



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENY AT NAIROBI**

**(FAMILY DIVISION)**

PETITION NO. 75 OF 2013

IN THE MATTER OF THE DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

AND

IN THE MATTER OF THE MARRIAGE ACT NO. 4 OF 2014

G G W.....PETITIONER

-VERSUS-

DG W.....RESPONDENT

JUDGMENT

1. The matter for consideration is the amended petition of G G W dated 13<sup>th</sup> May 2015 .The applicant avers that she got married to the respondent on 1st April 1995 at [Particulars Withheld]. That in the course of the said marriage the parties were given 2 properties I.R. [Particulars Withheld], I.R. [Particulars Withheld], I.R. [Particulars Withheld] and I.R. [Particulars Withheld] I.R.No. [Particulars Withheld].The parties have since divorced and the petitioner is seeking an amicable way of settling this matter. The petitioner claims a right to the properties aforementioned as enunciated in article 45(3) of the Constitution, which states that, “*parties to a marriage are entitled to equal rights as the time of the marriage, during the marriage and at the dissolution of the marriage.*”
2. She also claims that she is entitled to either of the properties by virtue of Section 14(b) of the Matrimonial property Act which provides that, “*where matrimonial property is acquired during marriage in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interest in the matrimonial property are equal.*”
3. Further under section 3(2) of the Marriage Act No. 4 of 2014 provides that, “*parties to a marriage have equal rights and obligations at the time of the marriage during the marriage and at the dissolution of the marriage.*”
4. The petitioner therefore seeks the court to hear, declare, and order for the division of the properties above further that the court so transfer either of the said properties to hold herself as absolute owners or order the Deputy registrar to execute transfer papers in the event any party herein defaults to execute transfer of papers. She also seeks costs of the suit.
5. The respondent in his replying affidavit dated 8<sup>th</sup> June 2015. He admitted to averments of the marriage and dissolution of the same and them being gifted the said parcels of land by the father but added that the said gift was to be held in trust for their son L M. He added that since the said marriage to the petitioner had been dissolved he was holding the title of the said parcel of land in trust on behalf of his son. He urges the court to dismiss the petition adding that should the court find that the said property forms matrimonial property the same should not be sub-divided but be reverted to the donor according to his wish to hold the same in trust for the minor.
6. G G testified that she was married to the defendant for 16 years but they were now divorced. After the said divorce, she approached the respondent so that they could share the land they held together but he refused necessitating her to file this suit. She stated that they held 2 parcels of land gifted to them by her father in law, the respondent’s father **I.R. [Particulars Withheld]**and **L.R. [Particulars Withheld]**. She denied the respondent’s claim that the said parcel of land was being held in trust for their son who is almost 18 years. That the said parcel of land was initially agricultural but changed to residential. She testified that her father in law subdivided his land into 32 plots with the family holding 4 plots her father in law had plot no. 10, her sister in law no. 11 and she and the respondent go plot 12 and 25 respectively. That when her father in law gifted

- them the said parcel of land the son was only 9 years and he did not mention that they were holding the said parcel of land in trust for their son. She stated that she should be allowed to decide what to do with the said parcel of land and was agreeable if the respondent got one parcel and her the other since both parcels were of the same size.
7. David Wakaba in his testimony reiterated the plaintiff's evidence. He insisted that they were holding the said parcel of land in trust for their son even if the same was not indicated on the title or documented at all. He argued that the property should be transferred to the donor for him to continue holding the same in trust for their son until he attains the age of majority. That his father had expressed that he wanted the property to be given back to him to hold in trust for the minor and had instructed his advocate to draft documents to that effect.
  8. On cross-examination, he stated that the affidavit adduced was fake as the trust was not documented though that was the intention. That he had met with the applicant and she was to sign the said documents but she never responded. He stated that he jointly owned the parcel of land with the applicant and denied that the issue of trust was hatched when G sought to divorce him to ensure that she left the marriage without any property. He further denied that G wanted to settle the matter amicably as he had tried to settle the matter with G before coming to court.
  9. On re-examination he stated that the dissolution of their marriage began in 2011 and denied the hatching of the trust idea then stating that the same was always there. That the applicant had sought a divorce on grounds of cruelty as against the respondent.
  10. A M W, the respondent's father testified that D was his firstborn son and was married to G and were blessed with a son L M W. He testified that he gave the son and G 2 plots of land so that he and the wife could live comfortably even after having children. That they held reconciliatory meetings with the parties to avoid the matter going to court but the same bore no fruits. That in one of the meetings he suggested that they transfer the land to him so that he holds the same in trust and advocate for the child as the parties and the child would benefit. He urged the court to revert the land back to the family of Mboche as he had earlier intended.
  11. On cross-examination, he testified that he transferred, the land willingly was in a right frame of mind and knew what he was doing and ownership was to transfer back to him to hold the same in trust and did not know that the applicant would refuse to sign. That trust was based on how they lived and the applicant and respondent had promised them in church to live together. He stated that he did not want the property back because the parties had divorced but that the main reason he gave them the land was for the benefit of their son.
  12. Parties filed written submissions. The petitioner submitted that the respondent's father on 6<sup>th</sup> April 2006 out of love and affection transferred the petition property to the petitioner and respondents as tenants in common in equal shares which transfer was written, stamped and registered. It was the petitioner's submission that upon doing so the said property became matrimonial property as per the definition of matrimonial property in Section 6(1) of the Matrimonial Property Act No. 49 of 2013. "*Any immovable and moveable property jointly owned, during the subsistence of the marriage.*" Further, the said property having been so acquired during the subsistence of the marriage is therefore subject to the provisions of The Matrimonial Property Act No. 49 of 2013, the Marriage Act and International Instruments. In reply to the respondents' claim that the said property was held in trust for their son.
  13. That the transfer instrument having been registered against the title transfer to D W M and G as tenants in common in equal shares as gifts. That the gift was absolute and vested on the donee on 6<sup>th</sup> April 2006 and the only way the donor can take back possession is if the donee willingly reconveys it to him. The applicant argues that the trust does not exist but it is an afterthought aimed at blocking the petitioner from acceding to what is legally and rightfully hers and that the father did not retain any power and cannot revoke the gift to the petitioner. It was further argued that there is nothing in law like partially executed transfer as the one the respondent seeks to rely on has not been signed or witnessed and sought to have the said document expunged from the record as the same portray the respondent as dishonest and that he has exposed himself to perjury. She urged the court to hold that the said land was not family land nor was it held in trust for the minor.
  14. The respondent submitted that the petition is defective having been supported by an affidavit sworn almost 1½ years before filed in support of a petition that had been amended. He relied on the case of *Naomi Cidi vs the County returning officer Kilifi & 3 Others, malindi election petition 13/2013* where it was held that, "*a petition proper in this case an amended petition*

*proper is one that must be as if necessity be accompanied by a supporting affidavit bearing the evidence to be called in support of grounds borne in the petition.*” That despite the court being vested with judicial discretion to dispense justice without undue regard to technicalities the omission by the petitioner’s omission is grave and incurable and as such the petition should be struck out. Further that under provisions of Matrimonial Property Act, 2013 Section 18, the petitioner is mandated by law to plead with clarity setting out the claim without any ambiguities which the petitioner in this case has failed to do and as such the same should be struck out with costs. That the said land was gifted to the parties as tenants in common and as such the same amounted to trust and that the petitioner’s son having been named after him the said land was made solely for the disposition to the said son. He referred to section 3 of the Judicature Act which he submits is not in conflict of written law adding that the respondent’s father entrusted the parties with the said parcel of land had customary rights that are overriding in support of this she relied on the case of ***Makangu v Mbui CA 281 of 200 while citing Alan Kiama Mathunya and others civil appeal 42 of 1978***. Further that registration of the land under the Registered Land Act did not extinguish the respondent’s rights under Kikuyu customary law and neither did it relieve the appellant of her duties and obligations under section 28 as trustee. It was submitted that customary law and norms are not penned on paper to have effect.

15. On the competence of the petition, the petitioner filed an amended petition but chose to rely on the affidavit filed with her first petition. The respondent did not challenge this at the hearing of the suit, even though he states in his replying affidavit dated 8/6/2015 that he will raise a preliminary objection on law. Article 159 2 (d) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities, further parties testified relying on the documents on record. The respondent should have raised this issue at the hearing instead of raising it after the matter was completed by the court. I will therefore proceed on the amended petition as filed. In the case cited the issue of the defective pleadings was raised before the hearing of the petition and not after the hearing of the petition as is being done in this case.
16. It is trite law that he who makes an allegation must prove it. In this case, the respondent alleged the existence of a trust; that he and the petitioner held the suit land in trust for their son. Therefore, the issue for determination is whether the appellants proved the existence of the alleged trust over the suit land. In the case of ***Mumo -vs- Makau, (2004) 1 KLR 13***, this Court held that *a trust is a question of fact and has to be proved by evidence*. In this case the respondent is tasked with the burden of proving the existence of a trust.
17. In the case of ***Mbothu & 8 others -vs- Waitimu & 11 Others, (1986) KLR 173***, the court of appeal held that :- *“The law never implies, the court never presumes a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”*
18. The respondent’s father gifted the land to both the petitioner and respondent and the same was registered in both their names. This registration was as per the provisions of sections 27 and 28 of the repealed Registered Lands Act that vested absolute rights upon the petitioner and respondent as the registered owners and the same was subject only to the overriding interests. These overriding interests are noted under Section 28. Overriding interests unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—(a) spousal rights over matrimonial property; (b) trusts including customary trusts.
19. The respondent’s father, A M W in his testimony stated that he gave the son the respondent and G the 2 plots of land so that he and the wife could live comfortably even after having children and that he did not intend to take back the plots of land because the petitioner had decided to divorce the respondent. He further testified that the petitioner respondent had promised them in church they would stay together. It is evident that respondent’s father was frustrated when the marriage between his son and the petitioner ended however one can decipher from his evidence that he intended both parties to benefit. The issue of the trust and the said plots of land appear to have been hatched after the marriage between the petitioner and respondent broke down. The said parcel of land was transferred from the respondent’s father to the parties joint names upon registration of the said transfer the donor forfeited all rights to the said plots of land. In his testimony the respondent’s father did not mention that he had informed the parties that the said

land was to be held in trust. Further, there was no mention of a trust on the said registration nor was there any trust deed registered to that effect. I find that the respondent has not proved the existence of a trust and as such the said parcel of land gifted to the parties by the respondent's father forms matrimonial property of the parties. The claim that the same is trust property was merely aimed and calculated to deny the petitioner her rightful share of matrimonial property. The petitioner is entitled to one of the said properties as an absolute owner. The properties are the same acreage; this court awards the petitioner I.R.[Particulars Withheld] , I. R no. [Particulars Withheld], which she shall hold as an absolute owner. The Deputy registrar shall execute transfer papers in the event any party defaults to execute the transfer papers. Each party shall bear their own costs

**Dated, signed and delivered this 16<sup>th</sup> day of *December* ,2015.**

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....**For the Petitioner**

.....**For the Respondent**

.....**Court Clerk**