



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MATRIMONIAL PROPERTY CAUSE NO. 41 OF 2017

GWG.....APPLICANT

-VERSUS-

FGW.....RESPONDENT

JUDGMENT

1. The applicant came to this court through an originating summons dated 25th June 2017 pursuant to the Matrimonial Property Act 2013 and section 3(1) of the Judicature Act seeking determination of the following issues;

- a. whether there was a marriage between the applicant and the respondent?**
- b. whether the marriage has been de facto, dissolved?**
- c. whether the applicant is entitled to a share of properties acquired by her and the respondent during the subsistence of marriage?**
- d. Whether the honourable court can order the Respondent to produce the particulars in court of these properties, as the applicant left the documents with the respondent, when they separated about 30years ago and she can no longer remember the particulars such as titles, share certificates and allocation numbers?**
- e. what action the honourable court will take if the respondent fails, neglects or refuses to file the information requested?**
- f. what, if any, will be the orders of the honourable court if the said properties have already been sold by the respondent?**
- g. what, if any, will be the proportion of share of the properties, if they exist, or of the proceeds from such sale of the same?**
- h. What orders, if any, the honourable court can make that will be just to the parties?**
- i. who to bear costs of the summons?**

2. The summons was supported by the applicant's affidavit sworn on 28th June 2017. It is the applicant's case that she got married to the respondent at Bahati, Nairobi according to Akorino church practices where no statutory certificate is issued. They subsequently settled and cohabited in various places inter alia; Kanunga, Githurai, Jericho Estate in Nairobi, Dagoretti Corner, Baba Ndogo, Nairobi, Pangani, Kanunga and finally Nairobi. They were blessed with eight (8) living issues although one is deceased.

3. It was further her case that through the assistance of one of her brothers, she started a small business for knitting and selling pull overs while the brother bought the respondent a lorry that he would use in the business of supplying construction materials. However, when the said motor vehicle broke down, the respondent started doing some menial jobs at the construction sites while the applicant sustained the family through her business. She stated that it was the respondent who used to keep proceeds from her business and that whatever they acquired belonged to the family.

4. She further averred that at some point, the then Kiambu County Council decided to allocate plots of land to the villagers of Ruthigiti out of which she was allocated one plot which she had registered in the name of the respondent.

5. It was her contention that out of the earnings realised from her business, they were able to acquire various properties among them; a plot of land in Githurai 44, Nairobi, Plot No. xxx in Githurai 45, a plot of land at Gwa Kungu Karumba at Nyahururu, plot of land at Mai Mahiu, Naivasha originally in her name but later changed by the respondent and 2 plots of Land at Marurui, Nairobi now called Thome. She asserted that the said properties were acquired during the subsistence of their marriage and she was therefore entitled to a share

6. The application was opposed vide the respondent's replying affidavit sworn on the 3rd August 2017. It was a summary of his case that; they got married under Kikuyu Customary Law in 1972 and the respondent deserted the home in 1984 together with their children who she continuously neglected. He denied physically or emotionally abusing and chasing the applicant away from their matrimonial home. He stated that he was the sole bread winner to the family using proceeds earned from working at the construction sites.

7. Further, he claimed that he solely educated all the children to their capability and were now in gainful employment. He claimed that he was the one that set up the knitting business for the applicant and not the applicant's brother as alleged. That the applicant's input in the knitting business was confined to selling the products. That the said business crumbled due to the applicant's mismanagement.

8. Regarding contribution towards acquisition of the property acquired during the subsistence of their marriage, the respondent stated that the applicant did not make any direct or indirect contribution as she was constantly on the move between their matrimonial home and her parental home. That he sold most of the properties to educate their children hence nothing remained for distribution. Further, that the Plot in Githurai 44 was sold when the marriage was in existence.

9. Concerning their matrimonial property on Plot xxxx Githurai, the respondent stated that the same was vandalized after the applicant deserted their matrimonial home. He denied knowledge of the existence of a plot known as Gwa Kungu Karumba. He however admitted that they bought a plot at Mai Mahiu through Nyakinyua women group and the same is still intact. Touching on the two plots in Marurui, it was his case that they were both sold to cater for the children's school fees expenses.

10. Regarding Ruthigiti property, it was his case that he had surrendered all the documents pertaining to the property to the applicant and that she can process ownership documents.

11. In her rejoinder, the applicant filed a further affidavit on 7th September 2017 in which she averred that the respondent had used the proceeds from the sale of plot xxxx in Githurai to buy a plot at Kanunga. She reiterated that she had bought the Nyakinyua Women's Group plot at Maai Mahiu (6 acres) in her name. Reacting to the respondent's assertion that the plot at Gwa Kungu does not exist, she insisted that the plot is existing.

12. The matter proceeded for oral hearing on 18th October 2018. After the close of their respective testimonies, parties were directed to file their submissions. The applicant filed her submissions on 1st November 2018. The respondent also filed his submissions on 16th November 2019.

Hearing

13. During the hearing, the applicant reiterated her averments contained in the affidavit in support of her summons as well as a further affidavit in response to the respondent's replying affidavit. She claimed that all the listed properties were bought during the subsistence of their marriage out of their joint efforts.

14. She however stated on cross examination that she did not know the exact location of Githurai Plots as she did not take part in the negotiation process although she contributed. She equally stated that she did not know where plots in Naivasha and Nyahururu were located and whether they are still there or not. The same case applies to Marurui(Thome) plots.

15. Regarding Ruthigiti plot, she acknowledged that it was still there and that she was the one cultivating it. She asserted that, she does not have any single document to prove ownership as they were kept by her husband whom she trusted so much.

16. It was her evidence that the respondent sold some unspecified plots and proceeds thereof used to pay school fees for the children. She claimed that she was still a wife to the respondent given that the respondent occasionally does visit their children with whom she is staying.

17. In the other hand, the respondent also adopted the contents of his replying affidavit and further affidavit plus a witness statement filed on 13th April 2019. He told the court that after siring 7 children, he bought his wife a sewing machine to make sweaters and general clothes. That when their business went down, he sold Githurai plot and spent the money while together. That the second plot in Githurai which constituted their matrimonial home was sold and proceeds used to build their son a house at Ikinu. He denied knowledge of the existence of any plot at Nyahururu. Touching on Naivasha plot at Mai Mahiu known as Nyakinyua plots, he confirmed that it is still intact and registered in the applicant's name although they were chased away by Maasais. As regards [particulars withheld] plot measuring 40 x 80ft, he alleged that, the same was sold and the proceeds realized therefrom used to pay school fees for the children.

19. Regarding Ruthigiti plot, the respondent stated he surrendered the ownership documents to the applicant's parents and that the plot belongs to her.

20. On cross examination, the respondent stated that the two plots in Githurai were allocated by Chiefs with one allotment letter and they later sold them verbally without any formal sale agreement. He further stated on cross examination that he bought a second plot at [particulars withheld] after they had divorced.

21. He asserted that he was the only one who shouldered the burden of educating their children up to university level including lifting one to U.S.A. for further studies after he was given custody of the children by the court following the applicant's desertion of their matrimonial

home.

Applicant's Submissions

22. The applicant filed her submissions on 1st November 2018 through the firm of E.W. Mugu and Co. Advocates. Mr. Mugu submitted that plots in Githurai 44, Githurai 45 and 2 plots in Marurui were bought or acquired during the subsistence of the marriage and any allegation by the respondent that they were sold is not true as there was no proof of such sale. Counsel submitted that the respondent did not dispute the fact that all these properties were acquired during coverture. He contended that neither the applicant nor the respondent produced evidence that she or he solely bought the property hence the presumption that they were acquired through their equal and joint efforts. Mr. Mugu urged the court to consider the circumstances of the case and apportion the two parcels of land at Ruthigiti and Mai Mahiu to the petitioner.

Respondent's Submissions

23. Mrs. Ngetho appearing for the respondent filed her submissions on 16th November 2018. It was counsel's submission that the respondent was the sole bread winner to the family during the subsistence of their marriage. She contended that, the applicant having given birth to 7 children in quick succession after their marriage had no time to work and earn a living to be able to contribute towards acquisition of matrimonial property.

24. Learned counsel submitted that the applicant was an irresponsible woman who indulged in drinking thus abandoning and neglecting children who later on became vagabonds leading to the respondent filing for maintenance and custody of the children under Kiambu CMCC No. 68/1991 which orders were granted for care and protection of the children.

25. Learned counsel submitted that the knitting business was the brain child of the respondent and that the applicant was only put there as the incharge although she later brought down the business. She further submitted that the proceeds out of the said properties were used in educating children.

26. It was counsel's further submission that the applicant can choose to take either Ruthigiti plot or Mai Mahiu plot. To support this position, she referred to the decision in **Civil Appeal No. 142/2016 CWM vs JRM Nairobi**. Counsel however blamed the applicant for bringing this suit a bit too late i.e. 35 years down the line since they separated thus making it difficult to remember some particulars of the land that changed hands long time ago.

Analysis and Determination

27. I have considered the pleadings herein, testimony by both parties and submissions by their respective counsel. There is no dispute that the respondent and the defendant contracted their marriage under Kikuyu Customary Law sometime 1972, separated 1982 and formally divorced on 16th February 1992.

28. It is also not in dispute that the listed properties were acquired during the subsistence of their marriage. However, what is in dispute is the element of contribution. The issues that arise for determination are:

- a. Whether the properties in issue were acquired through joint efforts.**
- b. Whether the properties are in existence and who is entitled to which share.**

29. The law governing division of matrimonial property is anchored under the Matrimonial Property Act 2013. Matrimonial property is defined under Section 2 of the said act as:

- a. Domestic work and management of the matrimonial home.**
- b. Child care.**
- c. Companionship.**
- d. Management of family business.**

30. Under the same act, Section 7 defines ownership of matrimonial property 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”.

31. In situations where property is acquired during the subsistence of a marriage like in this case, Section 14 of the Act provides that there is a rebuttable presumption where property is acquired in the name of one spouse that the property is held in trust for the other spouse and, in the names of the spouses jointly, that their beneficial interest in the matrimonial property are equal.

32. In the instant case, acquisition of the subject properties during the subsistence of their marriage is not in dispute. What is in dispute is

contribution; who contributed what? It is apparent from the pleadings and testimony of both parties that none of them adduced or tendered evidence to prove existence of some of those properties, how they were acquired, by who, how much was paid and if sold, to who and for how much.

33. Both parties admitted that the following plots were acquired during coverture:

a. Plot Githurai 44

b. Plot Githurai 45

c. Family plot ancestral home at Kanunga

d. Plot in Marurui

e. Plot at Ruthigiti Kiambu

f. Plot at Mai Mahiu - Naivasha

34. Save for Kanunga plot which is ancestral land, the rest of the properties were purchased. The applicant stated that she made contribution both directly and indirectly. She claimed that her direct contribution was through funds raised from her knitting business. She also stated that she took care of the family by raising seven children hence indirect contribution. The respondent claimed that he bought sewing machines and established knitting and tailoring business for the applicant and that she was in charge of the business. He also admitted that the properties in question were bought partly out of proceeds realised from the same business.

35. Although the knitting business later on collapsed just like any other business, the same did contribute towards the acquisition of most of their properties.

36. On his own admission in his submission, the respondent claimed that, the applicant spent most of her time looking after 7 children whom she sired in quick succession. Biologically, this was not her fault as getting children is also a joint effort. She therefore had every justification morally to take care of their children hence creating humble time and opportunity for the respondent to hustle around in doing business thus raising money to acquire some of their property. Indeed, this contribution cannot be underestimated or belittled by the respondent by saying that the applicant had no time to look for wealth as she was busy taking care of their children. Whose children?

37. It is my finding that looking after such a large family was sufficient indirect contribution in acquisition of property. This position has been upheld in several judicial precedents among them **Fida vs the Honourable Attorney General and ISLA Nairobi HC Constitutional Petition No. 1643/2006** where the court recognised contribution towards acquisition of matrimonial property by parties to a marriage whether monetary or non-monetary to be treated equally. Similar position was held in **Agnes Nanjala William vs Jacob Patrius Nicholas Vander CA No. 127/2011, Echaria vs Echaria Civil Appeal No. 75/2001 and PNN vs ZMN CA Civil Appeal No. 128/2014 (2017) eKLR.**

38. Guided by the above authorities and Sections 7 and 14 of the Matrimonial Property Act, I am inclined to hold that save for the ancestral land at Kanunga where one of the parties' sons is staying, the rest of the properties were acquired through equal and joint efforts with the applicant making both monetary and non-monetary contribution.

39. Concerning the ancestral land at Kanunga, this is property bequeathed to the respondent. Since there is no claim or proof that there were any developments done by the applicant, I will hold it as ancestral land acquired by the respondent before he married the applicant and therefore not subject to division pursuant to Section 9 of the Matrimonial Property Act. In a similar scenario, the court of appeal in the case of **M V M Civil Appeal No. 74/2002 (2008) IKAR, 247** held that –

“...property inherited and gifted to one spouse before the marriage, and where property exists in the same condition as it was inherited or gifted, no problem arise. The spouse to whom it was gifted should be allowed to retain it. Problems however arise where improvements are made using matrimonial resources and then the property ceases to be in its original form and increases in value”.

40. For the above reasons stated, that property will remain ancestral land for the benefit of the family while in the exclusive possession of the respondent for purposes of passing over the same to future family generation.

41. Having removed or cleared ancestral land, I now remain with the rest of the properties. Concerning the two properties at Githurai 44 and 45, the respondent claimed that the two were sold verbally as in those days there were no formalities like drawing sale agreements. That proceeds in respect of Githurai 45 plot were used to construct a house for their son at Kanunga. There is no proof that such plots were sold and for how much. The same position applies to the two plots at Marurui (Thome estate). Although the applicant admitted that one plot was sold to pay school fees for the children, the respondent has not accounted for any of the proceeds if indeed they were sold. The only presumption is that the respondent did sell or simply he is trying to hide behind the sale so as to keep the plots which have definitely increased in value over time.

42. As regards the Mai Mahiu plot and Ruthigiti plots, the two plots are in existence and the respondent is ready to surrender either to the applicant at the applicant's choice.

43. Whereas the applicant is ready and willing to surrender either plot, the court has already ruled that each party is entitled to equal share in all the plots at the ratio of 50% to 50%.

44. Since there was no valuation report filed, it cannot be that easy to share out specific plots without ascertaining their value and detailing the status of two plots in Githurai and two plots in Marurui. Although the applicant admitted that one plot was sold to raise school fees for the children and further, despite the respondent's claim that he sold one plot at Marurui to raise school fees, he did not state when he sold the same, to who and for how much. The respondent is duty bound to account for the four plots in default the applicant shall take 60% share in each plot in respect of both Mai Mahiu and Ruthigiti plots against the respondent's 40% share.

45. Turning to the plot referred to as Gwa Kungu Karumba in Nyahururu, there was no evidence tendered to prove that it ever existed. He who alleges must prove hence the duty imposed upon the applicant which she has failed to discharge to the required degree.

46. For the above reasons stated, it is my finding that the applicant has proved her case on a balance of probability and do enter judgment with orders as follows:

a. That the ancestral land located at Kanunga shall remain to be ancestral land in the name of the respondent in trust and for the benefit of the family.

b. That the plots at Ruthigiti and Mai Mahiu subject to orders (c)&(d) below shall be sold and the proceeds thereof shared equally in the ratio of 50% to 50% or in the alternative, the applicant be at liberty and have priority to choose either plot.

c. That the respondent to submit an inventory and a statement of accounts on how he sold and spent the proceeds out of two plots located at Githurai 44 and Plot No. xxxx Githurai 45 plus two plots located at Marurui

d. That in the event of the respondent's failure to account for the four plots, the applicant shall be entitled to 60% share in the two plots named in (b) above.

e. The respondent to submit the said inventory and statement of accounts stated in (c) above within 60 days from the date of delivery of this judgment.

f. This being a family matter each party to bear own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER, 2019.

J.N. ONYIEGO

JUDGE