



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NO. 02 OF 2015(O.S)

NS.....PLAINTIFF

VERSUS

JKS.....DEFENDANT

JUDGEMENT

1. The plaintiff brought this suit via her Originating Summons amended on 23rd February 2015 seeking for a declaration that parcels numbers **SOLAI /NDUNGIRI BLOCK NO. xxx AND xxx** are jointly owned in equal shares by herself and the defendant. In his reply the defendant denied the same entirely and urge the court to dismiss the suit.
2. When the matter came up for directions the court ordered the same to proceed by way of *viva voce* evidence. At the close of the hearing the court directed the parties to file their written submissions which they have complied. Before looking at the same it shall be necessary to summarise the evidence as presented during trial.
3. PW1 the plaintiff testified that she was the defendant's wife having married him many years ago and specifically during Mau Mau days. In their union they were blessed with 9 children and all have since died except two MK and EJ. She lives with M on the same land at Solai which is registered in the defendant's name.
4. She went on to state that the defendant did not built a house for her but she was living in the house of her late son SC. She said that she wanted the court to order the land to be divided according to the wives of the defendant.
5. She stated that she went to Salgaa with her mother in law and lived on the land which the defendant later sold and purchased the Solai land. She said that she used to take care of the farm as well as the children as the defendant did business with her co-wife.
6. She said that she participated in the marriage between the defendant and her co wife as they did traditional wedding. She had however passed on. She denied that she only got two children with the defendant since all the children are bearing the name of the defendant in their national identity cards.
7. When cross examined she said that she had lived with the defendant from those days of maumau after he betrothed him under the customary law although all the elders who witnessed have since died. That seven cows were paid as dowry.
8. She said that the only time she left matrimonial home was when she went to Salgaa with her mother in law having been taken there by the defendant. Her problems with the defendant began after he married the late G. That she did not participate in the hotel business but she was taking care of the children as well as undertaking farming business.
9. She went on to state that problems began when her mother in law MKto died since before then the defendant feared her. She could not however remember the number of the land they were staying in at Salgaa. At Salgaa she only went with S the younger child while the rest remained at Solai. They stayed in the six acres given to them by the defendant which he did voluntarily.
10. She denied that she has ever separated with the defendant neither has she been alcoholic and having bad manners. All the children she had were gotten out of her marriage with the defendant. She denied that her son M had abused the defendant but it was the sons of her co wife that were abusing and threatening M.
11. As regards her identity card she said that it was the defendant who gave her his card to use it in obtaining hers when women were not permitted to obtain one and that is why his name was in the card.

12. **PW2 MKS** the son to the parties herein and the 4th born and lives at Kiturs land since 1998 and he has built a semi-permanent house therein. His brother SC as well has a house on the same land courtesy of the defendant and he lives there with his family. That is the same house the plaintiff stays with S children.
13. He went on to state that prior to this the plaintiff used to stay in parcel number xxx belonging to the defendant till the year 2007. He said that the defendant had sold part of the land to some people including one PK and a water company. He produced a green card as part of the evidence. He said that he had been arrested severally so that the plaintiff could withdraw the case and he even had an ongoing criminal case no. 4148 of 2019 at Nakuru.
14. He said that it was the defendant who took him to school and even circumcised him and that his identity card has the defendant's name. He said that the defendant had land in Rongai which he sold to buy the Solai land. That when they closed school they would go to Rongai. He said that his mother came to Kitur farm in 1970 and stayed in S's house as from 2007.
15. When cross examined he said that Kongato was his grandmother and had lived in Rongai and was with her in the years 1968 and 1969. He said that he was ready to undertake DNA but he was not called and in any case it was an issue between the plaintiff and the defendant. Pressed hard by the defence counsel he said that it was the plaintiff who refused him to undertake the DNA.
16. He said that he was young when he was taken to Rongai and did not know who owned the land if it existed. He said that he knew P who purchased the land and he is using it currently. That he had no problems with the water company having the land as they also needed water. The only problem was that the defendant refused to give the plaintiff her portion.
17. When re-examined he said that he had no problem with DNA as the defendant had not complained that he was his son. In any case none of his siblings had been ordered to undertake DNA tests.
18. **The defendant** testified that the plaintiff was his wife for about 10 years at the European settler's farm and were blessed with two children J and J. They stayed till the year 1952 when she left while he was still at the said settler's farm. He said that the plaintiff left because she had no good moral character and he did not get to know where she went.
19. He married his second wife in the year 1956 although by the time the plaintiff left he had married her. He did business at Solai trading centre where he also lived with his wife and mother. The two children were left behind by the plaintiff and were taken care of by the defendant's second wife as well as his mother.
20. At Solai trading centre the defendant operated a hotel business while his second wife managed the shop. They did the business between 1961 till 1975 and they purchased Kitur land in 1970 using the proceeds from the hotel as well as the shop.
21. He said that the plaintiff came back in 1988 with 7 children and he refused to welcome her but out of sympathy and pressure from the elders and the fact that she was sickly she received her with her two children who were his but not the other 7 children. She allowed her to stay in a portion of the land.
22. The defendant denied that he had land at Salgaa/Rongai or at all. Neither did her mother have land at the said place. He said that he lived with his mother throughout. That the plaintiff did not contribute anything in acquisition of the land for she had already left.
23. On the issue of DNA, he said that he went for it but they did not turn up. He denied educating pw2 nor circumcising him. He did not know where the other 7 children schooled. He said that pw2 leased out his land to someone and that is why he had bad relationship with him and beside this he abused and wanted to fight him.
24. He said that he already gave 6 acres to her two children born out of the union with the plaintiff and that is where she was staying.
25. When cross examined she said that she married the plaintiff but not under any customary law and they lived together although no dowry was paid. They had the two children J and J. He said that the plaintiff left in the year 1954 to unknown destination leaving the two children with him.
26. As regards the hotel he said that the same was a partnership between him and one AC and It belonged to the county council. That they bought the land from the business proceeds in 1969 and moved into it in 1970. The land was purchased through a land buying company and they were 35 members. He had sold part of it to a water company.
27. He said that the plaintiff came back in 1988 and the elders persuaded him to receive her and she gave her two acres for the sake of her two children and that he was actually giving the land to her two children. Although the two have died they were alive when he divided the land.
28. He denied that M and S are his children and that they were staying on the same portion of land he gave to the plaintiff. He denied that his mother lived in Rongai with the plaintiff. He said that his mother took care of his children while he was carrying out his businesses.
29. **DW2 JCL** who is the 1st born daughter to the defendant from her marriage with GS testified that she was born in the year 1958 and were staying at Solai centre. That she got to know the plaintiff around 1980s and did not know her before. They later learned that she was the defendant's wife and that the two sisters were her children.
30. She said that her father gave them 6 acres and that after the death of her mother the defendant did not remarry. That the defendant has

already divided the land to her brothers and she did not know about the Salгаа land.

31. When cross examined she said that she only knew of the defendant's land measuring 27 acres at Kitur and had only one title deed. That the two girls were older than her and she heard that the plaintiff had been married elsewhere.

32. She said that she did not know issues between the plaintiff and the defendant before she was born. That he knew the plaintiff's other children when they came around 1980s.

33. On re-examination she said that she did not know what the plaintiff and the defendant acquired in their 10 years' marriage.

34. **DW3 TONY KIPKURUI KIPRONO** the chief Dungiri location testified that he knew the defendant and that his second wife had since died. That he knew him in the 1980s and the plaintiff was not there. That he did not know whether the plaintiff was involved in the purchase of the impugned parcel of land although she resides there in the house of one of his sons.

35. On cross examination she said that the defendant has had issues with the plaintiff's children, M and S. That the land was measuring 27 acres but he did not know how it was purchased.

36. As indicated above the parties were directed to file written submissions which they complied and the same can be summarised as hereunder.

PLAINTIFFS WRITTEN SUBMISSIONS.

37. The plaintiff generally reiterated the evidence as presented during trial and concluded that the issues for determination are whether land parcel SOLAI/NDUNGIRI BLOCK xxx and xxx were matrimonial properties and thus the plaintiff was entitled to the shares thereof and who was entitled to costs.

38. The plaintiff relied on the decision of the court in **T M W V. F M C (2018) eKLR** in which it reiterated section 6 of the Matrimonial Property Act that the same by all intent and purposes were matrimonial property and thus the plaintiff was entitled. That the same were acquired during the pendency of the marriage between the plaintiff and the defendant.

39. That they married in the 1950s and the property were acquired around 1968 when the marriage was subsisting. Despite the fact that the same are registered in the name of the defendant there is no doubt that under section 14 of the Matrimonial Property Act it is presumed unless the contrary is shown that the defendant held it in trust for the plaintiff.

40. consequently, based on the law and the facts presented the plaintiffs prayers be allowed and she be awarded costs as well.

DEFENDANTS WRITTEN SUBMISSIONS.

41. The defendant on his part denied that there was any valid marriage between him and the plaintiff after she left around 1955 because of her rebellious behaviour. The defendant relied on section 3 of the Marriage Act 2014 which defined what a marriage is. That by deserting the defendant for over 40 years and getting other children other than the two by the defendant she could not claim to be a wife of the defendant.

42. As regards the suit parcel of land the defendant submitted that he acquired the same after the plaintiff had left and he married the late GS with whom they were blessed with 11 children. The same was acquired in the 1970s after he joined Kitur land buying company. The proceeds came from the shop and hotel business he was operating with the late Grace.

43. This issue would have been settled according to the plaintiff if DNA test had been undertaken for MK as that would have determined if indeed they were still husband and wife. Michael however declined.

44. The defendant further submitted that there was no contribution at all by the plaintiff in the acquisition of the property as provided under **Section 9 of the Matrimonial Property Act.**

45. On the question of costs, the defendant prayed that the court grants him costs as provided under **Section 27 of the Civil Procedure Act** as the costs follow event.

ANALYSIS AND DETERMINATION.

46. The two central issues in this matter are whether in light of the evidence adduced the plaintiff is the defendant's wife and if so whether she is entitled to a share of the parcel of land.

47. It is in my view no doubt that based on the evidence of both the plaintiff and the defendant they were lawfully married although none was able to establish under what system of law. The plaintiff stated that it was under the tenets of customary law and the defendant paid dowry in form of cows. The defendant admitted that he married the plaintiff although he did not pay any dowry.

48. Whichever way one looks at it there was definitely a marriage between the two. As a result of the said marriage they were blessed with 9 children. The defendant only accepted the two children between him and the plaintiff while the plaintiff insist that all the 9 children belonged to the defendant.

49. The grey area which needs examination is whether the plaintiff left the matrimonial home after the defendant married his second wife GS. The plaintiff admits that her problems with the defendant started when the second wife was married. She said that it even became worse when her mother in law died.

50. The defendant testified that the plaintiff was amorous and a drunkard and she deserted and when to undisclosed destination way back in mid 1950s. That she only came back in the 1980s with other children and she was very sick. The elders prevailed upon him to consider her plight and she settled her with her children in a portion of his land measuring 6 acres. This portion in his testimony was the one he had earmarked for her two daughters J and J whom she had borne with the plaintiff.

51. The two girls had been left behind by the plaintiff and had been taken care by Grace and his mother K. Otherwise it appears the defendant had nothing to do with the plaintiff.

52. Based on the above scanty evidence, as there was no eye witness to their marriage ceremony i find that by their own admission the plaintiff and the defendant lawfully married each other and for all intent and purposes a wife and husband. There was nothing to suggest that there was any divorce but probably active separation.

53. The next issue is whether the plaintiff participated in the purchase of the parcel of land and if so to what extent. Section 9 of the Matrimonial Property Act provides that;

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other 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.”

54. The plaintiff ought to establish that she made contribution towards the acquisition of the property herein. It was the plaintiffs case that she did not leave the matrimonial home but she came to Rongai/Salgaa together with her mother in law where they lived with her in a land belonging to the plaintiff. That later the plaintiff sold the said land and used the proceeds to buy the Solai land. They went back to Solai from Salgaa and stayed in the current parcel of land.

55. What this court was unable to decipher is at what point was the Salgaa land purchased and sold by the defendant. The defendant denied that he had land at Salgaa. There was no evidence to that effect. In the absence of cogent evidence including oral evidence from an independent party this court will believe the defendants version that indeed he had no land at Salgaa.

56. At the same time this court is unable to believe that the plaintiff stayed for all her marriage period with the defendant. This is so for the reason that there was no evidence that the defendant built a house for the plaintiff. If indeed she stayed with him as husband and wife and even if they had domestic issues because of the incoming of the second wife, I find it very onerous to believe that for close to over 40 years the defendant would not built a house for the plaintiff.

57. As at the time of testifying in this matter the plaintiff was and is still staying in her late son’s house, one Stephen. Why was she not settled for all the years if she was simply at home? Even for arguments sake there was no evidence that the plaintiff built a house for the plaintiff or at all. Is it conceivable that the defendant would sire that number of children with the plaintiff, stay for over 40 years or even more and failed to settle his wife and let her stay in her son’s house.? For this reason, this court agrees with the defendant that the plaintiff left the matrimonial home way back in the mid-1950s and only arrived later after the land had been purchased.

58. The contested parcel of land was purchased through proceeds from the shop and hotel business operated by the defendant and Grace his second wife. The land was purchased through Kitur land buying company in which the defendant had shares sometimes around 1969 and they moved to settle therein in 1970. Although the plaintiff said that she was taking care of the children while the plaintiff and his co wife were operating the businesses, i do not find this plausible as she was no longer at the homestead.

59. Further there was no evidence that the money used to purchase the said land were proceeds from the sale of Salgaa/Rongai land as non-existed.

60. The evidence of DW2, the first daughter of Grace that the two elder sisters, J and J stayed with them was believable. She said that she only learned that they were from a different mother when the plaintiff came in the 1980s.

61. This court does not therefore see any part played by the plaintiff as by the time the land was purchased she was not available. By 1969 she was away and although she said that she was in Salgaa in one of the defendant’s parcel or properties, there was no evidence to that effect as found above. In summary she did not participate or contribute in the acquisition of the parcel of land as by the time she came back already the parcels had been purchased.

62. In **ENK V. JNK (2015) eKLR**, the court set out the principles which ought to be taken into consideration in such circumstances. The court stated as hereunder;

“whether property in question was acquired during marriage; whether contribution of either party is a factor, and if so, whether the claimant made such contribution; and if contribution is a factor, how the property is to be distributed”.

63. The property was indeed acquired by the defendant after the plaintiff had deserted the matrimonial home and specifically within the period before she came back. There was no evidence of her contribution in any way. The above authority as well as the Matrimonial Property Act presupposes that even the act of carrying out domestic duties and chores is a contribution towards acquisition of the property. In this case there was none by the plaintiff.

64. In view of the above observations, the plaintiff would not be entitled to a share in the said parcels of land. If this was a succession issue the court would have decided based on the Succession Act. For now, I do not find any reason to allow the prayers sought under the Matrimonial Property Act.

65. Finally, on the issue of failure by MK to undertake a DNA exercise, this court finds the same contemptuous and a total disobedience of the courts orders. As a matter of fact, this court construes that his refusal and by extension the plaintiff was deliberate and an obstruction of justice. The defendant availed himself and the plaintiff and M refused. The plaintiff advised according to M that he should not avail himself.

66. In the premises, this court does not find any merit in this suit and it is hereby dismissed with costs to the defendant.

Dated signed and delivered via video link at Nakuru this 11th day of November 2021.

H K CHEMITEI.

JUDGE.