



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL APPEAL NO: 6 OF 2007

R N M.....APPLICANT

VERSUS

W M K.....RESPONDENT

JUDGMENT

1. The Originating Summons herein was filed on 19th February 2007. It seeks specific declarations on Plot No. **[particulars withheld]**/Business – Isinya Trading Centre. The plaintiff avers that the property was acquired with joint efforts of the parties but was solely developed by the plaintiff. She claims that she contributed directly and indirectly to the acquisition of the property.

2. In the affidavit sworn on 6th February 2007, the plaintiff avers that she was married under statute on 9th December 2000 to the defendant. At the time both of them were working – the plaintiff as a secretary at an academy, the defendant a high school teacher. During coverture the parties jointly acquired Plot No. **[particulars withheld]**/Business – Isinya Trading Centre, which she single-handedly developed with funds sourced from a bank. She has been asked by the defendant to vacate the premises.

3. In reply to the application, the defendant swore an affidavit on 12th March 2007. He concedes marriage with the plaintiff, but states that the same was dissolved on 22nd November 2006 by a decree of the Nyahururu Principal Magistrate’s Court in Divorce Cause No.5 of 2006. The decree was made final on 22nd May 2007. He asserts that he solely and absolutely acquired the property in issue using his own resources on 5th July 1999, at least a year before he married the plaintiff. He avers that at the time he did not even know the plaintiff. He states that the plaintiff did not develop the plot during coverture, adding that the illegal structures put up on the land were done with the sole aim of clothing the plaintiff’s claim with some legality. He asserts that he did not consent to the said developments. He accuses the plaintiff of having removed the little property they had acquired jointly and that he has never benefited from them and he has no claim over them.

4. Attached to the affidavit are several documents. There is a letter dated 5th July 1999 from the Olkejuado County Council. It is correspondence on the transfer of Plot No. **[particulars withheld]**/Business- Isinya Trading Centre to the defendant. There is another letter dated 22nd December 2006 from the defendant’s advocates to the plaintiff, complaining about the putting up semi – permanent structure on the said plot.

5. Thereafter both parties filed their lists and bundles of documents. The applicant's list of documents is dated 4th February 2009. There is a copy of certificate of marriage serial number **[particulars withheld]**, as evidence that the parties contracted marriage on 9th December 2000. There is a letter dated 5th July 1999 from the Olkejuado County Council on the transfer of the property in question. The letter is addressed to **[particulars withheld]** Women Group and it relates to transfer of the subject plot to the defendant. There is the letter dated 22nd December 2006 from the defendant's lawyer addressed to the plaintiff, where he was complaining about structures being put up on the premises by the plaintiff. There are also receipts from the Olkejuado County Council, dated 19th June 1997, 5th July 1999 and 26th April 2007; one in the name of the defendant and the other two in the name of the **[particulars withheld]** Women Group, who appear to have been the original owners of the said plot. There is a letter dated 9th March 2005, from the plaintiff's employer granting her a building loan. There is also a bank statement from Equity Bank displaying the transactions in the account of the plaintiff showing loan repayments for the period between February 2005 and April 2007.

6. The defendant's list of documents is dated 5th February 2009. The documents attached to the list include an agreement for transfer of a plot. It is between the **[particulars withheld]** Women's Group, the initial owners of Plot No. **[particulars withheld]**/Business-Isinya Trading Centre, and the defendant. The transfer agreement was signed on 2nd July 1999. Then there is a rates clearance certificate given on 5th July 1999 showing the defendant as the registered owner of Plot No. **[particulars withheld]**/Business-Isinya. There is also a certificate of making decree *nisi* absolute dated 25th July 2007.

7. The suit was heard on 27th October 2011, when the plaintiff testified. The defendant had been served but did not attend court. She testified that before the formal marriage ceremony on 9th December 2000 the parties had cohabited for three (3) years. It was during the alleged cohabitation that the parties acquired the plot in question in 1999. The plaintiff alleged that each of them contributed Kshs.35,000.00. She gave her share to him and the property was registered in his name. The defendant left the plaintiff in 2004, whereupon the plaintiff embarked on the development of the plot after obtaining a loan of Kshs.60,000.00. She sought orders that the said plot be declared hers. On the basis of that the court granted leave the plaintiff to amend her Originating Summons so as to claim entitlement to the whole property.

8. The plaintiff made of formal application for the amendment of the Originating Summons. The application was heard on 3rd May and granted.

9. In a suit for division of matrimonial property, three issues must be addressed. Firstly, whether the parties were married at the time of the alleged acquisition of the suit property. Secondly, whether the claimant contributed to the said acquisition. Finally, whether the suit was filed at a point in time when the parties were married but undergoing divorce or separation.

10. From the material before me, there is evidence that there was a statutory marriage celebrated on 9th December 2000 which apparently brought the parties together. The said marriage ended in divorce in 2006, when decree *nisi* was pronounced, it was made final in 2007. The suit herein was filed in 2007. The suit herein was filed during the pendency of the divorce suit. On these facts, there is no dispute. It is pleaded by both sides, who have exhibited a copy of the marriage certificate serial number **[particulars withheld]**.

11. At the hearing the plaintiff raised the issue of co-habitation prior to the celebration of marriage on 9th December 2000. She did not plead this in her Originating Summons nor aver to it in her supporting affidavit. The defendant did not have opportunity therefore to deal with it in his replies. The testimony comes out as an afterthought, otherwise why did not brought out earlier. The fact of cohabitation for three (3) years prior to the celebration of the marriage ought to have been pleaded. I will therefore treat the parties as having contracted marriage as from 9th December 2000.

12. Was the property acquired during coverture? The material before me indicates that the property in

question was acquired in 1999, this was before the parties contracted marriage in 2000. Consequently, I find that the property was not matrimonial property.

13. If I were to find that the parties had been cohabiting prior to 2000, is there material from which I can find that the plaintiff contributed to the acquisition of the property? In her pleadings, the plaintiff merely says that the property was acquired jointly, yet she does not elaborate, in terms of stating what her contribution was. This would have given a chance to the defendant to respond to the allegation. It is instructive that at the trial, the plaintiff states her contribution to have been Kshs.35,000.00, yet this is not pleaded anywhere. I have therefore no material upon which I can find that the plaintiff played any role at all in the acquisition of the property in question.

14. What comes out clearly is that the plaintiff developed the plot. This she did after the breakdown of their marriage, after the defendant had left. There is evidence that the developments occurred against the active opposition of the defendant.

15. The plaintiff appears to argue that she is entitled to the property on account of having developed it. An interest in the property of another cannot be created by developing it without the consent and/or concurrence of the owner. I have already found that the property in question was not matrimonial and consequently the plaintiff should not have developed it without the concurrence of the defendant.

16. On the whole I find that there is no merit in the application by way of Originating Summons for the orders sought in the application. I hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 11th DAY OF December 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Mwangi for Ms. Kinyanjui advocate for the plaintiff.

No appearance for the advocate for the defendant.