



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL CASE NO 14 OF 2009 (OS)**

**L G K.....Plaintiff**

**Versus**

**L K W .....Defendant**

**RULING**

On 23<sup>rd</sup> February 2012, the plaintiff/Applicant herein filed a notice of motion dated 14<sup>th</sup> February 2012 seeking two substantive orders, namely; that the matrimonial home be valued and the defendant/Respondent be compelled to pay half of the assessed value and secondly tea bushes, coffee bushes, trees and all developments on land **Thengenge/[particulars withheld]** undertaken during the subsistence of the marriage and that the said valuation be undertaken by the district agricultural/forest officer and that the defendant/ Respondent be compelled to pay half of the value.

On 6<sup>th</sup> May 2013 the parties recorded a consent in the following terms:-

- a. (i) *Half of 470,400/= being for house no. 1 noted on valuation report by Gimco Ltd dated the 11.8.2011.*
- (ii) *Half of Ksh. 21,175/= being for store no. 1.*
- (iii) *Half of Ksh. 10,000/= being the value of one latrine.*
- (iv) *Half of Ksh. 3,500/= being the value of water tanks.*
- b. *That the applicant to undertake value of a half of the tea bushes and coffee bushes.*
- c. *That the parties to address the court on the issue of the second house if need be.*

On 10<sup>th</sup> May 2014 the court made a further order that the District /County agricultural officer do carry out assessment of the tea bushes, trees and all the coffee bushes on L. R. No. **Thengenge/[partiuclars withheld]** and do compile a report thereof.

Pursuant to the above order, two reports were filed, one dated 14<sup>th</sup> March 2014 prepared by the Tetu Sub county Agricultural Officer a one **Peter Gacheru Wainaina** (hereinafter referred to as the first report) and another report dated 23 April 2013 prepared by the Tetu District Agricultural Officer a one **Edward G. Wamugo** (hereinafter referred to as the second report). The applicant relied on the first report while the Respondent relied on the second report. No objection was raised on the production of either report.

The authors of the two reports were called as witnesses. **Peter Gacheru Wamugo** testified on behalf of the applicant and produced the first report. He testified that he is based at Tetu Sub-County, that he holds a Diploma in Food Science Technology and that he had been at the Ministry of Agriculture for 5 years. He confirmed that he visited the land in question on 13<sup>th</sup> March 2014 and did assessment of coffee and tea bushes. His evidence was that the number of coffee trees were **586** and that they were mature, that the condition was average, and the average price is **Ksh. 540/=** per tree as per the Tetu Sub-County District Agricultural Committee rate at the time.

On tea, his evidence was that the tea plants were **Ksh.1,750** valued at **Ksh. 140/=** for each. He compiled the aforesaid report. On cross-examination he said he was shown the entire land and could not tell how many people owned the coffee and tea because he was not shown a boundary on the said land and that his instructions were to value the entire farm.

The applicant also gave evidence. The crux of her testimony was that the house described as number 2 was matrimonial property, that it was valued at **Ksh. 328,300/=** that the parties built the house in 1978. She insisted that they constructed the house so that her mother in law could live in the house with her grandchildren. She denied that the house was built by her mother in law.

The respondent's testimony was that the second house was never part of their matrimonial home, but the same was built by his mother, whom he insisted was financially able and that she used to support them financially. He also testified that his mother was not in good terms with the applicant, that she chased them from her house because they could not cope, that his mother divided and gave them a portion of the land and established a clear boundary.

Regarding the coffee, the respondent insisted that after they got married, his mother planted 400 coffee bushes, that she divided the land into two and 200 coffee trees fell on their side and out of the two hundred, he gave their son 100 for his up keep. His son has since increased the number of his coffee trees. As a consequence what is available now as matrimonial property is 100 coffee bushes. He insisted that the boundaries on the ground are very clear.

He dismissed the first report as totally misleading since it included the entire land and did not factor the reality on the ground.

Regarding the tea, he insisted that they planted their own portion with **500** trees measuring a quarter of an acre, and that some did not survive and that for the first report to talk of **1,750** is totally misleading.

The respondent called two witnesses. The two witnesses out of ignorance sat in court when the applicant was testifying. Counsel for the applicant pointed this issue but urged the court to bear the same in mind while considering their evidence.

The Respondent's first witness was a one **Ndungu Ndiangui** whose testimony was that he is familiar with the land in question and that the same is divided into two and that one portion was occupied by the Respondent and the other portion by their mother.

The second respondents witness was **Edward Gaita Wamugo**, an agricultural officer at Tetu Sub-County with a working experience of **35** years and a holder of an Agricultural Certificate from Embu Institute of Agriculture. He confirmed that he visited the land, did the assessment and prepared the second report. He confirmed the coffee trees were **100** in various conditions. In his assessment, **9** trees were mature, he valued them at the rate of **Ksh. 600/=** per tree and this translated to **Kh. 5,400/=**. He found **21** trees to be in average condition and valued them at **Ksh. 540/=** per tree and this translated to **Ksh. 11,340/=**. A total of **70** were in poor condition and he valued them at **Ksh. 480/=** each and this translated to **Ksh. 33,600/=**. The aggregate for coffee bushes was **Ksh. 50,340/=**.

As for the tea crops, there was an average of **84** mature trees which he valued at **Ksh. 100/=**, a total of **403** bushes were in poor state and he valued them at **Ksh. 40/=** each and this translated to **Ksh. 16,120/=**. The aggregate total for the tea was **Ksh. 24,520/=**.

He compiled the second report signed by him. The aggregate total for both the coffee and tea is **Ksh. 74,860/=**. He confirmed that the assessment is based on the Tetu District Agricultural Committee schedule of 2010.

At the close of the evidence I directed the parties to file their written submissions within 14 days and fixed the matter for mention on 2<sup>nd</sup> December 2015 to confirm compliance. On the said date only the respondent had filed his submissions. Counsel for the applicant asked for one more day and a mention date was fixed for 7<sup>th</sup> December 2015. By the said date counsel for the applicant had not filed his submissions and counsel holding his brief sought more time. The court reluctantly adjourned the matter to 26<sup>th</sup> January 2016.

However, on 26<sup>th</sup> January 2016 when the matter came up for mention, the applicants advocate had not filed his submissions and counsel who held his brief confirmed his instructions as follows "*Submissions will be filed in the course of the day.*" I gave a date for the ruling. By close of the day no submissions had been filed as promised and as expected I embarked on writing the ruling. Counsel for the applicant filed his submissions on 9<sup>th</sup> February 2016, long after the expiry of the aforesaid time frame and long after I had finalized writing this ruling. I strongly hold the view that time frames as stipulated above must be complied with and where a party for one reason or another is unable to act within the set time frame, then the appropriate step to take is to approach the court and ask for extension of time rather than file court papers without courts leave because strictly speaking such a document is not properly before the court and ought to be disregarded.

Nevertheless, I, confirm that I have considered the said submissions in this ruling.

On the issue of the two defence witnesses who sat in court, I have analysed their evidence and I find no prejudice on the part of the applicant. The second witness' report was filed long before the application was heard and his evidence dealt on it. The applicants counsel was served with the same and was aware of the contents. There was no objection to the production of the said report. Nothing new was introduced in the oral evidence and the witness confined himself to its contents. I find that no prejudice was occasioned to the applicant by the fact that the said witness sat in court.

The first defence witness testimony was brief and did not dwell of the plaintiffs testimony. I also find that though he sat in court, there is nothing to show that affected his version of evidence to the prejudice of the applicant.

The issue for determination in this matter is the reasonable value of the coffee and Tea bushes. The two reports referred to are the basis upon which the parties seek the courts determination on the issue.

I find the first report to be rather shallow. No sufficient explanation was given to justify the conclusions. The witness did not elaborate to explain the basis of the findings. Key issues were left out such as clear evidence on the condition of the coffee and tea. The witness classified all as average. It's unlikely that hundreds of plants in one farm will grow into uniform size. Some are bound to flourish, grow bigger than others, have more branches and even yield more. It would be totally unrealistic and indeed unlikely that such a large number of plants would be in a uniform state such that they would attract a uniform value.

The second report is in my opinion more detailed and the witness clearly demonstrated in a more logical and convincing manner the basis of his findings which took into account the highly reasonable and probable conditions of the coffee and Tea bushes. The witness elaborated that some trees were mature, others were average and even some were poor. He gave the various conditions as he witnessed and the actual numbers as he counted and recorded.

I take judicial notice of the fact that same crops/plants planted on the same parcel of land under more or less the same conditions may not grow in a uniform manner. This is a reality of nature, hence I disagree with the first report in so far as the writer adopted a standard and uniform assessment for all the coffee and Tea bushes. My conclusion is that the final assessment in the second report of Ksh. **Ksh. 74,860/=** is

more reasonable and probable.

As to the number of coffee and Tea bushes, I am persuaded by the respondents testimony which agrees with the applicant that after they got married, initially they lived in their mothers house, and that owing to inability to cope with the applicant, the parties ultimately built their own house. Again a close look at the evidence of both parties confirms that both agreed that they moved into their own house, separate from their mothers and they had their own compound.

The evidence of the existence of a boundary between the portion occupied by the parties herein and their mother was not rebutted. What was contested is whether their mother constructed her own house. Given the admission that the parties were first housed by their mother, and in absence of more convincing evidence that the parties constructed the second house, I am convinced that their mother who was described as financially able did build her house. It is admitted that by the time the parties got married they had no house and they were housed by their mother until they build their own house. It's not clear when the situation reversed such that they were the ones to house their mother. In any event, even assuming that both parties helped to build the house in question for their mother (which is not proved), does that change ownership? Does that imply that after the mother died the house was to revert to them in absence of a clear arrangement to that effect? Does it mean they were building the house for her to use during her lifetime for them to claim it as matrimonial property after her death? These answers have not been provided in the evidence. *Duhaime's Law Dictionary*<sup>[1]</sup> defines Matrimonial Property as "*Property owned by one or both of two persons who are married to one another which, upon the application of one of the spouses to a court, is subject to division between them.*"

From my analysis of the material presented to this court, I have concluded that there is no clear prove that either both parties or individually contributed to the construction of the house. I conclude that the house remained the property of their mother. The upshot is that the house in question was not part of the matrimonial property hence the same is not subject to division between the parties herein.

Accordingly, I up hold the total value for the coffee and Tea bushes as **Ksh. 74,860/=** and order that the applicant is entitled to half of the said sum. Owing to the nature of this case and the period it has been in court, I find it unfair to condemn any of the parties to pay costs. Each party shall bear his/her costs of this application.

Orders accordingly

Right of appeal 30 days

Dated at Nyeri this 15<sup>th</sup> day of February 2016

**John M. Mativo**

**Judge**

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[1] Duhaime.org