



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL SUIT NO.3 OF 2011 (O.S)

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1982)

AND

IN THE MATTER OF THE CONSTITUTION (CHAPTER 4 ART.45 (3))

AND

IN THE MATTER OF SECTION 3(1) OF THE JUDICATURE ACT CAP.8 OF THE LAWS OF KENYA

BETWEEN

P.M.N.....PLAINTIFF

~VRS~

J.N.N.....DEFENDANT

RULING

The Plaintiff and the Defendant got married under Mbeere customary law in 1972. On 7/8/1982 the marriage was solemnized at the CPK Church at Muchungori. The marriage was blessed with five (5) children who are all adults. The couple has lived apart since 2001. The Plaintiff alleges that the Defendant deserted her whereas the Defendant alleges that the Plaintiff and the children chased him from the matrimonial home. The Defendant lives with one E.M. He has since filed **Embu SPM Divorce Cause No[PARTICULARS WITHHELD]** in which he seeks to divorce the Plaintiff.

On 19/1/2011 the Plaintiff filed this suit seeking a declaration that the following properties together with all the buildings and developments thereon, which were acquired jointly by the parties during the marriage and were all registered in the name of the Defendant and/or are in his

possession, are jointly owned by the parties and are held in trust for the parties by the Defendant:

- a) MBETI/[...]

- b) MBETI/[....]

- c) GATURI/[...]
- d) GATURI/[....]

- e) MBETI/[.....]

- f) MBETI/[.....]

- g) MBETI/[....]

- h) MBETI/[.....]

- i) NTHAWA/[.....]

- j) NTHAWA/[.....]

- k) PLOT NO[....]

- l) PLOT NO [...]SIAKAGO

- m) PLOT [....]GACHURIRI

It was sought that properties be settled for the benefit of the Plaintiff in such a manner and proportions as the court will deem fit and just. It was further asked that the Defendant be restrained from alienating, encumbering or in any other manner disposing of the said properties.

Filed along with suit was a chamber application under Order 40 rules 1 and 2 of the Civil Procedure Rules for a temporary injunction to restrain the Defendant by himself, his agents and/or servants from selling, transferring, charging, alienating, leasing or in any other manner interfering with the Plaintiff's quiet enjoyment, occupation and use of the land parcels nos.Mbeti/[.....] and Mbeti/[.....] pending the hearing and determination of the suit. The Plaintiff further sought a temporary injunction to restrain the Defendant, and all those acting under him, from selling, transferring, charging, leasing or in any other manner dealing with the rest of the properties in the suit. The application was opposed.

The Plaintiff was represented by M/s Njeru and the Defendant by Mr. Okwaro. I have considered the respective affidavits and the submissions by counsel.

From the filed affidavits, it is evident that the properties in question were acquired and developed during the subsistence of the marriage. The Plaintiff states that this was done with her contribution whereas the Defendant states that he alone bought and developed the properties. Whatever is the case, under Article 45(3) of the Constitution of Kenya 2010 the parties are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

This marriage is threatened with dissolution. The property acquired during the marriage is in need of preservation so as to protect the stake of the Plaintiff. I consider material the concession by the Defendant in paragraph 14 of the replying affidavit in which he deponed as follows:

“14. THAT I would also wish to have all the income from the rental premises deposited in a joint account, so that until the case is determined, each one of us can get half a share of the total.”

The Defendant must have realized that the Plaintiff may ultimately get half of the matrimonial property.

The matrimonial home is on parcel no.Mbeti/Gachuriri/20 where the Plaintiff and children live. The Plaintiff also utilizes parcel no.Mbeti/[.....]. She alleged that the Defendant is interfering with her use of these two properties and has threatened to evict the tenants on the later property. In paragraph 13 of the replying affidavit the Defendant admits that he is seeking to utilize at least half of each of the two properties. One of the reasons that he gives is that the Plaintiff is mismanaging the properties.

There is no dispute that the rest of the properties are in the possession and use of the Defendant. The Plaintiff alleges that parcels nos.Mbeti/[.....] and Mbeti/[.....] formed part of the matrimonial property but have been since been sold to a third party, even after she wrote a letter of protest (annexure “PMN 4”) to the District Commissioner. The Defendant admitted to have sold these parcels but alleged that this was out of necessity for his upkeep and to get money to revamp their irrigation project. She states that the Defendant sought to sell parcel no.Gaturi/[.....]. She filed a caution at the lands office but that the Defendant filed **Siakago PM CC No[.....]** against her seeking the removal of the caution. The suit is annexure “PMN 6”.

In the supplementary affidavit by the Plaintiff she claimed that parcels nos.Nthawa/Siakago/[...], [...],[.....],[...], [.....] and [.....] all belonged to the family but have since been transferred to E.M . The Defendant did not respond to this.

My view of the matter is that the Plaintiff has made a case to show that the matrimonial property is being disposed of by the Defendant and that unless orders are granted to preserve the property she will ultimately be put to irreparable loss and damage. It is for these reasons that I allow the chamber application. Prayer 2 is allowed as requested to enable the Plaintiff and the children to utilize, without interference, land parcels Mbeti/[.....] and [...] until the suit is heard and determined. In prayer 3, the Defendant will utilize the rest of the properties as named but will be restrained from selling, transferring, alienating, charging or leasing the same until the suit is heard and determined. He will also pay costs of the application.

Dated and signed at Bungoma on this 12th day of October, 2011.

A. O. MUCHELULE
JUDGE

Signed and delivered at Embu on this 2nd day of November 2011.

ONG’UDI

JUDGE