



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 4 of 2006**

**IN THE MATTER OF THE MARRIED WOMEN'S  
PROPERTY ACT, 1882**

**BBN.....PLAINATIFF/APPLICANT**

**VERSUS**

**EKW.....DEFENDANT/RESPONDENT**

**JUDGMENT**

This is an Originating Summons dated 20<sup>th</sup> January 2006. It was brought under the Married Women's Property Act 1882 and filed by M/S Mwangi Kigotho & Company advocates on behalf of BBN as plaintiff. The defendant is EKW. It seeks for orders that the court do find and declares that parcel of land [Particulars Witheld] Kileleshwa Nairobi, was acquired through and by Joint efforts and funds of the plaintiff and the defendant. Secondly, that the court orders that the said property be shared equally between the plaintiff and the defendant or sold and the proceeds thereby be shared equally between the plaintiff and the defendant, or that the property\ be dealt with in a manner and proportion that the court may deem just in the circumstances. Thirdly, that the court should declare that the property be used solely for educating the issue of the marriage KRW.

The Originating Summons has grounds on its face, and is supported by the affidavit of the plaintiff, sworn on 20/1/2006. The Notice of Motion is opposed and a replying affidavit sworn by the defendant on 8<sup>th</sup> February 2006 was filed.

At the hearing on 2/3/2006 Mr. Chahenza appeared for the plaintiff, while MS. Achieng appeared for the defendant. Both counsel for the parties made submissions before me. Mr. Chahenza submitted that his client was relying on two affidavits that were filed. They had come to this court, after they were so guided in a ruling from the Milimani Court. He submitted that the defendant had neglected the issue or child of the marriage. At one time during marriage, the plaintiff was the only spouse who was working, and had made substantial improvement to the property and was supporting the family. The defendant was a Ugandan, was separated from the plaintiff and had initiated the process of disposal of the subject property.

Ms. Achieng for the defendant opposed the prayers sought. She submitted that the main issue was whether, when the property was acquired, there was a marriage. According to the affidavit of the

defendant, he married the plaintiff in 1994. The property was bought in 1990, and therefore could not be matrimonial property.

She further submitted that the plaintiff had sworn an affidavit on 15/2/2005, in which, she deponed that she was married to the defendant in 1994, under customary law. She also swore an affidavit on 9/9/2005 in which she averred that she entered into a customary marriage with defendant in 1994. She also signed a declaration of a customary marriage jointly with the defendant, that they were married in 1994. The plaintiff however, has served them with another affidavit purporting to undo her earlier averments on the date of the Marriage. She asked the court to have the plaintiff brought to court and be cross-examined on the contents of the affidavits.

She submitted that the Originating Summons was an abuse of the process of the court and sought to rely on Order VI rule 13 of Civil Procedure Rules. In her view, the whole suit disclosed no cause of action. This was the fourth time that the plaintiff had made an application seeking similar orders. She had made two applications on 15/2/2005, and 9/9/2005. The application of 9/9/2005 was still pending in court. In the meantime, the plaintiff went to register a court order in the Lands Office, which was rejected and the court made an order dated 24/1/2006, to clarify that there was no court order in place restraining the defendant from selling, disposing off or otherwise dealing with all that property known as [Particulars Withheld] Nairobi together with all development thereon.

Also the orders sought were acquitable orders. The balance of convenience is not in favour of the plaintiff. She has come to court with unclean hands.

This is basically a case for determining the rights of spouse, to property which is said to be matrimonial property under the Married Womens Property Act 1882. None of the Counsel for the parties cited to me any authority on the issue of matrimonial property and how it can be shared.

From the documents on record and submissions of both counsel for the parties, it does not appear to be in dispute that the plaintiff and the defendant were husband and wife, married under Kisii customary law. It is not in dispute that the defendant is a Ugandan. It is not in dispute that the parties got a separation order from the court, and are living separately. The Plaintiff is in Kenya while the defendant has relocated to Uganda. It is not in dispute that the subject property [Particulars Withheld] (the property is registered in the name of the defendant and registered in 1990 in his name. It is not in dispute that the defendant intends to sell the said property.

The issues in dispute are firstly, when the marriage between the plaintiff and the defendant took place. Secondly, whether the property is matrimonial property. Thirdly, if the property is matrimonial property, whether it should be divided or utilised as prayed for by the plaintiff.

The marriage between the plaintiff and the defendant was a customary marriage. In Kenya, no marriage certificate is issued for such a marriage. The parties do not dispute that there was marriage, so there is no need of going into the details of how the marriage took place. The only dispute is the date of the marriage. The supporting affidavit to the Originating Summons herein dated 20.1.2006 which was sworn by the plaintiff on 20.1.2006, depones in paragraph 2 that the plaintiff and respondent got married under Kisii customary Law in 1989. The earlier declaration of a customary marriage made to the district Registrar of Persons Nyeri, on a date which is not legible, refers to the date of marriage to be 1994. This document has many erasures, and also many dates on its face, that one cannot be able to state exactly when it was made, or whether it is a genuine document. It was annexed to the replying affidavit of the defendant as "EKW!". At the top of it, there appears dates that look like 15<sup>th</sup> and 20<sup>th</sup> February 2005. At the bottom there are dates that look like 14<sup>th</sup> and 17<sup>th</sup> April, 1996. None of the parties is disputing its contents however.

The defendant in his replying affidavit sworn on 8<sup>th</sup> February 2006, paragraph 5, depones that the marriage took place in July 1994. Two earlier affidavits of the plaintiff were annexed to the replying affidavit as annexed "EKW2". They were sworn by the plaintiff on 15/2/2005, and 9/9/2005 respectively. I have perused the two affidavits of the plaintiffs. Indeed, in the affidavit sworn on 15/2/2005, in

paragraph 2, the plaintiff averred that the customary marriage between her and the defendant was entered into in 1994. In the affidavit sworn on 9/9/2005, also paragraph 2, the plaintiff averred that she entered into a customary marriage with the defendant in 1994. These two affidavits were sworn by the plaintiff in Nairobi Chief Magistrate's Court Separation and Maintenance Cause No. 34 of 1989, between the same parties. The affidavits were earlier than the affidavits sworn in the present case. Some decisions have already been made by the Chief Magistrate at Milimani between the parties. In response to the replying affidavit of the defendant, the plaintiff filed a further supporting affidavit sworn on 1/3/2006. She deposed in paragraph 3 of the affidavit that the marriage was in 1989 but formalized in 1994. In her view, that clarifies the issue of the date of the marriage, which she puts at 1989.

The earlier affidavits filed in the Chief Magistrate's Case, were very specific that the customary marriage was entered into in 1994. There is no reference to a customary marriage that was entered into in 1989 and formalized in 1994. In any case a customary marriage is completed when the formalities of the relevant customary law are done, not when it is registered. The plaintiff has not stated what was meant by formalization of the customary marriage.

It is my finding, that the averment that the marriage was entered into in 1994, in the affidavits of the plaintiff that were filed in these proceedings, are an after thought. They are meant to mislead the court. I find that the customary marriage was entered into in 1994.

The second issue is whether the subject property is matrimonial property. The Married Women's Property Act (1882) provides that a woman can own her own separate property either within or outside marriage. If she contributes to acquisition of property within the marriage she acquires proprietary interest in the same. In my view, even if property is acquired by the husband prior to the marriage, but the wife has contributed to its improvement, she acquires, an interest in it, and it can be called matrimonial property. Her contribution is however a matter of evidence. It has to be established by cogent evidence. It is not in dispute that the subject land, which is developed, was registered in the name of the defendant in 1990. That was before the marriage took place in 1994. It did not become matrimonial property, as it was acquired before the marriage and there is no evidence of the plaintiff's contribution towards it. I find that the subject property was not acquired through the joint efforts of the plaintiff and defendant. Nor was it contributed to, in any way, by the plaintiff. It was not matrimonial property. That disposes to prayer 1.

Having found that the subject property is not matrimonial property will also disposes of prayer 2 and 3. I cannot grant these prayers for division of the property, and utilization for the purpose of educating the child of the marriage. The property belongs to the defendant. The defendant is free to deal with the property, just like any other property owner. For the avoidance of doubt, I have to state that the existing orders or agreements on the maintenance of the child are not affected by my decision herein.

For the above reasons this Originating Summons herein has no merits and I have to dismiss the same.

Consequently I dismiss this originating summons. As this is a family matter, I am reluctant to award costs. I order that each party will bear their own costs of the proceedings.

Dated and delivered at Nairobi this 30<sup>th</sup> day of May 2006

**George Dulu**

Ag. Judge

In the presence of -