



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 84 of 2005

MARY WAIRIMU MWANGI..... PLAINTIFF

VERSUS

JOHN MWANGI MBUTHIA.....DEFENDANT

JUDGMENT

By Originating Summons dated 25th May 2005 the plaintiff herein MARY WAIRIMU MWANGI moved this court under section 17 of the Married Women Property Act 1882 and order xxxvi rule 7 of the Civil Procedure Rules.

The Plaintiff claims that she is entitled to whole interest in the assets or property referred to as matrimonial property and to

(a) *Determination of the plaintiffs interest in the matrimonial property being L.R. No. NYERI/UASONYIRO/133 and MWEIGA/BLOCK 5 MUTHUINI/368.*

(b) *A declaration that the defendant holds the whole matrimonial property in trust of the plaintiff.*

(c) *An order that the matrimonial property be transferred to the plaintiff.*

The summons was supported by the affidavit of the plaintiff sworn on 11th October 2005 in which the plaintiff deponed as follows:

1. She got married to the defendant on 23rd December 1961 under African Christian Marriage and Divorce Act.
2. They cohabited at various places but finally settled at matrimonial land known as NYERI/UASONYIRO/133.
3. She was employed as a teacher while the defendant was employed by the then Ministry of Culture and Social Services.
4. That they jointly acquired property but the same was registered in the defendant's name since in 1970 women were never issued with ID Cards.
5. That she contributed toward the purchase of land out of salary and out of the income from the milk of cows she reared while the defendant was working away.
6. That sometime in April 1998 the defendant attempted to charge the property to the bank for

a loan of Ksh. 530,000 and subsequently he lodged land disputed on the same.

7. That she has lived on the property with her children and also constructed a school thereat.

The defendant in reply thereto stated as follows:

That whereas it is true that he is married to the plaintiff he bought the parcel of land Nyeri/Uasonyiro/133 solely alone and the same is not a joint property.

He further deponed that he bought the land and kept cattle on the same.

That the plaintiff filed her claim before the land disputes tribunal and that he was in the process of transferring to her nineteen acres of the land which is five acres more than what she was awarded by the tribunal

he further stated that the suit is resjudicata HCCC No. 182 of 1993.

This is the pleading that was placed before the court.

In the interest of justice I would state a brief history of this matter.

Upon the filing of the OS herein the plaintiff subsequently applied for interlocutory judgment which was duly entered on 29th June 2006 and the matter fixed for formal proof.

The defendant thereafter applied to set aside the said judgment which was duly done vide ruling dated 19th March 2007.

On 8th August 2008 the defendant filed a notice of preliminary objection on a point of law to the effect that the suit herein was/is resjudicata which notice was taken before Justice MARY KASANGO who on 13th November 2007 did not allow the said objection on the basis that

“In making bare statement the defendant did not annex any document to show the existence of those prior suits. The court therefore as it considered the preliminary objection was unable to determine whether indeed those previous suits existed”

She therefore dismissed the objection.

The defendant through his new advocate on 6th March 2009 once again raised the preliminary objection which was once again dismissed by Justice Makhandia on the basis that the same had been ruled upon by Justice Kasango. Whether or not Justice Makhandia was right in dismissing the objection is an issue I will comment on later in this judgment.

On 23rd May 2011 directions were given that the matter proceed by way of oral evidence.

On 29th February 2012 the parties appeared before me for the hearing of the OS.

P.W.1 JOSEPH SHADRACK MUREITHI testified on oath and stated that he is a professional valuer who was instructed by the plaintiff to carry out valuation on Nyeri/Uasonyiro/133 and that the total acreage of the plot was 25.2 Hacters C63111 acres. He stated that the plot has been subdivided and that taking into account the area to be taken over by access roads to the said individual plots the remaining acreage is 61.60.

He stated that the registered owner as at 24th February 2012 is John Mwangi Mbuthia. He gave the current value of the plot having taken into account the development thereat a Kshs. 20,350,000/-.

Under cross examination by Mr. Gathiga Mwangi he further confirmed that there are two

permanent houses on the plot and that the nursery school is on the same side occupied by the plaintiff.

P.W.2 MARY WAIRIMU MWANGI: testified on oath and stated that she has been the defendant's wife since 23rd December 1961 when they celebrated their marriage at Tetu Catholic Parish. She was then a teacher while the defendant was working with the Ministry of Culture and Social Services. They got their first child on 30th November 1963 while the last child was born in July 1977.

She stated that after independent in 1963 the Government was giving people loan and therefore the defendant applied for loan for both of them and thereafter they were transferred to Machakos. The defendant used to come to Nyeri to look for land and that she subsequently found land at Ksh.1661 of which she had only 1060/-. She thereafter approached Nyeri Standard Bank and was allowed to withdraw the balance. She stated that they had a joint account.

She stated that the loan was given through settlement Fund Trustee and in 1966 she left the defendant in Machakos and moved back to Nyeri and retired in 1977.

In respect of Mweiga/Block 5/Muthuini/363 she stated that they were living together with both her father and the defendant's father. That her father gave her a bull which was sold and the proceeds used to buy shares in respect of the said land which was registered in the defendant's name since she did not have an identity card.

In 1977 the defendant complained that he could not live without sons and therefore went ahead and married another wife. The defendant thereafter told her to either live with the second wife or be abandoned together with her children and to my mind that is where their problem started.

The defendant did not come home with the second wife until 2010 when she was brought home and settled in a house the plaintiff had constructed through her daughter Jean Wanjiru Mwangi.

She objected to the proposal by the defendant since the property were bought through the money from the milk and barley they produced and that the property was their matrimonial home.

Under cross examination by Gathiga Mwangi the plaintiff testified that the defendant had contributed a little towards the purchase of the land and that he contributed to the education of their children upto 1977 but when shown documents by the defendant's advocates she confirmed that the defendant paid school fees in 1991. She stated that she did not know that Mweiga/Block 5 had been sold and that the last time she was there was in 1990.

She stated that the house on Nyeri/Uasonyiro/133 was built between 1980 – 1986 and that during that period of time she fed the construction workers. She admitted that the defendant in 1985 paid Ksh. 16,000/- to the settlement Trust Fund and that the elders gave her 19 Hacters which was confirmed on appeal by the High Court.

P.W.3 PETERSON M. WAWERU stated that he had known the parties since they share a common boundary since 1964 and that the plaintiff used to stay on the farm but now the defendant's second wife also stay there.

P.W.4 GREGORY NJERU WAMATHAI: stated that in 1986 there was a meeting at Mweiga Chief's camp and that the plaintiff wanted to get a portion of the land since the defendant had another wife and that the elders ruled that the land be divided into two between the two wives of the defendant.

D.W.1 JOHN MWANGI MBUTHIA in his defence stated that he married the plaintiff in 1961 and that he owned Mweiga/Block 5/Muthuini/363 which he gave to his nephew in 2005. He bought the shares in respect of the said land at Ksh. 2500 and that his nephew gave him Ksh. 50,000/= for the said farm.

He is the owner of Nyeri/Uasonyiro/133 which he acquired in January 1964. He subsequently bought three cows which he kept on the said farm together with sheep and employed someone called

Maina to look after them.

That between 1964 – 1965 both his mother and father came to live on the farm and were followed by the father and mother of the plaintiff. That the plaintiff did not assist him to buy the said land and that he paid for it from his pocket with the last installment of Ksh.16987 being paid on 7th September 1985. He stated that whereas the plaintiff cooked for the workers she did not pay for the farm and that the milk from his cows paid for the loan installment.

He stated that he had proposed to share the suit land as follows:

<i>a. MARY MWANGI</i>	-	<i>Plaintiff</i>	-	<i>19 acres</i>
<i>b. ANN W. MWANGI</i>	-	<i>2nd wife</i>	-	<i>19 acres</i>
<i>c. JOHN M. MBUTHIA</i>	-	<i>Defendant</i>	-	<i>20 acres</i>

He stated that he has had many cases with the plaintiff the first being a dispute before the elders who decided that the land be divided into three. He then went to the Provincial Appeal Board which upheld the decision of the elders. After that the plaintiff lodged an appeal before the High Court in Nyeri which upheld the said decision. He stated that each of his wives has a house on the said farm and urged the court to follow the decision of the elders and justice Khamoni.

Under cross examination by J.K. Mwangi he stated that the plaintiff did not make any contribution towards the purchase of the farm save for looking after the workers.

The advocate for the parties filed written submissions as follows:

The plaintiff submitted that the issue for current determination is whether the two properties are matrimonial property and what is the share of the parties herein and or whether the defendant hold the same at 100% in trust for the plaintiff.

It was submitted that the properties are matrimonial having been acquired during the marriage and that the parties are entitled to equal share under Article 45(3) of the Constitution of Kenya 2010.

For support thereof the plaintiff submitted that authority of **BEATRICE B. NYAMBUTO VS E.K WAPENYI Civil Case No. 4 of 2006** where it was held that if a woman acquires property within the marriage or contributes to its improvement she acquires property interest in the property.

It was submitted that the defendant hold the property at 100% in trust for the plaintiff and therefore hold 50% thereof in trust for the plaintiff.

It was submitted that the 2nd wife did not testify and therefore there is no evidence that she contributed anything.

On behalf of the defendant it was submitted that the plaintiff has not sought dissolution of her marriage yet she has lodged her originating summons for declaration on matrimonial property determination of her interest and or order for transfer or payment of equivalent value. In support thereof the defendant has submitted the cases of

1. PETER MBURU ECHARIA v PRISCILIA NJERI ECHARIA NRB CIVIL CASE APPEAL NO. 75 OF 2006 on the applicable principles under Married Women Property Act of 1881 section 17 thereof.

2. KANYORA V KINYANJUI (2005) KLR where justice Koome as she then was held

“In an application Under MWPA in respect to property acquired prior to marriage where the property is proofed with other property that the couple may have and is developed by joint effort it ceases to be

in its original form and increases in value, court should take into account such contributions if the marriage breaks down.

The jurisdiction of the court under section 17 of the Married Women Property Act is limited to making a declaration. The issue of valuation, portions and transfer are subject of separate execution proceeds". Emphasis added.

He also relied on the case of JEMEIMA MUIRURI V SAMUEL MUIRURI HCCC NO. 3491/1997 where Khamoni J was of the view that the claim can not hold when the marriage is still subsisting.

The defendant submitted that the only property available is Nyeri Uasonyiro/136 which should be shared into three equal portions. He urges the court to dismiss the originating summons for the following reasons

- (a) The defendant as a registered owner cannot be forced to divide his land when he is still alive.***
- (b) The plaintiff has not shown the court a valid decree of judicial separation or decree of divorce to entitle her to invoke the provisions of Married Women Property Act.***
- (c) The plaintiff has not shown any direct contribution.***
- (d) The defendant has stated that the 2nd wife contributed cash toward the last installment.***
- (e) The defendant has given over the other land to his nephew who has settled thereat.***

It is upon the said evidence and submissions that the court is called upon to make a decision.

Before going into the merits of the case before me I must point out that both advocates herein failed to address the court on the issue of the judgment of Khamoni J. as he then was in Misc. Application No. 268 of 2002 MARY WAIRIMU MWANGI vs PROVINCIAL LAND DISPUTE APPEAL COMMITTEES CENTRAL PROVINCE JOHN MWANGI MBUTHIA where the judge had this to say.

"It downed on the applicant that she can get the opportunity to start afresh under Married Women Property Act. If she turned around to complain today that Land Dispute Tribunal at Mweiga had no jurisdiction to adjudicate over her claim. Do not raise that complain in appeal raise it in an application for judicial review so that all the litigation through the tribunal and appeals committee comes to nought to give rise to a new and clear lease of litigation under the Married Women Property Act 1882 likely to reward the applicant handsomely ...

It is my humble opinion to let the applicant have and remain with what she has already got through the tribunal and appeals committee. Accordingly this notice of motion is hereby dismissed with costs to the second respondent." (emphasis mine).

What is the status of this ruling against the present case before the court?? I am of the considered opinion that the answer to the above question could have disposed of this matter. What was the issue before Justice Khamoni?

As pointed out by Justice Khamoni in the Land Dispute Tribunal as in the High court originating summons the applicant was claiming a portion and distribution of what she termed matrimonial property LR. No. NYERI UASONYIRO/133 which as per the records she withdraw and the plaintiff filed the claim through the land disputes Tribunal at Mweiga which subsequently went to the Provincial Land Dispute appeals Committee.

My understanding of the ruling by Justice Khamoni is that he confirmed the decision of the Provincial land Dispute appeals Committee when he held

“It is my humble opinion to let the applicant have and remain with what she has already got through the Tribunal and Appeals Committee.”

I therefore take the view that the issue of what the plaintiff is entitled to has been adjudicated upon by court of competent jurisdiction and the said judgment having not been appealed against or reviewed stands.

Having so stated the issue which then I need to determine is whether the property herein are matrimonial for purposes of MWPA.

From the pleadings and the evidence tendered before the court it is clear to my mind that the property herein are material property having been acquired during the course of the marriage. There is evidence that the plaintiff contributed directly and indirectly to the acquisition of the subject property.

There is also evidence that was not challenged that MWEIGA/BLOC 5/MUCHUIRI/313 had been given by the defendant to his nephew who was never made a party to the suit and I am therefore unable to make any order as regards the said property the plaintiff having admitted in her evidence that the last time she visited the property was in 1991.

This therefore leaves only one property NYERI/UASONYIRO/130 and since the jurisdiction of the court under section 17 of MWPA is limited to making a declaration as regards the property I hereby declare that NYERI/UASONYIRO/133 is a matrimonial property for purposes of the said Act. I am not persuaded by the submission by the defendant that the plaintiff is not entitled to lodge a claim herein during the subsistence of the marriage. I am persuaded by the holding of Koome J as she then was in *Kanyoro vs Kinyanjui* that the issue for courts determination under section 17 is where a question arises between a husband and a wife regarding title to property or shares acquired during marriage.

Having so ruled the plaintiff has proposed that each party is entitled to an equal share in the said property and in support thereof referred the court to article 45(3) of the Constitution of Kenya to wit that parties to a marriage are entitled to equal rights in everything. The question which the court has to answer is what does it mean that the parties to a marriage are entitled to equal right at the time of marriage, during marriage and at the dissolution thereof?

This question has been answered by justice GM Kariuki in WWM vs BMN High court at Nairobi Divorce case No. 179 of 2009 where the learned judge had this to say.

“In considering a claim for maintenance regard must be heard to the provisions of Article 45(3) of the Constitution which recognize that parties to a marriage are entitled to equal rights at the time of marriage during marriage and at the dissolution of the marriage. The rights enshrined in this article connote equality of parties in marriage and are intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedoms. The equality in this article does not create equal spousal ownership of property acquired during marriage regardless of which spouse has acquired and paid for it or regardless of how it has been acquired paid for. Rather and contrary to the assumption that it makes property acquired during marriage the property of both spouses in equal shares, it relates to and recognises personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudice. Article 45(3) is in harmony with Article 21(3) of the Constitution which enshrines equality of men and women and specifically states that man and men have the right to equal treatment, including the right to equal opportunities in political, economical, cultural and social spheres”.

This therefore means that in making the decision herein the court should be guided by the principles set out in decided cases and that the contribution of the either party is a matter of evidence.

Having so stated the only issue left is what order should the court make as regard the share of each party to the suit property.

As stated above I take the view that the said issue has been determined by Khamoni J. which judgment stands unchallenged and I have not been asked to set aside or review the same and therefore any contrary decision would create judicial disharmony.

It is therefore my considered opinion that Justice Makhandia was wrong in dismissing this defendant's preliminary objection since justice Kasango did not rule on the substance of the said judgment by Mr.Khamoni having held that proceedings/judgment was not provided to the court by the applicant at the said time.

In the final analysis I declare that the suit property NYERI/UASONYIRO/133 is a matrimonial property and that the issue of division thereof be as per the decision of Khamoni J. in Misc. Application No. 268 of 2002 between the same parties herein.

This being a family dispute each party shall meet their own costs.

Dated and delivered at Nyeri this 29th day of November 2012

J. WAKIAGA

JUDGE