



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 14 OF 2012 (OS)

F W M PLAINTIFF

Versus

M K..... DEFENDANT

JUDGMENT

This is one of those matrimonial disputes that are not really suited for the Courts. I however tried to have the parties who are still living together as man and wife resolve it out of Court but to no avail. In such circumstances, the Courts will still do what they are mandated to do.

As stated above, the parties are man and wife. By her Originating Summons filed herein on 12th November 2012 under the then Married Women's Property Act (now repealed), the plaintiff sought a declaration that land parcels Number [particulars withheld] and LOC [particulars withheld] now registered in the names of the defendant were acquired through their joint efforts and are therefore subject to the provisions of the Married Women's Property Act and the defendant should therefore be directed to surrender a third share of the suit properties to the plaintiff and that the Land Registrar Muranga be ordered to register a third of the said properties in the plaintiff's names.

However, in his replying affidavit, the defendant stated that he acquired the said properties long before he married the plaintiff and that in any event, he has already given the plaintiff her share in land parcel No.

[particulars withheld] (this must be a typing error and he must have meant LOC [particulars withheld] and not LOC [particulars withheld] as is clear from the certificates of official search).

The parties did file their agreed issues and having failed to reach an out of Court settlement, the hearing commenced on 28th October 2013.

The plaintiff's case is that she married the defendant before the period of land adjudication and they jointly bought several parcels of land which were later consolidated into the parcels subject of this suit but they were all registered in the defendant's names. She produced the certificates of search (Exhibit 1 and 2) adding that since the defendant has two other wives, she wants a 1/3 of each of the said properties.

In his defence, the defendant said he bought the properties himself and the plaintiff did not make any contribution towards the purchase. He was not sure if he has given her a share in LOC [particulars withheld] or 139 but added that he has sub-divided LOC [particulars withheld] among his five sons.

The parties' counsels did make written submissions which I have considered together with the evidence

on record. The following are not in dispute:-

1. ***That the parties are man and wife***
2. ***That the properties subject of this case were registered in the names of the defendant in 1971 as per the certificate of search.***

What this Court has to determine is whether the properties subject of this suit are matrimonial properties and if so, the plaintiff's share in the same.

The new Constitution of 2010 has re-shaped the legal landscape and one of its prominent features is that it has the principles of equality and social justice woven through it. ***Article 10 (2) (b)*** brings to the fore the principles of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. ***Article 45 (3)*** which is very relevant to the matter now before me provides as follows:-

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage Similarly, ***Section 18 of the Environment and Land Court Act*** provides that in exercising its jurisdiction under this Act, the Court shall be guided by the values and principles under ***Article 10 (2) of the Constitution*** as well as the principles of equity.

On the question as to whether or not the properties subject matter of this case were acquired during the marriage between the parties, there is clear evidence from the plaintiff that the said properties were purchased before the land adjudication process. She has even given the names of the persons from whom the properties were purchased. In her evidence in chief, she gave the names of those persons as follows:-

“We bought from people. One from Njora. One was called S G, W N, C K and N W who are all deceased. It is not true that the defendant bought the parcels of land before marrying me”.

In his defence, the defendant said the following with respect to how the properties were acquired:-

“I had written down the names of the persons I bought the land from but the list is lost. I know one of them was N W and the other was W N. The people I bought from are all dead”.

What is clear from the above is that the two names of N W and W N feature in the list given by both the plaintiff and the defendant as among those that the properties were purchased from. The defendant concedes that he cannot recall all of them as he lost the list. The plaintiff seems to have a better recollection and has given us five (5) names. To my mind, the plaintiff would not have remembered these names unless she was involved in the purchasing of the said properties in question. Indeed the defendant's major issue, as I understood it, is that although the plaintiff must have been aware about the purchase of the properties, she did not make any contributions. In cross-examination by the plaintiff's counsel, the defendant had this to say on that issue:-

“It is not true that the plaintiff gave me money to buy the land. She was my wife and she was also working but she did not give me money for the land. She was a house wife”

The defendant is therefore arguing that as the plaintiff did not make any financial contribution towards the purchase of the land, she is not entitled to any share in the same. However, it is now clear following ***KIVUITU VS KIVUITU 1991 K.L.R 248 (1988 – 1992) 2 K A R 241*** that a wife's contribution need not necessarily be only a direct financial contribution. It may also be an indirect contribution such as taking care of the welfare of the family by preparing food and also taking care of the children. In this case, the defendant himself conceded in cross-examination by Mr. Njoroge for the plaintiff that:-

“I used to work. I was a tailor. We used to work together with the plaintiff.

That being the position, there is clear evidence that the plaintiff supported the defendant in his work and even if she did not make a direct financial contribution towards the purchase of the properties, which is

denied, there is evidence of indirect contribution. It has not been suggested, for example, that the plaintiff neglected the defendant and the family or that she squandered her income on alcohol and other vices or that she was never at home. I am prepared to find from the evidence, which I hereby do, that the plaintiff did make a contribution towards the purchase of the properties subject matter of this case.

It must also be noted that the properties were acquired during the demarcation period which was in the 1950's when the parties were already married. The titles to the same were obtained some twenty years later in 1971. It is obvious therefore that the said properties were acquired during the marriage of the parties herein. Mr. Karuga Wandai counsel for the defendant has submitted that the Married Women's Properties Act was designed to apply in English monogamous marriages and does not apply to Kikuyu Customary Polygamous marriages. No authority was cited for that proposition. If anything, there is authority in the cases of I.V.I 1971 E.A and KARANJA VS KARANJA 2008 1 K.L.R (G & F) 171 that the Married Women's Property Act is a statute of general application and would apply to a Kenyan whether married under customary law or otherwise.

Having considered all the above, I am satisfied that the plaintiff herein has proved, on a balance of probability, that the properties subject matter of this case are matrimonial properties acquired during her marriage to the defendant and that she did contribute towards the purchase of the same. She is therefore entitled to a share in the said properties and in my view, going by the decision in KIVUITU (supra), I find that the plaintiff's contribution was in equal shares.

With regard as to how or in what proportion the subject properties should be shared, the plaintiff has asked that she be awarded a third (1/3) in each of the properties. She stated in her evidence that she seeks a third (1/3) as her share because the defendant has two other wives apart from herself. She also added in her testimony that although the defendant has given her a share in LOC [particulars withheld], he again proceeded to take back part of it leaving her only with a small portion which she described as being the size of my court - room. From the certificates of search, the parcel No.

LOC [particulars withheld] measures 1.49 Hectares while

LOC [particulars withheld] measures 0.81 Hectares. Under Section 17 of the Married Women's Properties Act of 1882, the Court has power to:-

“----- make such order with respect to the property in dispute, and as to costs of and consequent upon the application as he thinks fit -----“

The wording of the above section shows that the Court is clothed with a wide and unfettered discretion to make such orders as the justice of the case demand. In approaching the issue of how to distribute the property, some Courts have opted to have the properties valued, sold and the parties to share the proceeds in line with their respective shares. In other cases, the Courts have opted to have the properties valued and one party to buy out the other. Each case has to be determined on its own peculiar circumstances. As I have stated above, Section 17 of the Married Women's Property Act gives the Court wide discretion in deciding how to share the dispute properties. In the circumstances of this case, it would not be prudent to order a sale of a third (1/3) of the properties in dispute. This is because the properties are fairly small the largest being 1.49 Hectares (slightly above 2 acres). Secondly, the defendant is polygamous and the families reside on the land. The plaintiff has asked me to award her a third (1/3) in each parcel. Since the defendant has three wives, I think that request is reasonable in the circumstances. The plaintiff has taken into account the fact that she has co-wives and has been magnanimous enough in that regard. She has also conceded that she has been given a portion in LOC [particulars withheld] though she says that portion is very small.

In the circumstances of this case and doing the best I can in the interest of fairness and equity, I would enter judgment for the plaintiff against the defendant as prayed for in her Originating Summons filed herein on 12th November 2012 and make the following orders:-

1. ***The plaintiff be granted a third (1/3) as her share in LOC [particulars withheld]. in doing so,***

- cognizance be taken of the portion she already has*
2. *The plaintiff be granted a third (1/3) as her share in LOC [particulars withheld]*
 3. *As the parties are family, each shall meet their own costs.*

B.N. OLAO

JUDGE

18TH MARCH, 2014

18/3/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Mr. D. Njoroge for Mr. Njoroge for Plaintiff – present

No appearance for Defendant.

COURT: Judgment delivered this 18th March 2014 in open Court.

Mr. D. Njoroge for Mr. Njoroge for plaintiff present

Mr. Wandai for defendant absent

Right of appeal explained.

B.N. OLAO

JUDGE

18TH MARCH, 2014