



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HCC NO. 2 OF 2014

L W M.....APPLICANT

V E R S U S

P M N.....RESPONDENT

RULING

1. This matter came to court by way of Originating Summons filed by L W M on 27/1/2014. She seeks a declaration on matrimonial properties which she claims were acquired through joint efforts and funds of both parties during the subsistence of their marriage and are registered in the sole name of the respondent are owned jointly by the applicant and the respondent. The properties are:

- a) Plot No. *[particulars withheld]* Kangai and rental houses therein.
- b) Plot No. *[particulars withheld]* Kagio and rental houses therein.
- c) Land parcel No. Mutira/Kangai/ *[particulars withheld]* and the matrimonial houses therein.
- d) Posh mill and Rice Mill at plot No. *[particulars withheld]* Kangai.
- e) Water pump.
- f) Motor cycle registration Number *[particulars withheld]*.
- g) Ox-cart.
- h) Cow and female calf.
- i) Television set

2. The applicant seeks a declaration that the respondent holds the properties in trust for her and that the trust be determined, the properties be shared between them.

3. The application is based on the ground that the respondent and applicant are husband and wife respectively and the properties were acquired by the joint efforts and funds of both parties.

4. The applicant got married to the respondent on 27/5/1989 at *[particulars withheld]* under African Christian Marriage and Divorce Act Cap 151 Laws of Kenya. In the year 2009 the respondent moved out of the matrimonial home and went to live with Faith Wanjira at Kangai shopping centre. The applicant deposes that there is real danger of the respondent alienating or disposing of the properties and the properties should therefore be divided in just and equitable manner.

5. The respondent opposed the application and filed a replying affidavit. He states that plot No. - *[particulars withheld]* - Kangai is registered jointly and have shared it equally on the ground. The Posho Mill and Rice Mill were shared. Plot No. *[particulars withheld]* Kagio is owned jointly with one Patrick Maina Njiru who is not a party. Land parcel No. Mutira/Kangai/ *[particulars withheld]* was acquired before the marriage and there are no developments Motor Cycle *[particulars withheld]* is not registered in his name and the applicant should not claim it. That there is stall No. *[particulars withheld]* which applicant omitted, was acquired together and registered in applicant's name.

6. In summary the parties proposed as follows over the subject properties:

a) Plot No. [particulars withheld] Kangai

The said Plot is registered in both their names and the respondent proposes to share it equally.

However, the applicant claims that it was her mother's Plot and she paid the purchase price of Kshs.92,500/= therefore it should be registered in her name solely.

b) Plot No. [particulars withheld] Kagio

According to the respondent, the said Plot is registered between Patrick Maina and himself. However, the applicant claims that she contributed Kshs.67,000/= while her son in law Patrick Maina contributed Kshs.23,000/=. The applicant claims half share of the respondents share.

c) Mutira/Kangai/ [particulars withheld] and matrimonial house

According to the respondent, the land was inherited from his father before he got married to the applicant. The title deed indicates the land got registered in respondent's names in 1975 therefore it was acquired before the marriage in 1989 and it should be excluded.

However, the applicant claims that they got married customarily in 1968 and she has developed the land extensively and it should be registered equally between the parties.

d) Posho Mill and Rice Mill at Plot [particulars withheld] Kangai.

According to the respondent, the applicant to take the rice mill while he takes the posho mill. However, the applicant claims that she gave Kshs.30,000/= for purchase of posho mill and the respondent gave Kshs.20,000/=. Balance of Kshs 50,000/- paid from proceeds of rental houses. That as for the rice mill, she single handedly bought the same and it should not be part of the distribution. The applicant prays that posho mill be sold and proceeds be shared between them having acquired it jointly.

e) Water pump

The applicant states that she single handedly bought the water pump at Kshs.27,000/= and she should be given the same.

f) Motorcycle [particulars withheld]

As per the documents forwarded, it was sold by Gerald Muchoki in 2009 therefore it does not form part of matrimonial property. He later stated that he bought the motorcycle from Gerald Muchoki and he should remain with the same.

However, the applicant states that the motorcycle belonged to Gerald Muchoki before he sold it to her husband Kshs.40,000/= though transfer was not done.

g) Ox cart, Cow and female calf

According to the respondent, the applicant should take the cart while he remains with the cow. The female calf is already dead.

However, the applicant claims that the respondent sold all the cows and the cart should be sold and proceeds shared equally.

h) Television set

According to the respondent, he should remain with it since the applicant has hers. But the applicant states there is only one which should be sold and proceeds shared equally.

i) Stall No. [particulars withheld] Kagio

According to the respondent, the applicant failed to include this in her list of properties but they acquired it together whereupon they agreed to have the same registered in the applicant's names.

7. The fact of the marriage is not in dispute. The applicant testified that the marriage was solemnized in 1989 and they were blessed with nine children who are all living. The applicant testified that in Divorce Cause No. 9/2013 at Kerugoya the marriage was dissolved and parties told to share the property. The Constitution makes provision for the rights of the parties to a marriage. This is what court considers when called upon to determine the division of matrimonial properties:

Article 45(3) of the Constitution states:-

“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.”

8. That is to say that both parties enjoy “**equal rights.**” At every stage of the marriage. Equal rights envisages the rights of the parties but not equal division of the property as in sharing on equal basis but on what the party deserves not withstanding that the property is registered in the name of one spouse. The court has to consider the contribution by the parties which does not necessary mean monetary contribution.

9. The **Matrimonial Property Act at Section -2-** defines contribution as follows:-

- a) Domestic work and management of matrimonial home.
- b) Child care.
- c) Companionship.
- d) Management of family business or property.
- e) Farm work.

The Act goes on to define what constitutes matrimonial property. Section -5- provides:

“Subject to section -6- the interest of any person in any immovable or moveable property acquired or inherited before marriage shall not form part of the matrimonial property.”

The matrimonial property therefore comprises of what the parties acquire during the subsistence of the marriage. Property acquired before the marriage or which a party inherited before the marriage does not form part of the matrimonial property. The Matrimonial Property Act now governs the division of matrimonial property upon divorce or dissolution of the marriage.

P O M v M N K [2017] eKLR

The Court held;

This is a suit for division of matrimonial property. The legal regime governing such endeavour is the Matrimonial Property Act, Act No. 49 of 2013. The relevant provisions are to be found in Part III thereof. According to those provisions, in particular section 7, such property is to be divided upon divorce or dissolution of the marriage. The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made. A party, who moves the court for orders relating to division of matrimonial property, or declarations thereon, must strive to bring his case within the prerequisites stated above.

10. There is no dispute that the parties were married and acquired properties during the subsistence of the marriage. The properties listed were acquired during the subsistence of the marriage save for Mutira/Kangai/ [particulars withheld] which the respondent asserts that he acquired it before the marriage. I will consider this assertion later.

11. Plot No. [particulars withheld] the applicant claims she bought it and should be registered in her name. Though this was not rebutted, it was acquired and developed during the subsistence of the marriage. The plot is registered jointly between the parties. It is matrimonial property and should be shared equally between the parties.

12. Posho Mill and Rice Mill. The applicant admitted that the Rice Mill is registered in her name. The applicant should therefore get the rice mill and the respondent to get the Posho Mill.

13. The plot number [particulars withheld] at Kagio was acquired during the subsistence of the marriage. The respondent’s share of the plot should be shared equally between him and the applicant.

14. The Ox-cart to go to the applicant as the respondent took the cows.

15. The Television set be shared equally. It may be sold and the proceeds shared equally.

16. The water pump was acquired during the subsistence of the marriage it should be shared equally. It may be sold and proceeds shared equally.

17. The Motor Bike registration No. [particulars withheld] was bought by the respondent during the subsistence of the marriage a fact which the respondent admitted. Though not registered in his name the admission that he bought it during the subsistence of the marriage brings it in the ambit of the matrimonial property and therefore available for distribution. It should be shared equally between the parties.

18. The stall No. [particulars withheld] Kagio is applicant’s property.

19. Mutira/Kangai/ [particulars withheld] was ancestral land which the respondent claimed he inherited before the marriage and should therefore not form part of the matrimonial property. The title deed shows that the respondent was registered in 1975 which was before the date the marriage was solemnized. The applicant testified that she found the respondent on the land. In cross-examination she stated when she got married the land was there and that the respondent had the land before she got married to him. The applicant claims that she got

married to the respondent in 1968 under the customary law. The respondent was registered in 1975. The applicant helped in the processing of the title deed. She has lived on the land and developed it extensively for the 45 years she has been married to the respondent. The matrimonial home is on the land. Section 2 of the Matrimonial Property Act defines matrimonial home as:

“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.”

20. There is no dispute that the parties lived on the property where they have the matrimonial home. The applicant still lives on the property. It is the matrimonial home as defined under the Act, Section 6(1)a which states,

“for the purpose of this Act, matrimonial property means – matrimonial home or home.”

The property is registered in the name of the respondent. There is a presumption that the same is held in trust for the applicant as stipulated under Section 14(a) of the Act provides:

Where matrimonial property is acquired during marriage –

a) “In the name of one spouse there shall be a rebuttable presumption that the property is held in trust for the other spouse.” And

b) In the names of spouses there shall be rebuttable presumption that their beneficial interest in the matrimonial property are equal.”

The respondent has failed to adduce evidence to rebut the presumption that he holds the property in trust for the applicant. The parties got married in the year 1968 and lived together. The respondent admitted that a customary marriage was held in 1968 and they started living together as husband and wife. The respondent testified that he was allocated the land in 1958. He however did not prove that he owned the land as there was no evidence tendered to prove that he was registered or that he had a title deed for the land. The title deed which was tendered in court as evidence shows that the respondent was registered as the owner in 1975. This was well after the parties were joined together as husband and wife under a customary marriage which was later to be solemnized under **Christian Marriage Divorce Act**. The land is acquired upon registration and issuance of title deed. The respondent acquired ownership during the subsistence of the marriage. The applicant testified that she lives in the matrimonial home. She further testified that she has lived in the matrimonial home for the forty five (45) years she has been married to the respondent and has extensively developed it. The evidence tendered before this court shows that when the applicant got married to the respondent the Land Parcel No. Mutira/Kangai/ *particulars withheld* was not in the respondent’s name. He acquired it during the subsistence of the marriage. It is therefore matrimonial property where the parties lived in as their matrimonial home for a long period of time. It is property which should be shared equally between the parties.

IN CONCLUSION:

1. Plot No. [*particulars withheld*] be shared equally.
2. The applicant to get the rice mill.
3. The respondent to get the posho mill.
4. Plot No. [*particulars withheld*] Kagio, the respondent’s share of the plot be shared equally between him and the applicant.
5. The Ox-Cart to go to the applicant.
6. The Television Set be shared equally i.e, it be sold and proceeds shared equally.
7. The water pump be shared equally – it be sold and proceeds be shared equally.
8. The Motor bike [*particulars withheld*] be shared equally.
9. Mutira/Kangai/ [*particulars withheld*] be shared equally.

Each party will bear its own costs.

Dated at Kerugoya this 31st day of July 2018.

L. W. GITARI

JUDGE