



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 21 OF 2015

NKM.....PLAINTIFF

VERSUS

SMM.....1ST DEFENDANT

JMK.....2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit by way of a plaint dated 4th April, 2015 against the 1st and 2nd defendants seeking the following orders;

i. A permanent injunction against the defendants, their servants, employees and/or agents, restraining them from wasting, disposing, alienating, selling, transferring, leasing, charging and/or otherwise dealing with the plaintiff's matrimonial property including but not limited to; L.R No. xxxxx/xx-Embakasi Nairobi, Title Numbers Mwala/Kyawango/xxx-Mwala, Mwala Kyawango/xxx-Mwala, Mwala Kyawango/xxx-Mwala, motor vehicles registration number KBT [particulars withheld] Isuzu Bus, KBE [particulars withheld] Suzuki Station Wagon, KBX [particulars withheld] Chevrolet Station Wagon, KBU [particulars withheld] Isuzu Bus and KAC [particulars withheld] Mazda Van without the Plaintiff's consent.

ii. A permanent injunction against the 2nd defendant restraining her from using, converting, accessing and/or trespassing into the Plaintiff's matrimonial property including but not limited to the Plaintiff's matrimonial home situate in L.R No. xxxxx/xx - Embakasi Nairobi, Mwala/Kyawango/xxx-Mwala, Mwala Kyawango/xxx-Mwala, Mwala Kyawango/xxx-Mwala as well as, motor vehicles registration number KBT [particulars withheld] Isuzu Bus, KBE [particulars withheld] Suzuki Station Wagon, KBX [particulars withheld] Chevrolet Station Wagon, KBU [particulars withheld] Isuzu Bus, KBU [particulars withheld] Isuzu Bus, KBY [particulars withheld] Hino Bus, KBV [particulars withheld] Isuzu Bus and KAC [particulars withheld] Mazda Van without the Plaintiff's consent.

iii. A declaration that the 2nd defendant has conducted her affairs in a manner not befitting the public office that she holds as employee of the Teachers Service Commission.

iv. Costs of this suit.

2. Before the matter was set down for hearing, the matter was referred for mediation. A mediation settlement agreement was reached which was adopted by the Court on 21st September, 2017. The terms agreed upon and adopted by the court from the Mediation Settlement Agreement reached between the parties were that:

a. The 1st defendant undertook not to dispose of any of the properties acquired by him and/or the Plaintiff during their marriage.

b. The Plaintiff was to continue to occupy a House located in Avenue Park Estate situate in Nairobi L.R. No xxxxx/xx. The 1st defendant undertook not to interfere with the Plaintiff's occupation and use of the property. The ownership of the property was to remain in the joint names of the Plaintiff and the 1st defendant.

c. Parcels no. Kajiado/Kaputei Central /xxxx, xxxx, xxxx and xxxx are subject to litigation in Machakos Civil case No 299 of 2012 and subject of the said matter being determined in their favour, the plaintiff and the 1st defendant shall be entitled to equal and shared ownership thereof.

i. The plaintiff and the 1st defendant shall be entitled to share equally all compensation to be paid in respect of

compensation to be received from the Government on compulsory acquisition of parcel no. Kajiado/Kaputei central /xxxx.

ii. The Plaintiff and the 1st defendant shall be entitled to equal and joint ownership and shall be registered as such in respect of the properties known as Kajiado/Kaputei Central /xxxx, xxxx and xxxx which are subject to litigation in Machakos Civil case No 299 of 2012 and subject of the said matter being determined in their favour.

d. The 1st defendant shall live with their two children and shall be responsible for their upkeep and maintenance.

e. The plaintiff has no claim in respect of the ownership and or use of motor vehicle registration number KBT [particulars withheld], KBE [particulars withheld], KBX [particulars withheld], KBU [particulars withheld], KBU [particulars withheld] and KBV [particulars withheld].

f. The 1st defendant shall repair motor vehicle registration number KAC [particulars withheld] and transfer its title of ownership in the Plaintiff's name.

g. Parties were unable to agree on the issues relating to properties in Mwala known as Mwala/Kyawango/xxx, Mwala/Kyawango/xxx and Mwala/Kyawango/xxx and were at liberty to move the court on the said 3 properties.

3. This decision is therefore in respect to the properties known as Mwala/Kyawango/xxx, Mwala/Kyawango/xxx and Mwala/Kyawango/xxx over which the Plaintiff is seeking injunctive relief against the defendants and an order of access. In support of her claim, the plaintiff adopted her statement dated 4th April 2015 in which she states that she is the wife of the 1st defendant having been married under the African Christian Marriage and divorce Act (Repealed). She averred that during the subsistence of their marriage they acquired several properties including the Mwala Properties. She claimed that in June 2007 the 1st defendant deserted their matrimonial home in Avenue Park Estate and went to live in another matrimonial home in Pipeline Estate Karura with another woman. Further that the 2nd defendant has been using the matrimonial home in Mwala without her consent and on the instructions of the Plaintiff has denied her access to her home.

4. At the hearing of the case, the Plaintiff gave testimony that she is a Civil Servant and a part-time lecturer. She stated that she contributed wholly toward the purchase and construction of the Mwala properties with money from a loan at Ukulima Sacco, and additional money through the sale of her Plot in Mlolongo. The Plaintiff stated that in February 2000 the 1st defendant lost his job at Coca Cola Africa, and they engaged in farming to supplement her salary. That it was not until the 1st defendant got another job at Kenya Pipeline Company limited that he deserted his family.

5. The plaintiff sought orders to access the properties in issue and a chance to visit her son's grave who is buried therein. Further, that the 1st and 2nd defendant have denied her access and yet they do not live there wholly and only visit on weekends and holidays. She stated that of the three houses in Mwala, the 2nd defendant had turned two of the smaller houses into chicken pens. She urged the Court to restrain the 2nd defendant from using her house and grant her access as she needed to farm to enable her provide for her children who are still dependent on her.

6. PW2 NMM testified that he was a witness to the purchase of the Mwala Properties. He stated that the 1st defendant had informed him that his wife, the Plaintiff herein, had taken a loan to enable them purchase the properties. He also stated that at the time, the 1st defendant who is his brother had been laid off at Coca Cola Company and had no known means of income.

7. In his testimony, the 1st defendant stated that he purchased the properties in Mwala solely, while the plaintiff took a loan of only Kshs. 100,000 money which was used to construct the walls. He asserted that most of the construction was done by his finances as he earned more than the Plaintiff. He averred that he farms and has built a stone house on Plot no. xxx, while plot xxx and xxx are used for livestock keeping. He urged that he did not deny the plaintiff access to the Mwala properties, but was apprehensive that the plaintiff only intended to cause chaos in his life and to separate him with the 2nd defendant whom he maintains does not live on the Mwala properties but only visits him when he is there and during the holidays.

8. The 1st defendant further stated that the house at Avenue Park Estate is valued at Kshs. 17 million and is in the name of the Plaintiff although he is the one who bought the property while the Mwala properties are valued at about 2 million. He denied claims that he never maintained his children insisting has always provided for them and still does so today even when they are adults. He denied the Plaintiff's claim that the property sold in Mlolongo to raise funds to build the Mwala house belonged to the Plaintiff insisting it solely belonged to her and insisted that it belonged to him solely.

9. The parties filed written submissions in support of their respective positions. In her submissions the plaintiff reiterated the contents of her claim relying on the cases of **M W K v S K K & 5 others [2018] eKLR**, **Leah Wangui Ngata v Francis Ngatta King'ori & Another [2016] eKLR** and **Ochako Obinchi v Zachary Oyoti Nyamongo [2018] eKLR**. She submitted that her evidence demonstrated that the suit properties fell under the ambit of matrimonial property and she had established her contribution. That she had thus proved ownership and beneficial interest.

10. In their submissions, the defendants relied on the cases of **Migori HC Civil Appeal no. 52 of 2017 Daniel Otieno Migore v South Nyanza Co. Ltd[2018]eKLR** and **Raila Odinga & Another vs IEBC & 2 others [2017] eKLR** in support of their case. They submitted that this Court's jurisdiction under the Matrimonial Properties Act having not been invoked in the pleadings or by the consent of the parties, this court lacked jurisdiction to decide the questions being raised by the Plaintiff. Further that the suit against the 2nd defendant was actuated by malice to punish her for being in a relationship with the 1st defendant. They urged the court to dismiss the suit with costs.

11. I have considered the pleadings herein, the statements in support and affidavits, the evidence of the parties and the written submissions by both counsels. The issue that renders itself for determination is whether there is a prima facie case established to grant the orders of Injunction and access to the property in issue as sought.

12. The parties herein are in agreement that they were married under the African Christian Marriage and Divorce Act (Repealed) and a marriage certificate no. [particulars withheld] dated 16th October, 1982 was produced to that effect. At the time of the hearing, there was a pending Petition for divorce between the parties that was yet to be heard. In this regard, I am satisfied that the parties are husband and wife.

13. The dispute is whether Mwala/Kyawango/xxx, xxx and xxx are matrimonial properties. The defendants claim that they are not while the plaintiff asserts that they are. It is however clear that the properties were acquired and developed during the subsistence of the marriage. It is on these properties that the Plaintiff and 1st defendant settled and lived during their marriage.

14. **Section 6(1)** of the Matrimonial property Act provides the meaning of matrimonial property as follows;

(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.

The properties in Mwala having been acquired during the subsistence of the marriage form part of matrimonial property. Ownership of matrimonial property is provided for under Section 7 of the Matrimonial Property Act, 2013 as follows: -

“Subject to section 6 (3), 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”.

15. However, in this instance, the Court has not been moved by the Plaintiff to determine the contribution of each party for the purposes of distribution as the marriage between the Plaintiff and the 1st defendant is yet to be dissolved. The plaintiff is seeking a permanent injunction against the defendants restraining them from alienating the property and an order granting her access to the land.

16. The Constitution of Kenya under **Article 45 (3)** underscores the fundamental place of the family in our society. It provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

17. Before the enactment of the Matrimonial Properties Act, the Land Registration Act 2012 under **Section 28 (a)** provided that spousal rights over matrimonial property were overriding interests. **Section 2** of the said Act provides that matrimonial property means any interest in land or lease that is acquired by a spouse or spouses during the subsistence of the marriage.

18. Further **Section 93 (2)** of the Land Registration Act No. 3 of 2012 provides:-

“If land is held in the name of one spouse only but the other spouse(s) contributes by their labour or other means to the productivity, upkeep and improvement of the land, that spouse (s) shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by spouse(s) shall be recognized in all cases as if they were registered”.

19. It is the evidence of the Plaintiff that the property in issue is matrimonial, having been acquired during the subsistence of their marriage, having settled the family there and having buried their child on the property. That a permanent house was built for the family on the properties where they both lived and that she and her husband practiced Agriculture on the land. That they jointly developed the land and in particular, that she contributed wholly towards the acquisition and development of the suit properties as the 1st defendant was not employed at the time.

20. On his part, the 1st defendant asserted that the Plaintiff only contributed Kshs. 100,000/= money acquired through a loan from Ukulima Sacco. He denied claims that the plaintiff contributed towards the acquisition and development of the properties. He pointed out that the plaintiff was already in possession of the property in Avenue Park Estate and her claim for access on the suit properties was not genuine and was only intended to cause chaos in his relationship with the 2nd defendant.

21. The Matrimonial Property Act 2013 was enacted to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. **Section 12 (4)** of the Act provides that a spouse shall not be evicted from the matrimonial home by any person except:

a) On the sale of any estate or interest in the matrimonial home in execution of a decree.

b) by a trustee in bankruptcy or

c) by a mortgage or chargee in exercise of a power of sale or other remedy given under the law.

22. This court finds that the Plaintiff has rights over the properties in Mwala and she contributed financially to the purchase and development of the property. She has thus proved that it is matrimonial property and she has a beneficial interest thereto. The manner of the distribution of the properties must abide the outcome of the divorce proceedings and substantive suit for the distribution of the property.

23. On the issue of access, the 1st defendant denied that he had refused to grant the Plaintiff access to the property in issue. On her part the Plaintiff blamed the 2nd defendant for her woes claiming that she was directly responsible for the plaintiff being locked out of her matrimonial home. From the material placed before this Court by both parties, having found the property to be matrimonial the Plaintiff has a right to access it. She is therefore entitled to visit her child's grave located on the property and to use of the matrimonial home situate therein.

24. Be that as it may, the court notes that relationship between the plaintiff and the 1st defendant is toxic. From the evidence presented in court, the Plaintiff has exclusive use of Avenue Park House which is also matrimonial property and has a much higher value than the Mwala Properties put together. Without delving into the actual distribution of the property, it is my considered view that the orders sought are not merited at this point in time bearing in mind all the items agreed upon in the Mediation Settlement Agreement.

25. In the said Mediation Settlement Agreement, the 1st defendant already undertook not to dispose of any of the properties acquired by him and/or the plaintiff during the subsistence of their marriage. There is also no evidence that the 1st defendant is in occupation of any other matrimonial property. The orders sought are therefore not necessary at this point save to allow the plaintiff to access her son's grave.

26. On the issue raised by the defendants in their submissions that this Court lacks jurisdiction to entertain this matter, **Section 17** of the Matrimonial Property Act of 2013 provides as follows:

(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

This Court has jurisdiction to determine the issues raised by the Plaintiff without going further to distribute the property between the parties at this stage.

DATED SIGNED AND DELIVERED VIA EMAIL AT NAIROBI THIS 8TH DAY OF APRIL, 2020.

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L. A. ACHODE

HIGH

COURT

JUDGE