



FKB v JBR (Civil Case 71 of 2015) [2023] KEHC 20382 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE 71 OF 2015
TW CHERERE, J
JULY 13, 2023**

BETWEEN

FKB PLAINTIFF

AND

JBR DEFENDANT

JUDGMENT

1. The subject matter in this suit resolves around the following properties:
 - a. Lr. Ntima/Igoki/7812
 - b. Lr. Ntima/Igoki/7813
2. F.K.B (Plaintiff) took out an Originating Summons dated 17th August, 2015 filed on 18th August, 2015 under Section 14 (a) of the *Matrimonial Property Act*, 2013 and Order 37 (1) of the *Civil Procedure Rules* seeking orders That:
 1. Lr. Ntima/Igoki/7813 being immovable property developed during the period of coverture is wholly owned by the Plaintiff and the three children of the marriage namely E.K, K.M and B.G who are registered as joint owners
 2. Lr. Ntima/Igoki/7812 being immovable property which is undeveloped during the period of coverture is wholly owned by the Plaintiff and the three children of the marriage namely Erick Kimathi, Kelvin Mutethia and Betty Gacheri who are registered as joint owners
 3. Spent
 4. The rental money be remitted to the children’s account for their education and expenses
 5. The Defendant is not entitled to any portion of the said properties
 6. Costs be borne by the Defendant



3. By an order dated 18th May, 2017, the court directed that Meru CMCC 213 OF 2015 filed by the Defendant be consolidated with this suit. In that suit, the Defendant sought orders as against the Plaintiff for:
 1. A declaration that Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 measuring 0.10 and 0.15 hectares respectively are family properties and the Defendant should be included in the registration of the same as a co-owner
 2. An order directing the Plaintiff to execute all necessary documents to facilitate inclusion of the Defendant in the registration of Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 and in default the Executive Officer of the Court be empowered and authorized to execute the said documents in place of the Plaintiff and the Land Registrar be empowered and authorized to dispense with the necessity of the original title deeds of the two land parcels in including the Defendant in the registration thereof

Plaintiff's case

4. Plaintiff stated that she and the Defendant were previously married under the Christian Marriage and Divorce Act on 30th January, 1988 but the marriage was lawfully dissolved in 2020. It was her evidence that Defendant bought Lr. Ntima/Igoki/3829 and Lr. Ntima/Igoki/5191 in 1995 and 1997 respectively which were consolidated into one parcel Lr. Ntima/Igoki/7792. It was also her evidence that before the consolidation of the two parcels and more particularly on 23rd February, 2001, she bought Lr. Ntima/Igoki/3829 and Lr. Ntima/Igoki/5191 from the Defendant for KES. 120,000/- and KES. 100,000/- respectively to save them from being auctioned by a bank that was owed by the Defendant and that after consolidation, Lr. Ntima/Igoki/7792 was partitioned into Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 which were on 07th July, 2017 jointly registered in her name and the three children of the marriage namely Erick Kimathi, Kelvin Mutethia and Betty Gacheri. Plaintiff conceded that she had no evidence to demonstrate that she contributed in the purchase of the original land parcels or that she paid any consideration to the Defendant for Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 or that she contributed to their development. Plaintiff proposed that the parcels be equally shared between her and the Defendant.

Defendant's case

5. Defendant confirmed that he and the Plaintiff were formally divorced. It was his evidence that he single-handedly acquired original land parcels Lr. Ntima/Igoki/3829 and Lr. Ntima/Igoki/5191 which were consolidated and partitioned into Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 which he has now developed. It was his evidence that the only reason he entered into a sale agreement with the Plaintiff for the sale of Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 was to safeguard the assets from being auctioned and that he did not receive any consideration from the Plaintiff. He urged the court to revert the two parcels to his name. His witness Moses Kirima, an advocate of the High Court of Kenya who drew and witnessed the sale agreements between the Plaintiff and the Defendant stated that Plaintiff did not pay any consideration to the Defendant.

Analysis and determination

6. I have considered the evidence on record in the light of the pleadings, exhibits and the submissions filed on behalf of the parties. I have also considered that the marriage between the parties has since broken down and I have deduced the issues for determination as follows:
 - a. Whether Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 are matrimonial properties



- b. Whether the title to Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 to the Plaintiff and the three children of the marriage is absolute
 - c. Whether Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 should be distributed as between the Plaintiff and the Defendant
 - d. Whether Defendant should be registered as co-owner of Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813
7. Section 6(1) of the *Matrimonial Property Act* No. 49 of 2013 (the Act) defines matrimonial property to mean:
- a. 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
8. Both parties are in agreement that Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 (originally known as Lr. Ntima/Igoki/3829 and Lr. Ntima/Igoki/5191) were acquired by the Defendant around 1995 and 1997 which was during the subsistence of their marriage contracted between the parties on 30th January, 1988. The parties also agree that the matrimonial home was established on Lr. Ntima/Igoki/7813.
9. To the extent that Lr. Ntima/Igoki/7813 is where the matrimonial home was established, the asset is by virtue of Section 6(1) the *Act* is Matrimonial property.
10. I have considered the issue of ownership of Lr. Ntima/Igoki/7812 vis a vis the contribution to its acquisition by the Plaintiff.
11. The Supreme Court in *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment) stated that:
- “.....any substantial contribution by a party to a marriage that led to acquisition of matrimonial property, even though such contribution was indirect, but nevertheless had in one way or another, enabled the acquisition of such property amounted to significant contribution. Such direct or indirect acts could include:
1. Paying part of the purchase price of the matrimonial property.
 2. Contributing regularly to the monthly payments in the acquisition of such property.
 3. Making a substantial financial contribution to the family expenses so as to enable the mortgage installments to be paid.
 4. Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.
 5. Caring for children and the family at large as the other spouse worked to earn money to pay for the property.



12. As much as there is no evidence of any direct contribution to the acquisition of Lr. Ntima/Igoki/7812 by the Plaintiff, I find that Plaintiff's indirect contribution of caring for children and the family at large as the Defendant worked to earn money to pay for the property suffices and therefore conclude that Lr. Ntima/Igoki/7812 is equally matrimonial property.
13. In addition to the foregoing, the Plaintiff by urging the court to distribute Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 to her and the Defendant in my most considered view is an acknowledgement that the transfer of the same to her was not absolute but was intended to safeguard the property from being auctioned by a bank that was owed by the Defendant.
14. From the foregoing, I do not find it difficult to agree with the Defendant that the Plaintiff and the children of the marriage are holding the titles to Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 in trust for and for the benefit of the family.
15. Both parties concede that the marriage between them has broken down and this court therefore has a duty to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of the *Constitution*.
16. Article 45 (3) makes provisions regarding the rights of parties during marriage and upon dissolution and anchors the principle of "equal rights" as thus: -

"Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage."
17. The Supreme Court in the above quoted case stated as follows concerning application of Article 45 (3):

While article 45(3) of the dealt with equality of the fundamental rights of spouses during and after dissolution of marriage, equality did not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither did the reading of that provision lead to the assumption that spouses were automatically entitled to a 50% share by fact of being married.

The stated equality under article 45(3) of the meant that the courts were to ensure that at the dissolution of a marriage, each party to a marriage got a fair share of the matrimonial property based on their contribution.
18. The evidence on record has disclosed that Defendant has exclusively made substantial developments to both assets and more particularly on Lr. Ntima/Igoki/7813 and has continued in occupation thereof since Plaintiff left the matrimonial home in 2007.
19. Division is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she has contributed.
20. From the foregoing, I find that it would be in the interest of justice to distribute Lr. Ntima/Igoki/7813 solely to the Defendant and Lr. Ntima/Igoki/7812 to remain in the name of the Plaintiff and the three children of the marriage. Having so found, Defendant's claim to be registered as a co-owner in Lr. Ntima/Igoki/7812 is rejected.
21. For the reasons that I have outlined hereinabove, the respective claims by the parties herein are determined as follows:
 1. Lr. Ntima/Igoki/7812 and Lr. Ntima/Igoki/7813 are matrimonial property
 2. Lr. Ntima/Igoki/7813 is distributed solely to the Defendant



3. Lr. Ntima/Igoki/7812 shall remain as registered in the name of the Plaintiff and the three children of the marriage
4. Florence Kagwiria Bundi, Erick Kimathi, Kelvin Mutehia and Betty Gacheri are hereby directed to transfer Lr. Ntima/Igoki/7813 to the Defendant
5. Since this is a family matter, each party shall bear its own costs to these proceedings

DATED AT MERU THIS 13TH DAY OF JULY 2023

WAMAE. T. W. CHERERE

JUDGE

