



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL SUIT NO. 15 OF 2018 (OS)
IN THE MATTER OF THE MATRIMONIAL PROPERTY
ACT, 2013
GNM PLAINTIFF
VERSUS
PMK.....DEFENDANT
J U D G M E N T

1. By an Originating Summons dated 22/6/2018, the plaintiff sought the determination of the following questions: -

“

- a. Whether the plaintiff and defendant have been husband and wife?
- b. Whether the plaintiff has contributed to the acquisition of the properties?
- c. What is the plaintiff's equitable share over the properties acquired during the subsistence of the marriage?
- d. Whether the plaintiff is entitled to 50% of the matrimonial properties listed herein?
- e. What are the orders as to costs? ”

2. The Summons was supported by the plaintiff's affidavit wherein she stated that she got married to the defendant in 1983. The marriage was however dissolved in **Meru Chief Magistrate's Court, Divorce Cause No. 10 of 2015**. In the course of their union, they acquired and utilized, a parcel of land at **Kitharene**, their matrimonial home at **Mwacheke** in **Kaaga** and a parcel of land at **Ntumichiu**.

3. She further stated that she raised Kshs.50,000/- for the purchase of one acre of land to be excised from **parcel no. Nyaki/Mulathankari/****** then being sold at Ksh.100,000/-. She purchased fencing poles for their matrimonial home and obtained a loan of Kshs.53,000/- from Walimu Sacco to build a timber house. She solely began the construction of a modern 3 bedroomed house from the year 1998 to 2003 and after its completion the defendant was reluctant to sleep in it for months and took refuge in the old timber house.

4. The Summons was opposed through the replying affidavit of the defendant sworn on 10/7/2018. The defendant stated that he solely purchased **LR NYAKI/MULATHANKARI/****** from one **JKR** on 19/6/1989. That the plaintiff did not contribute anything for the purchase of the said property. The land at **Kitharene** was not family property but an inheritance from his father. That in the premises, it did not form part of matrimonial property.

5. Before the hearing, the parties consented that the properties the subject of the matter were **Nyaki/Mulathankari/****, Kitharene/Adjudication Section/Nos. 2411 and 1567, (hereinafter "plot nos. ****, ***** and *****)** respectively.

6. At the hearing, the parties gave oral evidence without calling any witness. The plaintiff told the court that she was married to the defendant between 1983 to 2017. She adopted her supporting affidavit and added that she contributed in the payment of school fees for the children of the marriage. She bought a cow and was given another by her late mother. She prayed that **plot ****** be transferred to her name and **plot nos. **** and ******* be divided equally between him and the defendant.

7. She indicated that the defendant currently lives on plot no. 1450 while she lives in Nanyuki as he had chased her away from that property. She told the Court that she contributed Kshs.50,000/- for the purchase of **one acre** but the defendant sold ½ an acre and left ½ acre being plot no. 1450. That the remaining ½ was therefore her's and should be registered in her name.

8. The defendant testified that it is him and his brother one **SMK** who purchased one acre from Joyce Kathiri Ringera for Kshs.100,000/- in 1989. That they each contributed Kshs.50,000/- whereby he gave his said brother ½ an acre thereof which was registered as **plot no. ****** and he was left with plot No. 1450. That for his share of Kshs.50,000/-, he got a loan of Kshs.40,000/- from **Mwalimu Cooperative** having given a down payment of Kshs.2,000/-. That his brother completed the purchase price by paying Kshs.58,000/- and he sorted him out later on. He went on to fence the land and took care of educating the children.

9. Having considered the pleadings and the evidence on record, the issues that fall for determination are: -

- a. **Whether plot nos. 1450, 2411 and 1567 are matrimonial property.**
- b. **Whether the plaintiff contributed towards the acquisition of the properties in (a) above.**
- c. **Whether the said properties should be divided between the parties and if so, how?.**

10. **Section 6 of the Matrimonial Property Act, No. 49 of 2013 (hereinafter "the Act")** defines matrimonial property as:-

"(1) For the purposes of this Act, matrimonial property means—

- (a) the matrimonial home or homes;**
- (b) household goods and effects in the matrimonial home or homes; or**
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.**

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property".

11. **Section 2 of the Matrimonial Property Act** provides: -

"Matrimonial home" means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property".

12. While the plaintiff contended that **plot no.****** was acquired through joint effort between her and the defendant, with each paying Kshs.50,000/-, the defendant contended otherwise. In his replying affidavit, which he adopted as his evidence at the trial, the defendant stated that he sorely purchased the same from one **Joyce Kathiri** Ringera for Kshs.100,000/-.

13. He contended that he paid the vendor Kshs.42,000/- upon signing the agreement and issued a personal cheque of Kshs.58,000/- for the balance. He produced a sale agreement dated 19/7/1989 between himself and the vendor, an acknowledgement receipt by the vendor dated 19/7/1989, a copy of a cheque dated 5/4/1990, a copy of a letter from the Chief Nyaki Location dated 16/4/1990 in support of his contentions.

14. The foregoing then was the rival evidence by the respective parties. This Court has carefully analyzed and considered the same.

15. The defendant's evidence was contradictory and did not add up. In paragraphs 4 and 5 of the replying affidavit he was categorical that he sorely purchased **plot no. ****** from **Joyce Kathiri Ringera**. He produced a sale agreement dated 19/07/1989 which disclosed the purchase price to be Kshs.100,000/-. He further stated that he paid Kshs.42,000/- at the signing of the agreement and issued a personal cheque of Kshs.58,000/-. The two payments would total Kshs.100,000/-.

16. However, he further stated that he instructed his bankers to transfer from his account Kshs.39,000/- to the vendor vide a letter dated 20/07/1989. That he had initially paid to the purchaser on 7/5/1989 Kshs.2,000/- for which he produced a copy of an acknowledgement as **"PK4"**. All these will amount to Kshs.141,000/- which was not explained.

17. As if that is not enough, the defendant did not produce any evidence that he issued a personal cheque of Kshs.58,000/- to the vendor. The copy of the cheque that was produced was a bankers cheque no. 008803 by Co-operative Bank, Meru dated 5/4/1989.

18. To compound the matters further, it was the defendant's testimony that he purchased one acre from the vendor jointly with his brother one **SMK** with each contributing Kshs.50,000/-. That it is his said brother who paid Kshs.58,000/= while he paid Kshs.42,000/=. That he excised ½ an acre for his said brother being **plot no.****** while he remained with **plot no. ******. The said brother was not called and no reason was given why he was not called to corroborate the defendant's allegations.

19. The sale agreement produced showed that the property purchased was one (1) acre by the defendant alone. The defendant raised the issue of joint purchase with his brother. This was information in the special knowledge of the defendant. **Section 112 of the Evidence Act Cap 80** is clear on how a court is to deal with such a situation.

20. On the other hand, the plaintiff was firm and consistent in her testimony. She testified that the property was purchased by her and the defendant jointly. She made her contribution of Kshs.50,000/- and the defendant also paid Kshs.50,000/- for one acre but the plaintiff excised ½ thereof and sold it. Although she did not have any evidence to prove that the defendant had sold ½ acre from the purchased property, the sale agreement dated 19/7/1989 shows that what was being purchased from **Joyce Kathiri** was one acre while the title for **plot no. ***** clearly shows the property is only ½ acre. The defendant admitted to have transferred a ½ acre to his brother.

21. The plaintiff backed her claim of contributing Kshs.50,000/- by producing copies of loan agreements that she claimed to have used in the purchase and development of the subject property. Her evidence remained unshaken despite intense cross-examination. I find that the plaintiff must have contributed both in acquisition and the development of the subject property by the construction of a three bedroomed modern house.

22. As regards the other two properties, **plot nos. **** and *****, these were given to the defendant by his father a few years after he got married to the plaintiff. The plaintiff contended that they were a gift from the father in law because of her marriage to the defendant. The defendant was of a different view.

23. While the said properties were given to the defendant by his father, they were not acquired by him through inheritance. They were given to him after his marriage to the plaintiff. The uncontroverted evidence was that, during the 37 year marriage, the plaintiff added value thereto by working on the said properties. The income therefrom was used for the upkeep and benefit of the family. It may have reduced the burden of the defendant in bringing up his children.

24. The Act defines “contribution” to mean “monetary and non-monetary contributions” which includes; domestic work and management of the matrimonial home, child care, companionship, management of family business or property, and farm work.

25. The parties referred the Court to several authorities in their respective submissions. These include **N. N. N. v. N. M. [2017] Eklr, E.N.K v. J.N.K [2015] Eklr, R.R.K. v. J.M.N. [2017] Eklr and A.K.M. v. N.N.N. [2019] Eklr**. From the said authorities, it is clear that where there is proof of contribution by the spouses, the principle of equality decreed by **Article 45(3) of the Constitution** applies. I will apply the said principle in this matter.

26. I am alive to the plaintiff’s contention that since the defendant sold ½ acre of the property they had initially purchased, the remaining ½ acre should be registered in her name.

27. That contention cannot hold. Firstly, in the questions that were framed for determination in her Originating Summons, she had claimed that she is entitled to 50% of the said property. She cannot now turn around and claim more even if she proved the fact that she contributed more. A party is always bound by his/her pleadings. Secondly, the ½ acre seems to have been sold long time ago, during coverture. She must have either approved of it or by her silence, she had acquiesced to that fact.

28. Accordingly, I hold that the plaintiff is only entitled to 50% of that property as well as to **plot nos. ***** and ******, respectively.

29. Since it was alleged that the defendant is now retired. He lives on **plot no.****** which was their matrimonial home and from where he chased away the plaintiff. The best course will be to have the property valued and the defendant pay the plaintiff 50% of the value thereof within a specified period.

30. Accordingly, the plaintiff has proved her case to the required standard. Her case succeeds and judgment is entered for the plaintiff against the defendant as follows: -

a. It is declared that during their marriage, they jointly acquired and developed Nyaki/Mulathankari/***, Kitharene Adjudication Section Nos. **** and *****, respectively.**

b. The plaintiff is entitled to 50% of the said Nyaki/Mulathankari/***, Kitharene Adjudication Section Nos. **** and *****, respectively.**

c. As regards Nyaki/Mulathankari/***: -**

i. There be a joint valuation of the property within 30 days. Thereafter, the defendant to pay to the plaintiff 50% of the value thereof within 30 days of valuation in default execution for the said amount to issue.

ii. In default of a joint valuation, each party to appoint his/her own valuer within 14 days of the lapse of the 30 days ordered in (a) above. Either valuer to proceed and value the said Nyaki/Mulathankari/** within 14 days thereafter and file their respective valuations in Court.**

iii. The Deputy Registrar to thereafter assess 50% of the value of the said property based on the valuations filed by the respective valuers. The defendant to pay to the plaintiff the said sum within 14 days of the Deputy Registrar assessing the 50% value in default whereof execution to issue forthwith.

d. As regards Kitharene Adjudication Section Nos. ***and *****, respectively the plaintiff be registered as owner of 50% thereof forthwith.**

e. Each party to bear own costs.

DATED and DELIVERED at Meru this 14th day of April , 2020.

A. MABEYA

JUDGE