



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 7 OF 2013 (O.S)

DOLPHINE AIDEKETE WANYAMA PLAINTIFF

VERSUS

SHADRACK MASIKA WEPUKHURU..... DEFENDANT

J U D G M E N T

INTRODUCTION

1. The plaintiff and the defendant are a married couple. The plaintiff brought this Originating Summons seeking division of **L.R. No. Kiminini/Kinyoro Block 3/Matisi/467** (suit land). The suit land is registered in the name of the defendant.

2. The Originating Summons was brought under Section 17 of the married Women Property Act of 1882 which has since ceased to apply to Kenya following the enactment of the Matrimonial Property Act of 2013. The plaintiff wanted the court to determine the following questions:-

- (i) Whether she is married to Shadrack Masika Wepukhuru.**
- (ii) Whether she is by virtue of the said marriage entitled to 0.526 Hectares of the suit land.**
- (iii) Whether she should be declared the owner of 0.526 of the suit land and registered as such.**
- (iv) Whether a temporary injunction should issue in her favour preserving the suit property until determination of the Originating Summons.**
- (v) Who should bear the costs of the suit.**

PLAINTIFF'S CASE

3. The plaintiff testified that she is wife of the defendant who has three other wives. She was married in 1979 and have 14 issues with the defendant. She is the third wife of the defendant. The defendant brought her to the suit land in 1992 where she has been staying since then. She testified that the defendant has deserted her for six years. She now wants to be registered as owner of half of the suit property. She contends that the defendant has already sold half of the suit property and that she therefore wants to be registered as an owner the remaining half so that she can use it to educate her children. She contends that the defendant has refused to educate her children. The defendant only educated the first born.

DEFENDANT'S CASE

4. The defendant testified that he is the husband of the plaintiff who is his third wife. He has settled his first three wives at Twiga Farm in Chepchoina where each of the three wives are occupying five acres each. The fourth wife is settled on a two-acre piece of land.

5. The defendant had taken a loan from the Agricultural Finance Corporation (AFC) to enable him educate his children. He had to sell part of the suit land to enable him repay the loan owed to AFC. He is now remaining with half of the suit land which has some rental houses which he uses to sustain his large family. He contends that the plaintiff cannot claim half of the property as the defendant is keeping it for the benefit of all his four wives and no one can lay claim to it alone.

ANALYSIS OF EVIDENCE

6. This Originating Summons was filed on 15/2/2013 under Section 17 of the Married Women Property Act of 1882. This legislation has since ceased to apply to Kenya following the coming into force of the Matrimonial Property Act of Kenya 2013 on 16/1/2014. The Married Women Property Act of 1882 provided for a procedure where married women could apply to court for division of property. This was mostly in the case where the married woman was in the process of divorce or had divorced. She could apply for court for determination of her share in matrimonial property.

7. In the instant case the plaintiff states that she is still married to the defendant. Though she says that the defendant has deserted her for about six years, she does not say that she is contemplating any divorce. The question which then arises is whether she can properly bring a claim for division of property when the marriage is still subsisting or when there is no divorce or separation contemplated. The defendant's counsel submitted that this court has no jurisdiction to determine the Originating Summons because the parties to this case are still married. He cited two High Court decisions where the judges upheld preliminary objections raised on the ground that there can be no division of property in a case where parties are still married. These two preliminary objections were based on the decision of the ***Court of Appeal in Civil Appeal No. 2 of 2000 between Peter Ndungu Njenga -vs- Sophia Watiri Ndungu.***

8. In all decisions which have been made by the High Court and Court of Appeal of Kenya touching on Section 17 of the Married Women's Property Act 1882, the parties involved had either divorced or were in the process of divorcing. It therefore follows that the plaintiff's claim is not properly before the court as she is still a wife of the defendant and as such cannot bring a claim for division of property. This is so because even in the Matrimonial Property Act of 2013, no claim for division of property can be brought until after there is a divorce. A married woman can only bring an application or claim for declaration of rights in a property but not for division of property in a marriage which has not been dissolved.

9. Even if Section 17 of the Married Women's Property Act of 1882 was available to the plaintiff, she has not demonstrated any contribution she made towards acquisition of the property. There is evidence that she is the third wife of the defendant. There are three other wives of the defendant. She cannot take half of the property and leave the other wives of the defendant. The plaintiff has five acres at Twiga Farm. That is where she was until she moved to the suit land in 1992. In the absence of any evidence of contribution to the acquisition of the property and given that the plaintiff is in a polygamous union where there are other wives of the defendant, I do not find any basis upon which the plaintiff can be given a share of the suit land even if her indirect contribution to its acquisition were to be considered.

DETERMINATION

10. I find that the plaintiff's claim is not maintainable for the reasons given above. The same is dismissed with no order as to costs.

Dated, signed and delivered at Kitale on this **28th** day of **September, 2015.**

E. OBAGA

JUDGE

In the presence of Plaintiff and Defendant.

Court Assistant – Winnie.

E. OBAGA

JUDGE

28/9/2015