



REPUBLIC OF KENYA



**FMM v EMN (Civil Case E002 of 2021) [2021] KEHC 9823 (KLR) (5 May 2021) (Judgment)**

Neutral citation: [2021] KEHC 9823 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI**

**CIVIL CASE E002 OF 2021**

**FN MUCHEMI, J**

**MAY 5, 2021**

**BETWEEN**

**FMM ..... PLAINTIFF**

**AND**

**EMN ..... DEFENDANT**

**JUDGMENT**

**Brief facts**

1. The plaintiff instituted the suit vide an Originating Summons dated March 4, 2021 seeking a declaration that the property known as Gatarakwa/gatarakwa/block 1 (lamuria)/xxx is matrimonial property jointly owned by the plaintiff and the defendant. The plaintiff further seeks that the court sell the property Gatarakwa/gatarakwa/block 1 (lamuria)/ xxx and the proceeds be deposited in an interest earning account to be operated jointly by the plaintiff and the Deputy Registrar to cater for the upkeep and children's education. The plaintiff further seeks that the defendant hand over the original title deed and log book and actual possession L.R Gatarakwa/Gatarakwa/Block 1 (Lamura)/xxx and motor vehicle registration number KBV xxxJ. In the alternative, the plaintiff seeks that the court issue orders that the defendant to execute transfer of the property Gatarakwa/gatarakwa/block 1 (lamuria)/ xxx and motor vehicle registration number KBV xxxJ together with the log book to the plaintiff to enable the plaintiff cater for the education and upkeep of the children.
2. The defendant was served with the Originating Summons and failed to enter appearance or file a statement of defence and thus the court entered interlocutory judgment on 5/5/2021 and set the matter for formal proof on 12/7/2021.

**The Plaintiff's Case**

3. The plaintiff led oral evidence in court whereby she stated that she got married to the defendant on 28/4/2006 and the parties were blessed with three issues of marriage. She further testified that in 2007, she and the defendant started disagreeing which led to the closure of their business in Nakuru and



they relocated to Nyeri in 2010. She further stated that the defendant used to physically assault her to the extent of breaking her jaw at one time. He also used to come home drunk. The couple separated in 2018 and the plaintiff then filed Divorce Cause No. 21 of 2020 in the Chief Magistrate's Court in Meru whereas the decree absolute was granted on 29/1/2021. She further testified that the court gave her custody of the three children and the family currently live in Mikinduri in Meru County.

4. The plaintiff stated that the 1<sup>st</sup> born child is in Form II in [Particulars withheld] High School, the 2<sup>nd</sup> born is in Class VI at [Particulars withheld] Academy in Meru and the 3<sup>rd</sup> born is in Grade II at [Particulars withheld] School, Masimo.
5. The plaintiff testified on how the parties acquired L.R Gatarakwa/Gatarakwa/Block 1 (Lamuraia)/xxx. She stated that the land is situated in Nyeri and it is registered in the joint names of the plaintiff and the defendant. The motor vehicle registration number KBV 845J is also registered in the joint names of the parties. She further testified that she is the one who bought the suit property as she took a loan from Wananchi Sacco of Kshs. 200,000/- while the defendant bought the motor vehicle at Kshs. 1,400,000/- in 2015.
6. The plaintiff further urged the court to declare that the two properties belong to the parties jointly and that the court ought to sell the two properties and deposit the money in a joint interest earning account in the names of the Deputy Registrar and herself to cater for the education of the children as the defendant does not support the children.
7. The plaintiff testified that she contributed non-monetarily to the purchase of the motor vehicle by looking after the children and the defendant for the duration of the subsistence of the marriage and that she was actively involved in the business and bought food and clothing for her children while the defendant paid school fees. She further stated that the defendant stopped paying school fees in 2018 leaving her to struggle alone on a meagre income from her cyber business. She further stated that she was involved in an accident in 2018 which left her disabled in that her right hip was fractured and an implant was fixed and as such, she cannot do heavy-duty labour.
8. The plaintiff opted not to put down written submissions.

### **Issues for determination**

9. After careful analysis, I identify two main issues for determination as follows:-
  - a. Whether L.R. Gatarakwa/gatarakwa/block 1 (lamuria)/817 and motor vehicle registration number KBV 845J are matrimonial properties;
  - b. Whether the plaintiff is entitled to a 50% share of the said properties.

### **The Law**

#### **Whether L.rgatarakwa/gatarakwa/block 1(lamuraia)/xxx and motor vehicle registration number KBV xxxJ are matrimonial properties.**

10. Section 6 of the *Matrimonial Property Act* 2013, defines matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage.
11. Basically, 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.



12. The evidence is clear that the land was registered on 21/5/2014 and a title deed issued in the joint names of the parties. The land was acquired during the subsistence of the marriage between the parties is not in doubt. Although the plaintiff may have purchased the property with her own funds, the land having been acquired during the subsistence of the marriage is matrimonial property.
13. As for the motor vehicle registration number KBV xxxJ, I note that the plaintiff has annexed a copy of records which indicates that the vehicle is jointly owned by her and the defendant. The vehicle was registered in 2013 which shows that the said vehicle was acquired during the subsistence of the marriage between the parties. As such, I find that the said motor vehicle and the land L.R Gatarakwa/Gatarakwa/Block 1(Lamura)/xxx are matrimonial properties as provided for by the Act.

**Whether the plaintiff is entitled to a 50% share of the said properties.**

14. Having established that L.R Gatarakwa/Gatarakwa/Block 1(Lamura)/xxx and the motor vehicle are matrimonial properties, the next issue for determination is in what proportion should the properties be apportioned between the parties.
15. Article 45 (3) of *the Constitution* of Kenya is instructive on this. It provides:-

“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.”
16. This principle is echoed by Section 3(2) of the *Marriage Act* and further recognized by the Court of Appeal in the case of *Agnes Nanjala William vs Jacob Petrus Vander Goes* No. 127 of 2011 (UR) where the Court of Appeal observed that Article 45(3) of *the Constitution* gives parties to a marriage equal rights before, during and after a marriage ends.
17. The plaintiff testified that the defendant bought the motor vehicle with his own funds. However, the plaintiff contributed to the running of the household, looking after the defendant and the children and was also running the family business. This is in line with sections 2, 7 and 14 of the *Matrimonial Property’s Act*, 2013. Section 2 recognizes indirect contribution in form of non-monetary contribution to include domestic work and management of the matrimonial home, childcare, companionship, management of family business or property and farm work. This contention has also been supported by the fact that both the title deed and the copy of records show that the parties are joint owners in respect of L.R Gatarakwa/Gatarakwa/Block 1(Lamura)/xxx and the motor vehicle respectively.
18. The plaintiff has intimated to the court that she prays that the court sells the land and the motor vehicle and put the proceeds in a joint interest earning account for the benefit of the children. She further told the court that since she is disabled, she cannot do heavy labour and thus raising the school fees for the children is difficult for her. While the court sympathizes with the plaintiff, this court cannot make orders on child maintenance for it lacks the requisite jurisdiction. The proper forum for the plaintiff to institute a suit for child maintenance is the Children’s Court.
19. It is my finding that the plaintiff has proved on the balance of probability that the land L.R. Gatarakwa/Gatarakwa/Block 1(Lamura)/xxx and motor vehicle registration number KBV xxxJ are matrimonial properties and that she has contributed to the acquiring of the properties both monetarily and non-monetarily.
20. I hereby enter judgment in favour of the plaintiff in the following terms:-
  - a. That a declaration is hereby made that L.R. Gatarakwa/Gatarakwa/Block 1 (Lamura)/ xxx and motor vehicle registration number KBV xxxJ are matrimonial properties.



- b. That the plaintiff is entitled to 50% share of the two properties.
- c. That the properties shall be sold and the parties equally share the proceeds.
- d. That the defendant is hereby ordered to surrender to the plaintiff the title for L.R. Gatarakwa/Gatarakwa/Block 1 (Lamuraia)/xxx and log book for motor vehicle registration number KBV xxxJ for purposes of disposal within forty five (45) days.
- e. That in default of compliance by the defendant on surrender of the ownership documents, the Land Registrar and Kenya Revenue Authority are hereby ordered to dispense with production of the ownership documents upon transfer and that the Deputy Registrar of this court shall execute the transfer on behalf of the defendant.
- f. That there will be no order as to costs.

21. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 5<sup>TH</sup> DAY OF MAY, 2022.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEOLINK THIS 5<sup>TH</sup> DAY OF MAY, 2022.**

