



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MATRIMONIAL CAUSE NUMBER 4 OF 2016**

**JWC.....PLAINTIFF**

**VERSUS**

**LKM.....DEFENDANT**

**JUDGMENT**

1. JWC (hereinafter the plaintiff) and LKM (hereinafter the defendant) got married under Kikuyu Customary Law around 1982. That marriage has since been dissolved through a decree of court in divorce proceedings between the parties.

2. By way of an originating summons dated 18<sup>th</sup> January 2016, the plaintiff sought from the court, division between her and the defendant of the following properties.

1. Nakuru/Rare/Nguringa/XXX
2. Plot Number XX Ngwataniro Centre
3. Matrimonial home in Njoro
4. Plot No. XX Thika
5. Nakuru/Rare/Gicobo/XX

3. The undisputed facts are that the defendant and the plaintiff were husband and wife. They have four (4) children.

4. In her testimony the plaintiff told the court that property Nakuru/Rare/Nguringa/XXX was bought by the defendant through a loan secured from Agricultural Finance Corporation (AFC) in 1982.

5. In 1983 the defendant went abroad for studies. He took the plaintiff to his home near the land.

6. It was the plaintiff's evidence that the property was not cleared and she worked on the farm and begun cultivation. By then she had two (2) children whom she took care of.

7. The defendant returned in 1985. It was agreed that the plaintiff was to help in the loan repayment. The plaintiff asserts that she used to sell beans and would give the proceeds to the defendant to pay for the loan. She said she was not keeping records as they were in good terms.

8. It is the plaintiff's case that the defendant sold this land in 2013. The plaintiff has since lodged a caution over this land. She prayed for a share of the land or proceeds.

9. The plaintiff testified that it is the defendant who bought plot number XX, Ngwataniro Centre. The plaintiff fenced it. She added that she used to cultivate this land planting vegetables for sale. The plot has since been sold by the defendant. The plaintiff seeks a share of the proceeds. Sale price was Kshs. 100,000/=.

10. Property Rare/Gichobo/XXX is the matrimonial home. This is the rural home of the defendant where the defendant took the plaintiff when he went out for studies. The plaintiff avers that she has lived there for thirty six (36) years. The plaintiff lays claim on a share of this property and states she contributed by providing transport for stones to the building site. The defendant was then at work at Thika. The

plaintiff states that she also used proceeds from the farm to build the house.

11. She adds that she secured a loan of Kshs. 50,000/= which she contributed to the construction of the house. She also paid electricity installation. She also contributed money for the purchase of iron sheets at AFCO stores. She was responsible for the ceiling and plastering of the house. She kept no records as they were in good terms.

12. The plaintiff prays that the matrimonial home be left to her as this is where her children know as home. She prays that the defendant should live with his other family.

13. On property plot number XX Thika, the plaintiff states that this was acquired by the defendant through allotment. He sold it at Kshs. 300,000/=. At the time the plaintiff was at home tending to children and other chores.

14. The plaintiff testified that she contributed Kshs. 27,000/= towards the purchase of property Rare/Gichobo/XX. She also fenced the land. She used to cultivate the land and give the proceeds to the defendant. The defendant sold the property in 2014 at Kshs. 3 million.

15. On cross examination the plaintiff stated that the defendant has a medical condition that requires constant drugs. She agreed that she owns rental premises and that she got timber from the matrimonial home. She denied that the properties were sold to educate children.

16. On further cross-examination, she confirmed that the matrimonial home is not complete. The house has no toilet and is not painted. She is still on pension and she gets rental income. She added that other than seeing documents in relation to plot number XX, Thika, she did not know where it is.

17. The defendant testified. He stated that he solely bought property Nakuru/Rare Nguringa/XXX. He exhibited a letter of offer for a loan from AFC where he was working. By the time he left AFC he had not repaid the loan fully and half of his pension was used to offset the loan.

18. On plot number XX, Ngwataniro Centre, the defendant stated that he bought this land in 1988. He sold the same around 2002/03 and used the money to pay school fees for the children.

19. On the matrimonial home, he stated that he inherited this property from his father. The plaintiff cannot be left at that home. It is the defendant who built the house on the farm. His parents are buried there. The plaintiff has an alternative place where she can go near Egerton University. She is still on pension. The children are free to be visiting the home.

20. On property Nakuru/Rare/Gichobo/XX, the defendant said he bought this land from one Samwel for Kshs. 170,000/=. He got Kshs. 8,000/= from his father. The plaintiff has been using this land but was never sharing the proceeds.

21. The defendant stated that he sold the properties due to his medical condition. He suffers from diabetes and hypertension. He runs no business. He unsuccessfully tried auctioneering. At one time he went to Indonesia as a volunteer and he used the money he got to educate their daughter Margaret.

22. On cross examination the defendant said that they live at the matrimonial home. He had an obligation to put a roof over his family. He denied that it is the plaintiff who cleared property Nakuru/Rare/Nguriga/XXX. He acknowledged that the plaintiff used to cultivate plot XX Ngwataniro and the produce was used as food for the family.

23. The defendant added that his second wife lives in a rented premises. He denied that the plaintiff supervised construction at home. He added that he sold land Nakuru/Rare/Nguringa XXX to educate children.

24. Further cross-examined, he acknowledged a deposit of Kshs. 27,000/= in his KCB account but he stated that the depositor is not indicated. He noted that he has controverted the plaintiff averment on oath that she was the depositor.

25. The parties filed written submissions through their respective counsels.

26. I have carefully considered the pleadings, the evidence on record and learned submissions by counsel.

27. The emerging issues for determination are;

**1. Whether the plaintiff is entitled to a share of properties;**

**Nakuru/Rare/Nguringa/XXX**

**Plot Number XX Ngwataniro Centre**

**Matrimonial home in Njoro**

**Plot No. XX Thika**

**Nakuru/Rare/Gicobo/XX**

2. If (1) is in the affirmative, what is the extent/quantum of the share to which the plaintiff is entitled.

3. Whether the plaintiff should retain the matrimonial home being property Rare/Gichobo/XXX.

4. Who should bear the costs of this suit.

28. I will start with a restatement of the applicable law to bring clarity on the width and breadth that the court is to cover in answering the issues set out above.

29. To begin with, what is matrimonial property? **Section 6** of the **Matrimonial Property Act** defines matrimonial property thus;

**“S. 6 (1) Meaning of matrimonial property**

**(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.”**

30. Having established what matrimonial property is, the next question is how ownership of matrimonial property is acquired by a spouse. **Section 7** of the **Matrimonial Property Act** gives the ready answer. It provides;

**“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.”**

31. I find it necessary to lay emphasis on the alignment of **Section 7** of the **Matrimonial Property Act** with the Constitution. *Mativo J* in **FIDA vs ATTORNEY GENERAL AND ANOTHER [2018] eKLR** stated as follows;

**“Article 45(3) of the Constitution treats parties to a marriage as equal partners. That equality is reflected in the provisions of the act which recognize that the contribution of parties to a marriage whether monetary and non-monetary will be treated equally. The same equality is maintained by section 7 of the act which provides that upon dissolution of a marriage, parties are entitled to a share of the property equal to their contribution whether monetary or non-monetary. The Petitioner’s fear as I understood it is that it is difficult to prove non-monetary contribution. I do not think so. Section 2 of the act defines contribution in very clear terms. All that a party is required to do is to provide evidence on details of his or her non-monetary contribution in the marriage and leave it to the Court hearing the dispute to determine. I have no doubt that the Court will rise to the occasion and in the circumstances of the individual case, apply the evidence, the law and appropriate legal skills and arrive at a fair determination of the valuation of the non-monetary contribution in the circumstances of the case under consideration, and determine the respective rights of the parties in the case. That, our Courts are capable of doing.”**

32. It is worthy of note that in the FIDA case (*supra*), the petitioner had sought to have **Section 7** of the **Matrimonial Property Act** declared unconstitutional and the court in dismissing the petition made a finding that the section recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the Section entrenches the principle of equality in marriage.

33. Contribution is defined under **Section 2** of the **Matrimonial Property Act** as monetary and non-monetary contribution.

34. I now move to analyse the evidence available in respect of each of the properties seriatim to show that;

1. The property is matrimonial property.

2. The property was acquired through contribution by the plaintiff.

3. The contribution was monetary or non-monetary.

35. Which leads me to the issue of what the plaintiff will need to prove. The burden of proof in this matter lies with the plaintiff. It is her duty to prove that a particular property is matrimonial property, she contributed to its acquisition either monetary wise or through non-monetary contribution and finally, what share, if at all, of each of the property she is entitled to. That is a duty bestowed on her by law.

36. **Section 107** of the **Evidence Act** provides as follows;

**“S.107. Burden of proof**

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

37. This burden is known as the legal burden of proof. The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17 at paragraphs 13 and 14 describes the legal burden as follows;

“Paragraph 13. **The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish those to the appropriate standard, he will lose.**”

“Paragraph 14. **The legal burden of proof normally rests upon the party desiring the court to take action: thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.**”

38. So what is the evidence in support of the plaintiff's claim in regard to each of the listed properties?

39. A) Nakuru/Rare/Nguringa/XXX

As regards this property, the plaintiff testified that the defendant took a loan and bought it. Soon after the defendant went abroad for 1½ years for studies. The plaintiff adds that she cleared this land and started cultivation thereon.

40. The plaintiff adds that the defendant returned in 1985 and it was agreed that the plaintiff was to help in repaying the loan. She testified that she would give money to the defendant from her beans and maize produce to help clear the loan. She said she was not keeping records as they were in good terms.

41. To controvert this evidence, the defendant testified that he bought this property through a loan from AFC. He repaid it over a long period of time. At the time he left AFC, he had not cleared the loan and half of his pension went to clear the loan. The defendant produced the letter of offer for the loan and demand notice from AFC as evidence.

42. From the evidence, it is clear that this property was acquired during coverture. As to the plaintiff's contribution, other than her oral uncorroborated evidence that she used beans and maize produce to supplement payment of the loan in respect of this property, she offers no other independent evidence oral or documentary. She bore the burden of proof.

43. Notably, though the defendant bought this land before he left for studies abroad, he never settled the plaintiff on this land. He took her to his rural home where he established the matrimonial home.

44. On the material before court, the plaintiff has not proved contribution to the acquisition of property Nakuru/Rare/Nguringa/XXX. Since under **Section 6 (3)** of the **Matrimonial Property Act** ownership of matrimonial property vests in spouses according to the contribution of either spouse towards its acquisition, there being no evidence of contribution by the plaintiff, the subject property is not available for sharing out.

45. B) Plot No. XX Ngwataniro Centre

The plaintiff testified that this property was bought by the defendant. This was during the subsistence of the marriage. The plaintiff averred that she fenced the plot. She used to cultivate this land and grow vegetables for sale. She would apply the proceeds for home use.

46. The defendant testified that he bought the property. He later sold it to raise fees for their children.

47. The plaintiff, again, fails to corroborate her evidence that she contributed through fencing of the plot and cultivation and growing of vegetables whose produce was used at home. **Section 7** of the **Matrimonial Property Act** is categorical that property vests in the spouses according to the contribution of either spouse. When a spouse lays a claim that they contributed to acquisition there must be evidence that they did so whether monetary or in non-monetary form. It cannot be possibly enough to have a party testify that land was bought, I fenced it and cultivated it and therefore I am entitled without offering evidence.

48. I am alive to the special relationship between spouses when things are rosy in the marriage and therefore one must not expect meticulous keeping of records like in a business enterprise. However, a claimant must strive to bring evidence even by eye witness account to prove the facts relied on. Like in our instant case would it have been such a difficult feat to atleast avail the artisan who fenced (if at all) to testify or to avail the evidence of a neighbor who would show the plaintiff used to till this land? In the absence of such evidence the plaintiff fails to prove her contribution on a balance of probability.

49. C) Rare/Gichobo/XXX

The plaintiff's testimony is that this is where the couple established their matrimonial home. This is where the defendant left the plaintiff when he went abroad for studies. The plaintiff has lived on this property for 36 years. It is inherited property being part of the estate of the defendant's father.

50. The plaintiff avers that she contributed to its development by looking for transport (*sic*) to get stones to the building site. At that time the defendant was at work at Thika. She used to farm and would use the produce in the construction of the home. She adds that she took a loan of Kshs. 50,000/= which she put into the project. She also paid for electricity connection. She also gave some money to the defendant to purchase iron sheets at AFCO stores. She fixed the ceiling and plastering. She kept no records as they were in good terms. She prays to keep the matrimonial home.

51. The defendant on his part maintains he constructed the house. The plaintiff had bought 8 iron sheets for the project but she converted the same for use to build her chicken cages. He adds that his parents are buried on this property and the plaintiff has an alternative place where she can live around Egerton University. The plaintiff is still on pension.

52. I have evaluated the evidence in respect of the acquisition of the matrimonial home. The property is inherited by the defendant from his father. There is no dispute that it is the established matrimonial home. The defendant himself put the plaintiff on this property when he went abroad for studies. In his absence it is obvious that the management of the same was certainly in the plaintiff's sole hands. The plaintiff and the defendant have children. It is the plaintiff who tended to the children in the absence of the defendant. Indeed even when back in the country, the defendant worked in various stations away from home. The duty of home care was on the shoulders of the plaintiff. The plaintiff was also involved in farm work and indeed the defendant confirms that it is the plaintiff who uses the farm even now. During the existence of the marriage the plaintiff gave companionship to the defendant.

53. **Section 2 of the Matrimonial Property Act** defines non-monetary contribution to include;

**(a) domestic work and management of the matrimonial home;**

**(b) child care;**

**(c) companionship;**

**(d) management of family business or property; and**

**(e) farm work.**

54. The plaintiff has made an attempt to prove material contribution to the matrimonial home. Even assuming that she falls short of proving that she took a loan of Kshs. 50,000/= and took care of transport of stones to site, fixing the ceiling and plastering, buying of iron sheets and connection of electricity, it is clear from the facts that the plaintiff held a central managerial role in the development of this property.

55. ***Azangalala JA*** in the case of ***PNN vs ZWN [2017] eKLR*** had to say at **page 17**;

**“There is admission from P that he was away from home most of the time leaving Z on the farm to take care of the children and the matrimonial house. P’s contention, without tangible proof, was that he had employed workers on the farm, but this does not take away Z’s managerial role. The affidavit of Josephine Wambui sworn on 9<sup>th</sup> December, 2008 confirmed her industry and diligence when it came to running the farm. Z swore, and it was controverted, that she requested for leave from her (particulars withheld) job in order to manage the farm effectively between 1<sup>st</sup> January, 1966 and 28<sup>th</sup> February, 1967.”**

56. Those sentiments resonate very well with the facts and circumstances in the instant suit.

57. I am satisfied that in respect of the above property the plaintiff has proved contribution to the acquisition and development of this property and she is entitled to a share therefrom.

58. **D) Plot No. XX Thika**

On this property, the plaintiff testified that the defendant acquired the same at Thika. It was an allotment. The defendant then sold it.

59. From the evidence on record it is clear that the property was acquired independently by the defendant and I find no contribution from the plaintiff. She thus proves no entitlement to a share thereof.

60. **E) Rare/Gichobo/XX**

The plaintiff's testimony is that the plaintiff took a loan to purchase this land. The plaintiff contributed Kshs. 27,000/= deposited in the defendant's account. The plaintiff states she cultivated the land and at one time gave the produce to the defendant to take to the cereals board. The value of the proceeds was Kshs. 115,000/=. The plaintiff has since sold the land.

61. The defendant denies that the plaintiff contributed to the purchase of this land. The defendant bought the land at Kshs. 170,000/=. The plaintiff used to cultivate it but she was not showing the produce with the defendant. It is averred that at one time the land was to be auctioned over a loan but the plaintiff refused to assist in offsetting a loan.

62. The plaintiff has laid a claim of a contribution of Kshs. 27,000/= towards the purchase of this property. The defendant acknowledges a deposit of Kshs. 27,000/= in his account but indicates that the depositor is not known. The plaintiff maintains this money was deposited by

her and it was towards the purchase of this land. The defendant's response to this evidence is a feeble one. He is the holder of the account into which the money was held. He would be in a very advantaged position to rebutt the plaintiff's claim as he certainly would be aware of the source of the money, if the same was not from the plaintiff. On a balance of probabilities the plaintiff has proved that she directly contributed to the acquisition of this property.

63. Having made the above findings, what is the share of the plaintiff in the properties in which she has proved contribution monetary or otherwise.

64. The plaintiff has proved contribution to the development of the matrimonial home and to the acquisition of property known as Rare/Gichobo/XX.

65. **Kiage JA** in his judgment in **PNN vs ZWN (supra)** had this to say on division of matrimonial property;

**“The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in FRANCIS NJOROGÉ vs. VIRGINIA WANJIKU NJOROGÉ Nairobi Civil Appeal No. 179 of 2009;**

**“... A division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal in Singapore in LOCK YENG FUN v CHUA HOCK CHYE [2007] SG CA 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 a precise mathematical exercise’.”**

66. As alluded to above, **Section 7** of the **Matrimonial Property Act** provides that property vests in the spouses according to their contribution. It must be noted that such contribution may not necessarily be ascertainable in mathematical precision. As stated by **Kiage JA** above, the division of the property must call into play the courts good sense of judgment in regard to fairness, conscience and to ultimately decide the case on its own peculiar circumstances arriving at appropriate shares.

67. The contribution towards property known as Rare/Gichobo/XX is a direct contribution. The plaintiff offered evidence that she contributed Kshs. 27,000/= towards its purchase. The purchase price was Kshs. 150,000/=. The defendant differs with the plaintiff on the purchase price and indicates the purchase price was Kshs. 170,000/=.

68. Working with the figure of Kshs. 150,000/= given by the plaintiff her contribution would be in the region of 1/3.

69. The defendant has stated that he sold this property to meet his medical needs. He tried to set up a business but failed. He stated that he fetched Kshs. 3 million from this sale.

70. I have considered the circumstances of the case. The defendant is a sickly man and his contention that he used the property to meet his medical needs cannot be faulted. I factor in the fact that the plaintiff is still on pension being a former teacher and has rental income for premises she owns alone and on which the defendant lays no claim. Her evidence is that she contributed Kshs. 27,000/= towards purchase of this property which according to her cost Kshs. 150,000/=. In my view it is fair and just that 1/3 share of the proceeds from the sale of this property (Kshs. 1,000,000/=) be given to the plaintiff.

71. The matrimonial property is 3 acres. Erected thereon is the matrimonial home which as per the evidence on record is not complete. The plaintiff has shown immense contribution to the development and management of the house, child care, companionship and farm work. She seeks that this property be left to her.

72. The subdivision of this property has presented to the court a very delicate balancing act to assuage all parties in the dispute. On the one hand, it would be manifestly unfair and unjust to eject the defendant completely from this property given that this is his only inheritance from his parents and he buried them there and his siblings live on the adjacent subdivisions of their father's property. This property certainly has more than sentimental value to the defendant.

73. On the other hand, the plaintiff knows no other matrimonial home since the day the defendant settled her there when he went abroad for studies. Their children know only this home as their home. Uprooting the plaintiff and her children from this home would pose obvious serious challenges to them.

74. I have agonized over the subdivision of this property. Doing the best I can, in the circumstances, I am of the considered view that only a win win situation for both parties would meet the ends of justice in this matter.

75. To that end therefore, I make a finding that the subdivision of this property should be as follows;

1. The defendant to get 2 acres out of this land.
2. The plaintiff to retain the matrimonial home which will sit on 1 acre.

76. In doing so, I have factored in the fact that there is evidence which is not controverted that the plaintiff owns some rental properties of her own and the defendant is not laying any claim thereon.

77. With the result that the originating summons dated 18<sup>th</sup> January, 2016 is partially allowed and I make the following orders;

- 1. The defendant to pay the plaintiff Kshs. 1,000,000/= out of the proceeds from the sale of Nakuru/Rare/Gichobo/XX.**
- 2. The matrimonial home being Nakuru/Rare/Gicobo/XXX be shared out as follows;**
  - i) The defendant to have two (2) acres of the open land.**
  - ii) The plaintiff to retain the matrimonial home which shall sit on one (1) acre.**
  - iii) The subdivision to consider reasonable access by both parties to their share and the parties are to accommodate any slight reduction to their share that may go to providing access.**
- 3. Each party to bear its own costs.**

**Dated and Delivered at Nakuru this 24<sup>th</sup> day of July, 2019.**

**A. K. NDUNG'U**

**JUDGE**