



**DNM v DKN; National Land Commission (Interested Party) (Matrimonial Cause 5 of 2020) [2024] KEHC 3593 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MATRIMONIAL CAUSE 5 OF 2020**

**A MSHILA, J**

**MARCH 8, 2024**

**BETWEEN**

**DNM ..... APPLICANT**

**AND**

**DKN ..... RESPONDENT**

**AND**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**JUDGMENT**

1. Before court is an application by way of Originating Summons dated 3<sup>rd</sup> February, 2022 and brought under Sections 2,7,12 and 17 of the *Matrimonial Property Act* 2013, Section 3A of the *Civil Procedure Act* and Order 37 of the *Civil Procedure Rules 2010*, Section 93 of the *Land Registration Act* 2012 and all other enabling provisions of the law. The Applicant sought for orders:-
  - a. That the National Land Commission be barred from compensating the Respondent for the compulsory acquisition of the Land Parcel Title No Kabete/Kabete/T.550 pending the hearing and determination of this suit.
  - b. That a declaration be issued that the suit property together with the improvements and the buildings thereon were acquired, improved, developed and maintained by the joint funds and efforts of the parties herein during the subsistence of their marriage and registered in the name of or in the possession of the Respondent and the same is jointly owned by the Applicant and the Respondent.
  - c. That a declaration be issued that the Respondent is accountable to the Applicant in respect of all the income and rental proceeds in respect of all the income and rental proceeds in respect of the matrimonial properties.



- d. That the said properties be settled for the benefit of the Applicant in such a manner and proportions as this Honorable court deems fit and just.
  - e. That an injunction to issue restraining the Respondent, his servants and/or agents from disposing, alienating, wasting, damaging and/or otherwise interfering with the above mentioned properties pending the hearing and determination of the suit.
2. The application is based on the grounds that the parties herein were married under Kikuyu customary law and were blessed with three issues and that the Applicant was a house wife taking care of the children plus the household. That the Applicant used her proceeds from rearing pigs to purchase and make improvements on the suit property. That parcel number Kabete/Kabete/T.50 was purchased and their matrimonial home was constructed and that she made both monetary and non-monetary contribution. That the parties have since separated and that the Applicant has learnt that the government is set to compulsorily acquire the suit property for purposes of road construction as such she is apprehensive that the proceeds could be paid to the Respondent with her being excluded as such the orders sought should be granted in the interest of justice and to protect her right to property.
  3. The application is supported by the affidavit of Dorcus Njoki Mbugua. She deposed that she was married to the Respondent under Kikuyu customary law and they were blessed with three issues. She stated that under the instructions of the Respondent she was a house wife taking care of the children and the household. She deposed that she reared pigs which proceeds she used to purchase and make improvements on the suit property. They purchased parcel number Kabete/Kabete/T.50 and the same was registered as jointly owned and their matrimonial home was constructed thereon. She established a butchery to complement their income. They bought two motor vehicles which were registered in the name of the Respondent. She averred that the Respondent became unfaithful and abusive and that the Respondent evicted her from their matrimonial home and thereafter abdicated his parental responsibilities. He transferred the matrimonial property to his name without her consent. She stated that the Respondent collects rental of Kshs 100,000/= monthly for his sole use. She had placed a restriction when she learnt that the Respondent wanted to sell the property. She had since learnt that the government was set to compulsorily acquire the suit property for purposes of road construction as such she was apprehensive that the same would be paid to the Respondent with her being excluded as the Respondent had refused to acknowledge her share.
  4. DOUGLAS KAMARU NJOROGE filed his replying affidavit sworn on 27<sup>th</sup> October, 2020. He averred that the Applicant preferred to be a stay at home mother and that he was the one who catered for their livestock. He purchased the matrimonial property in his name without the Applicant's contribution or involvement. He constructed the two-storey house and semi-permanent rental units to supplement his income and that he was the one who operated the butchery and not the Applicant as claimed. He averred that it was the Applicant who was unfaithful as such she moved out of the matrimonial home leaving behind what was registered in his name. The Applicant was said to have seen an opportunity of enriching herself from the property which she had abandoned. In any case, the Respondent stated that the property was no longer needed by the government for road construction. The Respondent reiterated that the Applicant did not contribute towards the acquisition or development of the property as such the same is not matrimonial property.
  5. The parties were directed to canvass the summons by way of filing and exchanging written submissions; hereunder is a summary of the rival submissions.



### **Applicant's Submissions**

6. The Applicant submits that a party can apply for declaration whether or not a petition for divorce has been filed. Reliance was placed in the case of *NCK v GVK* (2015) eKLR.

### **Respondent's Submissions**

7. The Respondent submitted that the Applicant failed to prove that the property is matrimonial. The Respondent submitted that the Applicant alleges that the property was bought before they parted ways but did not adduce any evidence. Reliance was placed on the case of *Kaguongo v Kabuthia* (2022) eKLR. It was further submitted that the Applicant failed to prove that she contributed towards the acquisition of the property. The marriage between the parties was said to have not yet been dissolved which was said to be a prerequisite. In the end, the court was urged to dismiss the suit with costs.

### **Issues for Determination**

8. Having considered the Applicant's Originating Summons, the supporting affidavit, the Respondent's replying affidavit and the written submissions, the only issue this court has framed for determination is whether the property known as Kabete/Kabete/T.550 forms matrimonial property and whether the Applicant made any monetary and/or non-monetary contribution.

### **Analysis**

9. It is not disputed that the parties herein were married under Kikuyu customary law in 1987 and were blessed with two issues from the union. The Applicant contends that under the instructions of the Respondent she was a stay at home mother where she offered companionship to the Respondent and took care of the children. She also alleged that she reared pigs and the proceeds were used to purchase and make improvements on the suit property which was purchased in 1990. She also claimed to have managed the butchery that they set up. The Applicant averred that the parties separated in 2001 due to the Respondent's cruelty, infidelity among other things. The Applicant is apprehensive that she will be left out of the compensatory payments in regard to the acquisition of the suit property for purposes of road construction by the Government.
10. The Respondent denied that the Applicant had ever contributed towards the acquisition and improvement of the suit property. His contention was that to the contrary that it was the Applicant who was unfaithful and there after she left the matrimonial home. He indicated that in any event, the government no longer required to compulsorily acquire the suit property.
11. Section 6 of the *Matrimonial Property Act* defines matrimonial property as:
  - (a) the matrimonial home or homes;
  - (b) household goods and effects in the matrimonial home or homes; or
  - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
12. In the instant matter, the parties herein were married in 1987 and in 1990 the property known as Kabete/Kabete/T.550 was purchased with the intention of establishing their matrimonial home which they did in 1995 and thereafter they moved into the said matrimonial home. The parties later separated in 2001.



13. Having considered the evidence tendered by both parties this court is satisfied that the property known as Kabete/Kabete/T.550 registered in the sole name of the Respondent is indeed matrimonial property within the meaning of Section 6 of the Matrimonial Property Act as the same was acquired during the subsistence of the marriage.
14. Refer to the case of T.M.V. v F.M.C (2018) eKLR where Nyakundi J. opined that:-
- “...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”
15. With regard to contribution, Section 7 of the Matrimonial Property Act is clear in its terms that:
- “Subject to Section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”
16. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the Matrimonial Property Act, 2013 in the following terms;-
- In this Act, unless the context otherwise requires—
- “contribution” means monetary and non-monetary contribution and includes—
- a) domestic work and management of the matrimonial home;
  - (b) child care;
  - (c) companionship;
  - (d) management of family business or property; and
  - (e) farm work.
18. Further, Section 9 of the Matrimonial Property Act recognizes contribution through improvement of a property acquired before or during the marriage in the following terms:
- “Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”
19. The Applicant herein contends that despite being a stay at home mother, she took care of the children and also reared pigs and the proceeds were used to purchase the suit property. The family also established a butchery which she was attending to so as to further compliment their income. They also purchased two motor vehicles which were registered in the sole name of the Respondent. The Respondent however, denies all these allegations that the Applicant contributed towards the acquisition and/or improvement of the suit property. He contends that he solely acquired the said property without the assistance of the Applicant. In any case, he alleges that the property was registered after the parties had separated.
20. It is trite law that he who alleges must prove. In this case the onus to prove contribution whether monetary or non-monetary vested on the Applicant. A perusal of the record herein, shows that the Applicant did not provide any evidence particularly documentary evidence to prove that she assisted



the Respondent in acquiring the matrimonial property. She averred that she helped with maintaining the household and taking care of the children.

21. Be that as it may, Section 14 of the *Matrimonial Property Act* provides that there is a presumption of law that where matrimonial property is acquired during marriage;-
- (a) In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse and
  - (b) In the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interest in the matrimonial property are equal."
19. In the circumstances, therefore, and bearing in mind the evidence on record, the Applicant may not have evidence of a tangible or considerable and /or substantial monetary contribution made towards the acquisition and/or improvement of the property known as Kabete/Kabete/T. 550. Nevertheless, having been married to the Respondent since 1987 and separated in 2001, this court is satisfied that during the subsistence of the marriage the Applicant made a non-monetary contribution in the form of companionship, child care, domestic work and management of matrimonial home which cannot be equated to money and this court holds that the Applicant acquired a beneficial interest in the matrimonial property;
20. This court recognizes that indeed the Respondent contributed the bigger share towards the acquisition of the matrimonial property herein; be that as it may, this court finds that the Petitioner is entitled to 30% of the share of the matrimonial property; even though the Respondent is the sole registered owner he holds the Applicants share in the property in trust for her.

### **Findings and Determination**

19. For the forgoing reasons this court makes the following findings and determinations;
- i. This court finds the Originating Summons is found to be partially with merit and it is hereby allowed.
  - ii. A declaration be and is hereby issued that the subject property known as Land Parcel Title No Kabete/Kabete/T.550 together with the improvements and the buildings thereon were acquired, improved, developed and maintained during the subsistence of the marriage and registered in the sole name of the Respondent to be matrimonial property.
  - iii. A declaration be and is hereby issued that the Applicant is entitled to 30% share of contribution in the subject property Land Parcel Title No Kabete/Kabete/T.550; Any distribution of the Applicants share to await formal dissolution of the marriage.
  - iv. The Respondent, his servants and/or agents are restrained from disposing, alienating, wasting, and or otherwise damaging the Land Parcel Title No Kabete/Kabete/T.550 pending distribution.
  - v. The other prayers sought by the Applicant are hereby disallowed.
  - vi. The parties are at liberty to apply.
  - vii. Each party to bear their own costs.

Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 8<sup>TH</sup> DAY OF MARCH, 2024**



**A. MSHILA**

**JUDGE**

In the presence of;

Mourice – Court Assistant

