properties. Further that the respondent intends to dispose off the properties unless restrained.

3. The application is supported by the affidavit of Phyllis Mumbua Mutua that states that the parties herein got married through Kamba customary law in 1972. They were blessed with five issues. During the subsistence of their marriage, in 1981 she was allotted property known as BLOCK 78/740 situate at Buruburu Phase 4 and that she had given instructions for the same to be registered in their joint names. Further that through joint contributions, they bought a plot at Mlolongo, a farm at Mwala, Machakos County, a farm at Nzai, Makueni County and shares at Konza Farm and that the same were registered in the Respondent's names. She averred that the plot at Mlolongo hosts a Celtel mast and which had been sold to them by her brother in law for Kshs 80,000/- and that she had paid Kshs 35,000/- vide bankers cheque annexed to the application; That the Celtel Mast is generating income to her detriment. The petitioner and the respondent are currently separated and live apart with effect from 1992 on grounds of alleged persistent acts of cruelty from the respondent. It is in the course of this arrangement that the petitioner has deponed that she has rented a house where she pays Kshs 25,000/- and Kshs 6,000/- for utilities. According to her affidavit, it's apparent that she is struggling financially without factoring her contribution to the acquisition of the said property. This affidavit also formed the basis of her viva voce evidence at the trial.

4. The respondent's case was primarily based on the replying affidavit filed in court on 25.10.2018. The respondent averred that indeed their marriage was solemnized under Kamba Customary Law in 1972. It is also not disputed that their union was blessed with five children who were left in his sole care in 1992 when the parties separated. With regard to the House at Buruburu, he averred that whereas the petitioner was the allottee, the purchase was financed by attachment of his salary and that the same is the matrimonial house that is not available for sharing because it is where the children reside. The respondent averred that the parties had not formally divorced and thus the application ought to be disallowed.

5. Further that the petitioner's payment of Kshs. 35,000/- out of the Kshs 80,000/- purchase price for the Mlolongo plot is not disputed save that the respondent completed the payment and pursued the title deed that was issued in 1999 after the petitioner had left the matrimonial home. The respondent denied the contribution of the petitioner towards the development of the Mlolongo plot and maintained that the proceeds of the Celtel Mast were used for catering for the needs of the children.

6. With regard to the Shares in Konza and Malili property, the respondent avers that he solely purchased the said property and sold them to pay for upkeep of the children. The land in Mwala was acquired before the marriage and that the land in Nzai was solely purchased by him as the petitioner had not contributed in any way and assets that he acquired during the marriage were held in trust for the children of the marriage and for their benefit. The respondent maintained that the petitioner is not entitled to the prayers sought.

7. In reappraising the facts of this case towards the final determination, I will take into account the written submissions by both learned counsels together with the evidential material by the disputants to the originating summons.

8. The issues to be determined by this Honorable Court are as follows;

1. Whether this court has the jurisdiction to make a determination on matrimonial property and or any adverse orders for the properties to be held in trust for the parties beneficial interest during the existence of a marriage.
2. Whether the petitioner contributed towards the acquisition and the development of the suit properties.
3. Whether the suit properties constitute matrimonial property
4. Whether the petitioner is entitled to the proceeds from the Mlolongo property.

9. On the issue of whether this court has the jurisdiction to make a determination on matrimonial property and or any adverse orders for the properties to be held in trust for the Petitioner's beneficial interest during the existence of a marriage, none of the parties made any submission because I deemed it necessary to address the issue of jurisdiction because the Married Women's Property Act under which the application was bought and remedies sought was repealed. I follow the finding in **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1** where Nyarangi J stated that where a court lacks jurisdiction, it has no power to make one more step and should down its tools.

10. **Section 19 of the Matrimonial Property Act, 2013**, is now the law governing disputes relating to matrimonial property, and states that a party may apply to the High Court by summons on any question between husband and wife as to the title to or possession of property. However in the case of **N.C.K vs G.V.K [2015] eKLR**, Muchelule J observed thus:

“In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the

beneficial entitlement to their property without using the divorce court's adjustive power. The Family Law Act 1966 at section 33(4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of Arif vs Anwar [2015] EWHC 124 (FAM) the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party's beneficial interest in the matrimonial property without severing the same...

It would appear to me that a spouse can, under section 17 of the Matrimonial Property Act 2013, either where there is a divorce matter pending, or where, for whatever reason, he can no longer live together with the other spouse but is not seeking to divorce, come to court to resolve any questions about beneficial interest in the matrimonial property without severing the same."

11. The evidence on record shows that the marriage between the parties herein is still alive and subsisting. The fact that the parties have separated cannot be equated with divorce or dissolution of the marriage. It is very clear from the provisions of the Matrimonial Property Act that matrimonial property can only be distributed where the parties to a marriage have officially divorced. I have not seen proof of divorce in form of a decree declaring the marriage between the parties dissolved. As to the document to prove divorce, the law recognizes decree Nisi or decree absolute.

12. In light of the above finding, I am persuaded and I find that this court is properly equipped with jurisdiction to resolve any questions about the parties' beneficial entitlement to suit property without severing the property. However, the issues of sharing of the property can only be determined upon dissolution of a marriage. It therefore means that prayers 5, 6, 7 and 8 cannot be granted by the court unless the marriage is dissolved.

13. Having mapped out the direction the court ought to take, I shall address the issue of whether the petitioner contributed towards the acquisition and the development of the suit properties.

14. As regards the issue of contribution towards the acquisition of the suit properties, the petitioner submitted that plot 78/740 situate at Buruburu is available for sharing and a look at the statement of account from Housing Finance indicates the names of both parties. Therefore the respondent cannot say that he serviced the loan single-handedly. With regard to the Mlolongo Plot, counsel submitted that there is evidence that the petitioner contributed Kshs 35,000/- out of the Kshs 80,000/- towards the purchase. The petitioner resorted to section 14 of the Matrimonial Property Act No 49 of 2013 and relied on the case of **Njoroge v Ngari (1985) KLR 480** in support of her claim. During the hearing of this matter the petitioner stated that she worked at the Lion of Kenya Insurance Company Limited and therefore it can be imputed that she contributed financially. The petitioner also relied on section 2 of the Matrimonial Property Act which defines the term contribution to mean both monetary and non-monetary to support her argument. She further relied on **CWN VS BN Civil Appeal 236 of 2009** to further support the argument that contribution must be seen in the lens of monetary and non-monetary contribution and therefore she urged this court to find as such.

15. In opposition to the above arguments, the Respondent resorted to section 6(3) of the Matrimonial Property Act which states 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."

16. Further reliance was placed **in the case of PNN vs ZWN (2017) eKLR**, in support of the argument that matrimonial property ought to be distributed according the contribution of each party towards its acquisition. The Respondent therefore pointed out that the interest should cease to run from the date that the applicant deserted the matrimonial home and cited the case of **Tabitha Ngina Kaunda v Francisco Kaunda Wambua (Machakos ELC 196 of 2014)**. He further provided the court with details of payments made to the acquisition of the suit properties. He also argued that the Petitioner made no contribution towards the acquisition of Shares at Konza, Malili and Mwala and hence she should not get a share.

17. Before addressing contribution, I shall address whether the suit properties fall in the category of matrimonial property. Section 6 of the Matrimonial Property Act, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Basically for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property. In the instant case, the marriage between parties herein commenced in 1972-1992. There is evidence that BLOCK 78/740 Situate at Buruburu Phase 4 was acquired toward the establishment of the matrimonial home. There is evidence of a Mlolongo Plot that was paid for by the petitioner in 1991. The title deed is not on record, however the contribution by the petitioner is not disputed. That is about all the evidence on record. As a result, there is no doubt whatsoever that the only properties that form part of matrimonial property as far as the parties herein are concerned are BLOCK 78/740 Situate at Buruburu Phase 4 and the Mlolongo Plot.

18. As regards ownership of matrimonial property, Section 7 states as follows: -

"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."

The above provision of law provides for entitlement to the property upon the divorce. It is then that the court would look at what each party brought to the table for the purposes of the distribution of such properties if any dispute concerning distribution of matrimonial property arise.

19. Section 9 of the Act also provides as follows: -

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in property equal to the contribution made.”

20. Section 14 of the Act provides that:

“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.”

The import of the section is a rebuttable presumption that the property acquired in the name of one spouse is being held in trust for the other spouse.

21. In the case of **NJOROGE v NGARI [1985] KLR, 480**, the court held that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property. The Respondent herein stated that the title to the Mlolongo property is in his names but however no proof of the existence of such title was produced before court. I therefore find that the Petitioner’s contribution can only be said to be in the realm of monetary contribution until such a time when the required evidence is tabled. Therefore I cannot make a finding on the entitlement to the Mlolongo Plot at this juncture. Therefore prayer 1 of the application should be stayed and left open for review once the title deed is produced. To this end therefore prayer 4 ought to be granted as it touches some of the properties in which the applicant lays claim namely Mlolongo Plot and Block 78/740 situate at Buruburu Phase 4 Nairobi.

22. The petitioner’s contribution on BLOCK 78/740 Situate at Buruburu Phase 4 was fronted by the fact that the Bank accounts presented contain records of the parties with no evidence of any deposits being made by the petitioner at any given time. It follows therefore that I would allude to the view that the petitioner’s share would be assessed in terms of non-financial contribution bearing in mind that a trusteeship relationship recognizes the beneficial interest. I do note that none of the parties has taken a step to apply for judicial separation or ultimate divorce. As a result, as observed earlier, the right to distribute matrimonial property under the Act has not crystallized in favour of the petitioner. Be that as it may, this court takes the view that the petitioner has established her interest in the property and therefore prayer 2 is allowed.

23. In the foregoing and in view of the circumstances of the case at hand, I cannot find better words rather than stating that the family is one of nature’s masterpieces, and what God has joined, no man can put asunder. That is the spirit of the constitution of Kenya under Article 45 which provides that:

“45. (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

24. In the premises, the court makes the following orders:

a. Prayer 1 is stayed and is left open for review once the title deed is produced.

b. Prayer 2 is allowed and a declaration do issue that the property known as BLOCK 78/740 Situate at Buruburu Phase 4, Nairobi with all the buildings and developments thereon was acquired by the joint funds and efforts of the Applicant and the Respondent during the subsistence of their marriage and registered in the name of or in the possession of the respondent and the same is jointly owned by the applicant and the respondent.

c. Prayer 3 is partially allowed to the extent that a declaration do issue that all the properties namely Block 78/740 situate at Buruburu Phase 4 Nairobi and Mlolongo plot with all buildings and developments thereon were acquired by the joint funds and efforts of the applicant and respondent during the subsistence of their marriage are owned jointly by the applicant and the respondent.

d. Prayer 4 is granted to the extent that it touches the Mlolongo Plot, and the respondent is directed by this Honourable court to produce all original title documents and share certificates in respect of the Mlolongo Plot.

e. Prayers 5, 6, 7 and 8 are stayed pending the determination of the divorce and issuance of the decree.

f. Each party shall bear their own costs.

It is so ordered.

Dated, Delivered and Signed at **Machakos 30th day of May, 2019.**

D. K KEMEI

JUDGE