



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

MATRIMONIAL CAUSE NO. 2 OF 2015

M W M.....PLAINTIFF

Versus

G L.....DEFENDANT

JUDGMENT

1. **M W M (M)** Seeks by her originating summons dated 27th July 2010 the following determinations:-

- 1. Whether the plaintiff contributed towards acquisition and improvement of the matrimonial property Title Number Nanyuki Municipality Block 6/155.**
- 2. Whether the plaintiff is entitled to ownership and registration of half (½) share or such other share as the court may determine of matrimonial property TITLE NUMBER NANYUKI MUNICIPALITY /BLOCK 6/155 having directly and monetarily contributed towards its acquisition and improvement?**
- 3. Whether the said matrimonial property formed the matrimonial home of the parties herein?**
- 4. Whether the defendant should be ordered to transfer half (½) share as the court may determine of matrimonial property in favour of plaintiff and in default the court to do so on his behalf?**

2. M has by her affidavit deponed that she and the defendant **G L (G)** were married on 21st September 2007. That they cohabited at their matrimonial house being property **No. Nanyuki Municipality block 6/155 (the property)** which is registered in the name of G. That they cohabited at that property until 30th November 2008 when G assaulted her and attempted to kill her. G was subsequently charged with two counts of offences; that is, attempted murder and assault. He pleaded guilty to both counts. M deponed further that she contributed towards the acquisition of the property and therefore concluded that she is entitled to half share of the same. Mary at **paragraph 10** of her affidavit deponed as follows:-

“Prior to the purchase I identified the property, contributed part of the purchase price, painted the entire interior and parts of the house, renovated the kitchen and did the garden amongst other improvements on the property.”

3. Through in her oral evidence M stated that she was a business woman before she met G. That she used the proceeds of about Kshs.1.3 million of her business to contribute to the purchase price of the property. She said that she contributed that amount because G did not have the finances to pay the entire purchase

price. She however conceded that the property was purchased before the marriage.

4. In respect of her business she stated that she used to make profit of between 100 and 300 but did not clarify whether this was thousands or millions neither did she clarify its currency. She also stated that she assisted G to pay for his work permit but when cross examined she was unable to state how much she paid for him in that regard.

5. In respect to their marriage M stated in evidence that it was officiated at Uhuru Gardens in Nairobi. She conceded that that was contrary to what is indicated in the marriage certificate as the venue of the marriage. The marriage certificate indicates that the marriage took place at Deliverance International Centre.

6. G by his replying affidavit denied that there was a valid marriage between him and M. The reasons he gave for there not being a valid marriage was because he was already married to another lady by the name of M E. He attached the marriage certificate which evidenced that marriage which was solemnised on 26th August 1978 in the UK. He also deponed that the marriage certificate which M relied upon was a fake since it could not be traced at the Registrar of Marriages. The other reason he attributed to his contention that the marriage was invalid was because he was a Caucasian and the certificate of marriage exhibited by M showed that the marriage was officiated under the African Christian Marriage and Divorce Act Cap 151. Further he deponed that the necessary processes required before such a marriage is solemnised were not observed.

7. He denied that M contributed to the purchase price of the property. To the contrary he stated that it was him who maintained M by giving her kshs. 20,000 per month and by paying her siblings school fees.

8. In his oral evidence G reiterated his deposition and further stated that M was merely his girlfriend and not a wife as she allege. He stated that at one time M informed him that her aunt was unhappy about their staying together while unmarried. In this regard M requested him that they do conduct a mock ceremony of marriage only for the purpose of pleasing her aunt. At one time he said M took him to Nairobi and when they reached at Uhuru gardens they met other people there. At that point he said he had not been informed by M the purpose of the visit at Uhuru Gardens. He noted that M's aunt who was smartly dressed together with other people was present. He stated that he informed the person whom he believed was conducting the ceremony for the purpose of pleasing M's aunt that he could not get married because he was already married.

ANALYSIS AND DETERMINATION

9. M's action is based on **Section 17 of the Married Women Property Act (The Act)**. That Act has since been repealed. M's action was however filed in the year 2010 when the Act was still applicable. Section 17 of the Act related to the question of possession and ownership of title of matrimonial property. It follows that on an action under that section the parties must be married. In my view the paramount issue that must be determined before any other issue is considered is whether M and G are husband and wife. M contends that they are husband and wife and in this regard relied on the marriage certificate of 21st August 2007. That certificate allegedly is evidence of their marriage at the Deliverance International Centre. G on the other hand denies that they are married and contends that the certificate produced before court is a fake.

10. M had a burden of proof on a balance of probability to prove that they are married. There are two cases which discuss that burden of proof which I shall refer to. **JENIFFER NYAMBURA KAMAU VS HUMPREY MBAKA NANDI CIVIL APPEAL NO. 342 OF 2010 (2013) eKLR** where the court stated:

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on those forms belong to the respondent. Section 107 of the Evidence Act provides that:-

‘Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.’

However, *section 109* stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as *Section 108* of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

The second is REGISTERED TRUSTEES OF MAXIMUM MIRACLE CENTER v. ANDREW MLEWA MKARE (2016) eKLR where the court stated:-

“From the outset, we must reiterate the provision of the Evidence Act on the burden of proof. *Section 107* place the burden of proof upon the party who desires the court to give judgment in his favour and *section 108* adds that the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all was given on either side. Addressing provisions similar to *section 107* and *108* of the Evidence Act, the learned authors of Mulla on the Code of Civil Procedure, 16th Edition, Vol. 2 state as follows:

‘The right to being is to be determined the rules of evidence. As a general rule, the party on whom the burden of proof rests should begin ... the burden of proof lies on that party who would fail if no evidence at all were given on either side. It is well settled law that a person who sets the law in motion and seeks a relief before the court, must necessarily be in a position to prove his case and get relief molded by the law.’

See also *Delphis Bank Ltd v. Channan Singh Chatte & 5 others CA No. 179 of 2008 (Kisumu).*”

11. G having denied that there was a genuine marriage between him and M, M ought to have proved otherwise. The question is, did she? M relied on a photocopy of a marriage certificate. That photocopy indicated the marriage took place at Deliverance International Centre whereas in fact M conceded that it was at Uhuru park. G contention was that the marriage ceremony was a make believe ceremony in order to please M’s aunt. That contention was not rebutted by M. Although M in cross examination stated that her aunt was one of the witnesses of her marriage that aunt or any other person present were not called to testify in this case. There was no evidence offered by M on the genuineness of that marriage certificate.

12. In my view M failed to prove on a balance of probability that she and G got married on 21st September 2007 or at all. Indeed M did not even respond to the fact raised by G that because he was a Caucasian he could not get married under **Cap 151** and in particular **Section 3** thereof.

13. **Section 17** of the Act only applies to those who are validly married. This was poignantly clear in the case *R.M.M v B.A.M [2015] eKLR* where the court stated:-

“The Court of Appeal in *Echaria vs Echaria* (2007) eKLR (five-judge bench) gave a detailed account and history of the application of *Section 17* in Kenya, and noted that the said section gives the courts discretion to grant appropriate remedies upon ascertainment of the respective beneficial interest in a disputed property. It stated in part:-

‘The Married Women’s Property Act, 1882 is, of course, an Act of general application in Kenya (see *I v.1 [1971] EA 278*; *Karanja vs. Karanja [1976] KLR 307*. *Section 17* of the 1882 Act under which the originating summons was brought provides in the relevant part:

“In any question between husband and wife as to the title to or possession of property, either party may apply by summons or otherwise in a summary way to any judge of the High Court of Justice and the judge of the High Court may make such orders with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit.”

14. M’s case fails on the ground that she failed to prove marriage to the required standard.

15. Even though I find that M’s case fails for lack of evidence on marriage I will also state that M failed to prove that she made any or at all contribution either materially or otherwise of the purchase of the property. I would also say that I had an opportunity to observe the parties as they testified and I found M not to be a truthful witness. She was in fact unable to categorically show her contribution if any. She at one time said that she used her business proceeds to contribute about 1.3 million to the purchased price. She provided no proof of such contributions. When asked how much her business yielded she failed to state with clarity. Her evidence in my view was farfetched. She became acquainted with G when she was 24 years old. He was then 69 years old. She failed to prove how at her youthful age she was able to contribute to the purchase of the property. G having denied that M contributed to the purchase of the property the burden was on M to prove otherwise. She did not meet the burden.

16. On the whole Mary’s case fails. This case is hereby dismissed with costs to the defendant. The inhibition orders in respect of Nanyuki Municipality/block 6/155 issued on 17th September 2010 are hereby vacated.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2016.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

Plaintiff:

Defendant:

For Plaintiff:

For Defendant:

COURT

Judgment read in open court.

MARY KASANGO

JUDGE