



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL SUIT NO. 16 OF 2017 (O.S)

FORMERLY NAIROBI HIGH COURT CIVIL SUIT NO. 49 OF 2016 (OS)

SWM.....PLAINTIFF

VERSUS

EKN.....DEFENDANT

JUDGEMENT

Brief facts

The plaintiff filed an Originating Summons dated 22nd November 2016 seeks for a declaration that the properties known as LAIKIPIA/SALAMA PESI BLOCK 1/xxxx; NYERI/WARAZA/xxx; NYERI/MURINGATO/xxxxx and xxxx 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.

2. In defence of this suit, the defendant has filed two Replying Affidavits, one filed on 20th December 2016 and the other dated 29th August 2018. The plaintiff in response further filed a Supplementary Affidavit dated 30th July 2019.

3. The matter came up for hearing on 12th July 2021 whereby both parties gave oral evidence in support of their cases.

The Plaintiff's Case

4. It is the plaintiff's case that she and the respondent got married on 8th December 1984 at Kiaguthu PCEA Church and as a result of their union were blessed with two issues. She stated that the marriage was dissolved on 1st December 2016 vide CM Milimani Divorce Cause No. 716 of 2015. The decree nisi was made absolute on 31st December 2016.

5. The plaintiff states that the defendant and herself lived together as husband and wife at their matrimonial home situated on Land parcel No. NYERI/WARAZA/xxxx till the defendant started neglecting his family and moved out of their matrimonial home to establish another home with another woman. During that period, the plaintiff states that she took care of the children and provided for all their basic needs as well as paying school fees till University Level. The plaintiff further stated that the couple established a private school namely [Particulars Withheld] School and she was issued with a Certificate of Registration as proprietor on 15/6/2006. She purchased all the furniture required in the school and the office furniture together with the school van which the defendant sold without her consent. Through the funds from the school, the applicant contends that they were able to acquire properties NYERI/MURINGATO/xxxx and xxxx otherwise known as [Particulars Withheld] properties vide agreements made on 20/7/2006 and 7/9/2005 and were registered in the name of the defendant. The said properties formed part of their matrimonial properties. The defendant settled on plot xxxx and xxxx where he constructed his house and he planted trees on plots no. xxxx, xxxx and xxxx.

6. The plaintiff argues that she participated in renovation of their matrimonial home on Land Parcel No. NYERI/WARAZO/xxxx. She further contends that during their subsistence of their marriage, the defendant's father bequeathed to him Land Parcel No. LAIKIPIA/SALAMA PESI BLOCK xxx measuring 11.86 Ha which forms part of their matrimonial properties. She adds that they had agreed to lease out the said parcel of land for 25 years and she gave her consent on the understanding that she will get half of the share of the proceeds to cater for the children needs as the payments were to be done annually. She states that she did not receive any monies from the defendant.

7. On cross examination, the plaintiff states that land parcel no. NYERI/WARAZA/xxxx was given to the defendant by his father through inheritance and he was registered as the proprietor in 2015. She further stated that she contributed to the development of their home on the

said parcel.

8. The plaintiff on cross-examination told the court that the land parcel no. LAIKIPIA/PESI BLOCK xxxx was given to the defendant in 2015 and not before they got married as stated by the defendant. The lease attached to the affidavit is dated 12/11/2014. It was executed to the parties on 25th September 2014 and leased out to Renewable Projects Ltd for 25 years by the defendant. The plaintiff confirms that there is no matrimonial house on the said land as it is still on lease.

9. The plaintiff further testified that Land Parcels No. OTHAYA/KIHUGIRU/xxxx was registered in her name on 6/11/2019 and OTHAYA/KIHUGIRU/xxxx on 1/12/2017 do not form part of their matrimonial properties. She stated that she acquired them from her father through succession.

The Defendant's Case

10. The defendant states that he worked for [Particulars Withheld] from 1/11/1978 until 30/6/2017 as an Engineer. It is the defendant's case that the suit properties are not matrimonial properties. Land Parcel No. LAIKIPIA/SALAMA PESI BLOCK xxx was gifted to the defendant by his father before he married the plaintiff. He leased the land for 25 years and he states that the land has never been used as matrimonial property. Land Parcel No. NYERI/WARAZA/xxxx was an inheritance which the defendant states was transferred to him after the marriage to the plaintiff broke down. He inherited the said land after a succession cause being Succession Cause No. 691 of 2014 in Nyeri and he became the registered owner on 21/1/2015. He further states that he constructed a house on the said land in 1991 and the plaintiff never contributed any money in the construction. He states that the plaintiff imposed herself on the said property in December 2014 on the pretext that she was attending their child's traditional ceremony and she has been squatting there ever since without the defendant's consent. The defendant contends that they have been living in rental premises from 1984 until 1991 as their matrimonial home in Ruring'u Nyeri. He adds that the plaintiff never contributed to the acquisition of any property during the tenancy of their marriage. Land Parcels NYERI/MURINGATO/xxxx – Plots xxxxx, xxx, xxx, xxx and xxx according to the defendant are unknown to him.

11. It is the defendant's case that the plaintiff did not contribute to their matrimonial progress and since her employment in the year 1984-2000 she spent her earnings on alcohol and therefore did not contribute to their investment or to utilities in their home. Instead, the defendant states that he singlehandedly invested his earnings from his employment to advance his family. In 2000, he used his saved resources to start a private school in [Particulars Withheld] which he placed under the management of the plaintiff in an attempt to put her to meaningful use. The plaintiff mismanaged the school running down the enterprise which forced the defendant to start again from a scratch. He states that he borrowed loans from employment to put back the business on track and adds that he is still servicing the said loans to date.

12. On cross-examination, the defendant admitted that the plaintiff had 20% shares in ownership of the school in [Particulars Withheld] but she did not contribute any monetary funds to its acquisition. He further stated that the [Particulars Withheld] properties were purchased through a loan which the defendant says he is still paying.

13. By consent, parties hereby agreed to file written submissions in support of their arguments.

The Plaintiff's Submissions

14. The plaintiff submits that the court must give effect to monetary and non-monetary contributions of parties in a marriage during the subsistence of the marriage to acquire matrimonial properties. She refers to the cases of **N.W.M vs K.N.M (2014) eKLR; White vs White (200) UKHL 54 and P.W.K vs J.K.G (2015) eKLR** to support her contention. The plaintiff further submits that she took an active role in managing the family and that she ran a business to support the family, a point acknowledged by the defendant in his replying affidavit in paragraph 15. She points out that through the proceeds of running [Particulars Withheld] School that she undertook management and development of the suit properties as well as their purchase. The plaintiff further contends that they have two issues who are adults with a bright future ahead of them and that is clear evidence of child care. She adds that she engaged in farm work and other activities to beautify the home.

15. She states that the defendant testified that land parcel No. NYERI/WARAZA/xxxx is their matrimonial home and the only home their children have known which shows that the plaintiff indeed made substantial non-monetary contributions in the course of their coverture and is therefore entitled to equal proportions of the matrimonial properties. The plaintiff further submits that it would be discriminative against her when she made non-monetary contributions not to consider the same because she did not provide documentary evidence to support the same. The plaintiff urges the court to find that looking after the family and raising the children to be deemed as sufficient indirect contribution to the acquisition of the properties. The plaintiff relies on the cases of **FIDA vs The Honourable Attorney General and ISLA Nairobi HC Constitution Petition No. 1643/2006; Agnes Wanjala William vs Jacob Patrius Nicholas Vander C.A No. 127/201; Echaria vs Echaria Civil Appeal No. 75 of 2001 and P.N.N vs Z.M.N CA Civil Appeal No. 128 of 2014 (2017) eKLR.**

16. The plaintiff submits that the ancestral land where the matrimonial home is established was bequeathed to the defendant by his father during the currency of their marriage and not before as alleged by the defendant. As such, it is matrimonial property for all intents and purposes.

17. The plaintiff further states that Land Parcel No. OTHAYA/KIHUGIRU/xxxx and OTHAYA/KIHUGIRU/xxxx cannot be deemed to be matrimonial property because the plaintiff acquired ownership on 5/11/2019 and 1/12/2017 when the marriage had been dissolved. She points out that the decree nisi was issued on 1/12/2016 and made absolute on 31/12/2016. As such, the plaintiff prays that the court finds that she has proved her case on a balance of probabilities and grant her the prayers she has sought in her originating summons.

The Defendant's Submissions.

18. The defendant reiterates the contents of his affidavits and submits that Land Parcels No. LAIKIPIA/SALAMA PESI BLOCK xxxx and

NYERI/WARAZA/xxxx are not matrimonial property pursuant to **Section 6(1) of the Matrimonial Property Act**. Furthermore, the defendant relies on **Section 7 of the Matrimonial Property Act** and states that the plaintiff did not contribute towards the acquisition of the said properties and the properties were not inherited during the subsistence of the marriage. The defendant makes reference to the case of **P.N.N vs Z.W.N [2017] eKLR and M.N.H vs F.H.M [2018] eKLR** and urges the court to find that distribution of matrimonial property ought not to be divided at 50:50 but it must be decided after weighing the peculiar circumstances of each case. The defendant further relies on the case of **E.N.K vs J.N. K [2015] eKLR** and submits that since Land Parcel No. NYERI/WARAZA/xxxx was transferred to him after the marriage had broken down, it does not fall within the tenets of matrimonial property. As such, the defendant prays that the suit be dismissed with costs.

Issues for determination

19. After careful analysis, the three issues for determination are identified as follows:-

- a. Whether Land Parcel Nos. LAIKIPIA/SALAMA PESI BLOCK xxxx; NYERI/WARAZA/xxxx; NYERI/MURINGATO/xxxx- PLOTS xxxx & xxxx and NYERI/MURINGATO/xxxx- PLOTS xxxx, xxxx & xxxx constitute matrimonial property;
- b. Whether the plaintiff contributed towards the acquisition and development of the suit properties.
- c. Whether the plaintiff is entitled to 50% share of the said properties.

The Law

Whether Land Parcel Nos. LAIKIPIA/SALAMA PESI BLOCK xxxx; NYERI/WARAZA/xxxx; NYERI/MURINGATO/xxxx- PLOTS xxxx & xxxx and NYERI/MURINGATO/xxxx- PLOTS xxxx, xxxx & xxxx constitute matrimonial property

20. **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.

21. 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.

Section 2 of the Act defines contribution as

- 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**

“Family business’ means any business which –

- a. is run for the benefit of the family by both spouse or either spouse; and**
- b. generates income or other resources wholly or part of which are for the benefit of the family;”**

The parties in this cause got married at Kiaguthu PCEA church on 8th December 1984. The marriage herein was dissolved on 1st December 2016 through a decree nisi that was made absolute on 31st December 2016.

22. As for L.R No.s NYERI/MURINGATO/xxxx-plots xxxx,xxxx,xxxx,xxxx and xxxx otherwise known as the [Particulars Withheld] properties, the defendant said that he took a loan and bought the said plots. The properties were acquired during the subsistence of the marriage which is not disputed by the defendant. His contention was that the plaintiff did not contribute to the purchase of the said properties. The marriage between the parties was still in existence in that it was dissolved in 2016. The law on division of property upon dissolution of marriage is contained in the Matrimonial Property Act, 2013 and in a host of decisions. I therefore find that LR NYERI/MURINGATO/xxxx plots xxxx, xxxx, xxxx, xxxx and xxxx are matrimonial properties

23. This land L.R xxxx was acquired in 2015 as shown by a copy of the register. It was through transmission in the defendant father’s estate Succession Cause No. 691 of 2014. The plaintiff says the matrimonial house to which she contributed to the construction was put up before 2014. She moved to occupy the home in the same year. The plaintiff did not adduce any evidence to demonstrate that she contributed to the construction of the matrimonial home and neither did she establish that she moved there before the land was acquired through succession. In my considered view the land having been acquired from the estate of defendant’s father by the defendant as a beneficiary cannot be held as a matrimonial property.

24. As regards L.R LAIKIPIA/SALAMA PESI xxxx, the plaintiff said it was a gift from his father during the marriage of the parties. He

went on to say that his father gave him the land in exchange of money because the father was in a financial problem. The defendant did not explain the source of the funds he gave his father. It therefore follows that the funds given were those meant for investment or subsistence of his family to which the plaintiff has an entitlement. The exchange of the land with money is akin to purchasing the land and thus fits within the meaning of “acquired” under the Act. The said land was acquired during the marriage of the parties which is not denied. The land was later leased by the defendant with the consent of the plaintiff as she stated in her evidence. This was also stated in clause 16 of the lease agreement. This goes further to confirm that the parties had no doubt in their minds that the property belonged to the family and that it was in order for the defendant to seek spousal consent in leasing it out.

25. I therefore find that L.R LAIKIPIA/SALAMA PESI/BLOCK xxxx constitutes matrimonial property.

What share is each of the parties entitled to?

26. The defendant was in formal employment with [Particulars Withheld] as an engineer and earned a salary of a professional that may have enabled him to service loans for purchase of various properties and other types of investment. Although he denies that the plaintiff made any contribution to the purchase of properties she testified that she worked as a teacher before she resigned to go and run the family business namely the [Particulars Withheld] School in the year 2000. This is not in dispute that the plaintiff who had 20% shares and worked as a manager of the school also earned substantial income for the family for over ten (10) years while the marriage subsisted.

27. The defendant branded the plaintiff as a drunkard arguing that she wasted resources from the family business and never contributed to purchase of any of the family properties. The couple had two children both of whom were over 30 years of age at the time this case was filed in 2016. The plaintiff no doubt took care of the said children and gave them parental love. She testified that she provided for the maintenance of the children and paid school fees for them when the defendant established another home with another woman. This was not disputed by the defendant. To the defendant, the plaintiff was a wife who took care of him as he served the nation at his place of work. For the plaintiff to have a successful career 39 years, the plaintiff did contribute to his performance at work that earned him the long service with [Particulars Withheld].

28. With her salary as a teacher and a manager of a family business, the plaintiff also contributed to the welfare of the family and cannot be said to have done nothing during their married life of 32 years.

29. It was held in the case of **MVV Vs AN 2021 eKLR** by Judge T. Matheka where the plaintiff was not just a housewife but employed and where the marriage was in existence for eight (8) years that:-

“It is not easy for the spouse working away from home and sending money to lay claim to the whole property purchased and developed with that money by the spouse staying at home and taking care of the children and the family. That spouse will be heard to say that the other one was not employed so they contributed nothing. That can no longer be a tenable argument as it is a fact that stay at home parents and in particular women because of our cultural connotations do much more work(house wives) due to the nature of the job. For instance society has now placed monetary value to carrying a baby in the womb. this is seen on the unregulated surrogacy agreements that people are getting into. Raising of children is a full time job that families pay a person to do. Cooking and cleaning as well. Hence for a woman in employment who has to balance child bearing and rearing this contribution must be considered.”

The judge went further to state:-

“It should also count if the man also does the same thing. It should count when division of the property is being discussed. This is because at the end of the day, a monetary value will be put on the property, and each party will be showing how much they put in. It is time that parties took time to give evidence, sufficient enough to support the value to be placed on the less obvious contribution. It is unfair and unjust for one party to be busy just making their money (the ‘seen’ income) while the other is doing two or three other jobs in the family whose income is ‘unseen’ and then claim this other one did nothing. This attitude is so entrenched we still hear women especially housewives say ‘sifanyi kazi’(literally I do not do any work) simply because they do not leave the home to go earn money elsewhere.

30. Following the foregoing reasoning, the honourable judge in the M.V.V case apportioned the matrimonial property in equal shares between the parties.

31. I agree fully with judge Matheka’s reasoning above that non-monetary contribution of a spouse ought to be given equal weight with monetary contribution. The plaintiff was a wife of the defendant for over thirty years and brought up the two issues of marriage to adulthood before the unfortunate event of divorce came calling.

32. The parties were in agreement that the plaintiff was the manager of their primary school at [Particulars Withheld] in Nyeri. The business earned the family income that must have been used for family investments. Even if the plaintiff enjoyed her life by taking a few alcoholic drinks once in a while, this does not mean that she squandered the business income to an extent that the business became non-profitable. I hold that from the business income, the plaintiff contributed monetarily to the family investments not forgetting that earlier she was employed as a teacher earning a salary.

33. In the final analysis, I find that the parties herein contributed to the purchase of the matrimonial properties namely:-

a. L.R. NYERI/MURINGATO/xxxx – PLOTS NO.s xxxx,xxxx,xxxx,xxxx AND xxxx

b. LAIKIPIA/SALAMA PESI/BLOCK xxxx

34. I therefore enter judgment in favour of the plaintiff to the effect that she is entitled to half share of the said properties.

35. Each party will meet their own costs of the suit

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 4TH DAY OF NOVEMBER, 2021

F. MUCHEMI

JUDGE

Judgement delivered through videolink this 4th day of November, 2021.