



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 204 of 2011

IN THE MATTER OF AN APPLICATION BY JACKLINE NUNGARI KARIUKI

AND

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

BETWEEN

JACKLINE NUNGARI KARIUKI.....PLAINTIFF

VERSUS

SIMON NJOROGE MBUGUA.....DEFENDANT`

JUDGMENT

This is an Originating Summons for a declaration that:

“LR NO.BAHATI/KABATINI BLOCK1/4674 acquired and developed by the joint effort and funds of both parties during the subsistence of their marriage and presently registered and in possession of the Defendant is jointly owned by the Plaintiff and the Defendant.”

It is the plaintiff's case that she got married to the defendant on 30th march, 1996 under the African Christian Marriage and Divorce Act (Cap 151) and established their matrimonial home at Nakuru. Their marriage was blessed with three children. As a result of marital differences, the defendant filed Nakuru C.M. Divorce cause No.[....] to dissolve the marriage.

In the meantime, the plaintiff has brought the instant summons under **Section 7** of the **Married Women's Property Act** (1882) claiming that she is entitled to the suit property, having contributed towards its acquisition and development. Specifically, the plaintiff maintains that she obtained loans which were used in the construction of the suit property; that at some point, the defendant was jobless and the plaintiff used her own resources for the upkeep of the family and also to continue with the construction of the suit property.

While admitting that indeed the plaintiff made some contribution towards the construction of the suit property, the defendant maintains that that contribution was so negligible that it would not entitle the plaintiff to have half share of the property. He has denied the averment that he was jobless in 2005 arguing that he was employed by the Redeemed Gospel Church.

I have considered these arguments and written submissions. Parties took directions that the dispute be determined by way of affidavit evidence.

It is clear from the pleadings that the suit property is registered in the name of the defendant. It is conceded that both parties made contributions towards the construction of that property. The sole issue falling for determination is the extent of the plaintiff's contribution. Although she has not specifically stated so, the plaintiff contends that she is entitled to equal share of the suit property with the defendant.

I reiterate that the defendant admits that the plaintiff made contributions towards the development of the suit property, but maintains that the contribution was minimal. That contribution, according to submissions made on behalf of the defendant cannot exceed 25% of the cost of development.

The case of **Peter Mburu Echaria V. Priscilla Njeri Echaria**, Civil Appeal No.75 of 2001 reviewed several previous decisions based on **Section 17** of the **English Married Women's Property Act (1882)** as well as international conventions and treaties on women's rights which have been ratified by Kenya. That case settled the law thus:

- i) that the Married Women's Property Act, 1882 is an Act of general application;
- ii) that the court has discretionary power to determine a dispute between a husband and wife with regard to title to or possession of property;
- iii) that in deciding such dispute, the court must apply settled law to the facts as may be established in the same manner it does in ordinary suits between any other party who are not married;
- iv) that for a wife to be entitled to a share of the property registered in the name of the husband, she has to prove contribution towards the acquisition or development of the property.

The defendant has annexed a sale agreement between himself and the seller of the suit property to the effect that he purchased the property in September, 2000 at a cost of Kshs,80,000/=. At paragraph 12 of the replying affidavit dated 15th August, 2011, the defendant has deposed that:

"..... I have slowly been finishing the construction of the matrimonial home and I have expended more that 300,000/= this year alone in building materials."

In support of this, he has annexed a list of how Kshs.347,400/= was incurred in the construction of the property and some receipts amounting to only 30,000/=

For her part, the plaintiff contends that the defendant was only able to purchase the property because the plaintiff was available to take care of other household expenses from her salary. But towards the development of the property, the plaintiff maintains that out of Kshs.159,700/= loan she obtained from Nakuru Teachers' Co-operative Savings and Credit Sacco Limited, she invested Kshs.150,000/= towards the construction of the property.

The following year (2006), the plaintiff obtained a further Kshs.70,000/= from Kenya Commercial Bank which went towards the purchase of iron sheets to roof the property. On behalf of the defendant, it has been submitted that:

"Indeed, the defendant acknowledges that the plaintiff contributed only Kshs.100,000/= which explains where some of Kshs.159,700/= she claims she borrowed went to. In any case, even if she contributed Kshs.159,700/= it is the defendant's contention that the same is very little when you consider how much he himself has put in the house....."

In the same breath, we submit that the plaintiff is entitled to only 25% as claimed."

There are two sets of figures. The plaintiff's figure is Kshs.150,000/= plus Kshs.70,000 and the defendant's figure is Kshs.80,000/= and Kshs.300,000/=.

Although the plaintiff only seeks a declaratory order that the property was acquired and developed with joint funds of both parties, the court must proceed further and make orders beyond declaring the interest of the parties. The court in **Echaria** case (supra) observed that:

“In Muthembwa’s case which was decided two years after Kamore’s case, the court said that its jurisdiction was not limited to merely making declaratory orders and that it had jurisdiction to make orders as it considered appropriate on the facts and circumstances of the case before it.”

Section 17 of the **1882 Act** gives the courts discretion to grant appropriate remedies upon ascertainment of the respective beneficial interest in a disputed property.

For the reasons stated I find that the plaintiff is entitled to 35% share of the suit property being her proved contribution towards the development of the matrimonial home. The property will be valued after the parties have nominated a mutually agreed valuer. They may agree to sell the property and share the proceeds or the defendant may pay to the plaintiff 35% of the value of the property. The parties will meet valuation charges equally.

I will not award costs.

Dated and Signed at Nakuru this 18th day of January, 2013.

**W. OUKO
JUDGE**

Dated, Signed and Delivered at Nakuru this 5th day of February, 2013 by Hon. Justice M. J. Anyara Emukule.

JUDGE