



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**ELC CASE NO. 256 OF 2013**

T M N ..... PLAINTIFF

VERSUS

N N ..... DEFENDANT

**JUDGMENT**

This suit was filed by the plaintiff seeking substantive orders that two parcels of land i.e.

a. *L.R No. [particulars withheld]*

*and*

(b) *[particulars withheld]*

or any other property to be identified was acquired jointly by the plaintiff and defendant during the subsistence of their marriage and should therefore either be sold and/or be distributed in equal shares between the parties. The claim was premised upon the plaintiff's supporting affidavit in which she deponed, inter alia, that she and the respondent were married under Kikuyu Customary law in 1965 and cohabited firstly at [Particulars Withheld] Village Kerugoya and thereafter [Particulars Withheld] Village Embu. That during their marriage, they were blessed with eight (8) children and also acquired the above listed properties in addition also to another parcel of land in Ng'arua in Rift Valley and a plot at Ndato Market in Embu. That the properties were purchased from the parties joint efforts.

However, the defendant filed a replying affidavit in which he stated that he bought the properties without any assistance from the plaintiff and therefore the same cannot be shared equally.

Directions were taken in the suit before Ong'udi J. on 21<sup>st</sup> November 2012 before it was transferred to this Court for hearing. Prior to that, Muchelule J. had issued injunctive orders on 28<sup>th</sup> July 2011 restraining the defendant from alienating or disposing off land parcels No. [particulars withheld] pending the hearing of this suit.

When the hearing of the suit commenced before me on 9<sup>th</sup> December 2012, the plaintiff who was represented by Mr. Ombachi Advocate told the Court that she was previously married to the defendant but the two divorced vide proceedings in Embu Chief Magistrate's Court Case No. 48 of 2011 and a decree followed – Plaintiff's Exhibit 1.

The parties had been married in 1965 under Kikuyu Customary Law and were blessed with eight (8) children and that during the subsistence of that marriage, they acquired the following properties:-

1. L.R No. [particulars withheld]
2. L.R No. [particulars withheld]
3. Parcel of land measuring 3 acres in Ng'arua Rift Valley
4. Plot at Ndato Market, Embu

She added that although the properties are in the defendant's names, they were acquired through the proceeds of their Embu land. She therefore seeks the Embu property i.e. L.R No. [particulars withheld]

In his defence, the defendant stated that the properties were solely acquired by him from the proceeds of his cobbler business in Kerugoya. He added that he was making 26 shoes per month and selling them at Ksh. 30/= a pair and a plot of land (one acre) was then selling at Ksh. 300/= per acre and that is why he was able to purchase L.R No. [particulars withheld] at Ksh. 5,250/=. After buying that land, he moved the family from Kerugoya to Embu where he opened another shoe business in Runyenjes and thereafter a similar business in Siakago. He had savings in National and Grindlays Banks from which he bought L.R No. [particulars withheld] on which he grew coffee the proceeds of which he used to educate his children. He also bought three (3) acres of land in Rift Valley. He produced a document (Defence Exhibit 1) showing how much he spent on her as dowry adding that if she refunds that money, he will give her what she wants.

I have considered the evidence by both parties and the documentary exhibits produced.

The following are not in dispute:-

1. ***That the parties were married under Kikuyu Customary Law in 1965***
2. ***That they were divorced following proceedings in Embu Chief Magistrate's Court Civil Case No. 48 of 2011 in which a decree was issued on 10<sup>th</sup> September 2012***
3. ***That L.R No. [particulars withheld] and [particulars withheld] are all registered in the defendant's names***
4. ***That the said parcels of land were acquired during the parties marriage***

Although the plaintiff also lays claim to the other parcels of land being a three (3) acre piece of land in Rift Valley and a plot in Embu, those properties cannot be the subject of this suit for two main reasons. Firstly, those properties are not sufficiently identified and therefore the Court would not be able to make orders about un-known property. Secondly, those two properties were not the subject of the injunctive orders issued by Muchelule J. on 28<sup>th</sup> July 2011 and therefore it is not clear whether in fact those properties are still registered in the defendant's names and this Court would not wish to act in vain.

This suit was filed on 27<sup>th</sup> April 2011 and is predicated under **Section 17 of the Married Women's Property Act 1882**, a Statute of general application which was the law applicable then. That Act has now been repealed following the enactment of the Matrimonial Property Act 2013 which commenced on 16<sup>th</sup> January 2014. However, since this suit was filed in 2011, it will be determined on the basis of the Married Women's Property Act 1882 which was the law then in force. The suit was also filed post the 2010 Constitution which will also apply together with any other relevant treaties or conventions ratified by Kenya.

From the material placed before me, it is not in dispute that both L.R No. [particulars withheld] and L.R No. [particulars withheld] were acquired during the subsistence of the parties marriage. The only issue taken by the defendant is that those properties were acquired solely by his own efforts from his cobbler business and later, the coffee crop. He does not however deny that even as he did so, the plaintiff was playing an important role taking care of the family. It has not been suggested that the plaintiff was not playing any role. In cross-examination by Mr. Ombachi, the defendant had this to say about that:-

***"It is true that I acquired all the properties during our marriage. But I don't have a plot at Ndato Market in Embu. I was a cobbler and my money was in National and Grindlays Bank. When I was acquiring the properties, the plaintiff was living at the [particulars withheld] taking care of our children and the property"***

Therefore, while the plaintiff may not have produced any direct evidence of her financial contribution towards the purchase of the properties L.R No. [particulars withheld] and [particulars withheld], there is the defendant's own admission that the plaintiff was taking care of the family and the property. It is now recognized that a spouse's contribution need not only be direct financial contribution as was held in the case of ***ECHARIA VS ECHARIA C.A CIVIL APPEAL NO. 75 of 2001***. Such contribution can also be indirect contribution as noted in the case of ***KIVUITU VS KIVUITU 1991 2 K.L.R 248*** In this case now before me, the plaintiff stated in her evidence in chief that apart from taking care of the eight children of the marriage, she was also cultivating the land in Embu proceeds of which were used to purchase the other properties. The defendant himself as I have quoted above recognizes that indeed the plaintiff played that role. That is therefore evidence that although the properties acquired during coverture were registered in the names of the defendant, the plaintiff did make her own indirect contribution by taking care of the family and working on the land and proceeds of that work were used in acquiring other properties. Therefore, while the defendant made a direct financial contribution, the plaintiff made a direct though non-financial contribution but nonetheless a contribution that this Court must recognize.

It is also clear from the new ***Constitution that under Article 45(3)***, 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.

Further, under the new Constitution, we now have a robust bill of rights whose purpose is to recognize and protect the fundamental rights and freedoms as well as preserve the dignity of individuals while promoting social justice and realizing the potential of all human beings.

In assessing the contribution of the plaintiff herein, the Court must also take into account the length of time that the parties lived as man and wife. In the case of ***PORTER VS PORTER 1963 I W.L.R*** Justice Sachs stated as follows:-

***“the Court must always take into account how long the marriage has lasted and to what extent the wife has rendered domestic services to the husband”***

In this case, the parties were married in 1965 and following divorce proceedings in Embu Civil Suit No. 48 of 2011, a decree dissolving their marriage was issued on 10<sup>th</sup> September 2012. The proceedings in the divorce case were not availed to this Court and therefore it is not clear when they stopped living as man and wife. However, it is clear that they cohabited as man and wife for well over forty (40) years and had eight (8) children. That is a substantial period of time and the plaintiff's contribution, indirect as it was, must have been significant. Clearly, there is merit in her claim to a share of part of the property acquired during that period.

In her Originating Summons, she seeks orders that the following properties be sold and/or be distributed in equal share between the two of them:-

- a. ***Parcel of land known as L.R. No. [particulars withheld]***
- b. ***Parcel of land known as L.R No. [particulars withheld]***
- c. ***Parcel of land at Ng'arua in Rift Valley***
- d. ***A plot at Ndato Market in Embu***

As stated earlier in this judgment, the land at Ng'arua in Rift Valley and the plot at Ndato Market in Embu have not been sufficiently identified to enable this Court make any orders with respect to them. No search certificates were produced as proof that they are registered in the defendant's names. Therefore, those two properties cannot be the subject of this judgment. And although the plaintiff has identified one of the properties as [particulars withheld], the defendant stated that it is infact [particulars withheld] and indeed the certificate of search (Plaintiff's Exhibit 3) identifies it as [particulars withheld] and I will therefore refer to it as such and not as identified in the Originating Summons. In cross-examination by Mr. Ombachi for the plaintiff, the defendant stated that he is willing to give the plaintiff three (3) acres out of [particulars withheld] for her to hold in trust. He also insisted that he must get back the dowry that he paid for the plaintiff as well as what he has spent on bringing up their eight (8) children. He added the

total expenditure totals Ksh. 22,661.595/= and although he produced a copy of agreement (Defence Exhibit 2) to show that he has sold the RIANDU property, he at the same time offered to give the plaintiff three (3) acres out of the same. Clearly, that agreement cannot relate to [particulars withheld] because he could not have sold it and yet again offer the plaintiff three (3) acres out of the same. In any case, if indeed he has sold [particulars withheld], he would have produced evidence of the new registered owners. This Court will treat the agreement as a ploy to mislead it. On the claim for Ksh. 22,661,595/= which he spent on bringing up his children, the defendant must be told that it was his legal obligation to do so and he cannot claim that sum either from the plaintiff or the children. And with regard to refund of dowry, it was paid to the plaintiff's parents who are not parties to this suit. In any case, there was no counter-claim for both the dowry and Ksh. 22,661,595/= and even if there was, it is un-likely that any Court would have awarded the defendant those claims for the simple reasons stated above that it was his responsibility to take care of his family including his children and dowry is ordinarily paid to the parents of the prospective wife and not to the wife. I therefore do not see on what basis I should order the defendant to refund the same.

Having found that the plaintiff did make a contribution though not financial, towards the acquisition of their properties though registered in the defendant's names, what is the best order to make in the circumstances of this case?

In her Originating Summons, the plaintiff in paragraph three (3) makes the following claim:-

***“That the said properties be sold and/or be distributed in equal shares between the applicant and the respondent”***

**Section 17 of the Married Women's Property Act of 1882** which was the applicable law when this suit was filed gives the Judge the power to make orders with regard to property in dispute ***“as he thinks fit”***. The discretion is therefore left to the Court to decide the best way of dealing with property in dispute. It is now clear that when matrimonial property is registered in the names of one spouse and there is evidence that the other spouse made a contribution, financial or otherwise, towards the acquisition of the same, both spouses have proprietary interest in the said property and the spouse in whose names the property is registered is deemed to hold the same in trust for himself and the other spouse. In such circumstances the law imputes an intention to create a trust – **FALCONER VS FALCONER 3 ALL E.R. 449.**

The protocol to the **African Charter on Human and People's Rights** on the **Rights of Women in Africa** provides as follows in **Article 7(d):-**

***“In case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage”***

Therefore, in determining how best to distribute the matrimonial property among the parties herein, this Court, while exercising its discretion in the matter, will be guided by the principles enunciated in the above mentioned cases and protocol, the **Married Women's Property Act of 1882** and the principles of Equity and Social justice which are inherent and indefeasible to all human beings. Indeed **Article 16(1) of the Universal Declaration of Human Rights** to which Kenya is also a signatory and which is part of our law by virtue of **Article 2(6) of the Constitution of Kenya 2010** states as follows:-

***“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.***

Bearing all the above into account, how will this Court distribute the matrimonial property? As indicated above, the proper particulars of the parcel of land at Ng'arua in Rift Valley and the plot at Ndato Market in Embu were not provided and this Court cannot therefore make orders with regard to property that cannot be properly identified. Those properties will therefore be excluded. That leaves this Court with only the following properties to distribute:-

- a. *L.R NO. [particulars withheld] and*
- b. *L.R No. [particulars withheld]*

In her testimony, the plaintiff stated that she wants the Embu property being [particulars withheld] adding that she will leave the rest of the property to the defendant. The defendant on the other hand was willing to give the plaintiff three (3) acres out of the parcel [particulars withheld].

Doing the best I can and guided by the principles stated above, I enter judgment for the plaintiff against the defendant in the following terms:-

1. *L.R No. [particulars withheld] to be surveyed and sub-divided into two equal portions to be given to each of the parties. Survey and other necessary fees to be shared equally*
2. *L.R No. [particulars withheld] to be surveyed and sub-divided into two equal portions to be given to each of the parties. Survey and other necessary fees to be shared equally*
3. *In the alternative, the properties be valued and sold and each party to get half of the proceeds with the option of either party buying off the other party's share of the valued property with a view to retaining the land. Valuation and other fees to be shared equally.*
4. *Each party shall bear their own costs.*

**B.N. OLAO**

**JUDGE**

**20<sup>TH</sup> APRIL, 2015**

20/4/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Gathirwa for Mr. Ombachi for Plaintiff – present

Defendant – present

COURT: Judgment delivered this 20<sup>th</sup> April 2015 in open Court.

Mr. Gathirwa for Mr. Ombachi for Plaintiff present

Defendant in person present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**20<sup>TH</sup> APRIL, 2015**