



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 21 of 2007

E.J.T.....PETITIONER

VERSUS

S.K.T.....RESPONDENT

JUDGMENT

The Application has been instituted by way of Originating Summons and is brought under Section 17 of the Married Women Properties Act, 1882 which shall be hereinafter referred to as “The Act”.

The Applicant is seeking for a declaration that she is entitled to a half (1/2) share of the matrimonial property known as **MUTWOT[....]** which measures thirty (30) acres in total.

In her evidence the Applicant testified that she got married to the Respondent, Shadrack Kibor Tabot in 1973 and she produced into court a certified copy of the Marriage Certificate and the same was marked as **“PEXb1”**.

It was the Respondents evidence that, the Respondent and Applicant did not have any property of their own, her father in-law gifted to them the subject property.

The couple then put up a three bedroomed semi permanent house and the Applicant testified that she started herding dairy cattle, planting trees and generally cultivating and tilling the said land.

Whilst the Applicant remained at home, taking care of the children and supervising the farm work and doing general home duties the Respondent worked as a driver away from home. During his employment the Respondent worked in various stations namely Baraton, Eldoret and at Central Bank and had been employed as a driver. The marriage was blessed with four issues from the said marriage.

In 1987 the Respondent chased the Applicant from the said land, and it was her testimony that she did not leave on her own accord. She sought the intervention of Wazees but the parties failed to agree. Later the Respondent filed for divorce vide Divorce Cause [....] which was disallowed by the court. A copy of the Judgment was produced and marked as **“PEXb4”**.

The Applicant reiterated that the land was gifted to them by her father in law and she had run a dairy farm on the land and she had utilized the proceeds of the milk sales to maintain the family and develop the suit land.

The Applicant left the property on the 12.12.1987 shortly thereafter on the 15.12.1987 the Respondent proceeded to obtain registration of the property in his name.

The Applicant urged the court to grant her the prayers sought in her Originating Summons

The Applicant called three (3) witnesses to testify on her behalf. H.K.B (PW2) the son of both the Applicant and the Respondent, testified in support of the Applicant. He confirmed having lived on the said property with his mother for fourteen (14) years and confirmed that in 1987 his father chased his mother from the property.

He stated in evidence that his father the Respondent lived and worked away from home whereas the Applicant lived on the property and he confirmed that she was in charge of the general upkeep of the property and cultivated the same and also looked after the cows. He also confirmed that his mother provided for his needs together with his other three (3) siblings.

H.C.T (PW3) who is the sister of the Respondent also testified on behalf of the Applicant and also testified to the fact that the Applicant stayed on the suit land whilst the Respondent was away in Nairobi and that the Respondent worked at Central Bank as a driver.

She testified that the Applicant looked after the children and also herded and raised dairy cows and she confirmed that the Applicant and the Respondent built a house with three (3) rooms on the said property.

PW4 David Kimboi Kibitok who was the Area Chief in 1987, testified that when the Respondent chased the Applicant away, he convened a Wazee's meeting and called the Respondent to discuss the matter. The Applicant agreed to abide with the elders ruling but the Respondent refused.

The witness confirmed in his evidence that the Applicant lived on the land, with her children and she looked after them and that she also herded cattle and cultivated the land.

The Applicant closed her case after PW4 testified and urged the court to grant her the orders as prayed.

The Respondent's case is that he worked as a driver with Central Bank of Kenya. In 1967 after his circumcision, his father gave him the suit land and also showed him where to put his "**Kasimba**" and also helped him to build the said hut.

He testified that he was given the land even before he married the Applicant. That in 1971 his father advised him to build a bigger house and as his father was a "**fundi**" he assisted him to build this house.

When he got married to the Applicant, the big house had already been built and that the cultivation of land and herding of the cows was done and supervised mostly by his father

The Respondent stated that he hired a worker to work on the land and he sent money to his father, to pay the worker. That all the developments that were on the land were done by him with the assistance of his late father. That the Respondent solely contributed all the monies to development on the land and his father supervised the same and the Applicant had made no contributions to the any development on the land.

The Respondent confirmed that he had filed for Divorce but the same was disallowed and he was therefore un-successful in his bid to divorce the Applicant.

In conclusion the Respondent testified that the land was gifted to him by his father before he got married and the Applicant found all the developments in place and that none of the developments on the property were ever made by the Applicant.

The Respondent stated that he was not agreeable to dividing the property equally with the Applicant and prayed that the Originating Summons be dismissed.

ISSUES FOR DETERMINATION:

Upon hearing the evidence of both the Applicant and her witnesses together with the evidence of the Respondent the court finds the following issues for determination;

- (a) The marriage.
- (b) Matrimonial home and matrimonial property
- (c) Contribution – whether indirect or direct.
- (d) Apportionment - share

THE LAW

The court made reference to;

- (a) Section 17 – Married Women’s Property Act.
- (b) Case Law: **MUTHEMBWA –VS- MUTHEMBWA**

NEEMA NUNGARI SALIM –VS- SALIM ALI MULLA (2006) eKLR

- (c) Article 45 and Article 27 of the Constitution.

ANALYSIS

The first issue for determination is the marriage. It is not in dispute that the parties were married. The Applicant produced a Marriage Certificate which was marked as **“PEXb 1”**. The Respondent also acknowledged the existence of the marriage which he attempted to have dissolved vide Divorce Cause No.[...] but was unsuccessful. This court finds that there was a marriage in existence.

The next issues for determination are the matrimonial home and the matrimonial property.

The Respondent stated that he had been given the property by his father as a gift after he had been circumcised. It was not in dispute that the property had been gifted by the father in law. The dispute was whether it had been gifted before the marriage or after the marriage.

When the parties got married in 1973 it is not in dispute that the Respondent took the Applicant to live in a house built on the property known as **MUTWOT[...]** the suit property herein.

The Applicant in her evidence and her witness PW2 confirmed having lived on the said property for a period of fourteen (14) years. The Respondent did not give any evidence to rebut this fact.

A matrimonial home can be defined as property that is either owned or leased by either one of the spouses and the parties occupy and establish a family home on the same.

The court finds that the parties had established a family home on the said parcel of land and that it can be properly described as the matrimonial home.

The Blacks Law Dictionary defines matrimonial property as;

“....property that is acquired from the time when the marriage begins until one spouse files for divorce.....”

The court finds that from the evidence adduced that the Applicant and Respondent cohabited in the house on the property in issue and established a matrimonial home thereon. The Applicant lived on the property for a period of fourteen (14) years and raised the four (4) children of the marriage thereon.

It was the Respondents contention that the property was gifted to him by his father and that he therefore acquired the same before he married the Applicant.

The Respondents case was that all the developments were in place before he married the Applicant and that she made no developments to the property in issue.

It was the Applicants contention that she started raising cows on the said land and used the proceeds to develop the land. It was also her evidence and that of **PW3** that the Respondent lived in a “**Kasimba**” prior to the marriage and after the marriage both parties, that is the Applicant and the Respondent built a bigger three roomed house.

In determining the status of the property, the court is guided by the case of **MUTHEMBWA –VS- MUTHEMBWA.**

The Court of Appeal held that

“.....property inherited and gifted to one spouse before the marriage, and the property exists in the same condition as it was gifted or inherited, no problems arise. The spouse to whom it was gifted should be allowed to retain it. Problems however arise where improvements are made using matrimonial resources and then the property ceases to be in its original form and increases in value....”

The above definition then leads this court to the third issue, which is the contribution of the Applicant.

Contribution can either be indirectly or direct or it can be by way of monetary contribution or non-monetary contribution.

The Applicant adduced evidence that she took care of the children whilst the father was away on duty, this has been held to be indirect contribution. Refer to **KIVUITU –VS- KIVUITU** – where it was held that looking after the welfare of the family and back up service on the domestic front was an indirect contribution by the wife and that this form of contribution can form a basis for assessment of contribution just like financial contribution.

Companionship to the spouse has also been held to be a form of indirect contribution.

The Applicant as a fact did domestic work and managed the matrimonial home and also managed the family dairy business. It was the Applicant’s contention that she utilized the proceeds from the dairy business to make developments to the property.

The Court of Appeal in **MUTHEMBWA –VS- MUTHEMBWA** supra held that improvements can be in the form of planting trees or planting of perennial cash crops which then yield a regular income.

From the evidence adduced by the Applicant this court is persuaded, on a balance of probabilities, that the Applicant made a contribution towards the development and improvement of the property.

This then leads to the determination of the issue of the Applicants share.

This court is guided by the submissions of both Counsel for the Applicant and Respondent.

The court finds the property to be matrimonial property and that the Applicant has a beneficial interest in the said property.

This court has to determine what is just and equitable. Counsel for the Applicant seeks for a declaration that the Applicant be granted half (1/2) of the property.

Counsel for the Respondent submitted that this would be unfair entitlement and urged the court to grant the Applicant the two (2) acres offered by the Respondent.

The court has taken into consideration that the Respondent has another wife and other young children and that they all reside on the suit premises and that the Applicant has four (4) issues from the marriage with the Respondent.

To be just, fair and equitable this court finds that the Applicant is entitled to a 29 % share in the matrimonial property which translates to approximately Eight (8) acres.

The jurisdiction of this court is limited to making a declaration and therefore the court cannot grant the Applicant an order for Transfer as prayed for in the Originating Summons.

In conclusion and for the reasons stated above it is hereby ordered and DECLARED;

- a) That the Applicant is entitled to a 29% in the matrimonial property known as **MUTWOTI...**
- b) Each party shall bear their own costs.

It is so ordered.

Dated and delivered at Eldoret this 17th day of August 2012.

**A.MSHILA
JUDGE**

Coram: Before Hon. A Mshila J
CC: Andrew
Counsel for the Applicant: Mutai
Counsel for the Respondent: No appearance.

**A.MSHILA
JUDGE**