REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL CASE NO. 25 OF 2008

G W M…..…APPLICANT

VERSUS

W M K.…RESPONDENT

JUDGMENT

1. The applicant herein moved the court by way of an Originating Summons dated 16th June 2011 seeking –

a. a declaration that 50% of [particulars withheld] was acquired by the joint funds of both parties;

b. an order that the applicant be allowed to purchase the respondent's share of the said property upon valuation thereof or the property be sold and the net proceeds be shared between the parties;

c. a declaration that [particulars withheld], [particulars withheld], 5 Fire welding machine, Barclays Banks shares (562) and a *posho* mill were acquired by joint funds and efforts of the applicant and the respondent during their marriage be shared equally.

2. In the affidavit in support of the summons, the applicant states that she had married the respondent on 5th January 1983 under statute, which union was blessed with five (5) children. The family resided at Dagoretti/Riruta [particulars withheld]. She avers that she contributed financially through her businesses, by purchase of food, and building rental housing on Dagoretti/Riruta [particulars withheld]. She asserts that the respondent would not have managed to acquire the assets on his own. She states that the couple lives at the matrimonial home at Kawangware but in different houses. She complains that the respondent has transferred [particulars withheld] to the woman that he was living with.

3. The respondent has filed a reply to the Originating Summons, taking the form of a replying affidavit sworn on 1st October 2014. He avers that he has three (3) wives and eighteen (18) children. He contests the claim by the applicant that she contributed to the acquisition of [particulars withheld], asserting that he bought the property single-handedly in 1983 from a named buyer using funds raised from sale of another plot which he had inherited from his parents. He avers further that he subdivided [particulars withheld] into ten plots, some of which he registered in the names of his third wife, a daughter with his first wife and a son with his second wife – that is to say N W M, M W M and P K M. One plot was sold to defray surveying costs. He pleads that [particulars withheld] no longer exists and that he is not registered as owner of any of the plots that resulted from the subdivision thereof. He concedes that Dagoretti/Riruta/[particulars withheld] is registered in the joint names of the parties, but asserts that the

money for the acquisition of the property came from him alone and that the decision to have it registered in their joint names came from him. He states that the said property has been subdivided equally between him and the applicant, and he says that he has no intention of interfering with her portion. It is his case that the application is misconceived.

4. He has attached several documents to his affidavit. There are there copies of certificates of official searches in respect of eight of the subplots resultant from the subdivision of Karai/Gikambura/[particulars withheld]. The certificates are in respect of Karai/Gikambura/[particulars withheld], all in the names of N W M, M W M and P K M. The said certificates are all dated 17th July 2013. There is also copy of a letter of consent dated 12th February 2014 of the Dagoretti Land Control Board regarding partition of Dagoretti/Riruta/[particulars withheld] to two equal parts.

5. The applicant has reacted to the replying affidavit by swearing an affidavit on 28th October 2014. She pleads ignorance to the existence of other wives of the respondent. She also accuses the respondent of acting fraudulently in an effort to deny her share of the matrimonial property. She pleads that he used a forged court order to have a caution removed. She asserts that the transfer of the assets to third parties was meant to defeat her claim. She further states that she is the one in occupation and control of the subject property, as she has a home there and she has extensively developed the same.

6. The Originating Summons was disposed of by way of oral evidence. The applicant testified on 2nd July 2015. She stated that she started to cohabit with the respondent in 1970, but their union was solemnized in 1983. They begat a number of children. She stated that during the course of the marriage, they acquired several assets. There was Dagoretti/Riruta/[particulars withheld], where they built a home and rental houses. She said that she lived on the said property. Then there was Karai/Gikambura/[particulars withheld] which they also bought. They also allegedly bought shares in Kenya Airways and Barclays Bank. They had a [particulars withheld] business and a [particulars withheld]. She stated that she had exclusive use of the Karai property, although she shares the other property with the respondent. She asserted that the Karai property had been transferred to the other wife. On cross-examination, she stated that she and the applicant had a joint bank account, and she used to sell milk and deposit the money in the joint account. She stated that Dagoretti/Riruta/[particulars withheld] was not bought, but was given to them jointly by the applicant's grandfather. It was initially in one name and then it was transferred to their joint names. It was later subdivided into two, she was given one portion and the respondent took the other. She said she had no problem with the Dagoretti/Riruta/[particulars withheld], what she wanted was to have Karai/Gikambura/[particulars withheld] shared equally between them. On re-examination, she stated that the respondent was a plumber by trade. He subsequently became a [particulars withheld] in the line of his trade. He bought welding machines and began a welding business. She had three head of cattle from which she would get milk for sale. She was also selling tea.

7. The respondent took the stand on 24th September 2015. He stated that he had married three (3) times and had eighteen (18) children. He stated that at the time he married the applicant he lived at Kawangware, Riruta, on Plot No. [particulars withheld], which he had inherited from his mother. He also had Plot No. [particulars withheld], which he subdivided into two; one was registered in the name of his brother, while he retained the other portion, Plot No. [particulars withheld]. He further said that after selling Plot No. [particulars withheld] he used the sale proceeds to buy another plot at Gikambura and to develop the plot at Riruta. At the time of the said sale he was living with his first wife and their children. The first wife had cattle, which the applicant found when he married. After the first wife left, the respondent hired workers to look after them. He testified that he later shared the Gikambura property between his three (3) houses, by giving one portion to his third wife, one to his daughter from the first house and the third to his son from the second wife. The three were supposed to hold the same in trust for the rest in their respective houses. He explained that he subdivided the Dagoretti property, Plot No. [particulars withheld], between himself and the applicant. He explained that that was necessitated by the efforts that the neighbours were then making to grab the property. He stated that he and the applicant both had their own titles. On his side of the plot he had a [particulars withheld] business, while there were rental houses on the applicant's side. Regarding the Gikambura land, the applicant was said to be farming on the side of the farm given to her son, K. He said that he had not sold any of the portions subdivided

from the Gikambura plot.

8. The law on division of matrimonial property is the Matrimonial Property Act, No. 49 of 2013. The relevant provisions on distribution of such property are sections 7 and 8 of the Act.

9. Paragraph 5 of the Originating Summons prays for settlement of the properties listed in the application for the benefit of the applicant. That paragraph prays for the determination of the distribution of the properties in proportions to be worked out by the court. Paragraph 4 prays for a declaration that the respondent holds the said assets in trust for the applicant.

10. Section 7 of the Act states as follows –

> *'Subject to section 6(3), 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.'*

11. My understanding of this provision is that matrimonial property is to be divided only after the parties have divorced or otherwise upon the dissolution of their marriage. I note from the record that the applicant has pleaded that there is a pending divorce cause, being Milimani CMCDC No. [particulars withheld], which had not been determined as at the date this matter was lodged in court in 2008. There is therefore jurisdiction to divide matrimonial property.

12. According to section 7, the division of the property ought to be guided by the respective contribution of either party to its acquisition. The applicant alleges that the properties were acquired during the course of the marriage, and she did contribute to the acquisition, albeit indirectly. The respondent states that he acquired the same by his sole efforts and resources. Two landed assets are at the heart of the matter, Karai/Gikambura/[particulars withheld] and Dagoretti/Riruta/[particulars withheld].

13. I will start by considering the evidence relating to Karai/Gikambura/[particulars withheld]. A green card in respect of the property, which is on record, shows that the register for the subject property had opened on 24th January 1963, when the same was registered in the name of the Trust Land Board. On 20th September 1983 it was transferred to the name of Peter Njuguna Rubia, and on 7th December 1983 it was transferred to the name of the respondent. The respondent was initially issued with a land certificate on 7th December 1983 and subsequently with a title deed on 10th August 1995 and again on 3rd January 1997. The applicant herein caused a caution to be registered against the title on 7th November 1997. The cautions and restrictions on the register were removed in 2003, and the property was transferred to the names of N W M, M W M and P K M, and a title deed was eventually issued in their names on 21st February 2008. The register closed on 16th October 2013 following the subdivision of the title into subplots [particulars withheld]. There are on record copies of official searches indicating that Karai/Gikambura/[particulars withheld] exist as registered on 16th October 2012 in the names of N W M, M W M and P K M.

14. A green card in respect of Dagoretti/Riruta/[particulars withheld], which is also on record, indicates that the register for that property opened on 31st December 1982 following subdivision of Dagoretti/Riruta/[particulars withheld]. It was initially registered in the name of the respondent on 31st December 1982. On 19th January 1994, it was transferred to the joint names of the applicant and the respondent. There is also on record a letter of consent from the Dagoretti Land Control Board, dated 8th May 2013, allowing the subdivision of the subject property equally in favour of P K M, M K M, E K M and S W M. There is also copy of a letter of consent from the Dagoretti Land Control Board, dated 12th February 2014, allowing partition of the subject property into two to persons who are not indicated on the face of the consent.

15. The issue for me to determine is whether Karai/Gikambura/[particulars withheld] and Dagoretti/Riruta/[particulars withheld] are matrimonial property within the meaning of section 6 of the

Matrimonial Property Act, and, if so, whether the court can grant the orders sought herein with respect to them.

16. Section 6 of the Act states that –

> *'(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.'*

17. My understanding of the above provision is that for property to qualify to be matrimonial property, it ought to be either the matrimonial home or homes, or the household goods and effects in the matrimonial home or homes, or any other property jointly owned and acquired during coverture.

18. The question to answer in this cause would be whether these two assets were acquired during coverture. And if they were, were they acquired and owned jointly. The latter aspect introduces the issue of contribution as defined in section 7 of the Act.

19. The marriage certificate on record, serial number [particulars withheld], indicates that the parties hereto contracted a statutory marriage at the Registrar's Office on 15th January 1983, but it would appear that they were already married under customary law according to the same certificate. In her affidavit sworn on 26th June 2013, the applicant avers that she had cohabited with the respondent since 1970 prior to the solemnization of the marriage in 1983. She testified along similar lines on 2nd July 2015. The respondent, in his affidavits and the oral testimony tendered on 24th September 2015, did not advert as to the dates when he married the applicant and the circumstances of the said marriage. The certificate of marriage has not been denounced by the respondent; it is also not denied that prior to that the parties had been in cohabitation for a while. The statutory marriage no doubt happened in 1983. It is however not clear when the alleged customary law marriage was contracted or when the parties began to cohabit prior to the solemnization of their union. The applicant states that the cohabitation began in 1970, and says that her first child came in 1971. The marriage certificate puts her age at twenty-six (26) in 1983 when she entered into the statutory marriage with the respondent. That would mean she was thirteen (13) years of age in 1970 when she allegedly began to cohabit with the respondent and fourteen (14) years old when she had her first child. That has not been disputed by the respondent and I shall therefore treat it as the correct position.

20. The respondent did not give coherent evidence regarding Dagoretti/Riruta/[particulars withheld]. I understood him to say that at the time he married the applicant he was living on a property he called Plot No. 206, which he had inherited from his mother. He then also had another property, Dagoretti/Riruta/[particulars withheld]. He did not explain how he had it, but he says that he had it subdivided into two, one portion came to him, which I believe to be Dagoretti/Riruta/[particulars withheld], while the other was given to his brother, which would suggest Dagoretti/Riruta/[particulars withheld] was ancestral property. He then sold Plot No. [particulars withheld], and used the proceeds therefrom to buy Karai/Gikambura/[particulars withheld] and to develop Dagoretti/Riruta/[particulars withheld]. He later caused Dagoretti/Riruta/2070 to be registered in his joint names with the applicant.

21. The applicant's version of events is similar but with some variations. She asserts that Dagoretti/Riruta/[particulars withheld] was not bought by the respondent. It was property that they were given by the respondent's grandfather, which was initially registered in the respondent's name, but it was later transferred to their joint names. The applicant says that she lives on her portion of Dagoretti/Riruta/[particulars withheld], and is comfortable with that arrangement. On his part the respondent has averred that he has no intention of taking the applicant's portion of

Dagoretti/Riruta/[particulars withheld].

22. Is Dagoretti/Riruta/[particulars withheld] matrimonial property? It would appear from what has been presented before me that the same was ancestral land, for it originated from the respondent's side of the family. The applicant has alluded to a gift to them both, but there is no concrete evidence of the same. It cannot therefore be said that the applicant contributed in any way towards its acquisition, and therefore it would be unnecessary to consider whether or not she made any contribution to its acquisition. In that respect therefore it cannot really be said to be matrimonial property going by section 5 of the Matrimonial Property Act.

23. I have noted, however, that the same is developed and it would appear that the parties cohabited there and the applicant still lives there. It was therefore where they set up for themselves a matrimonial home. Put differently, the matrimonial home for the two parties is situated within this property. Added to that is the fact that the property was eventually registered in the joint names of both parties, and both of them have asserted that the property ought to be shared equally. If the applicant's share thereof came to her by way of gift, then it would appear that section 15 of the Act, applies. The sentiments of the respondent on the property would mean that he intended the gift to pass to the applicant absolutely.

24. Karai/Gikambura/[particulars withheld] was allegedly acquired by the respondent from money that he had raised from the sale of Plot No. 206, which he had allegedly inherited from his mother. According to the green card on record, Karai/Gikambura/[particulars withheld] was registered in the name of the respondent on 7th December 1983, roughly twelve (12) months after the solemnization of the marriage of the statutory marriage and thirteen (13) years after the parties began to cohabit, whether or not they had contracted a customary law marriage. Its acquisition was therefore during coverture.

25. The question then is whether the applicant contributed to its acquisition. She asserts that she did, indirectly, through various means. The respondent states that she did not. He argues that the property was bought with money raised from sale of ancestral property. The ancestral property is said to be Plot No. 206. No evidence was led to establish that the said property ever existed and to prove its disposal so as to raise money for the purchase of Karai/Gikambura/[particulars withheld] and the development of Dagoretti/Riruta/[particulars withheld]. I cannot thereof find basis that the property was acquired by the respondent in the manner that he alleges. Did the applicant contribute to its acquisition? Scanty evidence was led to prove that assertion, other than saying that whatever she did as a wife amounted to indirect contribution. I would be prepared to find that there could have been some minimal indirect contribution by the applicant.

26. However, before I can consider apportionment of the said property as between the parties, I have to take into account another matter that emerged from the proceedings. The respondent described himself as a polygamist, having married more than once, and that he had eighteen (18) children from the three (3) marriages.

27. The application for division of matrimonial property is by only one of the three (3) alleged wives, yet under the Matrimonial Property Act, where the man is a polygamist the distribution ought to take that account into fact and follow the principles for division of the property as set out in section 8 of the said Act, which provides as follows-

> *'(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 married 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.*

(2). Despite subsection (1)(b), where it is clear by agreement of the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then any such wife shall own that matrimonial property equally with the husband, without the participation of the other wife or wives.'

28. Are the circumstances of this case one to which section 8 of the Act applies? The parties did not address this matter in any meaning way. None of them addressed section 8 of the Act in their submissions. Yet, the respondent in his papers has pleaded that he had three wives. He repeated that in his testimony. The assertion that there were several wives is feebly contested by the applicant. She says in her papers that she is unaware of other wives, but refers in some of the papers to a woman that the respondent was living with. In her oral testimony she refers to that other woman as the other wife. She however remains silent on whether there was a first wife. She asserts that she was married under statute, and implies then that the respondent could not possibly have had capacity to marry other wives. Underlying this argument, would be the proposition that the property should therefore only be shared out between her and the respondent.

29. I have already noted that the marriage certificate on record indicates that the applicant married the respondent when she was at age twenty six (26) in 1983, which would mean that she was only thirteen (13) when she began to cohabit with the respondent. I find that a little curious and improbable. A girl of fifteen or sixteen (16) years of age would appear to be closer to the age of marriage then, but at thirteen she would be a mere child. The age of the respondent in 1983 is put in the certificate as forty-seven (47) years. It is probable and logical that he might have had another wife before marrying the applicant. He still states that he has three wives, and he refers to his first wife, Wanjiru, who he says was on and off his compound. It is not clear from the record whether she is still alive. He asserted at the hearing that he had married her traditionally, and did not allude at all to any dissolution of that marriage, at any rate before he married the applicant. I am persuaded that the respondent has three (3) women in his life who can loosely be defined as his wives.

30. The applicant suggests that the other two cannot possibly be legal wives qualified to lay stake to the property of the respondent. She points to the statutory marriage contracted in 1983 under the Marriage Act, Cap 150, Laws of Kenya, now repealed. Her position appears to be hinged on sections 36 and 37 of the Marriage Act, Cap 150. Section 36 of that law provided that all marriages celebrated under that repealed Marriage Act were good and valid to all purposes and intents. Section 37 on the other hand stated that a person who had contracted marriage under that statute lacked capacity to contract a valid marriage under customary law. That would then mean that after 1983, the respondent lost capacity to contract any other marriage and therefore his purported marriage to the so-called third wife got caught up under that provisions and therefore it would seem to be null and void.

31. Regarding the first wife, the respondent pleads that she was a wife he had married under customary law. I have mentioned above that there is no mention of any divorce from that wife. The applicant chose to be silent about the matter of the alleged first wife. I will presume in the circumstances that there was and probably still is such a wife. The question is, did the purported statutory marriage between the applicant and the respondent have any impact on the said alleged first marriage?

32. The answer to that question would appear to lie in section 11(d) of the repealed Marriage Act, which provided that the registrar of marriages was required to be satisfied that none of the parties to a proposed statutory marriage was married under customary law to any person other than the person with whom such marriage was proposed to be contracted. Section 49 of the same Act made it an offence for a person who was married under customary law to go through a ceremony of marriage under the Act with a person other than the person they had married under customary law. In *Pauline Ndete Kinyota Maingi vs. Rael Kinyota Maingi* CACA No. 66 of 1984 it was held that a marriage contracted in contravention of section 11(d) of the repealed Marriage Act was a nullity.

33. At the time the respondent married the applicant under statute, he was already married under customary law to another woman. By virtue of section 11(d) of the repealed Marriage Act, he had no capacity to contract a statutory with any other person besides the woman that he had previously married

under customary law. His marriage to the applicant therefore cannot be a valid statutory marriage, and she cannot as a consequence appropriate the benefits that come with such a marriage. The ceremony of 1983 therefore did not render invalid the respondent's earlier marriage to the first wife or the subsequent one to the third wife.

34. Having found that all three marriages are valid, I should hold that section 8 of the Matrimonial Property Act applies to this matter. The property acquired by the respondent during the currency of the three marriages should be subjected to the provisions of section 8. It is clear that both landed assets were acquired during the time when the currency of the marriage to the first and second wives, but it is unclear as to when the third wife was married. If she had not been married as at the time the said property was acquired, then there would be no basis for taking her interest into account in the division of the said property. Going by section 8(2) of the Matrimonial Property Act, Dagoretti/Riruta/[particulars withheld] was jointly owned between the applicant and the respondent and therefore it ought to belong exclusively to the two. Karai/Gikambura/[particulars withheld] is what ought to be shared between the first two wives and the respondent, and even the third wife should it turn out that she had been married by the deceased at the time the property was acquired, subject of course to the question of contribution of all concerned being taken into account. As there are other persons who are entitled, or potentially entitled to this property, it would be unjust to determine the applicant's rights thereto without affording those other persons a hearing.

35. There are also movable items to be taken into account – a welding machine, a *posho* mill and shares in a limited liability company. The applicant did not lead evidence to establish existence of these items. Therefore there is no proof that they are available for division. There was no evidence adduced as to when, if at all, they were acquired, and under whose name. Consequently, no orders can be made on them.

36. I have noted from the material placed before me that the respondent proceeded to have Karai/Gikambura/[particulars withheld] subdivided and the sub-parcels so created transferred to names of other persons in 2012, during the currency of this suit. I am persuaded that those manoeuvres were made with the purpose of defeating this suit.

37. In the end I do hereby answer the applicant's Originating Summons in the following manner:-

a. That I hereby declare and decree that Karai/Gikambura/[particulars withheld] **was a property to whose acquisition the applicant might have contributed to its acquisition but her said contribution cannot be determined without also considering the contribution and or interest of G W, and possibly N W;**

b. That the subdivision of Karai/Gikambura/[particulars withheld] is hereby nullified and the land registrar responsible for lands within Kiambu County is hereby directed to cancel the said subdivision and the transfers of the resultant parcels numbers Karai/Gikambura/[particulars withheld] and [particulars withheld], and to revert the same to Karai/Gikambura/[particulars withheld];

c. That the parties hereto shall be at liberty to move the court appropriately for determination of the interests of the applicant, the respondent, G W, and possibly N W, in Karai/Gikambura/[particulars withheld];

d. That Karai/Gikambura/[particulars withheld] as restored shall be preserved by way of an injunction directed at the respondent to restrain disposal thereof in any manner pending determination of any applications to be made under (c) above;

e. That I hereby declare and decree that Dagoretti/Riruta/[particulars withheld] is a property jointly owned by the applicant and the respondent, the same shall be divided between the two equally; and

f. That the applicant shall have the costs of this suit.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH DAY OF DECEMBER, 2016

W. MUSYOKA

JUDGE