



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 14 OF 2013

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT 1882

E MN.....PLAINTIFF

VERSUS

N M.....DEFENDANT

J U D G M E N T

1. The plaintiffs claim against the defendant is for half share of the matrimonial properties all registered in the name of the defendant. The parties are married under Kiambu customary law and have several issues of marriage. The plaintiff's claim is based on non-monetary contribution.
2. In his response to the claim, the defendant denied the claim on ground that the plaintiff never contributed to acquiring of the property either in monetary or non-monetary terms. The defendant said that despite the separation, he still supports his first wife in various ways.
3. The evidence of the applicant is that she got married to the defendant in the year 1950 and were blessed with ten (10) children. During the subsistence of the marriage, the parties acquired the following properties:-
 - (a) L.R. Nthawa/Riandu/xxx
 - (b) L.R. Gaturi/Githimu/xxxx
 - (c) L.R. Gaturi/Githimu/xxxx
 - (d) L.R. Gaturi/Githimu/xxxxx
4. The parties extensively developed L.R. Gaturi/Githimu/ xxxx together with other parcels. The matrimonial home sits on L.R. Gaturi/Githimu/xxxx.
5. The couple was later to establish a butchery business in Embu town after which the defendant moved to reside in the town to run the business. The plaintiff was left at their rural home working on the land parcels.
6. The plaintiff testified that the plot at Embu L.R. xxxx is extensively developed with 10 rental rooms from which the defendant collects rent. It measures 100 x 50 ft.

7. The defendant while resident at Embu married another woman as a 2nd wife. He stays with her and has since bought plots and land at Makima area for himself and his second wife. The plaintiff has no interest in the Makima parcels of land.

8. The defendant's evidence is that the plaintiff is his first wife having married her in 1950's. He married his second wife J whom he stays with in the 1980's. The plaintiff stays on the defendant's land L.R. Gaturi/Githimu/xxxx.

9. It is denied that the plaintiff contributed to the purchase of the land in any way. It is admitted that the couple are blessed with 10 children.

10. The only property the defendant says he had bought before he married his second wife is the parcel on which the plaintiff's home is situated. He states that it is his 2nd wife who has contributed extensively to purchase or acquisition of his properties. He further states that the plaintiff has been incited by her sons to get part of the defendant's land to distribute to them.

11. The counsels filed submissions in support of their clients arguments. Mr. Mugambi Njeru represented the plaintiff while Ms. Beth Ndorongo is the advocate for the defendant.

12. The issues for determination in this case are as follows:-

(1) Whether the properties listed in the plaintiff's statement of evidence are matrimonial properties.

(2) Whether the plaintiff is entitled to the declaration sought that she has a legal interest in the said properties.

13. The applicable law is the Constitution of Kenya 2010 and the Matrimonial Property Act.

14. Article 45(3) of the Constitution provides:-

Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

15. The Matrimonial Property Act, 2013 Section 6 provides:-

(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.

16. Section 8 defines property in a monogamous marriage.

(1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the—

(a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and

(b) 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.

17. It is not in dispute that the parties in this case are husband and wife who have separated but their marriage has not been dissolved. The defendant is living with his second wife and has not indicated that he has any intention to resume cohabitation with the plaintiff. In the event that he resumes cohabitation, the decision in this case will not affect any of the parties concerned. Section 8 of the Act takes care of property rights in a polygamous marriage.

18. The plaintiff has never been gainfully employed while the defendant has been carrying business of cattle trade and butchery business. The parties have their matrimonial home at Riandu on L.Rxxxxx where they do subsistence farming. The plaintiff is the person who has been managing the farm as the defendant stayed away doing business. Their marriage was stable and fruitful in that they were blessed with children.

19. It is not in dispute that the plaintiff did not make financial contributions to the purchase of the land parcels acquired during their marriage. Her contribution was basically that of taking care of the children, managing the family farm and giving moral support to her husband for over twenty years of the marriage as he struggled to earn a living and invest for the benefit of the entire family. It must be noted appreciated that the work done by the plaintiff in her capacity as mother and wife as well as farming contributed to the welfare of the family.

20. The companionship and social support to the defendant enable him to enjoy the comfort and offered a stress-free atmosphere that enhanced his mental and physical capacity to invest caring less about his ten children since the plaintiff had taken the responsibility. This kind of support made a tremendous difference in the social and economic life of the defendant which enabled him to acquire property and make other strides in life.

21. The law recognizes non-monetary contribution in the definition of the term “contribution”.

22. Section 2 of the Act states:-

“contribution” means monetary and non-monetary contribution and includes—

(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;

23. I reach a conclusion that the plaintiff contributed to the properties acquired during marriage by the parties and which are registered in the name of the defendant and is entitled to half share in the properties I proceed to identify.

24. The plaintiff testified that she has lived with the defendant for over 50 years having married him in 1995. The defendant said he married the plaintiff in 1960's but cannot recall the year. None of the parties gave the year of separation in their evidence. Taking 1960 as the year the parties got married, the time they separated is in the late 1990's or early 2000 from their evidence. The couple had then stayed together for between 35 – 40 years. The Kerugoya case between the parties was struck out in the year 2003 after the parties separated. Thirty five years of marriage brings the year of separation to between the year 1995 to 2000.

25. L.R. Gaturi/Githimu/xxx AND xxxx resulted from sub-division of L.R. Gaturi/Githimu/xxxx. The parcels were registered in the names of the defendant on 18/11/1987. This means that L.R. Gaturi/Githimu/xxxx was registered in the name of the defendant before sub-division. The registration of

L.R. Gaturi/Githimu/xxxxx was done during the subsistence of the marriage of the parties. The parcels L.R. xxxx and xxxxx sizes being 1.22 ha. And 1.21 ha. respectively. The home of the plaintiff is on L.R. xxxx and she cultivates the land while the defendant cultivates the L.R. xxxx

26. There was no evidence to controvert that of the plaintiff that the land was acquired during the subsistence of the marriage and at the time the parties had not separated. The defendant said he bought the original parcel when his wife had one child. I find that L.R. xxxx and L.R. xxxxx are matrimonial properties.

27. L.R. Nthawa/Riandu/xxx was acquired and registered in the defendant's name on 11/01/1978 as shown by the certified copy of the register. This was during the subsistence of the marriage and during the period the parties cohabited together. The evidence of the plaintiff was not challenged. I find that the property falls within the description of matrimonial property under the Act and I so hold.

28. The copy of register shows that L.R. Gaturi/Githimu/xxxx measuring 0.05 ha is registered in the name of the defendant from 18/01/1990. This was during the subsistence of the marriage and before separation. It is the plot situated in Embu town and said to be developed with ten (10) rental units. The defendant said he bought this plot with his second wife but did not produce any evidence to that effect. He had told the court earlier that he bought the plot in 1980's but could not recall the year.

29. The plaintiff did not explain in her evidence how this plot was acquired. She said her husband was residing in Embu town during that period. The defendant said his first child with the 2nd wife was born in 1990. Being newly married and not in gainful employment, it was unlikely that the 2nd wife of the defendant could have raised money to contribute to the purchase of the plot. The defendant was very economical with information on the year he married his 2nd wife.

30. In the absence of any evidence of purchase or contribution by the 2nd wife this court finds that the property was bought during the subsistence of the marriage and before separation of the parties and it is therefore matrimonial property.

31. Having found that the plaintiff provided non-monetary contribution to the acquiring of the four (4) matrimonial properties, it is imperative that the contribution must be measured as compared with that of the defendant.

32. The defendant generated income which was used to invest for the family, educate the children and provide other needs for the family. The plaintiff on the other hand took care of the family's ten children among other duties. This is not a mean task. It is my considered opinion that the plaintiff's contribution be and is hereby assessed at 45% and that of the defendant at 55%.

33. For the following matrimonial properties, I find that the plaintiff is entitled to 45% share of each one of them. A declaration is hereby made to that effect and judgment entered in favour of the plaintiff against the defendant in the said terms.

34. Each party to meet his/her own costs of the suit.

DATED, DELIVERED AND SIGNED THIS 23RD DAY OF MAY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Ngige for Mugambi Njeru for Applicant

Mr. Andande for Ndongoro for Respondent