



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MATRIMONIAL CAUSE NO. 2 OF 2017

SOR..... PLAINTIFF/APPLICANT

VERSUS

MGO..... DEFENDANT/RESPONDENT

JUDGMENT

The Plaintiff, **SOR** instituted these proceedings by way of an Originating Summons, seeking a declaration that the property **L.R. NO. KISUMU/NYALUNYA/xxxx** is matrimonial property.

1. Secondly, he asked the Court to make an Order that the property in issue was held by the Defendant in trust for the Plaintiff.
2. Thirdly, the Plaintiff asked that;

“..... the said property be settled for the benefit of the Plaintiff in such proportion that is equal to that of the Defendant.”

3. Finally, the Plaintiff asked the Court to order the Defendant to pay the costs of this application.
4. It was the Plaintiff's case that the suit property was acquired and developed by the joint efforts of both the Plaintiff and the Defendant.
5. According to the Plaintiff, the Defendant's employment had been terminated before the year 2002, and that from her terminal benefits, the Defendant made a down payment of Kshs 100,000/= for the property.
6. The Plaintiff told the Court that from the year 2003, he sent money to the Defendant, for her upkeep and for the construction of the suit property.
7. The Plaintiff said that in the year 2015;

“the defendant opted out of the marriage, and kicked the Defendant out of the matrimonial property.”

8. In the said circumstances, the Plaintiff believed that he was entitled to a share, equal to that of the Defendant.
9. When arguing his case the Plaintiff reiterated that the Defendant had remained unemployed until the date when the 2 parties herein became estranged.
10. According to the Plaintiff, the estrangement begun in the year 2015, when the Plaintiff moved back to Kenya, from the United States of America. He said that the Defendant was the cause of the estrangement, as she insisted that she was unwilling to live with her husband on the matrimonial property.
11. In answer to the case, the Defendant, **MGO**, swore a Replying Affidavit, indicating that the suit property was purchased in the year 2004, for a sum of Kshs 70,000/=.
12. The Defendant also stated that she could not have utilized the terminal benefits from the Uganda Railways Corporation to purchase the parcel of land in issue, because she never received any such benefits.

13. The Defendant was shocked by the Plaintiff's assertion to the effect that the parcel of land was purchased with funds which the Plaintiff had saved up.

14. Having perused the Sale Agreement dated 8th November 2004, I note that the full purchase price of Kshs 70,000/= was paid by the Plaintiff prior to the date when the Agreement was executed.

15. If there was any truth in the Plaintiff's contention concerning the terminal benefits of Kshs 100,000/=, that would imply that the Defendant had more than sufficient funds to pay for the purchase of the parcel of land.

16. It is to be noted that the Plaintiff had deponed that;

"5. THAT I know of my own knowledge that using part of her money and some money which I had saved up, we purchased LR. NO. KISUMU/ NYALUNYA/xxxx, which we subsequently agreed to have registered in the Defendant's name...."

17. Even assuming that that deposition was factually accurate, it would imply that the Defendant was never a person who failed to generate income. The point I am making is that it was inaccurate for the Plaintiff to describe himself as *"the sole breadwinner in our household...."*

18. But more significantly, the Defendant exhibited letters which showed that she was out of employment for a very limited period of time.

19. In effect, the Plaintiff's attempt to portray the Defendant as being wholly dependent upon him;

"..... since the Defendant/Respondent was not employed at the time nor did she conduct any business", was completely futile.

20. I also find that the Defendant did not say that she did not want the suit property to be registered jointly in the names of the parties herein because the dates which the Plaintiff had cited in his case were wrong.

21. In my understanding, the exposition of the correct dates was simply to put the record straight. In other words, the Plaintiff had cited inaccurate information as the basis for his case.

22. It is common ground that the parties herein are married. They are husband and wife.

23. However, whilst the Plaintiff asserted that the Defendant had kicked him out of the suit property, the Defendant insisted that the two parties continued to live together under one roof.

24. Given the other inaccurate and false statements made by the Plaintiff, I am more inclined to believe his wife. I therefore find that on the day when the Defendant was served with the suit papers herein, it is the Plaintiff who opened the door to allow the process server to gain entry into the house, where he served the Defendant.

25. In the event, as the Plaintiff has access to the suit property and resides therein, when he wants, I find that the Plaintiff failed to demonstrate that the Defendant had denied him some rights.

26. It is noteworthy that the Defendant readily described the suit property as *"our matrimonial home."* Therefore, no issue arises for determination by the court, concerning the question as to whether or not the suit property was matrimonial property.

27. In his submissions, the Plaintiff said;

"..... it really doesn't matter what the other party's intention is with the property so long as it can be categorized as being matrimonial property. And that the property be sold and proceeds be shared equally between the parties."

28. Through that submission, the Plaintiff expressly confirmed the Defendant's fear, which is that the Plaintiff's intention was the sale of the suit property.

29. The Plaintiff cited the cases of **PNN Vs ZWN [2017] eKLR**, and **FEDERATION OF WOMEN LAWYERS (FIDA) Vs ATTORNEY GENERAL & ANOTHER [2018] eKLR** to back his contention that the suit property ought to be distributed equally between the spouses.

30. It is clear from the case of **AKM Vs NNN HCCC NO. 2 OF 2015** (at Chuka) that the marriage between the two parties had been dissolved prior to the institution of the proceedings under the **Matrimonial Property Act No. 49 of 2013**.

31. Pursuant to **Section 7** of that statute;

"..... ownership of matrimonial 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."

32. Therefore, to the extent that the Plaintiff was asking for the distribution of the property, I find that that prayer is premature.

33. However, there is a distinction between **Section 7** and **Section 17** of the **Matrimonial Property Act No. 49** of **2013**. Whereas distribution may only be done upon divorce or other dissolution of the marriage, it is open to either spouse to seek declaratory relief even whilst the marriage was still alive.

34. In the case of **PETER NDUNGU NJENGA Vs SOPHIA WATIRI NDUNGU, CIVIL APPEAL NO. 2 OF 2003** the Court of Appeal said;

“We have powers under Section 3 (2) of the Appellate Jurisdiction Act, to make such orders as the superior court could have made when we are properly seized of an appeal. In the exercise of those powers, we find and hold that the learned Judge had no jurisdiction to alienate suit lands between spouses during their life-time or unbroken coverture and he ought to have dismissed the suit.”

35. Musyoka J. applied the *ratio decidendi* of that case when he was determining the case of **MNW Vs WNM & 3 OTHERS HCCC NO. 46 OF 2012**, (at Milimani). The learned Judge reiterated that;

“..... the High Court has no jurisdiction to alienate lands between spouses during their lifetime or unbroken coverture, and that a Judge faced with a suit where division of matrimonial property is sought in such a case ought to dismiss it.”

36. Musyoka J. took a further step and explained the rationale for the said decision. He said;

“It is against public policy for the court to entertain such a dispute as it would accelerate the break-up of the family involved. Public policy favours family unity and stability and should foster peace and reconciliation. Alienation of lands between spouses during unbroken coverture does not augur well for the well-being of the family as a unit.”

37. Based on those reasons the learned Judge dismissed the suit, because the marital relationship between the two parties was still in place.

38. In the case of **MNH Vs FHM HCCC NO. 11 OF 2018 (O.S)**, at Kajiado, Nyakundi J. said;

“In the absence of conclusive proof of the dissolution of the marriage between the parties, the suit properties herein cannot be distributed.”

39. The learned Judge noted that when the court was called upon by spouses who were asserting their property rights, it should not turn a blind eye to the best interests of the children who were borne out of the marriage. I am in agreement with my learned brother, that the court needs to always bear in mind the need to provide protection to children, so that whatever orders are made in the case between the spouses, the best interests of the children are safeguarded.

40. In the case of **MNH Vs FHM HCCC NO. 11 OF 2018 (O.S)**, Nyakundi J. noted that the Plaintiff and the Respondent were at loggerheads at the material time. Nonetheless, the learned Judge held as follows;

“I find the request for a declaration on the distribution of the matrimonial property to be rather rash and injudicious.”

41. In the case before me, there is not even any conclusive evidence that the parties are at loggerheads. The Plaintiff asserted that he had been forced to move out of the suit property. However, the Defendant pointed out that the Plaintiff was living with her in the same house, and that it is he who opened the door to allow the process server to enter, so that he could serve the Defendant.

42. I find that the parties herein are still a couple in marriage and also that they are in an unbroken coverture. Accordingly, the court lacks jurisdiction to make any orders for the sub-division or the distribution of the suit property.

43. To the extent that the Plaintiff wished to have the suit property distributed, the claim is dismissed.

44. However, I do find and hold that the suit property was matrimonial property, as it was purchased and developed during the currency of the marital relationship of the parties herein.

45. As regards costs, I order that each party should bear his or her own costs. I so order because the parties are members of the same family. By dint of the provisions of **Article 45 (1)** of the **Constitution**, I am enjoined to recognize and also to protect the family, because it is the natural and fundamental unit of society, which is a necessary basis of social order. I find no justifiable reason for creating antagonism between the parties, by ordering one to pay costs to the other.

DATED, SIGNED and DELIVERED at KISUMU

This 13th day of July 2021

FRED A. OCHIENG

JUDGE