



SMK v MK (Deceased) & 2 others (Originating Summons E004 of 2021) [2024] KEHC 3271 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
ORIGINATING SUMMONS E004 OF 2021**

**A MSHILA, J
APRIL 5, 2024**

BETWEEN

SMK APPLICANT

AND

MK (DECEASED) 1ST RESPONDENT

HWM 2ND RESPONDENT

SWW 3RD RESPONDENT

JUDGMENT

1. Before court is an application by way of Originating Summons dated 10th June, 2021 and brought under Section 6 of the *Matrimonial Property Act* 2013. The Applicant sought for orders:-
 - a. That it be declared by this Honourable Court that the suit property Kiambu/Gatuanyaga/411 is the matrimonial property of the applicant and 1st Respondent and not the 2nd Respondent. That the 1st and the 2nd respondents have subdivided Kiambu/Gatuanyaga/411 to KIAMBU / GATUANYAGA/9906-9957 in contempt of the court issued on 8th March, 2021.
 - b. That the titles Kiambu/Gatuanyaga/9906-9957 be cancelled and the suit premises be restored to Kiambu/Gatuanyaga/411.
 - c. That the suit property Kiambu/Gatuanyaga/411 be registered in the names of the Applicant SALOME MUGURE KAMAU with the 1st Respondent MBUGUA KARIUKI.
 - d. That the court does order division of the said property.
 - e. That the 1st and 2nd Respondent be restrained from alienating, encumbering or in any manner disposing off the said property in any other manner prejudicial to the Applicant’s interest.



- f. That this Honourable court be pleased to grant such further relief as they may be just in the circumstances.
2. The application is supported by the affidavit of SALOME MUGURE KAMAU. She deposed that she got married to the 1st Respondent in 1988 through Kikuyu Customary Law and that they set up their matrimonial home at Gatuanyaga. She stated that when they got married the 1st Respondent was working in Germany while she was working at Blue Post Hotel and when the matrimonial home was completed she moved there and also resigned her job to take care of the family and also cultivate their 5 acres of land. That the 1st Respondent returned from Germany and they continued to cohabit with the 1st Respondent was working at Kamiti Farmers. She deposed that her marriage started experiencing marital problems due to adultery and violence and that in 2006, the 1st Respondent married the 2nd Respondent and took her to their Karen home then to Kamiti. In 2015, the 1st Respondent was said to have taken the 2nd Respondent to the suit property but they also separated. That the 1st respondent settled the 2nd Respondent at Maguguini where he built a matrimonial home for the 2nd Respondent. She deposed that the suit property was fraudulently registered in the name of the 1st and the 2nd Respondent denying her, her legal rights as such she registered a caution and on 5/12/2021, she was called for a hearing as the respondents wanted the caution to be removed. That after the hearing, the registrar ordered for the removal of the caution on 12th February, 2021 as he found that the land was not matrimonial. She stated that the 2nd wife should not interfere with the property which she finds in the family. She claimed that she occupies the suit premises with her four children where she has extensively developed the matrimonial home.
3. Hannah Wanjiru Mbugua filed her further affidavit sworn on 4th April, 2022 to the amended originating summons on her own behalf and on behalf of the 3rd Respondent. She contended that its only 3 acres of the suit property that is in contention and not 5 acres as the 1st Respondent already sold 2 acres before his demise. She stated that on 15/3/2021 the land registrar closed the suit land for sub division as the orders of 8/3/2021 had not been served for registration as such there is no contempt on the part of the respondents. In any case the said orders were extracted on 22/3/2021 when they had already been overtaken by events. The subdivision of the suit property was said to have been lawful as such there are no lawful grounds for cancelling land titles Kiambu/Gatuanyaga/9906-9957. She averred that the applicant did not build the house which she occupies as the same was built by Fedelis Wanjiru Gitu. She denied that the suit property is jointly owned by the Applicant and the 1st respondent and the same is not matrimonial as it was not acquired during the marriage between the applicant and the 1st respondent. In any case, the applicant was said to have failed to contribute towards the purchase and/or development of the suit property.
4. The summons were canvassed by way of written submission.

Applicant's Submissions

5. The Applicant submits that in defiance of the court order issued on 8/3/2021 which were served upon the respondents, the suit land was subjected to sub-division into 52 plots and that the applicant was being evicted from her matrimonial home and was going to be rendered homeless. It was submitted that the Applicant has been occupying the suit property since 1988 as such she cannot be said to be trespassing as alleged by the 2nd Respondent. The suit property was said to be matrimonial property as the 1st Respondent settled the Applicant in the said premises when they got married. The Applicant submitted that the matrimonial home has never been an issue and that the 2nd Respondent maliciously brought the 3rd Respondent to frustrate the Applicant's case. Finally, the court was urged to find that the subdivisions on the suit property were done in contempt of the court order of 8/3/2021 as such the



titles should be cancelled and the property registered in the name of the Applicant as the 1st Respondent is now deceased. Reliance was placed in the cases of SM vs ASM (2021) eKLR and TNM vs BMK (2020) eKLR.

Respondents' Submissions

6. The Respondents submitted that the suit land was lawfully closed for subdivision and that the 1st and the 2nd Respondents are registered as joint tenants of some subdivisions as such rules of survivorship ought to come into play upon the death of the 1st Respondent. It was submitted that the purchasers of the 2 acres already sold by the deceased are registered proprietors as such cancellation of their titles would be prejudicial to the deceased's estate. In any case, the registration of the suit property to the names of the 1st and the 2nd Respondent was said to be lawful as fraud, misrepresentation, illegality among others have not been raised and /or proved to warrant cancellation of the titles. Further, it was submitted that the suit property was acquired by the 1st Respondent in 1985 without the Applicant's contribution as the Applicant began cohabiting with the 1st Respondent in 1988 as such not matrimonial property. The Respondents submitted that the Applicant has failed to produce evidence that she contributed towards the maintenance of the suit property to warrant an equal share of the same. Reliance was placed in the case of JOO vs MBO, Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (2023) KESC 4 (KLR). Lastly, it was submitted that the preservation orders issued by the court on 8/3/2021 were issued ex-parte and the same were extracted on 22/3/2021 long after the title had been closed for subdivision on 15/3/2021. The land registrar was said to be unaware of the said orders as the same had not been served as such the said subdivisions cannot be said to have been done in contempt of the court.

Issues For Determination

7. Having considered the Petitioner's Originating Summons, the supporting affidavit, the Respondent's replying affidavit and the parties written submissions, the issues arising for determination are-
 - i. Whether the property is matrimonial property
 - ii. Whether the subdivisions were in contempt
 - iii. Whether titles should be cancelled.

Analysis

8. The 1st Respondent herein purchased the suit property in 1985. He then married the Applicant under the Kikuyu customary law in 1988. The Applicant settled at the suit land where she was taking care of her family and cultivating the 5 acres suit land. They later experienced marital issues and in 2006 the 1st Respondent married the 2nd Respondent and built for her a home at Maguguini. The Applicant contended that the registration of the suit land in the names of the 1st and the 2nd Respondent was illegal as such she put in place a caution which was later on removed by the land registrar when he declared that the suit property was not matrimonial property having being acquired before the subsistence of the marriage between the Applicant and the 1st Respondent.
9. The 2nd Respondent was accused of defying preservation orders issued on 8/3/2021 when they subdivided the suit property as such land titles Kiambu/Gatuanyaga/9906-9957 should be cancelled. The Applicant submitted that she has been residing on the suit property with her children since 1988 as such she will be rendered homeless if evicted.



10. The 1st Respondent stated that the available land is 3 acres as 2 acres have already been sold by the deceased before his demise. She contended that the land was closed for subdivision on 15/3/2021 while the preservation orders issued on 8/3/2021 were extracted on 22/3/2021 as such the land registrar cannot be said to be in contempt of the said orders as he was not aware of the same as she had not been served. The 1st Respondent denied that the suit property was jointly owned by the Applicant and the 1st Respondent. The suit land was said not to be matrimonial as the same was bought before the marriage between the Applicant and the 1st Respondent.
11. Further, the 1st Respondent submitted that the Applicant has failed to provide proof that she contributed towards the development of the suit property and that she had also failed to provide any evidence that there was fraud, misrepresentation and/or illegality during the registration of the suit property in the names of the 1st and the 2nd Respondent.
12. 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.
13. There is no doubt that the suit property herein was acquired by the 1st respondent in 1985 before he married the applicant in 1988. This automatically makes the suit land not a matrimonial property. However, the 1st Respondent built a home for the Applicant at the suit land where the Applicant resided for the most part with her children making the home their matrimonial home.
14. The 1st Respondent having been in Germany the Applicant must have been the one who supervised the construction as well took care of the children as well as cultivate the land as such made non-monetary contribution towards the matrimonial since she has not provided any monetary contribution.
15. Refer to the case of T.M.V. vs 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.”
16. In 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.”
17. 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. In the circumstances therefore, the Applicant can be said to have acquired a beneficial interest over the matrimonial property over time being that she has her matrimonial home on the said property where she has been living with her children over the years and she has been cultivating the land.

20. The 1st Respondent, during his life time went ahead and registered the suit land in his names and that of the 2nd Respondent. The Applicant being aggrieved by the act placed a caution which was removed as the land registrar found that the parcel of land was not matrimonial as the land was not bought during the subsistence of the marriage between the Applicant and the 1st Respondent. As of now, there exists a title issued in 2019 indicating that the Applicant and the 1st Respondent are the registered proprietors of the suit property.

21. At this point this court is being asked to determine the issue of ownership of the suit property being that the 1st Respondent has a title to the suit land while the Applicant has acquired a beneficial interest towards the same property as such the Applicant seeks the court herein to cancel the land titles Kiambu/Gatwanyaga/9906-9957 as well as find the 1st Respondent in contempt of the orders of the court issued on 8/3/2021.

22. Article 162(2) provides that:-

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

- (a) ...
- (b) the environment and the use and occupation of, and title to, land.”

19. Article 165 of *the Constitution* sets out the jurisdiction of the High Court which at Article 165(5) states as follows:-

“The High Court shall not have jurisdiction in respect of matters-

- (a) ...
- (b) falling within the jurisdiction of the courts contemplated in Article 162(2).”

19. It is apparent that a title has been issued; *the Constitution* 2010 and the *Environment and Land Court Act* gives the Environment and Land Court the mandate and jurisdiction to hear and determine issues relating to ownership of land and the cancellation of titles;



Determination

19. For the foregoing reasons this court finds that it is not the proper forum as it has no jurisdiction to entertain and determine any disputes that center on ownership, occupation and use of land.
20. The orders being sought by the Applicant are best placed before the Environment and Land Court as such parties are directed to channel their dispute in the right forum. In the circumstances, this Court finds it proper to stay the proceedings herein awaiting any outcome of the ELC court.
21. Mention 4th June, 2024
22. The costs shall be in the cause.

Orders accordingly

DATED, SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 5TH DAY OF APRIL, 2024.

A. MSHILA

JUDGE

In the presence of ;

Martin – Court Assistant

Mrs Ngetho – for the Applicant

Wangusi – holding brief for Njairu – for the Respondents

