



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 169 OF 2009

M M T DEFENDANT/ APPLICANT

versus

S N M PLAINTIFF/ RESPONDENT

and

G K)

J G M)

P K N).....INTERESTED PARTIES

RULING

1. By way of **Notice of Motion** dated **21st June, 2014**, **M M T**, the Applicant, seeks orders that:
 - **Land parcel No. Mavoko Town Block [particulars withheld] measuring 16.5 Hectares or thereabout (subject property) and registered in the name of M M T, the Defendant/Applicant herein, be sold at a prevailing market price and the proceeds thereof be shared equally between the Plaintiff and the Defendant as prayed in Prayer (b) in the Plaintiff's Originating Summons dated 29th April, 2009.**
 - **The restriction/caution registered against the aforesaid title (Mavoko Town Block [particulars withheld]) be removed to facilitate transfer of the said property upon sale.**
2. The application is premised on grounds that: the subject property together with a few others were allocated to the Defendant (Applicant) as a Shareholder **of Lukenya Ranching & Farming Co-operative Society Limited** (now liquidated); the Applicant is married to two (2) wives, the Respondent/Plaintiff being the 1st wife; In 2008 the Applicant put up the property for sale and even received some money from willing buyers, a sale that was objected to by the Respondent resulting into the **Land Control Board** declining to sanction it; the sale proceeds will be shared equally; the Applicant will use his share of proceeds to pay the sum of money received and the Applicant is old and ailing therefore needs money for treatment.
3. The Respondent, **S N M**, opposed the application. She deponed in her replying affidavit that: her marriage to the Applicant is monogamous having been solemnized under the **African Christian Marriage and Divorce Act** on **17th December, 1977**. Therefore the Applicant has no capacity to marry another woman; During the subsistence of their marriage they acquired the following properties:

- a. *Mavoko Town Block [particulars withheld] measuring approximately 16.15 Ha.*
- b. *Machakos Town/Block [particulars withheld] measuring approximately 0.8255 Ha.*
- c. *Mavoko Town Block [particulars withheld] measuring approximately 2.140 Ha.*
- d. *Mavoko Town Block [particulars withheld] measuring approximately 8.090 Ha.*
- e. *Plot No. [particulars withheld] Membership No. [particulars withheld] Muka Mukuu Farmers Co-operative Society now measuring approximately 8 acres.*
- f. *LR [particulars withheld] Athi River Town – fully developed Plot in Athi River Town with 26 rental residential units.*
- g. *¼ Plot at Katelembo.*
- h. *¼ Plot at Kinanie.*
- i. *75 Shares at Muka Mukuu Farmers Society Membership No. [particulars withheld].*
- j. *Share at Lukenya Ranching and Farming Co-operative Society Membership No. [particulars withheld].*
- k. *Shares at Katelembo Athiani Muputi Farming and Ranching Co-operative Society Membership No. [particulars withheld].*
- l. *Shares at Ngomano Business Group with Plots at Kaloleni Market developed with Commercial Building, Posho Mills and Plots in Athi River Town with residential units where there is monthly rental income.*
- m. *Property at Kyamwilu – Ngelani Land bought from [M/N] approximately 2.5 acres.*
- n. *Inherited property:-*

- a. *Kwa Mavala.*
- b. *Kyamwilu*

4. Both of them (Applicant and Respondent) agreed and designated the subject property to be subdivided amongst their eight (8) children. Each child was getting five (5) acres and one of their sons **C M** and his family have already occupied their five (5) acres; having moved from **Kyamwilu**; the Applicant enjoys all the income generated from:

- *Ngomano Business Group.*
- *LR [particulars withheld] Athi River Town with 26 rental residential units.*
- *Income from Market Plot/Commercial Plot at Kinanie.*
- *Dividends from Lukenya Ranching and Farming Society LTD, Katelembo Athiani Muputi Farmers and Muka Mukuu Farmers Co-operative Society.*

5. That the Applicant unilaterally disposed off **Machakos Town Block [particulars withheld]** and solely appropriated the money and this should be taken into account as they share out matrimonial properties; Two (2) of their children who are mentally ill and generally ill, respectively, are her responsibility as the Applicant deserted their matrimonial home; the Applicant has regular income from the rental properties and share dividends therefore has absolutely no reason to sell any property and being the Applicant's age mate she also suffers from poor health therefore would like to access regular income to take care of herself and their dependent children.
6. The interested parties filed a Notice supporting the application on condition that their joint share from the share entitled to by the Applicant be catered for, otherwise they opposed the application.
7. In her submissions Counsel for the Applicant **Mrs. Nzei** stated that the Applicant is married to a second wife. The property in issue is to be shared between the Applicant and Respondent and both of them have equal rights over the property. The Applicant wishes to refund the money received from the interested parties. She argued that the Respondent did not plead some of the properties mentioned in the application as matrimonial properties.
8. In response thereto Counsel for the Respondent, **Mr. Mathuva** submitted that the Applicant and Respondent having been married under statute law the Marriage is monogamous, any other purported marriage is null and void as the Applicant had no capacity to marry. The property stated as having been acquired during pendency of the marriage is not denied by the Applicant. The Respondent does not oppose sharing of the properties equally but argues that property **Machakos Town Block [particulars withheld]** that was sold by the Applicant unilaterally must be taken into consideration.

9. Half a share of the subject property which constitutes the biggest percentage of all matrimonial property, will not be sufficient to compensate her for what she lost following the loss **Machakos Town/Block [particulars withheld]**: she prayed that the properties should not be shared out in piecemeal.
10. I have duly considered rival submissions by both counsels. I do note that the Originating Summons herein was filed under Certificate of Urgency on 29th April, 2009. The issue in contention was the subject property was acquired by the parties amongst others during pendency of their marriage. The relief sought was a declaration that although it is registered in the name of the Applicant herein the property is a matrimonial one which belongs to both of them.
11. It is demonstrated that the Applicant and Respondent entered into a monogamous marriage. Therefore the subject property that was acquired during pendency of their marriage belongs to both of them. The Applicant purported to dispose it off, therefore entered into a liability without the knowledge and/or consent of the Respondent. He appreciates the fact that they own the property jointly and seeks to have proceeds realized from the sale shared equally.
12. By way of affidavit evidence, however, it is stated that the property he seeks to dispose off is unavailable as it was given to their children and one of them has developed his portion and resides thereon. With this kind of arguments it may be in the interest of justice to have the substantive summons heard before any of the properties is divided between the couple.
13. Looking at the nature of the relief sought in the substantive motion and the prayers in the instant application, granting prayers sought may dispose off the substantive application.
14. In the premises I decline to grant the prayers sought and advise parties to ensure the matter is heard as a matter of urgency.
15. The application is therefore dismissed with no orders as to costs.
16. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 29th day of July, 2015.

L. N. MUTENDE

JUDGE