



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 29 OF 2011**

**IN THE MATTER OF: PETITION UNDER (THE PREAMBLE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA  
AND UNDER ARTICLES 2(4),**

**AND**

**ARTICLES 19(2), 20(1), 21(3)**

**AND**

**ARTICLES 22(1), 23(1)&(3), 25(A) &(C)**

**AND**

**ARTICLES 26(1), 27(1)**

**AND**

**ARTICLES 28, 40, 45(1)(3), 50(1), 57(C)**

**AND**

**ARTICLES 165(3),(a,b,d)(ii)**

**AND**

**ARTICLES 165, 3(b),(6),(7)**

**BETWEEN**

**S M M.....PETITIONER/APPLICANT**

**AND**

**R A Z.....1<sup>ST</sup> RESPONDENT**

**A M Z.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner is the 1<sup>st</sup> wife of the 2<sup>nd</sup> respondent who was married under the African customary marriage. They had 9 children. The 1<sup>st</sup> respondent is the 2<sup>nd</sup> wife to the 2<sup>nd</sup> respondent and together they had 6 children. The petitioner and the 1<sup>st</sup> respondent had been living in one house, which was their matrimonial home in plot no.[particulars withheld] Mariakani. The 1<sup>st</sup> respondent commenced eviction proceedings at Mariakani Law courts vide Mariakani SRMC Civil suit No. 17/2011. This prompted the petitioner to filing this instant

petition dated 16<sup>th</sup> May 2011 and filed in court on the same day.

### **The Petitioner's case**

2. The Petitioner's case is based on alleged facts set out in the Petition as follows. The Petitioner is aged 70 years and she resides in an unsurveyed land plot [particulars withheld] in Mariakani. She had 9 children whom she attached their birth certificates for courts reference. The 2<sup>nd</sup> respondent married the 1<sup>st</sup> respondent in the year 1972. In the year 1981 the 2<sup>nd</sup> respondent bought a property, which is the land, in question in this suit and another plot in Mtopanga within Mombasa. The petitioner and the 1<sup>st</sup> respondent had been staying in one house, and later the 2<sup>nd</sup> respondent constructed a house in Kinango. She further avers that her husband constructed a Swahili house which had 6 rooms for rental income. The 1<sup>st</sup> respondent secretly changed particulars of the matrimonial home to her name. She averred that she does not have any home or house to relocate to despite the efforts by FIDA to have her retain her home, which she contributed to acquire.

3. The 1<sup>st</sup> respondent had filed a suit in the Senior Resident Magistrate's Court Mariakani Civil case No. 17 of 2011 where she pleaded for revocation of the licence and the police to provide security for the eviction process. In the suit she had asked for an interlocutory mandatory order of eviction under Order 40 and 51 of the Civil Procedure Act and Section 1A, 1B, 3A and 63(e) of the Civil Procedure Rules. The Petitioner sought to defend her right to the matrimonial house by stating that her right to human dignity should be protected. She cannot be evicted without any provision of an alternative home since she had been married to the 2<sup>nd</sup> respondent for over 50 years.

4. On the basis of the said facts, the Petitioner prayed for the following specific orders:

A. A declaration that any eviction of the petitioner from her matrimonial house, unsurveyed plot No.[particulars withheld] Mariakani where she has cohabited with the 1<sup>st</sup> respondent a co-wife in a polygamous marriage by the respondents shall be in contravention to and a breach of her rights and fundamental freedoms particularly:

I. Article 25(a) and (b) which provides that the applicant's freedom from torture and cruel, inhuman, degrading treatment or punishment and her right to a fair trial shall not be limited.

II. Article 26(i), which provides that every person has a right to life.

III. Article 27(i), which provides that every person is equal before the law and has the right to equal protection of the law and equal benefit of the law.

B. A declaration that the petitioner has acquired proprietary rights and beneficial interests in plot No.[particulars withheld] Mariakani as her matrimonial house over 30 years and any eviction therefrom by the respondents shall be a breach of her constitutional rights pursuant to:

I. Article 40(i) (2) of the Constitution, which provides that she has a right to acquire and own property of any description and that she can not be arbitrarily deprived of property of any description.

C. A Declaration that the petitioner's husband the 2<sup>nd</sup> respondent being a polygamist cannot discriminate between his wives in provision of matrimonial houses pursuant to:

I. Article 45(3) thereof which states that parties to a marriage are entitled to equal rights at the same time of marriage, during the marriage and at the dissolution of the marriage thus she has acquired a constitutional right over plot No. 120 unsurveyed Mariakani as her matrimonial house over 30 years.

II. A Declaration that Mariakani Law courts SRMCC NO. 17 OF 2011, R Z v. S M M is an abuse of the due process of the law and should be quashed by an order of this court.

D. A Declaration that the 2<sup>nd</sup> respondent's failure to provide for the petitioner and maintain her is an abuse of her rights under Article 57(a) (b) (c) (d) and as such the petitioner is entitled to appropriate income from the matrimonial asset situated in Mtopanga Mombasa which is a Swahili house.

E. A Declaration that the threat to evict the petitioner from her home by the respondents without any adequate alternative home for her amounts to discrimination between parties to a marriage based on sex, marital status, age and culture contrary to Article 27(5) of the Constitution.

F. A permanent injunction order do issue restraining the respondents by themselves or any other person whomsoever and whatsoever from interfering with the petitioner's rights and peaceful and quiet enjoyment and possession of her matrimonial house and all the income therefrom situated in Mtopanga within Mombasa Town.

G. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondent from alienating, selling, disposing off, transferring, gifting or in any manner whatsoever from selling, disposing off, transferring, gifting or in any manner whatsoever from altering or changing the status and ownership of the said two properties without consent of the petitioner.

H. Costs of the petition.

## THE RESPONSE

5. The respondents opposed the petition stating that the applicant had no right or interest in the suit property that would entitle her to the reliefs sought. The respondents averred that the 2<sup>nd</sup> respondent bought a plot in Mtopanga in 1972, which forms part of the matrimonial property. The Mariakani plot No.[particulars withheld] was bought by the 1<sup>st</sup> respondent without any contribution from the petitioner or the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent upon retirement asked the 1<sup>st</sup> respondent to allow the petitioner to move into the Mariakani plot as he built a home for the petitioner Kinango. She urged that the plot did not fall under the matrimonial property therefore the petitioner could not claim to have a right over it.

## SUBMISSIONS

### PETITIONER'S SUBMISSION

6. The petitioner filed its submissions on 24<sup>th</sup> November 2014 and framed the following issues for the court to determine:

- I. Whether the suit property was the petitioner's matrimonial home.
- II. Whether the respondents can legally evict the petitioner from her matrimonial property of over 30 years in a polygamous marriage.
- III. Whether the petitioner has rights or interests in the suit properties.
- IV. What is the appropriate remedy for the parties herein.

7. The petitioner urged the court that she was married to the 2<sup>nd</sup> respondent in 1963 and the 1<sup>st</sup> respondent was married in the year 1972. A family home was purchased in Mariakani and Mtopanga. The two wives lived in the same house at the plot in Mariakani. A second matrimonial home was built in Kinango for the 2<sup>nd</sup> respondent. The family has a house at Mtopanga Mombasa which has 6 rooms for rental income of Ksh 6,000. The respondents then filed eviction proceedings against the petitioner after reconciliation proceedings by FIDA collapsed.

8. The petitioner urged also that she contributed to acquisition of the matrimonial home thus she has equal rights and interest in the property. Further her rights as enshrined in Article 45(3) which provides as follows have been infringed on, "**parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of the marriage.**" The right to shelter for a married woman in a polygamous marriage is protected in the above article. Hence the 2<sup>nd</sup> respondent lacked the capacity to gift, bequeath or alienate any rights in the house without her consent.

9. The eviction proceedings have degraded to her dignity, honour and reputation. It was her submission that she had a right to equal access to housing and acceptable living conditions in a healthy and acceptable living conditions. Further if at all the 1<sup>st</sup> respondent had any title or ownership over the suit property an implied trust was created in her favor.

10. She further averred that she was protected under article 57(C) being an old member of the society to live and be free from abuse and to receive reasonable care and assistance from her family and the state in general. The right to life as provided under Article 26(1) has to be upheld. She relied on an article by Professor M.P/Jain an Indian Constitutional law 6<sup>th</sup> Edition as follows, "**the difference between the need of an animal and a human being for shelter has to be kept in view. For an animal it is the bare protection of the body. For a human being it has to do with suitable accommodation which would allow him, to grow in every aspect physical, mental and intellectual**". Under Article 40(1) (2) (a) a person cannot be arbitrarily be deprived of property or interest in or right over property including a matrimonial property.

11. The Matrimonial Property Act was enacted by Parliament and it commenced in 16<sup>th</sup> January 2014. It was established to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. Section 6 of the Act defines matrimonial property as follows:

**a) The matrimonial home or homes**

**b) Household goods and effects in the matrimonial home or homes, or**

**c) Any other immovable and moveable property jointly owned and acquired during the subsistence of the marriage**

**(2) Despite subsection (1), trust property including property held in trust under customary law, does not form part of matrimonial property**

**(3) Despite subsection (i) the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.**

**(4) A party to an agreement made under subsection (3) may apply to the court to set aside the agreement and the court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.**

12. The petitioner further urged the court to rely on section 7 of the Act which provides ***that subject to section 63 ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards the acquisition and it shall be divided between the spouses upon divorce or when the marriage is dissolved.*** Further section 12 of the Act provides that a spouse shall not during the subsistence of the marriage be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.

13. Also section 12(3) of the Matrimonial Property Act 2013 provides that a spouse shall not be evicted from the matrimonial home by any other person except,

- a) On the sale of any estate or interest in the matrimonial home in execution of a decree,
- b) By a Trustee in bankruptcy or
- c) By mortgage or charge in exercise of a power of sale or other remedy given under any law.

14. It was her submission that the matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses. She urged the court thought the petition was filed in 2011 the enactment of the Marriage Act and the Matrimonial Property Act 2013 supported the case, the prayers sought be granted as prayed.

### **RESPONDENTS SUBMISSION**

15. The respondents submitted that the law was clear as to property owned in a polygamous family, where the Matrimonial Property Act, 2013 emphasizes on spouse's contribution which could be monetary or non-monetary, including domestic work and management of matrimonial home, child care, companionship, management of family business or property and farm work. This contribution is limited to husband and wife and does not include a co-wife.

16. In regard to proprietary rights in polygamous marriages section 8(1)(b) provides as follows:

***“Matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives”.***

In this case the petitioner did not contribute to purchase of the plot. At the time of purchase of the plot the petitioner and the 2<sup>nd</sup> respondent were living elsewhere. The 1<sup>st</sup> respondent was stationed at Mariakani as a teacher till when the 2<sup>nd</sup> respondent retired and they joined her after requests by the 2<sup>nd</sup> respondent.

17. The petitioner refused to move to the matrimonial home in Kinango after it was built and that her allegations that she had been barred from accessing the home are false. Further the petitioner's son one J M who has frustrated all efforts to have the same rented out occupies the other home in Mtopanga. It is also not true that they have changed the ownership of the Mariakani plot since the plot had been registered in her name when she bought it. The eviction proceedings were instituted since the petitioner refused to move out of the 1<sup>st</sup> respondent's home, which does not form part of a joint matrimonial home. The 2<sup>nd</sup> respondent did not gift or bequeath the 1<sup>st</sup> respondent the said plot as alleged by the petitioner.

18. The 1<sup>st</sup> respondent urged the court that she has right to property under Article 40 of the Constitution. Further, the Matrimonial property only relates to spouses and that in a polygamous marriage a wife can only claim from that which the husband has acquired and not the co-wife or co-wives. She prayed that the petition be dismissed with costs.

### **Issues for determination**

19. The court has referred to the Petition, the affidavits in support and in opposition to the petition and the written submissions. The issues for determination are whether the suit property was the petitioner's matrimonial home; and if so, whether the petitioner can legally be evicted from the matrimonial home.

### **Determination**

#### ***Whether suit property petitioner's matrimonial home***

20. Section 6 of the Matrimonial Property Act, No. 49 of 2013 defines matrimonial property as:

- (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.

21. Equally, Section 2 of the Matrimonial Property Act has defined a matrimonial home as: -

**“Matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”**

In light of the aforementioned, the people of Kenya in promulgating a new Constitution in 2010 intended a fundamental transformation of society. A society imbued with values like respect for human rights and human dignity, equality, equity, respect for the rule of law; non-discrimination (**Article 10**); a society that recognizes and protects the family as the fundamental unit of society and honors entitlement of spouses to equal rights at, during and after marriage (**Article 45**); a society that upholds the supremacy of the Constitution.

22. The petitioner submitted that she was married to the 2<sup>nd</sup> respondent in 1963 and the 1<sup>st</sup> respondent was married in the year 1972. The 2<sup>nd</sup> respondent had bought a family home in Mariakani and Mtopanga. The two wives lived in the same house at the plot in Mariakani. She further stated that she contributed to acquisition of the matrimonial home. She, however, did not adduce any evidence of contribution to the acquisition of the Mariakani property upon which her matrimonial home is alleged to stand. The question whether the petitioner has rights or interests in the suit properties must therefore be answered in the negative.

23. This court in **Agella v. Richard Mbole Kimuyu** Mombasa High Court Originating Summons No. 1 of 2012, [2013] eKLR considered the matter of a spouse’s interest in matrimonial property acquired by the other held as follows:

**“9. The Blacks Law Dictionary defines matrimonial property as, property that is acquired from the time when the marriage begins until one spouse files for divorce...”** In the case of **Essa vs Essa**, Civil Appeal No. 101 of 1995 which is supplied by the Applicant, Hon. Omolo, JA stated that, **“There is of course, no presumption and there could not have been any, that any or all property acquired during the subsistence of the marriage must be treated as being owned jointly by the parties”** thus requiring proof of contribution before the court can make a declaration as to ownership. **Matrimonial property therefore is all property acquired by joint contribution of the spouses, either directly or indirectly during the subsistence of the marriage.**

10. In **Kivuitu v Kivuitu** (1982 – 1988) 2 KAR 241, Hon. Omolo, Ag JA (as he then was), laid down the rule that where property acquired during coverture is registered jointly, it shall be presumed to be held in equal shares. In **Karanja v Karanja**, (1976) KLR 307 the court held that when property is purchased jointly by both spouses and registered in the name of the husband with the wife’s approval, a resulting trust can be inferred in her favour. In **Njoroge –vs- Ngari** (1985) KLR 481 where the plaintiff sought declaration that half of the property registered in the name of her husband was held in trust beneficially for her, the court therein held, inter alia, that: **“If property is held in the name of one person but another contributes towards acquisition of the property, then both persons have proprietary interests in that property...”**

**If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person.”**

11. In **Nderitu vs. Nderitu**, Civil Appeal No. 203 of 1997, the Court of Appeal ruled that such contribution need not be in monetary terms, but that in the typical Kenyan context, indirect contribution **“will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution.”** The Applicant has sought to rely on the case of **Chakupewa vs. Mpenzi & Anor** (1999) 1 EA wherein Hon. Mackanja, J. of the High Court of Tanzania also opined at page 39, **“Now contribution to the acquisition of matrimonial property is not restricted to material contributions. It includes intangible considerations such as her love; the comfort and consolation she gives to her husband; the peace of mind the husband gets from a loving wife; the food she prepares for him. All these, and other psychic satisfaction go a long way to contribute to the acquisition of property which is acquired through the joint effort of the parties.”**

12. In **Echaria vs Echaria** (2007) eKLR, the Court of Appeal sitting as a five judge bench settled that the cases of **Essa vs Essa**, Civil Appeal NO. 101 of 1995, **Nderitu vs. Nderitu**, Civil Appeal No. 203 of 1997, **Kamore vs Kamore** (1998) LLR 714 CAK, **Muthembwa vs. Muthembwa**, Civil Appeal No. 74 of 2001 and **Mereka vs. Mereka**, Civil Appeal No. 236 of 2001 were correctly decided in that in each case, **“the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property.”** **The Court however held that such contribution must be of financial nature.”**

24. I find that the plot at No.[particulars withheld], Mariakani does not form part of the 2<sup>nd</sup> respondent’s property since it was allotted to the 1<sup>st</sup> respondent who paid a premium of Ksh.8.846/- for rent, registration, rates, stamp duty and approval fees in 1996, and subsequently Ksh.3000/- for rate clearance certificate fee in 2011. By a letter dated 12<sup>th</sup> September 2005 the Town Clerk Town of Mariakani confirmed that the plot was registered in the name of the 1<sup>st</sup> respondent and requested the Commissioner for Lands to issue a letter of allotment and title deed to the 1<sup>st</sup> respondent. A spouse cannot claim an interest in a house that is acquired by a co-wife. Such a house can only become the matrimonial property of the co-wife and the husband.

25. This Court decided the **Agella** on the basis of the law as it was on **19<sup>th</sup> February 2013 when the ruling was delivered.** Although the Matrimonial Property Act No 49 of 2013 (assented to on 24<sup>th</sup> December 2013 and commencement on 14<sup>th</sup> January 2014) now recognizes non-monetary or non-financial contribution by a spouse in the property acquired by his/her spouse, it surely cannot extend to property acquired by a co-wife.

**Whether a spouse can legally be evicted from the matrimonial property.**

26. Section 12 (3) of the Act, under which the application is expressly brought, provides that **“a spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse”.**

Section 12 (4) of the Act, however, injuncts removal from matrimonial home of a spouse by any person by providing as follows:

“4. Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except —

(a) on the sale of any estate or interest in the matrimonial home in execution of a decree;

(b) by a trustee in bankruptcy; or

(c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.”

27. While section 12 (3) appears to limit the parties to spouses and their authorized representatives, section 12 (4) appears to found action on the principle in the Latin legal maxim *ubi jus ibi remedium* (where there is a right there must be a remedy). As there is a statutory right that “a spouse shall not be evicted from the matrimonial home by any person”, she or he must be entitled to come to court to restrain or remedy such eviction.

28. However, in this particular case, the petitioner not having shown that the suit property is matrimonial property, the protection of a spouse from eviction under section 12(3) of the Act would not apply.

#### ***Whether the Petitioner may recover maintenance from the 2<sup>nd</sup> respondent by this proceedings***

29. The petitioner had urged the court to order the 2<sup>nd</sup> respondent to maintain her. She averred to be an elderly person who needs to be cared for. The proceedings for maintenance is the proper province of a family court in maintenance proceedings and not a constitutional court.

30. On the merits however, she did not prove to this court why she needed maintenance while still in the marriage. Maintenance can only be provided on the context of matrimonial proceedings under the then applicable Matrimonial Causes Acts (now repealed by Marriage Act, No. 4 of 2014 where while there is a presumptive duty on the spouse with a higher earning capacity to maintain the other spouse she should not seek for this court’s intervention without providing evidence that he or she has made an effort or is making an effort to secure a livelihood for herself or for the 2<sup>nd</sup> respondent. In *WMM v. BML [2012] eKLR*, GBM Kariuki J. (as he then was) observed that:

*“In considering a claim for maintenance regard must be had to the provisions of Article 45(3) of the Constitution of Kenya which recognizes that parties to a marriage, during the marriage and at the time of the dissolution of the marriage. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or to turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.”*

31. The court is in agreement with the above when a party has filed for divorce or maintenance proceedings, which is not the case in the present suit. In the circumstances the court declines to find that the 2<sup>nd</sup> respondent has a duty to maintain the petitioner.

#### ***What is the appropriate remedy for the parties herein.***

32. The petitioner has not established that she is entitled to an interest in the suit property and the claim for the reliefs sought by the petitioner must fail.

33. The prayers for an order that the petitioner had acquired proprietary rights and beneficial interest in plot No. [particulars withheld] Mariakani by virtue apparently of long occupation by her as matrimonial house over 30 years suggests that the applicant is aware that she has no legal interest in the suit property. Any beneficial interest by way of prescription and long occupation must be pursued in accordance with the law before the specialized court, the Environment and Land Court, and having not been declared by a competent court to have acquired such an interest by adverse possession or prescription, no right over the property can be asserted and protected by the Article 40 constitutional right to property.

34. The petitioner must move the court appropriately for private law provision of maintenance as a spouse, and to raise of want of maintenance or provision for a spouse as a constitutional claim to protection from discrimination in view of polygamous nature of the 2<sup>nd</sup> respondent’s marriage, equality of parties to a marriage and protection of older members of the society is an abuse of process of the Court.

#### **ORDERS**

35. Accordingly, for the reasons set out above, the court makes the following orders:

a) The Petition dated 16<sup>th</sup> May 2011 is dismissed.

b) In view of the matrimonial nature of the dispute there shall be no order as to costs.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF MAY, 2018.**

**E.K.OGOLA**

**JUDGE**

**Appearances:**

M/S Opu & Co. Advocates for the petitioner.

M/S Marende Birir & Co. Advocates for the respondents.