



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

REPUBLIC OF KENYA

CIVIL CASE NO. 13 OF 2010 (OS)

IN THE MATTER OF MARRIED WOMEN PROPERTY ACT OF 1882

AND

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

S W G .....APPLICANT

-VERSUS-

H M K.....RESPONDENT

JUDGEMENT

1. The Originating Summons I am tasked to determine is dated 26<sup>th</sup> April 2010. It is taken out under Section 17 of the Married Women's Property Act (1882). In it the applicant seeks a declaration that the properties listed in the application were acquired and developed by the joint funds and efforts of the applicant and respondent during a period of cohabitation and a declaration that although the said assets are registered in the name of the respondent he holds them in trust for her. She would like the said assets and any income from them to be settled in such manner as the court may be pleased to order.
2. The application is based on the grounds set out on its face, as well as the facts deposed to in the affidavit sworn in support by the applicant, S W G, on 26<sup>th</sup> April 2010. The general grounds are that that the applicant and the respondent cohabited as man and wife from the year 2007 and that the said properties were acquired or developed during the subsistence of the cohabitation with the joint efforts or contribution of the parties.
3. In the affidavit it is averred that the parties cohabited as man and wife from 2007 to sometime in March 2010 when the respondent chased the applicant away from the matrimonial home for no justifiable or reasonable cause. She avers that the parties acquired Thika Municipality Block **[particulars withheld]** in January 2008, and the property was then registered in the respondent's name. She states that although she did not contribute to the purchase of the said property, she substantially contributed to its development. It is her averment that she took full responsibility of supervising the construction, buying materials as well as dealing with organizational issues as the respondent worked out of the country - in Darfur, Southern Sudan and later Chad. She says that

once the house was complete, she took charge of the interior decoration and the same is acknowledged by the respondent in correspondence that the parties exchanged at the time, copies of which she has attached to her affidavit in support of the application. She has stated further that she was also responsible for paying stamp duty and land rates for the property while the respondent was away. She avers that in June 2007, she was granted a loan from Commercial Bank of Africa for Kshs. 375,000.00 to purchase a car, registration mark and number **[particulars withheld]**, which was later involved in accident and written off. It is her case that she utilized part of the insurance compensation to purchase another car, being registration mark and number **[particulars withheld]**, which was registered in the joint names of the respondent and herself. She avers that there was a balance which she plied to finance construction works and other developmental costs at the property. She says that in August 2008, she obtained another loan of Kshs. 550,000.00 from Commercial Bank of Africa and injected the proceeds into the development of the house.

4. The respondent has opposed the application. He has signified that by swearing an affidavit on 3<sup>rd</sup> June 2010. He avers that he and the applicant never cohabited as a husband and wife. His case is that the applicant always lived on her own in Thika town and paid for her own house rent. On his part, he says that whenever he came home from Sudan he would always go to stay with his mother in Nakuru and would only meet with the applicant for a few days. He states further that no marriage ceremonies (whether customary, legal or otherwise) were ever conducted between them to evidence marriage. He avers that he solely identified, conducted a search at the Lands Registry and purchased the property known as Thika Municipality Block **[particulars withheld]** with his savings from his salary earned while working in Juba, Darfur and Chad. He states that he employed the applicant to supervise the construction of the house and paid her a monthly salary of Kshs. 30,000.00 through a standing order from his account with Equity Bank to her account. He avers that the salary was payable only when he was outside the country but when he came back on leave, he took control of the construction of his house. He further avers that during that period when he was constructing and the applicant was supervising the works, the car had an accident and he decided to purchase another vehicle to ease movement while she was carrying out the supervision duties of the construction of his house. He explains that the cost of the motor vehicle, **[particulars withheld]**, was Kshs. 850, 000.00, to which the applicant contributed Kshs. 250,000.00, with the balance coming from him. According to him the agreement was that the vehicle would be used to run errands during the construction period.
5. He avers that all the property that the applicant is claiming was purchased solely by him and a declaration by the court that he holds the same in trust for her would not be in the best interests of justice. He states that he found it rather absurd for the applicant to claim that she secured loans for the development of his property yet he had transferred monies to her account for the sole purpose of construction of the house and upon request as evidenced by a copy of his bank statement. He argues that the proceeds of the loans were for her own use or investments and that he was not privy to how the same were used.
6. The application was canvassed orally. Both sides testified and called witnesses, one each. The applicant testified first, giving vent to the averments made in her application as well as in her deposition. She referred extensively to the documents annexed to her affidavit. She called G G N K as her witness. He testified that he was a cousin of the applicant, by virtue of their mothers being sisters. He alleged that he supervised the construction of the house in issue. He allegedly met the respondent through the applicant in April 2008, who was introduced as the husband of the applicant. He stated that he met him in 'a house.' It was the first time they met, and he said that it was first time he knew the applicant had a husband. He said they showed him the plot where the works were to be done. The respondent was said to have been 'coming and going.' The witness said that he would communicate with the respondent on phone on occasions when the applicant called him. The respondent is said to have attended the funeral of the witness's father.
7. The respondent's oral testimony largely mirrored his case as set out in the documents that he has filed in court in opposition to the application. He similarly referred extensively to the documents

- attached to his affidavit. He called three witnesses. The first one was his mother, M G. She testified that she knew the applicant as a friend of the respondent. She said she met her for the first time in 2007 when she was invited for Christmas. She met her again in 2009, when her husband died and the applicant came over to console her. She stated that the applicant came as a friend and ended up being a member of the burial committee. It was in that capacity that she travelled to Nairobi to deliver a draft of the obituary at the Nation Media House for publication. She volunteered to do the same. She was given the original draft to take to Nairobi, and there were no copies of the draft. She said that the applicant included her name in the obituary where she was described as a daughter in law. She said that the respondent never told her that he intended to marry the applicant, neither was she introduced to her relatives. She stated that the respondent used to come home at Nakuru whenever he came back from his duties overseas. She said that she was never told that he had bought property with anybody, asserting that he was never married to the applicant.
8. His second witness was Rev. S W, an uncle of the respondent by virtue of being a brother to his mother. He testified to the fact that he was at Nakuru during the period after the death of the respondent's father, and located the applicant at the scene. He said that she was among the friends who came to condole with them, and she was assigned the duty of getting the obituary published in the press. He learnt on day of the funeral that the obituary read that the deceased was a father-in-law of the deceased. He stated that he had never met nor heard of her before the death, and he was not aware whether she had alleged to have had been married by the respondent.
  9. In her written submissions filed on 23<sup>rd</sup> June 2014, the applicant contends that the parties cohabited as husband and wife between 2007 and 2010 at Happy Valley, Thika, and upon completion of the suit property they moved into the new house together. It is submitted that the bundle of emails in the applicant's list of documents show that the parties were in a long term relationship and had every intention of conducting a marriage. It is also submitted that the photographs in the applicant's list of documents also show an intimate relationship between the parties, meaning that they were more than just friends. It is also argued that in the obituary of the respondent's late father, the applicant is referred to as daughter-in-law. It is contended that three years of cohabitation between the parties should be considered as resembling a marriage, and the court is urged to find that the cohabitation was indeed a marriage.
  10. On the question whether the applicant contributed towards the development of the matrimonial property, it is submitted that the applicant had admitted that she did not contribute towards the acquisition of the property, but contributed to the development thereof. Relying on the Court of Appeal decision in the case of *Peter Mburu Echaria vs. Priscilla Njeri Echaria* (2007) eKLR, the applicant submits that in order for a party to prove their beneficial interest on a supposed matrimonial property they need to demonstrate that they contributed either directly or indirectly towards the acquisition of the property. However, in cases where the parties have made a substantial and unascertainable contribution, it may be equitable to apply the maxim "equality is equity" and regard them as being entitled to half a share each.
  11. It is contended that the applicant was in gainful employment at **[particulars withheld]** Kenya Limited throughout the cohabitation and that she was able to secure three loans of Kshs. 375,000.00 from Commercial Bank of Africa to purchase a car, Kshs. 550,000.00 from the same bank which was injected into the development of the house, and Kshs. 600,000.00 from Kenya Cannery Co-operative Society for offsetting the loan from Commercial Bank of Africa and the balance was utilized for the development of the house.
  12. With regard to the applicant's indirect contribution, it is submitted that throughout the subsistence of the cohabitation, the applicant, who was in gainful employment, also took the responsibility of supervising the construction, buying materials, landscaping and furnishing the matrimonial home. It is further stated that the applicant conducted a search for the said property, paid stamp duty and land rates and connected water and electricity.

13. It is therefore the applicant's submission that the properties registered in the respondent's name are held in trust for the applicant and that the matrimonial home is jointly owned by the applicant and the respondent and that the applicant is entitled to 50% of the matrimonial properties.
14. On his part, the respondent submits that he has never at any time lived with the applicant as a husband and wife as the applicant lived on her own. He submits that in 2008 he embarked on the construction of his house and proposed to the applicant to work for him as a supervisor for a monthly salary of Kshs. 30,000.00. The applicant did indeed supervise the construction to the end. A few months before the completion of the house the respondent and applicant started a relationship and moved in together into the respondent's house. It is submitted that the said property was identified, purchased and developed singlehandedly by the respondent. The court is urged to dismiss the applicant's claim to the property as she has not proved any contribution. It is contended that the respondent is the absolute owner of the suit property as there is no subsisting relationship between him and the applicant.
15. This court having considered the application, the affidavits on record and the submissions by the respective parties, forms the view that the issue for determination by this court is whether the applicant has established a case for this court to grant her the orders that she seeks in her application. The central issue for determination is whether the property in question is matrimonial property which would make it amenable to division in the manner proposed by the applicant. However, before that question can be addressed it has to be determined whether the parties were in matrimony at the material time.
16. From the evidence on record it is not disputed that the parties herein were not formally married under any law. What then the court has to do in the first instance is to determine whether a presumption of marriage due to long cohabitation can be made in the circumstances. The applicant's case is that she did cohabit with the respondent as a husband and wife, but the respondent contests this.
17. Where a marriage does not comply with the relevant formalities laid down by the Marriage Act or under customary law, it may be rescued by presumption of marriage by cohabitation. The presumption may be made in circumstances where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife. A lawful marriage between them will be presumed to have taken place, though there be no positive evidence of any marriage having taken place, and this presumption can be rebutted only by strong and weighty evidence. (See *Rayden and Jackson's Law and Practice in Divorce and Family Matters*, 17<sup>th</sup> Edition, Butterworths, 1997). A marriage may be presumed if the facts and circumstances show the parties by a long cohabitation, or other circumstances, evinced an intention of living together as husband and wife.
18. In the case of *Hortensiah Wanjiku Yawe vs. The Public Trustee*, Civil Appeal No. 13 of 1976 Kneller JA., stated at page 21:-
- "The presumption does not depend on the law or system of marriage. The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife..."*
- Further, in *Njoki vs. Muthuru* [1985] KLR 487, Nyarangi JA. stated that:
- "In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute."*
19. The doctrine of presumption of marriage has a statutory foundation, in section 119 of the Evidence Act, Cap 80, Laws of Kenya, where it is provided that 'the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.'

20. Can it be said with certainty that there are facts and circumstances in this case that would amount to presumption of marriage? I do not think so. The material laid before me in this cause does not prove such a marriage. There is no positive evidence from witnesses that the parties herein lived together for so long as to gain general repute that indeed the parties were husband and wife. In my view, the applicant failed to place any evidence establishing marriage by cohabitation and repute between her and the respondent. There is material though establishing that the parties had an intimate relationship. However, I am unable from material presented before me to declare on a balance of probabilities that the applicant has proved that her cohabitation with the respondent gave rise to a presumption of marriage in her favour. In actual fact, there is nothing shown to establish that the said cohabitation did in any manner presume an apparent and obligatory responsibilities on any party herein.
21. With regard to the applicant's contribution towards the development of the matrimonial property, it is apparent from the records that the parties made substantive development jointly, either from direct or indirect contributions. The applicant has shown that she conducted a search on the title to the said property, paid stamp duty and land rates and even connected water and electricity. There is no denial that the applicant was involved in the supervision of the said construction and did everything that was required, and saw it to its completion. She has also established that she took bank loans towards the said development of the suit property, a fact that the respondent acknowledged in his emails and even thanked her for. But was all this done in her capacity as a spouse? Not at all, in my view. She did this in her capacity as the respondent's friend, a person with whom she had had an intimate relationship.
22. However, having found that there was no marriage by cohabitation, this court lacks jurisdiction to delve into the issues of division of matrimonial property in the circumstances.
23. Having found so, I hold that the applicant is not entitled to a share in the said property. The upshot of the above is that the application by way of originating summons dated 26<sup>th</sup> April 2010 lacks merit and is hereby dismissed. There shall be no order as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>ST</sup> DAY OF JULY, 2015.**

**W. MUSYOKA**

**JUDGE**