



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MATRIMONIAL CAUSE NO. 5 OF 2017 (O.S.)

GNK.....APPLICANT

VERSUS

EKM.....ESPONDENT

JUDGMENT

1. By her Originating Summons (O.S) filed on 19th September, 2017, **GNK** (hereafter the Applicant) sought the following orders:-

a) THAT this ... Court does declare the subject Title Number Kabete/ Kanyariri/xxx measuring 0.23 Ha which portion is the Respondent's share from the estate of Thomas Muchiri (Deceased) as matrimonial property.

b) THAT the ...the Court do issue an order directing the beneficiary (Respondent) of the property known as Title Number Kabete/Kanyariri/xxx measuring 0.23 Ha to abstain from doing any particular act, transferring, charging, disposing and/or otherwise wasting the afore-mentioned property without the consent of the Applicant.

c) THAT in the alternative the property known as Title Number Kabete/Kanyariri/xxx measuring 0.23 Ha proposed for the Respondent be distributed /apportioned equally as between the Applicant and the Respondent” (sic).

2. The Summons is premised on grounds inter alia that the Applicant and **EKM** (hereafter the Respondent) are a married couple; that the Respondent is a beneficiary in the estate of **TKM** (deceased) by virtue of being a son of the said deceased; and that in related succession proceedings, it has been proposed that the land portion where the Applicant and the Respondent have set up their matrimonial home on land parcel **LR.No. Kabete/Kanyariri/xxx**, an asset in the said deceased's estate, be apportioned to the Respondent. Further that Respondent has on previous occasions attempted to sell off and/or dispose off the subject property to the detriment of the Applicant.

3. In her affidavit in support of the O.S, the Applicant deposed that she has been married since 1978 to the Respondent who is a beneficiary of the estate of **TKM** who died in November 1980, by virtue of being a son. She contends that soon after their marriage in 1978, the parties set up their matrimonial home on a distinct portion of the deceased's property known as **LR. No. Kabete/Kanyariri/xxx** and have since farmed and made extensive developments thereon even during the lifetime of the deceased. She further asserts that the Respondent deserted her and the couple's issues in the matrimonial home in 2007 has never returned to the matrimonial home. She deposed that suit property is the subject of distribution under a pending Summons for Confirmation of Grant dated 7th June, 2010 in **Kiambu Succession Cause Number xxx of 2016 In the Matter of the Estate of TKM** and that it is proposed therein that the distinct portion measuring 0.23 Ha of be apportioned to the Respondent.

4. She expressed fear arising from the fact that the Respondent had previously made attempts to alienate the said portion before distribution of the estate and without her consent and therefore urged that the distinct portion measuring 0.23 ha be declared as matrimonial property, be apportioned /distributed equally between the Respondent and herself. She further urged the court to restrain the Respondent from adversely dealing with the portion without her consent.

5. In her further affidavit filed on 26th September, 2017, the Applicant reiterated these matters adding that she had contributed significantly to the developments on the distinct portion; and was in fact the sole breadwinner of the family as the Respondent was on many occasions away from home and incarcerated/imprisoned for various offences. She produced a copies receipts to demonstrate her contribution towards the building and establishment of their matrimonial home which she asserted was also her source of livelihood together with her children.

6. The court had directed parties to file affidavits, but the Respondent did not comply or attend, despite being served on several occasions.

However, on two occasions, namely, on 14/06/2018 and 25/09/2018 two different advocates had appeared on his behalf. On the former date,

one **Ms. Nyakiana** held brief for Mr. Kiragu of the firm of **Waweru Kiragu & Associates Advocates** who had received service of process on behalf of the Respondent since the filing of the originating summons. The court had then directed that the Originating Summons proceeds by way of viva voce evidence, based on the parties filed affidavits. On the subsequent date (25/09/2019) another counsel, **Ms. Wainaina** appeared on behalf of the Respondent. However, no notice of change of advocate was filed, and when the process server attempted to serve upon **G. W. Wainaina & Co. Advocates** with the originating summons and other filed material on the 30th September 2019, the service was rejected on the basis that the firm had no instructions to act for the Respondent (see affidavit of service dated 2nd October, 2019) and filed on 27/02/2020. Thus, the hearing notice and other notices were served upon the firm of **Waweru Kiragu & Associates** once more. The Respondent did not attend the hearing on 27/02/2020 or 25/06/2020 or subsequent mention on 1/10/2020 when the judgment date was reserved.

7. During the hearing on 25/06/2020 counsel for the Applicant urged that in light of the Respondent's failure to file responses or attend, the O.S be determined on the basis of affidavit material on record. The court acceded to the request and directed that submissions be filed. Once again ,only the Applicant filed submissions and the Respondent though served with the mention notice for receiving submissions did not attend.

8. The Applicant's submissions reiterated her affidavit material and identified three issues for determination. On the question whether the land portion subject to the O.S is matrimonial property; reliance was placed on the definition of matrimonial property in Section 2 of the Matrimonial Property Act. The Applicant cited the decision in **AW-M V CMAW – M (2016) eKLR** to assert that though the subject portion consisted of an inheritance there were improvements made thereon by the Applicant and her estranged husband the Respondent.

9. On the second issue, as to the Applicant's contribution to the said improvements and/or developments, reliance was placed on Section 9 of Matrimonial Property Act and the Applicant's evidence on her contribution thereto, both monetary and non-monetary. Finally on the last issue it was submitted that in view of the Applicant's contribution to the development of the suit property, the same ought to be apportioned equally between the two parties herein.

10. The court has considered the uncontroverted affidavit material on record and the Applicant's submissions. It is evident that the Applicant and Respondent got married in 1978 and are blessed with children; that the couple set up their matrimonial home on a distinct portion of land parcel **LR no. Kabete/Kanyariri/xxx**; that the said property was the subject matter of **Kiambu Succession Cause no. xxx of 2016 In the matter of the estate of TKM (deceased)** who was the father of the Respondent; and that whereas the subject property comprised the estate of the said deceased, the Respondent as a beneficiary is proposed to receive the distinct share thereof measuring 0.23ha. This court's ruling in the succession cause delivered on 25/07/2019 determined the said share as due to the Respondent. There is no dispute that the Respondent deserted the matrimonial home since 2007, and according to the Respondent he previously made attempts to alienate the portion of the suit property upon which his family resides and ekes a livelihood through farming activities.

11. The key questions falling for determination are whether the suit property is matrimonial property and whether the orders sought in the originating summons ought to be granted. The Applicant has asserted that she and her estranged husband established their home on the subject property upon getting married in 1978. The Matrimonial Property Act (hereafter the Act) defines a matrimonial home as a property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes other attached property. Section 6 of the Act which defines matrimonial property includes matrimonial home or homes in the category of matrimonial property. The portion that is the subject matter of this application was technically acquired by the Respondent since the Court's ruling of 25/07/2019 in the succession cause.

12. There is no evidence that prior to the marriage in 1978, the Respondent had acquired any interest in the said portion while his father was still alive. Thus, section 5 of the Act does not apply in this case. It would seem that upon the Respondent and the Applicants' marriage, they were allowed to make their home on the suit portion while not acquiring any title thereto. The Respondent's precise interest in the suit property crystallized upon the confirmation of the grant vide the ruling of 25/07/2019.

13. However, by dint of Section 9 of the Act, there is no doubt that the Applicant has, despite the absence of a title in the Respondent's name, continuously and significantly contributed to the development of the suit property. The bundles of documents annexed to the Applicant's further affidavit filed on 26/09/2017 and marked annexure **GNK2, GNK3a, GNK3b, GNK4 and GNK4** amply demonstrate investments in developing the home, farming activities, payment of various utilities and fees for the couple's children by the Applicant. The dates in the said documents cover a period of over two decades. The Applicant having been married to the Respondent since 1978, it is conceivable that she has over time made significant contribution within the meaning found in Section 2 of the Act, to the general welfare of the family and development of the matrimonial home. It matters not that the couple were essentially licensees on the distinct portion of land parcel **LR No. Kabete/Kanyariri/xxx** prior to 2019, occupying it with the permission of the deceased father of the Respondent in whose name the title was registered.

14. Reviewing all the available material, which was not controverted in any way, I am persuaded that the subject property herein being the matrimonial home of the parties herein is indeed part of the couple's matrimonial property. Further, I find that the Applicant has contributed significantly to the development of the home. The court therefore declares that the Respondent's share of **LR No. Kabete/Kanyariri/xxx** measuring 0.23 ha that was apportioned to him as a beneficiary in the court's ruling delivered in **Kiambu Succession Cause no. xxx of 2016** (delivered on 25/07/2019) is matrimonial property to be held in trust and for the benefit of the Respondent and the Applicant as envisaged in Section 14 of the Act. An injunction will also issue against the Respondent in terms of prayer (2) of the originating summons. The alternative prayer is not available where, as in this case, the marriage between the parties still subsists. Parties will bear own costs.

Delivered and signed electronically on this 13th Day of May 2021.

C. MEOLI

JUDGE

In the Presence of:

For the Applicant: Ms. Wamuyu

For the Respondent: N/A

Court Assistant: Kevin Ndege