



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 32 OF 2014

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT 1982

J M M.....PLAINTIFF/APPLICANT

VERSUS

J N G.....DEFENDANT/RESPONDENT

RULING

PLEADINGS

The Applicant; J M M filed the Originating Summons of 9th May, 2014 brought under **Section 1A, 1B and 3A of the Civil Procedure Act and other enabling provisions of the Law** and sought the following orders;

- a. A declaration that the following properties are matrimonial property.
 - i. Kajiado/Kajiado North/*[particulars withheld]*
 - ii. Dagoretti Waithaka/ *[particulars withheld]*.
- b. The property be divided 50%/50% and the portion of the property of the Plaintiff be held in trust by the Defendant.
- c. The Defendant to account for the aforementioned properties and/or income thereof.
- d. The Defendant be restrained from alienating, destroying, damaging or otherwise interfering with the said matrimonial properties.

In the affidavit annexed to the application the Applicant deponed that he and the Respondent are married but separated vide **Separation Cause No. 19 of 2005** which has never been concluded to date. The Magistrate's Court gave interim orders to exclude him from the matrimonial home pending the hearing and determination of the suit as per the annexed Court Order "**JNMI**". Since then he has been excluded from accessing the matrimonial home and accessing his personal documents/effects from the home. The Respondent has been adamant and refused him to access the home or take his belongings or pursue the matter.

The Respondent in her Replying Affidavit of 18th July, 2014 stated that she and the Applicant lived

together through cohabitation since 1979. They did not formalize the union. In 2005 she filed a **Separation Cause No. 19 of 2005** and obtained interim orders that the Applicant was not to access to the matrimonial home Dagoretti/Waithaka/ **[particulars withheld]**. The Respondent stated that she bought Dagoretti/Waithaka/ **[particulars withheld]** from her brother in law; brother to the Applicant F G M as per the sale Agreement “JNG-3”.

She got a loan from her employer and paid for the plot and then obtained another loan and built a house. Later she bought Kajiado/Kajiado North/ **[particulars withheld]**. She claims the matter regarding the land should not be heard in this Court as there is another suit over the same land as per the document marked “JNG 5” and having the matter heard in this Court would cause conflicting decisions.

The Applicant in his Further Affidavit filed on 22nd September, 2014 stated the Separation Cause filed in Court was to evict him from the matrimonial home. He is an electrician by profession and employed, he contributed to the purchase of the property in question and the construction of the matrimonial home.

He stated that Respondent as shown by her payslip annexed to his Replying Affidavit could not sustain various activities at the same time. She claimed to pay and build the home; to start a business with a fulltime job, pay school fees for the children and buy another piece of land. He contributed to the purchase of both pieces of land. The Respondent withheld the Title Kajiado/Kajiado North/ **[particulars withheld]** whose copy is attached as it is in both their names as shown by the attached Certificate of search under the Registered Land Act marked “JNB 2”

The attached Plaintiff of the pending suit Civil Suit 57 of 2014 filed by the Applicant herein shows in paragraph 3, 4 and 5 that the Applicant/Plaintiff offset and paid that between 2003 – 2008 the Kshs. 110,000/= towards purchase of the land and the Respondent paid Ksh. 20,000/= for the land in question. Yet after the said payment, the Respondent declined to transfer the land Kitengela/Kisaju/Kajiado/ **[particulars withheld]** to him.

HEARING

The hearing date was obtained by consent on 9th December, 2014. On 19th February, 2015 the hearing of the application proceeded exparte. No reasons were adduced by the Respondent and/or her advocate for the Court to consider.

The Applicant J M M testified and gave detailed evidence on the facts deponed in the affidavit. He stated that he and the Respondent were married for 26 years. During this period they obtained 3 properties;

- a. Giturai **[particulars withheld]**
- b. Dagoretti/Waithaka/ **[particulars withheld]**
- c. Kajiado North/ **[particulars withheld]** – 1 ½ acres

The 1st and 2nd properties the Respondent sold them and she declined to give the Title deed of the 3rd property to the Applicant. He contributed to the purchase of all 3 properties.

After the Separation Suit/Cause 15 of 2005 he was ordered to vacate the matrimonial home and since then he has not settled in his own home but in rented premises. He therefore sought for the Court orders to obtain the Title deed for the said land and subdivide it into 50% for him and 50% for her.

DETERMINATION

This Court has considered the evidence on record. The Plaintiff/Applicant and Respondent/Defendant were man and wife. They cohabited for 26 years. Under the previous law, inspite of no formal ceremony to officiate the union, a presumption of marriage could be presumed. They cohabited and had children of the marriage.

In the case of **MARY WANJIRU GITHATU Vs ESTHER WANJIRU KIANI (2010) eKLR E. A.** provides;

“A Court of Law is not precluded from presuming existence of a marriage even in circumstances when a party claims that the marriage in question was not celebrated under Customary Law of the Community of the parties involved in the particular marriage.”

They contributed to the matrimonial home and the itemized properties which were confirmed as matrimonial property under **Section 6 of the Matrimonial Property Act, 2013** as they were obtained during the subsistence of the said marriage. Since the Magistrate’s Court ordered him to vacate the matrimonial home vide Separation Cause 15 of 2005 the union and marriage came to an end. They remained separated to date. Therefore the properties ought to be divided equally between the 2 spouses.

There does not seem to be much information regarding the children of the marriage, their age, formal education stage, residence etc so as to inform the Court’s decision in division of the matrimonial property.

The Court finds from the Respondent’s evidence as follows;

- a. Although she made contributions through obtaining loans to purchase the properties she could not have contributed the same solely on her own; taking into account the contents of the attached payslip and various responsibilities prevailing at the time. These include children subsistence, school fees, running business, fulltime job, repayment of loans, purchase of properties and development and/or construction of the house(s).
- b. The Applicant was and is employed by **[particulars withheld]** as an electrician. Therefore he was able to contribute to the purchase of the matrimonial property, contrary to the Respondents accusation that she obtained all properties single handedly.
- c. With regard to whether they were married or not, having been together since 1979 to 2005 they had lived together for 26 years and under the provisions of law a presumption of marriage as in this case is inferred. In any case if there was no formal marriage or union why did she apply for judicial separation, in the Magistrate’s Court? This Court finds that the Plaintiff and Respondent had a legal and lawful marriage.
- d. With regard to the issue that the matter regarding Kajiado/Kajiado North/ **[particulars withheld]** is the subject of **Civil Suit 57 of 2014 of the Magistrates Court** and should not be heard and determined by this Court, the position is not borne out by the law. The High Court deals with division of matrimonial property under the **Matrimonial Property Act, 2013**.

During the pendency of this Court’s ruling the Respondent filed under certificate of urgency on 25th March, 2015 an application to stop the hearing and ruling of this Court.

The basis of the application sought the Court to set aside the exparte proceedings of 19th February, 2015 and the defendant be allowed to defend the suit. Secondly, the Respondent urged the Court to consider the evidence of the Respondent in the pleadings in reaching its decision.

The Court has considered the Respondent’s evidence as the proceedings cannot be set aside. The application has already been heard and has been pending for ruling. The Respondent was served through the advocate on record.

This Court is satisfied with the fact that the property was bought during the subsistence of the marriage through contribution by both parties. Therefore it falls within the purview and jurisdiction of the High Court.

FINAL ORDERS

1. Therefore in the instant case, the Court is satisfied by the evidence on record adduced by both Plaintiff and Respondent that they both contributed to the purchase and development of the properties. Since they have separated since 2005 clearly there is no likelihood that the marriage or union is to be salvaged. Each party seems to have moved on.
2. The Court orders as follows in terms of the 3 properties;
 - a. Githurai / *[particulars withheld]* - 50%/50% to each party.
 - b. Dagoretti/Waithaka/ *[particulars withheld]* - 50%/50% to each party
 - c. Kajiado North/ *[particulars withheld]* - 50%/50% to each party.
3. In this event the 1st and 2nd properties were disposed off by the Respondent and she did not share the proceeds with the Applicant and he did not obtain his ½ share in each of the properties, then the remaining property shall wholly be used, disposed and owned by the Applicant and he should obtain a new title deed.
4. In sum total the Court finds that the evidence at hand confirms that the properties in question are matrimonial property under **Section 6 of the Matrimonial Property Act 2013** purchased by both the Plaintiff/Applicant and Respondent/Defendant during the marriage.

In the absence of other evidence /or reasons that properties should be shared and divided equally between the spouses.

5. No orders as to costs.

READ AND SIGNED IN OPEN COURT ON THIS 30TH DAY OF APRIL, 2015

M. MUIGAI

JUDGE