



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 130 OF 2014

A N M.....PLAINTIFF

VERSUS

D M N.....DEFENDANT

JUDGMENT

From the record herein, these proceedings were conducted in a very un-usual manner. I shall revert to that later on in this judgment. First, a look at the pleadings.

By an Originating Summons filed on 15th March 2005 at the High Court in Embu under **Section 17 of the Married Women Property Act** of 1882 (now repealed), the Applicant asked the Court to determine the following issues:-

- a. ***Does the Respondent hold whole of the matrimonial property INOI/NDIMI/408 inclusive of the dwelling home thereon in trust for the Applicant?***
- b. ***Does the Respondent hold half of the following matrimonial property including the developments thereon, in trust for the Applicant?***
 - i. ***INOI/NDIMI/[particulars withheld]***
 - ii. ***INOI/KERUGOYA/[particulars withheld]***
 - iii. ***Plot No. [particulars withheld]***
 - iv. ***T.O.L Plot at Kerugoya near [particulars withheld]***
- c. ***Does the Respondent hold half of the proceeds of matrimonial property INOI/KERUGOYA/[particulars withheld] sold after the dissolution of their marriage?***
- d. ***Does the applicant, as the Respondent's wife, make a measurable direct financial and material and indirect contribution to the acquisition and development of the matrimonial properties?***
- e. ***Is the Applicant entitled to whole of the matrimonial property INOI/NDIMI/408?***
- f. ***Is the Applicant entitled to half of the following matrimonial properties:-***
 - i. ***INOI/NDIMI/[particulars withheld]***
 - ii. ***INOI/KERUGOYA/[particulars withheld]***
 - iii. ***Plot No. [particulars withheld]***
 - iv. ***T.O.L Plot at Kerugoya near [particulars withheld].***
- g. ***Is the Applicant entitled to half of the proceeds of matrimonial property INOI/KERUGOYA//[particulars withheld] sold after dissolution of their marriage?***

Simultaneously with the filing of the said Originating Summons, the Applicant filed a Chamber Summons under the then Order XXXIX Rule 1 of the Civil Procedure Rules seeking orders that the Respondent be restrained from disposing and/or transferring the following matrimonial properties until this suit is heard and determined i.e.

- a. *INOI/NDIMI/[particulars withheld]*
- b. *INOI/NDIMI/[particulars withheld]*
- c. *INOI/KERUGOYA/[particulars withheld]*
- d. *Plot No. /[particulars withheld]*
- e. *T.O.L Plot at Kerugoya near /[particulars withheld].*

That order was granted on 16th March 2005 as per the typed proceedings herein.

Thereafter, there is nothing in the record to show that the Respondent filed any replying affidavit to the Originating Summons. Indeed in her submissions at the end of the trial, Ms Fatuma advocate for the Applicant submitted that the Respondent has never filed any response to the Originating Summons filed herein on 15th March 2005. What is clear from the record is that the Respondent was first represented by the firm of Gacheche Miano advocate then Ann Thungu advocate then Mbichire advocate and back again to Gacheche Miano advocate who came back on record on 5th October 2015. The only other application on the record is that filed on 20th September 2010 by one ESTHER WAKERA MURAGE seeking to be enjoined as interested party in these proceedings. However that application was never prosecuted.

Basically therefore, what I have before me is an Originating Summons to which no reply was ever filed.

Now to the proceedings.

The hearing commenced on 26th September 2006 before the late Khaminwa J. when the Applicant testified in not more than ten (10) sentences. She was however cross-examined at length by her advocate Ms Fatuma and then re-examined by Mr. Miano then on record for Respondent. It is not clear when the Applicant closed her case but on 26th November 2007, the Respondent made a lengthy statement of defence followed by his witnesses DAVID MURAGE NJOGU (DW1) and MONICA WAMUTHARA (DW2).

On 13th October 2008 the matter came up before W. Karanja J. (as she then was) who directed that the proceedings be typed and the case do proceed from where it had reached. It took upto 29th July 2009 for the proceedings to be typed and when the matter came up before W. Karanja J. (as she then was) on 29th September 2010, the defence was ready with three (3) witnesses although Ms Fatuma advocate pointed out that there was a mix-up in the typing of the proceedings as related to the Applicant's evidence. It was nonetheless agreed that the Respondent's three (3) witnesses should testify and accordingly GEORGE MURAGE MUITA (DW3), JAMES MAGONDU (DW4) and BENARD MUGO GATEI (DW5) testified and thereafter Ms Thungu advocate for the Respondent closed his case. W. Karanja J. (as she then was) then directed that the Applicant do testify afresh and this was done on 22nd November 2010 and this time she gave a fairly lengthy testimony in support of her claim. Ms Thungu advocate for the Respondent then applied that he too should testify afresh as his evidence as per the typed proceedings was mixed up and this application was granted.

The matter then came up before Ong'udi J. on 1st February 2012 who directed that the proceedings be typed and on 9th September 2013 she transferred the case to this Court.

When the matter came up before me on 29th September 2014, Mr. Maina advocate then holding brief for Ms Fatuma for the Applicant informed this Court that the parties had agreed to proceed from where the case had reached. The Court conceded and fixed the hearing for 6th November 2014 but on that day the Respondent appeared without his advocate and was granted an adjournment to enable him contact his

lawyer. However, from that date neither the Respondent nor his advocate attended Court though served and it was not until 8th October 2015 after the Applicant had called a witness to testify that Mr. Miano re-appeared for the Respondent and sought time to file his submissions in response to those filed by Ms Fatuma.

The confused nature of the proceedings herein has been caused partly by the deficiencies in the proceedings, the mix-up of the record during typing, the un-orthodox manner in which counsels prosecuted their respective cases and also the fact that this case has been in Court for the last ten years. The Court cannot escape its share of the blame for this scenario. This Court will try to do its best under those circumstances to bring this litigation to an end even if only for a while.

As indicated above, the Respondent did not file any reply to the Originating Summons. Indeed no directions appear to have been taken in this matter. However, the Respondent testified and called witnesses who were cross-examined at length. The parties proceeded on the assumption that the claim had been resisted and in the circumstances, I do not think it would be in the interest of justice for the Court to rule as suggested by Ms Fatuma advocate for the Applicant in her submissions, that I should treat this claim as un-defended. In my view, bearing in mind the manner in which counsels prosecuted their clients' respective cases, the interest of justice would best be served if the Court considers all the evidence as adduced by the parties and their witnesses which I shall now do together with their respective documentary evidence and the submissions of both Ms Fatuma advocate for the Applicant and Mr. Miano advocate for the Respondent.

From the Applicant's oral evidence and her supporting affidavit filed herein, it is her case that the parties got married first under Customary Law in 1976 before they solemnized their union in church in 1980. They then parted ways in 1992 before a formal divorce in 2005 after having been blessed with five (5) children.

During their marriage, the parties lived on the land belonging to the Respondent's father at Gaibei and the applicant was working in their butchery and keeping pigs and cows and out of the proceeds of that business, they bought the parcel No. INOI/NDIMI/408 measuring $\frac{3}{4}$ acre where they lived and even buried their son Maurice. They also bought parcel No. INOI/NDIMI/439 in 1985 measuring 2 acres and thereafter in 1988 parcel No. INOI/KERUGOYA/1122 measuring 1 $\frac{1}{2}$ acres.

When they parted, the applicant moved to Kerugoya where they lived in a single room with her children and through a loan from K-Rep, she bought parcel No. INOI/KAITHERI/401 in 1999 but sold it in 2001 to one Wakini so that she could raise fees to educate her children. She added that the Respondent's mother gave him parcel No. INOI/KERUGOYA/1164 though he later sold it. She also added that she bought four vehicles being registration numbers KAP 336 B in 2002, KAO 463 L in 2003, KAQ 581 in 2005 and KAR 190 N in 2004 which she sold in order to educate her children.

She therefore asked the Court to give her the following properties:-

1. ***Plot No. INOI/NDIMI//[particulars withheld] because it is their matrimonial home where her son lives and which was purchased jointly.***
2. ***Plot No. INOI/NDIMI//[particulars withheld] since she is the one with the children.***
3. ***Plot No. /[particulars withheld] which is in the village.***

She added that the Respondent can keep parcel No. INOI/KERUGOYA/1122 as well as plot No. 58.

In his defence, the Respondent while confirming that the parties were married and established a home in INOI/KERUGOYA before their divorce, he said when he bought the parcel No. INOI/KERUGOYA//[particulars withheld], the Applicant had run to her home and did not make any contributions. He said parcels No. INOI/NDIMI//[particulars withheld] and Plot No. 61 were given to him by his mother and that when he purchased parcel No. INOI/KERUGOYA//[particulars withheld], he was not living with the Applicant. He added that parcel No. INOI/KERUGOYA/1/[particulars withheld] belongs to his father. The Respondent stated that all his properties belong to his children and in

any case, they did not cohabit for long.

He added a witness his mother M W (DW2) who told the Court that she bought land from one James Mugendi which she gave to the Respondent. She could not however describe the land in question.

The other witnesses were GEORGE MURAGE MUITA (DW3) who testified that he sold the parcel No. INOI/NDIMI//[*particulars withheld*] to the Respondent in 1982 for Ksh. 55,000/=. On his part BERNARD MUGO (DW5) said he sold parcel No. /[*particulars withheld*] to the Respondent. JAMES MAGONDU (DW4) testified that he sold to the Respondent's mother parcel No. INOI/NDIMI/in 1985 for Ksh. 60,000/=. It is not indicated in his testimony the exact registration particulars of this parcel of land but it can only be INOI/NDIMI/439 because the other INOI/NDIMI//[*particulars withheld*] was sold to Respondent in 1982 by GEORGE MURAGE MUITA (DW3).

Counsels for both parties have filed their submissions which I have considered together with the evidence herein.

It is not in dispute that the parties herein were married under Customary Law in 1976 before they solemnized their union in church and divorced in 2005. There were five (5) children of this

marriage. The Applicant's claim is that the Respondent holds, the matrimonial home on INOI/NDIMI/408 in trust for her and also half of the following properties in trust for her i.e.

1. *INOI/NDIMI//[particulars withheld]*
2. *INOI/KERUGOYA//[particulars withheld]*
3. *Plot No. /[particulars withheld]*
4. *T.O.L Plot at Kerugoya near /[particulars withheld]*
5. *Half of the proceeds of the matrimonial property INOI/KERUGOYA//[particulars withheld].*

The Respondent's claim is that the Applicant did not make any contribution towards the acquisition of the above properties.

The proceedings herein relate to matrimonial property and are grounded on **Section 17 of the Married Women's Property Act of 1882** (now repealed) which was the applicable law before it ceased to apply following the enactment of the **Matrimonial Property Act of 2013**. Since this dispute was filed in 2005 it will be determined in accordance with the provisions of the law then applicable i.e. the **Married Women's Property Act of 1882**.

Section 17 of the said **Married Women's Act** (hereinafter the Act) did provide that in determining disputes between a man and wife over property, the Judge shall make any orders with regard to the same "***as he thinks fit***". It is not in dispute also that although the parties were originally married under Customary Law and thereafter in church, their dispute is governed by the said Act. The Respondent has insisted that the Applicant made no contribution towards the acquisition of the aforementioned properties and indeed in cross-examination by Ms Fatuma for the Applicant, he challenged her to show any evidence of her contribution towards the acquisition of those properties. It is however now well settled that a wife's contribution may not necessary be direct financial contribution. Such contribution may be direct or indirect such as taking care of the family, working on the family land and business etc – see **KIVUITU VS KIVUITU 1991 K.L.R. 248**. In such circumstances, the wife would be entitled to a share of the property so acquired during the subsistence of the parties' marriage. And even before the new Constitution was promulgated in 2010, Kenya was a signatory to various International Conventions which recognize that women are entitled to an equitable sharing of properties acquired during marriage. For instance, **Article 7(d) of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa** provides as follows:-

"In cases of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the property deriving from the marriage"

Bearing the above in mind, I shall now determine whether in fact the Applicant is entitled to the orders sought in her Originating Summons.

1. **INOI/NDIMI//[particulars withheld]**: It is clear from the certificate of search

that this property was registered in the names of the Respondent on 18th May 1983. The parties herein were married in 1976 and only parted ways in 1992 before divorcing in 2005. They had five (5) children and the Applicant's evidence is that she was working in the family butchery and keeping pigs and cows the proceeds of which were used to purchase this property. The Respondent's evidence is that at that time, the Applicant had run away but he does not say when she ran away neither has he rebutted her testimony that they only parted ways in 1992. This Court finds that the Applicant's claim with respect to parcel No. INOI/NDIMI//[particulars withheld] is well merited.

2. **INOI/NDIMI//[particulars withheld]**: The certificate of search with respect to this property shows that it was registered in the names of the Respondent on 30th December 1985. The parties were still living together and the Applicant has testified on how she contributed towards its acquisition. Her claim is also well merited.
3. **INOI/KERUGOYA /[particulars withheld]**: This property was registered in the names of the Respondent on 23rd September 1988 and the Applicant similarly testified that they bought the property together. The Respondent's evidence is that by the time this property was acquired, he was not living with the Applicant. However, as I have found above, the parties only separated in 1992. This claim is also merited.
4. **INOI/KERUGOYA//[particulars withheld]**: This property was registered in the names of the Respondent on 10th February 1989. The Applicant confirms the Respondent's evidence that this property was a gift to him from his mother or father. This property is therefore not available as in any case, it has already been sold and there is no evidence of what the proceeds of sale were.
5. **Plot No. /[particulars withheld] and T.O.L Plot at Kerugoya near /[particulars withheld]**: There is no evidence either of the existence of these properties, when they were acquired or in whose names they are registered. The same are therefore not available for consideration by this Court.

Ultimately therefore, upon considering all the evidence herein, I am satisfied that the Applicant has proved that she is entitled to half of the following matrimonial properties:-

1. **INOI/NDIMI//[particulars withheld]**
2. **INOI/NDIMI//[particulars withheld]**
3. **INOI/KERUGOYA//[particulars withheld]**.

Judgment is entered for the Applicant against the Respondent with respect to those properties to the extent that the Respondent holds the same in trust in equal shares for the Applicant.

Each party shall bear their own costs.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015

COURT: Judgment delivered this 4th December, 2015 in open Court.

Mr. Otieno for Ms Fatuma for Applicant present

Mr. Miano for the Respondent present

Right of appeal explained.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015