



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**MATRIMONIAL CAUSE NO. 1 OF 2019**

**FWN.....APPLICANT**

**VERSUS**

**MWW..... RESPONDENT**

**JUDGMENT**

1. The applicant seeks a *declaration* that he is entitled to *half* of two properties known as LOC. 14/KIRU/ [...] and LOC.14/KIRU/ [...] (hereafter *the suit properties*). He pleaded that the properties were acquired during his marriage to the respondent.

2. The applicant and respondent are divorced. A *decree absolute* was issued by the Kangema Senior Principal Magistrates Court on 18<sup>th</sup> July 2019.

3. The applicant's *originating summons* is dated 23<sup>rd</sup> August 2019. It is supported by a brief deposition of even date.

4. The defendant opposed the claim vide a replying affidavit sworn on 13<sup>th</sup> September 2019. She avowed that she exclusively financed the purchase of the suit properties from one *Daniel Kiruri* in 1983 for consideration of Kshs. 4,500.

5. I should add that *none* of the disputants attached any sale agreement or any evidence of payment. Both parties filed witness statements dated 23<sup>rd</sup> August 2019 and 28<sup>th</sup> September 2019 respectively. On 14<sup>th</sup> April 2021, I recorded the evidence *viva voce* from both parties.

6. The plaintiff testified that he used to work as revenue collector and bought the suit properties in 1969 but later transferred them to the defendant as a trustee. He contended that it was only fair and just that they be divided equally.

7. Although the respondent asserted in her deposition and witness statement that she exclusively financed the purchase of the property, she conceded in her oral evidence that-

*I am the one who bought the land from Daniel Kiruri together with the plaintiff as we were husband and wife. I was a farmer. We paid the purchase price together. I was registered as the owner of the lands on 9/6/[...] and 16/6/[...] as per the searches. Initially the plaintiff had been registered as owner but he transferred to me on those dates....*

8. **Article 45 (3)** of the **Constitution** provides that “*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*”. Pursuant to **Article 45 (4)**, Parliament enacted the **Matrimonial Property Act 2013** which at section 6(1)(c) defines *matrimonial property* to include any immovable and movable property jointly owned and acquired during the subsistence of the marriage.

9. The principles applicable in division of matrimonial property, where the properties are registered in the name of one spouse, were restated in **Peter Mburu Echaria v Priscilla Njeri Echaria, Civil Appeal No. 75 of 2001 [2007] eKLR**. See also **SNK v MSK and 5 others**, Nairobi, Court of Appeal, Civil Appeal 139 of 2010 [2015] eKLR; **MBO v JOO**, Nairobi, Court of Appeal, Civil Appeal 81 of 2017 [2018] eKLR.

10. A spouse is entitled to a share of the property if he or she contributed to the acquisition or development of the asset. The contribution may be direct or indirect. **Esther Wanjiru Githatu v Mary Wanjiru Githatu**, Court of Appeal, Eldoret, Civil Appeal 50 of 2016 [2019] eKLR.

11. From the totality of the evidence, I readily find that both the parties contributed to the acquisition of the suit properties during their union. It must follow as a corollary that they constitute matrimonial properties. I would in the circumstances; and, in the interests of justice, grant the applicant a *share* of the properties. Like I stated, their individual contributions to the purchase of the assets remained uncertain. None of them lives on the suit properties though the plaintiff has been leasing them. It is not lost on me either that the respondent was left with the children named in paragraph 3 of her deposition.

12. In the interests of justice, and, to avoid the costs of subdividing each of the two properties, and which from the annexed official searches are in the same area and nearly of equal size, I order that the defendant, *MWW*, is entitled to and shall retain LOC. 14/KIRU/[....] measuring 0.81 Ha. The plaintiff shall surrender that title to the respondent which I note is in the respondent's name. I order that the plaintiff, *FWN*, is entitled to LOC.14/KIRU/[....] measuring 0.60 Ha. He shall bear the cost of transferring that1 title to his name.

13. Each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 4TH DAY OF MAY 2021.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Applicant present.

No appearance by counsel for the applicant.

The respondent (in person) present.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.