



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 37 OF 2014

MJY..... PLAINTIFF

VERSUS

PKB..... RESPONDENT

JUDGMENT

The plaintiff moved this court by way of Originating Summons dated 26th November 2014 in which she seeks the answers to the following questions:-

1. **WHETHER** the following properties/assets or any one or more of them should be classified as matrimonial property;

- a) Motor vehicle registration number KAY XXXL, Mitsubishi Fusso
- b) A Ford Tractor, registration number KYA XXX
- c) Land parcel numbers CHERANGANY/KIPKUNDUL/XXX – 3 Acres
- d) Land parcel number CHERANGANY/KIPKUNDUL/XXX and XXX – 3.5 Acres.
- e) Land parcel in Kuserwa location, Jemunata sub location measuring 11 acres.
- f) Land parcel, Eldoret Municipality Block XX (Kimumu)/XXX

2. **WHETHER** or not the plaintiff/applicant is entitled to or sole or vacant possession or use of the said properties/assets as separate property she has acquired during the marriage.

3. **WHETHER** the defendant/respondent should or should not be restrained by way of a permanent injunction from alienating, taking possession, selling, transferring, using or in any other manner interfering with the plaintiff's/applicant's lorry and possession of the said separate properties/assets.

4. **WHETHER** costs of these proceedings should be ordered in favour of the Defendant/Respondent.

The plaintiff claims that she was married to the defendant under the Marakwet Customary Law in 2005 in a ceremony called 'koito' and were blessed with a son named Cornelius Kipchumba. The plaintiff claims that the defendant always performed his parental duties up and until financial issues strained their union.

The plaintiff claims that she jointly purchased motor vehicle Mitsubishi Lorry Registration No. KAY XXXL with the defendant from Resma Commercial Agencies in Nakuru. She attached as part of her evidence a sale agreement between the parties, marked as PEXH3. She further claims that she contributed towards the same as evidenced by bank withdrawal from Family Bank, a withdrawal she claims was to facilitate the purchase of the said property. This was produced and marked as PEXH4. She allegedly made deposits to Resma Commercial Agencies and produced the same in evidence as PEXH6.

The plaintiff had her witness, Francis Kimeli Kiptanui, a senior chief at Koisungur location. He stated that he had known the plaintiff and the defendant as wife and husband since 2005. He states that the plaintiff approached him to try and resolve a dispute that had arisen between her and the defendant on the management of their property. The chief claims that he convened a meeting between the parties and their families and it was agreed that the Mitsubishi Lorry be sold and the proceeds shared equally.

The plaintiff claims that the defendant never honoured the agreement as he excluded her from the running of the business. She felt aggrieved and moved to court for redress.

The defendant, vide a replying affidavit dated 10th December 2014 denied having been married to the plaintiff. He claims that he has been married to one, Alice Paul since 1993 and have six children together. He further denies that he had jointly ventured into transport business with the plaintiff. He claims that he purchased the lorry in question solely by himself. He claims that he purchased the lorry to assist him in his farming business.

The defendant claims that he would occasionally send money to the plaintiff who would then bank the money for him. He denies that there was an agreement between him and the plaintiff to have the property jointly registered under both of their names. He claims that the plaintiff has been harassing him, including using the police, since their courtship lapsed.

The defendant claims that the pieces of land in contention do not belong to either him or the plaintiff but third parties. He claims that the property known as CHERANGANY/KIPKUNDUL/XXX is registered under his father's name. He produced a copy of an official search at the lands registrar, marked as PKB 2. He further claims that the property known as Cherangany/Kipkundul/XXX is registered in the name of Kipserem Kuto. He evidenced this with a copy of official search marked as PKB3. As for CHERANGANY/KIPKUNDUL/XXX property, the defendant claims that it is registered under Kipserem Kuto. He evidenced this with a copy of the official search marked as PKB4. The defendant claims that MOIBEN/KIMNAI/XXX property is registered under his father's name, Kibiwott Cheptarus.

This court, as a point of departure, must ask itself whether there was a valid marriage between the plaintiff and the defendant. The answer to this question would be the wellspring from which all other legal and factual tenets of this suit would flow. In *Hortensiah Wanjiku Yawe v Public Trustee CA Civil Appeal No.13 of 1976 (UR)* the Court of Appeal for East Africa held that a long period of cohabitation as man and wife may give rise to a presumption of marriage in favour of the party asserting it. Mustafa JA., held as follows:

“I find nothing in the Restatement of African Law to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising out of long cohabitation. In my view, all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case, should not apply just because she was married according to Kikuyu customary law. It is a concept that is beneficial to the institution of marriage to the status of the parties involved and to the issue of their union, and in my view, is applicable to all marriages, however celebrated. The evidence concerning cohabitation was adduced at the hearing and formed part of the issue concerning the fact of marriage ...”

Further, in *Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR*, Bosire JA., summarized the position thus:

The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

The Court of Appeal in *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR*, held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held that:

“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.

The question then for consideration before this court is whether the plaintiff proved on the balance of probabilities that there was a marriage between her and the plaintiff. I acknowledge that the plaintiff has a son with the defendant and the evidence adduced has proved on a balance of probability that the two indeed cohabited for a long time. The Marakwet Customary Law allows for polygamy and as such the defendant's earlier marriage with one, Alice Paul could not invalidate subsequent marriage entered by the defendant.

This court must then ascertain whether the property in contention can be considered as matrimonial property or not. **Section 6(1) of the Matrimonial Property Act** defines matrimonial property as- the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

As for the three parcels of land in contention, this court isn't satisfied that it forms part of the matrimonial property. The plaintiff hasn't proved on a balance of probability that she is a joint owner of the said parcels of land. **Under Section 26(1) of the Land Registration Act** the title of a registered proprietor is *prima facie* evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

I am neither convinced that the plaintiff contributed in improving the said parcels which are said to be owned by other parties and not the Respondent.

This court is however convinced that the plaintiff, on a balance of probability proved her contribution towards the purchase of motor vehicle Mitsubishi Lorry Reg. No. KAY 839L as evidenced largely by her deposits to Resma Commercial Agencies in Nakuru. This court further

holds the view that the 30 heads of cattle and 30 sheep acquired during the subsistence of the marriage should form part of the matrimonial property.

Having ascertained what forms part of the matrimonial property and what doesn't, this court will now move to the next fundamental question on whether it has jurisdiction to hear and determine this suit.

It is not in dispute that this matter is one that touches on distribution of matrimonial property. *Section 7 of the Matrimonial Property Act* 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.'

Further, the court of appeal in ***Peter Ndungu Njenga vs. Sophia Watiri Ndungu*** held as follows with regard to jurisdiction, that,

'In the exercise of those powers we find and hold that the learned Judge had no jurisdiction to alienate suit lands between spouses during their life-time or unbroken coverture and he ought to have dismissed the suit.'

It is my determination that there subsists a valid marriage between the plaintiff and the defendant. The two have neither divorced under the Marakwet Customary Law nor any written law. This court therefore lacked, and still lacks jurisdiction, to hear and determine on the sharing of the matrimonial property for as long as the above mentioned parties are in a subsisting marriage.

That said, I dismiss this suit. Each party to bear own costs. This court so orders.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 25th day of June, 2019.

In the absence of:-

Ms Isiaho for Plaintiff/Respondent

Mr. Tororey for defendant/Applicant

Ms Sarah - Court clerk