



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL SUIT NO. 16 OF 2016

MWW.....PLAINTIFF

VERSUS

MNW.....DEFENDANT

JUDGEMENT

Brief facts

1. The plaintiff in her originating summons dated 14th November 2013 seeks for orders that:-

- a) A declaration that the properties known as TETU/MUTHUAINI/xxx (measuring 1.82 Ha) and NYERI/LUSOI/xxx (measuring 3.2Ha) together with all the buildings and developments acquired by the joint efforts of the parties herein during the subsistence of their marriage and registered in the name of the defendant are jointly owned;
- b) The said properties be settled for the benefit of the plaintiff in such a manner and proportions as the Honourable court deems fit and just;
- c) The defendant be condemned to pay for the costs of this application and incidentals thereto.

2. In opposition to the originating summons, the defendant filed a Replying Affidavit dated 11th December 2013 and a Further Replying Affidavit dated 20th December 2019.

3. The matter came up for hearing on 1st March 2021 whereby both parties gave oral evidence in support of their cases.

The Plaintiff's Case

4. It is the plaintiff' case that she got married to the defendant on 1st June 1980 under Kikuyu Customary Law and on 4th June 1993, they celebrated a Christian marriage in Kigogo-ini PCEA Church. The plaintiff adds that the marriage was blessed with four issues, who are currently all adults. They resided on Land Parcel No. TETU/UNJIRU/xx as their matrimonial home. Subsequently after the marriage between her and the defendant was dissolved in 2013 vide Divorce Case Number 8 of 2011 at the Nyeri Chief Magistrate's Court.

5. The plaintiff states that the defendant went to the United Kingdom in 1993, for further studies and came back in 2012. During that period she used her own money to fend for the family since the money the defendant was sending was not enough. She even leased property TETU/UNJIRU/xx at Kshs. 20,000/- for a period of two years to sustain her family.

6. The plaintiff further contends that during the subsistence of the marriage, they acquired property Number TETU/MUTHUAINI/ XXX and NYERI/LUSOI/xxx. She adds that NYERI/LUSOI/xxx was a wedding gift from the defendant's aunt to the plaintiff and defendant however, the same is registered in the name of the defendant. The plaintiff added in her oral testimony that the said property was not purchased by the defendant as he alleged in his replying affidavit.

7. TETU/MUTHUAINI/xxx was acquired through the joint efforts of both parties herein however the same has been registered in the defendant's name. The plaintiff stated in her oral evidence that the said property was acquired through an auction process and that since the

defendant was out of the country, he sent a nominee to represent him in the said process.

8. The plaintiff states that she relocated from TETU/UNJIRU/xx, to TETU/MUTHUAINI/xxx when the defendant came back because they could not live together due to their marital differences. She however stated that she grew about 100 tea bushes on the said land and renovated their matrimonial home.

9. The plaintiff further contends that she had placed a caution on property number TETU/MUTHUAINI/xxx because the defendant intended to dispose of the said land which would leave the plaintiff, her daughter and grandchild homeless as that is where they currently reside. She further adds that she has been working on the farm since the land was acquired.

10. The defendant served the plaintiff with an eviction notice from the said land, however the plaintiff contends that it will leave her homeless as she knows no other residence since that is where she lives with her daughter and grandchild.

11. The plaintiff states that the defendant is currently living in their matrimonial home which he inherited from his parents on L.R TETU/UNJIRU/xx

12. The plaintiff further added that she did not contribute financially to the acquisition of the said parcels of land but she worked on the farms and developed the said parcels of land as well as caring for the children of the marriage.

The Defendant's Case

13. It is the defendant's case that Land Parcel No. TETU/UNJIRU/xx is ancestral land where the parties herein established their matrimonial home from 1993. The said land is registered in the name of defendant's mother.

14. He further adds that Land Parcel No. NYERI/LUSOI/xxx was not given to the parties herein as a wedding gift but the land was acquired through a loan of the Settlement Fund trustee and in the name of the defendant's aunt's, who was unable to pay the loan and the defendant contends that he assisted his auntie to pay the loan. She thereafter transferred the land to me. The defendant adds that he started paying off the loan prior to his marriage to the plaintiff, from the year 1978 to 1980.

15. As regards Land Parcel No. TETU/MUTHUAINI/xxx, the defendant states that he acquired the land through a loan given to him by his brother in law, JNC in 2002 for the sum of KShs. 2,185,000/-. He adds that he has been paying up the loan to the said James and up to date he has not completed the repayment. The defendant adds that the said properties are registered in his name and he does not intend to sell any of them. He adds that the plaintiff resides on the said land and only their daughter currently studying at the university goes to visit and stay with the mother during the school holidays.

16. On cross-examination, the defendant states that Land Parcel No. TETU/MUTHUAINI/xxx was bought by him through his sister LWC in a public auction and was registered in her name. The defendant adds that Leah thereafter transferred the land to him and that he did not make any payments towards the purchase of the said land.

17. The defendant further adds that he educated his children with no assistance from the plaintiff and that he also assisted the plaintiff financially. However he stated that the plaintiff was looking after their children when he was in the United Kingdom.

18. The defendant also stated in his evidence that the plaintiff looked after Land Parcel No. TETU/MUTHUAINI/xxx together with the farm manager and she also looked after TETU/UNJIRU/xx on her own. As for Land Parcel No. NYERI/LUSOI/xxx, other people assisted in its management.

19. The defendant called one witness, his sister who testified that she purchased Title Number TETU/MUTHAINI/xxx on his behalf and for the benefit of the defendant out of love and as a gift to the defendant.

20. The defendant called LWC as his witness who told the court that she is the defendant's elder sister and she works in the real estate business in Nairobi and Kiambu.

21. She testified that she participated in a public auction to acquire Land Parcel No. TETU/MUTHUAINI/xxx whose purchase price was KShs. 700,000/- and later transferred the said land to the defendant.

22. On cross-examination, she stated that her name appears as a nominee in the certificate of the said land. Also that her name does not appear in the transfer of the land to the defendant by the bank (Housing Finance Company of Kenya). The witness further stated on cross-examination that she had no documents to show that she bought the land and gave it to the defendant.

23. By consent, parties hereby agreed to file written submissions and both parties complied accordingly.

The Plaintiff's Submissions

24. The plaintiff submits that the two said properties known as TETU/MUTHAINI/xxx and NYERI/LUSOI/xxx are matrimonial property as they were acquired during the subsistence of the marriage between the parties herein. It was further argued defendant has not availed any evidence in court to show that he purchased land parcel no. NYERI/LUSOI/xxx. Thus the plaintiff's assertion remains unchallenged and as such the plaintiff testified that the property was acquired as a gift during the subsistence of the marriage. As for Title number TETU/MUTHAINI/xxx, the plaintiff submits that she has been residing there with her children.

25. The plaintiff submits that she did not make any monetary contribution towards the acquisition of the property but surely made non-monetary contributions in the form of domestic work and management of the matrimonial home, child care management of the family property and farm work. She relies on **Section 2, 7 and 14 of the Matrimonial Property Act, Article 45(3) of the Constitution of Kenya and the case of Agnes Nanjala William vs Jacob Petrus Nicolas Vander Goes (Civil Appeal No. 127 of 2011)** to support her contention.

26. The plaintiff further submitted that following **Section 14 of the Matrimonial Property Act and the case of Njoroge vs Ngari [1985] KLR 480** she has proprietary rights in the said properties despite the fact that they were in the defendant's name. She adds that the Act takes into account non-monetary contribution and provides that a party may acquire beneficial interest in property by contribution towards the improvement of the property equal to the contribution. In saying so, she relies on the case of **N.W.M vs K.N.M (2014) eKLR**.

27. The plaintiff further relies on the case of **White vs White (200) UKHL 54** to support her contention on the consideration of non-monetary contribution. She further submitted that in the division of property, one must effect the same having due regard to the principle of equality. To support her contention she relied on the case of **Miller vs Miller & McFarlane (2006) UKHL 24**.

28. The plaintiff further submits that the court ought to consider her non-monetary contribution and measure the same as compared with that of the defendant. She relies on the persuasive decision in **E.M.N vs N.M. [2018] eKLR**. The plaintiff adds that she took care of the family's children as the defendant generated an income, which was used to invest for the family, educate the children and provide other needs for the family. The plaintiff urges the court that her contribution ought to be assessed at 50% and that of the defendant at 50%.

29. The plaintiff prays that the court finds that she has proved her case on a balance of probabilities and find that the two said properties should be settled for the benefit of the defendant at 50% and at her benefit at 50%.

The Defendant's Submissions

30. The defendant submits that whether or not the plaintiff contributed directly or otherwise towards the acquisition of the said properties is a question of fact. At the inception of their marriage, the defendant submits that he is the only one who was in gainful employment. He adds that in 1978 before marrying the plaintiff he started the process of purchasing Land Parcel No. NYERI/LUSOI/xxx through his sister LW who also assisted the defendant acquire Land Parcel No. TETU/MUTHUAINI/xxx. From 1983 to 1993, the defendant contends that the plaintiff was not in gainful employment.

31. The defendant submits that in 1993 he went to the United Kingdom where he was not in any gainful employment. This contention is also supported by the plaintiff who led evidence that the money she received from the defendant was not enough to sustain the family. As such, the defendant contends that neither the plaintiff nor he contributed towards the acquisition of land Parcel No. TETU/MUTHUAINI/xxx. The defendant adds that the plaintiff was idle and not hardworking and that is why she leased their matrimonial home instead of developing their other properties.

32. The defendant submits that Land Parcel No. TETU/MUTHUAINI/xxx was bought in the year 2002, which is 9 years after the defendant went to the United Kingdom. Whereas the divorce petition was filed in 2011, which is 9 years after the said land was bought. The defendant states that from that depiction, the parties did not acquire the said property together, and therefore since no party purchased the said property, the land should divest into the defendant, as he is the registered owner.

33. The defendant further submits that Land Parcel No. TETU/MUTHUAINI/xxx ought not to be treated as their matrimonial home, further that the plaintiff did not show any evidence in court to prove that she developed the said land. As for Land Parcel No. NYERI/LUSOI/xxx, the defendant submits that the plaintiff on cross-examination did not even know where the said land was situated and she did not produce any documentation to show that the land existed. As such, the court ought to find that the said land was purchased solely by the defendant.

34. The defendant further states that all the suit properties herein were purchased with the assistance of the defendant's sister as shown by the documents produced. He further adds that the plaintiff did not provide any non-monetary contribution in the acquisition of the said properties.

35. The defendant relies on the case of **Cosmas K. Muthembwa vs Eunice Kyalo Muthebwa Civil Appeal No. 74 of 2001 Nairobi** to support his contentions in the case herein. He submits that the plaintiff's case be dismissed.

Issues for determination

36. After careful analysis, I identify the issues for determination to be as follows:-

- a) Whether Land Parcel Nos. TETU/MUTHUAINI/xxx and NYERI/LUSOI/xxx constitute matrimonial property;
- b) Whether the plaintiff contributed towards the acquisition and development of the suit properties.
- c) Whether the plaintiff is entitled to a 50% share of the said two properties.

The Law

Whether Land Parcel Nos. TETU/MUTHUAINI/292 and NYERI/LUSOI/619 constitute matrimonial property

37. **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.

38. 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.

39. In the instant case, the marriage between the parties herein commenced in 1983 vide a Christian marriage. The marriage herein was dissolved on 24th July 2013. According to the defendant, he began the process of acquiring Land Parcel No. NYERI/LUSOI/xxx in 1978 before he married the plaintiff. He added that he acquired Land Parcel No. TETU/MUTHUAINI/xxx in 2002 while he was in the UK. I am therefore of the opinion that the two properties consist matrimonial property as they were acquired during the subsistence of the marriage. The defendant did not produce any evidence in court to support his contention that he acquired Land Parcel No. NYERI/LUSOI/xxx between 1978 and 1980. What he has produced in court shows a transfer dated 13/8/1986 between him and his sister, which period was during the subsistence of the marriage. Further the Application for Consent of Land Control Board indicates that the nature of the transaction, as normal transfer of a gift.

Thus I hold the opinion that the said land though a gift from LWK to the defendant, it was acquired during the subsistence of the marriage.

Whether the plaintiff contributed towards the acquisition and development of the suit properties.

40. The Matrimonial property Act under **Section 7** provides:-

Subject to Section 6(3), ownership of 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.

41. The law therefore provides that in the event of divorce, the matrimonial property is divided between the spouses according to the contribution of each spouse.

42. What then amounts to contribution? **Section 2** of the Act defines “contribution” as monetary and non-monetary 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.

43. The Court of Appeal enunciated this principle in the case of **Civil Appeal No. 142 of 2018 in C.W.M. vs J.P.M [2017] eKLR:-**

“...parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having being married for 18 years made some contribution to the family of the respondent at the time of such overture. In our view, that contribution, be it domestic work and management of the matrimonial home, childcare or companionship falls within the definition of contribution under the Act.”

44. According to the defendant, he began the process of acquiring Land Parcel No. NYERI/LUSOI/xxx in 1978 before he married the plaintiff, till 1980 when he completed the purchase by paying in instalments. He stated that he sent the money to his sister who then forwarded the sums to the seller of the said parcel of land. Notably on perusal of the documents pertaining this suit land, the Transfer from LW to the defendant is dated 13/8/1986 which period is during the subsistence of their marriage and the Application for Consent of Land Control Board indicates in the nature of the transaction, as normal transfer, gift. As regards, Land Parcel No. TETU/MUTHUAINI/xxx, the defendant adduced evidence that he acquired the said land in 2002 while he was in the UK. It is evident that both properties were acquired while the defendant was in the UK and while the marriage of the parties subsisted.

45. It is not disputed that the plaintiff did not make any monetary contribution towards the acquisition of the suit properties however she contends that she contributed non-monetarily by looking after the children for the 20 years of marriage. She further adds that she developed Land Parcel No. TETU/MUTHUAINI/xxx to which the defendant did not deny but instead echoed her sentiments. He led oral evidence that the plaintiff together with the farm manager managed the said suit property. The case of **White vs White (200) UKHL 54** is instructive on the issue of non-monetary contributions. The court alluded to the greater awareness of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money earning qualifications and skills. The law recognises child care as part of contribution which the court must give due consideration. The farm management done by the plaintiff and care given to the defendant as he worked to earn a living, was part of contribution by the plaintiff.

46. It is my considered opinion that the plaintiff has satisfied this court that she contributed non-monetary to the acquisition of the properties namely L.R. TETU/MUTHUAINI/xxx and NYERI/LUSOI/xxx.

47. However, I hold the opinion that the plaintiff has not led evidence to show that she developed Land Parcel No. NYERI/LUSOI/xxx. She led evidence in court stating that no economic activity was going on, on the suit property and the defendant stated that he hired other people

who looked after the said farm.

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

48. Section 9 and 14 of the Matrimonial Property Act and Article 45 of the Constitution are instructive herein.

49. Section 9 of the Matrimonial Property Act provides:-

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.

50. There is a presumption of law, Section 14 of the Matrimonial Property Act where matrimonial property is acquired during marriage:-

a) In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

b) In the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interest in the matrimonial property are equal.

51. The Constitution of Kenya 2010 under Article 45(3) states that:-

Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage.

52. 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 the marriage ends.

53. From the above discussions, the plaintiff having established that she contributed non-monetarily towards the acquisition of the two suit properties, I am of the considered opinion that she is entitled to a 50% share of L.R. NO. TETU/MUTHUAINIxxx and NYERI/LUSOI/xxx.

54. Despite holding the opinion that the plaintiff did not develop the Land Parcel No. NYERI/LUSOI/xxx, I hold the opinion that she contributed towards its acquisition vide section 14 of the Matrimonial Property Act on the presumption that the defendant acquired the property in trust for the both of them.

Conclusion

55. The plaintiff has proved her case on the balance of probability as required by the law.

Consequently, I enter judgement in favour of the plaintiff in the following terms:-

a) That L.R. TETU/MUTHUAINI/xxx and NYERI/LUSOI/xxx are hereby declared matrimonial property and that the plaintiff is entitled to half share of each of the properties.

b) That the properties L.R. NO. TETU/MUTHUAINI/xxx and NYERI/LUSOI/xxx shall be divided between the parties in equal shares.

c) That each party shall meet their own cost.

DELIVERED, DATED AND SIGNED AT NYERI THIS 17TH DAY OF JUNE, 2021.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 17TH DAY OF JUNE, 2021.