



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. MATRIMONIAL NO. 3 OF 2014

L W K.....APPLICANT

V E R S U S

G M M.....RESPONDENT

JUDGMENT

The applicant L W K by an originating summons dated 24/10/2014 seeks the following orders:

1. THAT the Honourable Court be pleased to declare the following properties which are registered in the names of the Respondent herein as jointly owned by the Applicant and the Respondent.

- a) L.R NO. MUTIRA/KAGUYU/[particulars withheld]
- b) L.R NO. MUTIRA/KAGUYU/[particulars withheld]
- c) L.R NO. MUTIRA/KAGUYU/[particulars withheld]
- d) L.R NO. MUTIRA/KAGUYU/[particulars withheld]
- e) L.R NO. MUTIRA/KAGUYU/[particulars withheld]
- f) L.R NO. MUTIRA/KAGUYU/[particulars withheld]
- g) L.R NO. MUTIRA/KAGUYU/[particulars withheld]
- h) L.R NO. MUTIRA/KAGUYU/[particulars withheld]
- i) L.R NO. MUTIRA/KAGUYU/[particulars withheld]
- j) KAGUMO MARKET PLOT NO. [particulars withheld]INOI/KARIKO/[particulars withheld]
- k) MOTOR VEHICLE REGISTRATION NO. KAV [particulars withheld].

2. THAT the Honourable Court be pleased to order the subdivision of the said properties equally taking into account that the Respondent has unfairly benefited from proceeds of L.R NO. MUTIRA/KAGUYU/[particulars withheld], MUTIRA/KAGUYU/[particulars withheld], MUTIRA/KAGUYU/[particulars withheld],MUTIRA/KIRUNDA/[particulars withheld], INOI/THAITA/[particulars withheld] and KAGUMO MARKET PLOT NO. [particulars withheld].

3. THAT the Honourable court be pleased to issue an order of inhibition to the said properties.

4. THAT the Honourable Court be pleased to refrain the Respondent from selling, disposing, encumbering or in any other way alienating, the above said properties.

5. THAT the Honourable Court be pleased to restrain the Respondent from demolishing the buildings situated in the above said land

parcels which is part of the matrimonial property.

6. THAT the Honourable Court be pleased to grant such other and/or further relief that it may deem fit.

7. THAT the costs of this application be provided for.

The application is premised on the following grounds:

- a) THAT the applicant and the Respondent got married and cohabited as such together as husband and wife since 15th November 1975.
- b) THAT the Respondent was registered as a sole proprietor of the above said properties.
- c) THAT the Applicant and the Respondent established their matrimonial home on one of the suit properties.
- d) THAT the Applicant's children live and depend on the suit properties for their livelihood.
- e) THAT the property was acquired by the Respondent and the Applicant jointly and has been developed by the two.
- f) Further grounds and reasons to be adduced at the hearing hereof and the affidavit of L W K.

In her affidavit the applicant deposes that she got married to the respondent on 15/11/1975 at the [particulars withheld] Church Kerugoya as shown by the marriage certificate annexure LWK-1-. The marriage was blessed with eight issues namely:

- P W M

- A N

- I W

- C M

- T K

- P W

- J M

- L M

It is her contention that during the subsistence of their marriage they purchased the above mentioned matrimonial properties and the respondent was registered as the proprietor on behalf of the family. The properties were developed by both parties during the subsistence of the marriage. That the relationship has been strained and has culminated in the respondent filing a petition for divorce as shown by the proceedings in Kerugoya Principal Magistrate's Court Divorce Case No. 26/2012 annexure LWK 3. The Judgment dissolving the marriage was delivered on 6/5/14.

She deposes that she is reliably informed that there are potential buyers who have been visiting the properties with intent to buy them and the respondent has threatened to alienate the same. The respondent has already transferred land parcel No. Inoi/Thaita/[particulars withheld] and Kagumo Market Plot No. [particulars withheld]. The respondent has solely benefited from the proceeds of sale. That she is likely to be rendered a destitute.

The respondent G M M opposed the application and filed a replying affidavit sworn on 16/11/14. He deposes that the Originating Summons is incompetent, bad in law and an abuse of Court process. He deposes that he is the registered proprietor of the subject properties safe for Mutira/Kaguyu/[particulars withheld] and Kagumo Market Plot No. [particulars withheld].

His contention is that he has not tried to sell the suit properties and that he solely acquired the suit properties without the input of the applicant. He avers that he worked as a civil servant in the Ministry of Agriculture between 1972 to 2005 when he acquired the properties. That the applicant was only a house wife and has never been in meaningful employment and has never had any source of income capable of purchasing land. That the applicant has been away during most part of the marriage and has not made any contributions. The applicant attempted to kill him in 1984 and have since lived separate lives without doing anything together including the issues of purchasing properties.

The respondent further deposes that the marriage was dissolved. That they only had seven issues of marriage as one of the issues P W was born before they got married. That the applicant has not availed evidence of her contribution. That he had planted tea bushes before he got married. He prays that the Originating Summons be dismissed.

Based on these pleadings and further affidavits, one sworn by applicant on 29/7/2016 and further Replying Affidavit sworn by Respondent on 25/8/16, the parties adduced evidence. Submissions were also filed at the close of the respondent's case. I have considered the evidence and the submissions.

The issue for determination is the distribution of the matrimonial property. There is no dispute that the parties were legally married under the **Christian Marriage and Divorce Act**, a marriage which was later dissolved on 6/5/2014. This court can therefore order the division of matrimonial property. The division of matrimonial property is provided under **The Matrimonial Property Act**. At Section 7 it is provided:

“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”.

On the other hand the Constitution recognizes the rights of the parties in a marriage to equal rights. **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.”

The property that is acquired during the subsistence of the marriage is available for division between the parties to the marriage based on the contribution by the parties. Property acquired before marriage is not available for division between the parties. **Section -5- of the Matrimonial Property Act** provides:

“Interest of any person in any movable or immovable property acquired or inherited before marriage shall not form part of the matrimonial property.”

Where the property is acquired during the subsistence of the marriage and is registered in the name of one of the parties, this does not exempt the property from being shared between the parties. There is a rebuttable presumption that the party is so registered in trust for the other party. Under Section 14(a) of the Matrimonial Property Act it is provided:-

“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 the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

The division of the property is based on two factors, that is, the property was acquired during the substance of the marriage which has been dissolved and contribution by the spouse. Contribution must not be monetary only, section -2- of the Matrimonial Properties Act provides:

“Contribution means monetary and none monetary contribution and includes –

a) Domestic work and management of matrimonial home.

b) Child care

c) Companionship.

d) Management of family business or property and

e) Farm work.”

What constitutes matrimonial property is defined under **Section -6- of the Act**. It provides:

“For the purpose of this Act matrimonial property means –

a) The matrimonial home or homes.

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

c) Any other immovable property jointly owned and acquired during the subsistence of the marriage.”

The respondent relied on **S.N.K-V-M.S.K & 5 Others (2015) eKLR** where the Court of the Appeal stated:

“Rather, in each case the court appreciated that for the wife to be entitled to a share of the property registered in the name of husband, she had to prove contribution towards the acquisition of the property.”

The respondents case is that all the subject properties are registered in his name except for Mutira/Kaguyu/[particulars withheld] and Kagumo Market Plot No. [particulars withheld]. His position is that he was in gainful employment as a Civil Servant while the applicant was a house wife and has never had any source of income capable of purchasing land. That in 1994 the applicant started living alone. He however admitted that in 2000 on 18/11/00, they renewed their marriage vows. The evidence the respondent adduced in divorce court shows that they were living together upto year 2009. The respondent is viewing contribution in monetary terms only and ignoring the fact that contribution must not necessarily be monetary.

The applicant in the supplementary affidavit deposes that Land Parcel No. Mutira/Kaguyu/[particulars withheld] was purchased in 1977 before it was sub-divided into ten plots. She deposes that she contributed greatly to the purchase of the said land. She deposes that she used to do farming and sell proceeds at Kagumo open air market.

The respondent annexed a green card for land parcel No. Mutira/Kaguyu/1238 to his further replying affidavit, G.M.A and shows that he acquired the land on 2/2/81 which was during the subsistence of the marriage. The applicant has given a chronology of the work she used to do in her supplementary affidavit to prove that she was earning some income. She further deposes that she was at home most of the time taking care of the children. The respondent admitted that land parcel No. Inoi/Thaita/[particulars withheld] was bought in 1986. Land Parcel Mutira/Kaguyu/[particulars withheld] was bought in 1987. The respondent admits that he sold Land Parcel No. Inoi/Thaita/[particulars withheld].

On considering the averments by the applicant, I am convinced that she did make both monetary and none monetary contribution towards the acquisition of the properties. It is expected that with her farming activities including keeping cows, chicken and picking tea she had some income. She has deposed that it is from this income that she gave the money to the applicant when they were purchasing the properties which were registered in the name of the respondent. She has deposed that some of the documents in support of her case were burnt by the respondent. The parties were living together in harmony when they acquired the properties and the respondent was registered as the owner. The applicant has proved on a balance of probabilities that the respondent was registered in trust. They continued to live together on the properties until they separated in 2009 and later divorced. The applicant has shown that she has made a substantial and unascertainable contribution which is one of the factors to be considered when determining the division of matrimonial property.

The applicant has deposed that the returns from the sales of eggs, milk and chicken and manure as well as from a shop which she opened at Karaini Shopping Centre were put in an account which was being managed by the respondent. That it is from the account that the respondent would draw money towards off-setting outstanding debts. The fact that the applicant deposited the money in the account has not been denied. The applicant did contribute to repay loans over the matrimonial property contrary to what the respondent stated. The applicant has proved that she contributed to the acquisition of the properties.

In a persuasive decision in P.O.M –V- M.N.K(2017)eKLR the court stated:

This is a suit for division of matrimonial property. The legal regime governing such endeavor 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.

Article 45(3) of the Constitution gives the parties to a marriage equal rights during the subsistence of the marriage and dissolution. The Court of Appeal in the case of P. N. –v- Z. W. N (2017) eKLR stated as follows with regard to this provision –

It cannot be gainsaid that the people of Kenya in promulgating a new Constitution in 2010 intended a fundamental transformation of society. A society imbued with values like respect of 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 which incorporates the general rules of international law and Conventions ratified by Kenya as part of law (Article 2). The issue is whether those provisions and aspirations were retrospective in effect.

This court will therefore strive to ensure the equality by considering both monetary and none monetary contribution which the applicant has proved in the acquisition of the properties. The Court of Appeal in P.N.N –V- Z.W.N which I have cited above stated:

Our new Constitution dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty. What the Matrimonial Property Act has done is recognize at Section 2 that contribution towards acquisition of property takes both monetary and non-monetary forms which essentially opens the field of contribution to both spouses without distinction on the basis of remunerative employment, especially so in an urban setting

In such circumstances, an assessment of the inauspicious party's non-monetary contribution may well turn out to be in the negative, the account in debit. No fifty-fifty philosophy would grant such a party any right to property acquired without their contribution notwithstanding their negation or diminution of the efforts towards its acquisition.

In the end it does work out justly and fairly enough in that assessment may turn out 50:50 or as in the case of NJOROGE -- -vs- NJOROGE(supra)70:30 in favour of the man. There is no reason why the math may not be in favour of the wife if that is what

the evidence turns up. In many cases in fact, percentages never feature as the Court only ascertains who between the spouses owns which property.

I have considered the evidence and given reasons which make me come to the conclusion that the applicant has proved that though she was not in gainful employment like the respondent has proved that she did make monetary as well none monetary contributions towards acquisition of the properties. She did not just sit at home and leave everything to the respondent, she instead engaged in activities which generated income and deposited money in her husband's account which was used to repay loans and acquire properties. The applicant has made out a case for distribution of the matrimonial property between her and her husband.

The properties to be shared equally – Mutira/Kaguyu/[particulars withheld] which were a sub-division of plot Mutira/Kaguyu/[particulars withheld] and [particulars withheld]. The applicant has proved that these properties are in the names of the respondent and were acquired during the subsistence of the marriage and cannot therefore be excluded from the list of the matrimonial properties. As for the properties acquired during the subsistence of the marriage and sold by the respondent to 3rd parties, this cannot form matrimonial properties which should be considered during the division of the matrimonial property. The 3rd parties are not parties and may be affected by the order adversely without giving them a chance to be heard. As for Lock up No. 29 Kagumo Market, the applicant transferred it to the respondent without any conditions. Section 15 of the matrimonial property Act applies. It provides:

“where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be are rebuttable presumption that the property thereafter belongs absolutely to the recipient.”

The presumption was not rebutted. The fact that the respondent sold various property which were acquired during the subsistence of the marriage shows that he has had more than a fair share of the properties and more so the reason why what remains should be shared equally.

He sold the following properties;

- Mutira/Kaguyu/[particulars withheld]
- Mutira/Kaguyu/[particulars withheld]
- Mutira/Kirunda/[particulars withheld].
- Inoi/Kariko/[particulars withheld].

In conclusion I find that the applicant has proved her claim and is entitled to the orders sought.

I order as follows:-

- The Land Parcel No. Mutira/Kaguyu/[particulars withheld] and [particulars withheld] shall be shared equally between the parties since they are nine plots, each party will take four (4) plots and the last one be sub-divided into two and each party to take a portion.
- Land Parcel No. Inoi/Kariko/[particulars withheld] shall be shared equally between the parties.
- Plot No. [particulars withheld] Kagumo Market does not exist. The applicant admitted she had made a mistake as the plot is No. [particulars withheld]. No orders will be made on this plot.
- Motor vehicle No. KAV [particulars withheld] was bought after the parties separated. The applicant did not contribute towards its purchase. It is respondents property.
- I award the costs to the applicant.

Dated at Kerugoya this 28th day of September 2018.

L. W. GITARI

JUDGE