



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL SUIT NO. 4 OF 2017

FW.....PLAINTIFF

VERSUS

RWJ.....1ST DEFENDANT

DORCAS ANN ASIONYI.....2ND DEFENDANT

JUDGEMENT

1. By her plaint dated 6th April 2017 the Plaintiff sought the following reliefs against the Defendants.

(a) a declaration that all the property registered and or purchased by the 1st Defendant in his name is matrimonial property and the 1st Defendant is holding the same in trust for himself and the Plaintiff.

(b) a declaration that the 1st Defendant has no capacity to contract another marriage under any system of law during the subsistence of the marriage with the Plaintiff.

(c) an injunction to restrain the 2nd Defendant from occupying or remaining in the Plaintiff's family property at Sipala or any other family property.

2. The Plaintiff also prayed for the costs of the suit. The Defendants filed their defence and prayed that the suit be dismissed with costs and for being frivolous and an abuse of the courts process.

3. The matter did proceed to full trial and the parties adduced their evidence which it shall be appropriate to summarise before analysing the same.

PLAINTIFFS CASE

4. She testified that she got married to the 1st Defendant on the 4th day of November 1995 under the tenets of African Christian Marriage and Divorce act which is now repealed. They were blessed with 4 children although one of them was from a union between the 1st Plaintiff and someone else but nonetheless she has been in her custody all through and has taken her as her child for all intent and purposes.

5. The Plaintiff who is a nurse has been in Britain for about 11 years having gone to further her nursing career and in the process obtained a resident permit which enabled her to work there. The 1st Defendant, a civil servant has all along remained in Kenya but would occasionally travelled to Britain just as the Plaintiff would travel back home at least three or 4 times in a year.

6. The Plaintiff went on to state that she has been paying the children school fees all along and all of them are now adults and in colleges and they are pursuing their various careers. One of them RW is in Britain with her. She produced several documents indicating that she has been paying the children's school fees.

7. She said that they were living in Kibomet before they left and later they purchased land at Ndivisi and she sent 600 pounds to the 1st Defendant in the year 2015 towards the said purchase. In April, 2017 they went to do a house warming party but the 1st Defendant sent police officers who came and caused disruption and had them arrested and taken to Webuye police station.

8. It was at the above police station that the 2nd Defendant appeared and claimed that that was her home and that the Plaintiff did not have

any right over it. The police then told her to seek legal redress in court.

9. She said that the funds to build the home was from the 1st Defendant and that it was their matrimonial home. She said that she had contributed in the family by paying the children's school fees among others. She said that they have other properties including a plot in Nairobi which she purchased but it was as well a family asset.

10. On cross examination she said that she would come back to Kenya about 4 times in a year and she would go to her matrimonial home. She said that although the first Defendant bought the land she constructed the house using her own money. She said that she took some loan and pumped into the construction of the house at Kibomet.

11. In regard to the Sipala land she contributed 600 pounds which was equivalent to kshs.75000. She reiterated that the 1st Defendant sent police to arrest her during the house warming party and those other persons arrested included E, AB and a cook.

12. She said that apart from the Sipala property there are other properties including those in Kitale and Nairobi and all are matrimonial as well. She said that she had not file for divorce despite filing for a separation matter at Webuye but was withdrawn.

DEFENDANTS CASE

13. The 1st Defendant said that he was a civil servant and currently working at Bungoma County after working at the office of the Vice President. He admitted that the Plaintiff was his wife who has been studying in the United Kingdom or Britain. He also admitted that they had 4 children with the Plaintiff. She however extended her stay in Britain despite promising to comeback to Kenya after her studies.

14. He went on to state that they have their matrimonial home in Kitale where they have been living and have been a home. He said that there was no matrimonial home at Webuye but that was a business property he has developed with the 2nd Defendant.

15. On cross examination he said that he had contributed to the children's school fees although the plaintiff was paying for RW's fees in Britain. He said that he has been in the UK about 4 times and part of the tickets were purchased by the Plaintiff. He said that the property at Sipala was purchased by him and that all the properties were acquired when their marriage was subsisting.

16. He said that the 2nd Defendant was his business partner and they had a partnership agreement although he did not produce it. He did not live with her at the Sipala home although he had 2 children with her. He further said that the Sipala property was worth kshs. 1,750,000 and the 2nd Defendant had paid Kshs. 1,050,000 to the Kenya Commercial bank. The title to the property is still charged to the said bank.

17. On re-examination he said that the Sipala property was still registered in the name of one JACOB CHEMWA MULATI. He said that it was true that he had affairs with other women which was normal for him as a man.

18. The 2nd Defendant said that she was a Probation Officer and was living at Sipala in Webuye although working at Likoni. She said that they were friends with the 1st Defendant and were business partners and she knew the plaintiff as the wife to the 1st Defendant.

19. She said that the Sipala property was jointly owned by her and the 1st Defendant. She described the premises therein which she said she put them up at a cost of Kshs. 5.6 million. She said that if it belonged to the Plaintiff she should have filed for an injunction to stop her developing it.

20. She went on to state that the Plaintiff came to do a house warming in her house in 2017 and the police came in her aid. She said that she took 11 months to develop the same and she got a loan from Jogoo Sacco and other money she got from her tendering business. She denied that the Plaintiff has in any way contributed to the development of the same.

21. On cross examination she said that she got to know the Plaintiff in 2006 and he was already married. She said that she was not a party to the purchase of the Sipala land by the 1st Defendant. She admitted having two children with the 1st Defendant and that she was staying in the said land since 2016. She said that she did not have any partnership deed with the 1st Defendant and that she was not in an illicit affair with him.

ANALYSIS AND DETERMINATION

22. The parties after the conclusion of the case filed their respective written submissions which the court has perused. Suffice to state that they each pulled towards their respective directions. The court has also perused the authorities cited especially by the Defendants.

23. There are issues which are not disputed in this matter and are agreed across the board. Some of them include the fact that the Plaintiff and the 1st Defendant are husband and wife having solemnised their marriage under the tenets of the African Christian Marriage and Divorce Act which was repealed. That marriage is still subsisting to date.

24. Secondly they have four children between them who are now adults and at different levels in their careers whether in college or other levels.

25. It is also not disputed that the Plaintiff went to the United Kingdom or Britain to study and she is still there having obtained a resident permit. The 1st Defendant would occasionally travel there as well and on the same breath the Plaintiff would travel back to Kenya at least

about three times in a year.

26. On the issue of the properties purchased by the couple, it is not in dispute that the property in dispute is the one at Ndivisi, namely Ndivisi/Mihuu[...] otherwise known as Sipala. The title to the land is not yet in the names of the parties herein but in the name of the original owner. All the rest of the properties are not in dispute. The one at Kibomet for example is developed and the 1st Defendant contents that that is the matrimonial home. Whichever way, the same belong to the couple and not disputed.

27. The Sipala land was purchased in the name of the 1st Defendant a fact which was acknowledged by the Plaintiff who said that she also contributed 600 pounds towards its purchase. She however said that after the purchase she contributed to the development of the same directly and indirectly. She said that she continued to pay the children's school fees and their upkeep and the 1st Defendant contributed in the development of their matrimonial home.

28. The trouble began when 4th April, 2017 the Plaintiff travelled home for a house warming party in the same controversial property. The defendants jointly and severally objected to her intrusion by calling in the police. The matter was reported at Webuye police station and they were advised to refer the matter to the court which they have done.

29. The Defendants have admitted that they are business partners and they have two children whom they have seared. There is no evidence of any marriage between them although they never at any one time admitted so. They testified that they had a partnership deed and that is how they developed the property. During cross examination the 1st Respondent did not produce anything to exemplify this deed.

30. The 2nd Defendant said that she was staying in the premises having spent about Kshs 4.5 million to develop the property which in her words was a business venture. She accused the Plaintiff of not doing anything to stop her developing the property in the 11 months she undertook. In her Replying Affidavit on record she has attached several receipts and other payment vouchers indicating how she purchased the building materials.

31. Having stated so, can one conclude that the property can be termed as matrimonial? Is the property a business venture between the Defendants?

32. It is not disputed that the 1st Defendant purchased the property while his marriage with the Plaintiff subsisted. The Plaintiff stated that she contributed 600 pounds a fact not disputed by the 1st Defendant. She went further to state that although she did not add much in its development the issue of the children's education was carried out by her solely while her husband carried out the development.

33. What then constitutes matrimonial property? **Section 6** of the **Matrimonial Property Act 2013** defines the same as follows;

(**“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.”

34. Thus the Sipala land which was bought in the name of the 1st defendant falls into this category. There is no evidence that the 2nd defendant participated in the purchase although she claims that she participated in its development.

35. **Section 14** of the above act goes on to state that;

“Where matrimonial property is acquired during marriage—

(a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

36. It clearly demonstrates that any property acquired during the subsistence of the marriage like the case at hand is considered to be held in trust by the person in whose name it is acquired.

37. There is no evidence that the Defendants are in any joint business venture. There is no partnership deed. The truth as it can be deduced from the evidence and especially that of the first Defendant is that they are in a love affair with the 2nd Defendant. As a result of their relationship they have two children.

38. The 2nd Defendant may have contributed in the development of the property, but that was without the consent of the Plaintiff the legitimate wife of the 1st Defendant. Having admitted that they were in a venture and that the property was commercial in nature it was incumbent upon the 2nd Defendant having known that it was solely purchased by the 1st Defendant, to have been very cautious and to ensure

that her interest is taken care of.

39. The Defendants have submitted that the 3rd party, namely Kenya Commercial Bank was not invited into the matter and that its input was necessary. This in my view was not very material for the simple reason that the bank has not raised any eyebrows. Neither has Mr. Mulati, the seller raised any objection to the sale and purchase of the property by the 1st Defendant and by extension its development. The 2nd Respondent who purported to have paid part of the loan should as well have invited or notified any of the 3rd parties.

40. It is therefore not true that a 3rd Party was condemned unheard. Mr Mulati for instance must have been aware of the developments being carried out in the property by the parties herein and he has not raised any complaint. In any event why should the 3rd Parties feel aggrieved over a property who's interest they have none? Even if the property is not registered in the names of the plaintiff or the Defendants as submitted by the Defendants, it is clear that the parties knew which property they were litigating on and there was no confusion.

41. This court finds that the Sipala property belonged to both the Plaintiff and the 1st Defendant by virtue of their marriage. It was purchased jointly although the name of the husband was indicated. The Plaintiff contributed some 600 pounds towards its purchase. The Plaintiff further has demonstrated that she has all along shouldered the children's education and in my view this was and is still fundamental.

42. The 2nd Defendant knowingly or unknowingly entered into a fray which she ought not to. She was well aware as she admitted that the Plaintiff was still married to the 1st Defendant. She did not produce anything to demonstrate that they were in any partnership with the Co-defendant. It is therefore easy, which this court does to conclude that she may have contributed to the development of the Sipala property by virtue of her illicit relationship with him. She ought at least to have carried out some due diligence. Whether this is true or not she has no legitimate claim over the same and perhaps she can lay her claim elsewhere but not against the couple herein least of all the Plaintiff.

43. The clarification of Article 45(3) of the Constitution by Hon Justice Kiage in **P N N v.Z W N (2017) eKLR** is worth reproducing here as I conclude this matter. The learned judge stated that;

“45(3) Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.” (My emphasis)

To my mind, all that the Constitution declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words all forms of gender superiority-whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage covered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest-all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law.”

44. In essence the 1st Defendant cannot wish away the Plaintiffs interest. His marriage with the Plaintiff still subsist and he ought to have consulted her. To the extent that she shouldered much of the children's education, the Defendant could not enter into any business venture with the 2nd Defendant without notifying the Plaintiff. This position is buttressed by the provision of Section 12(1) of the Matrimonial Act 2013 which goes on to state that;

(1) “An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.”

45. For the foregoing reasons I hold that the plaintiff has proved her case on a balance of probability. She has demonstrated that the Sipala property is a matrimonial property purchased in the name of the first defendant her husband and that she contributed to its acquisition. Her marriage to date being monogamous is still subsisting and thus any property purchased belonged to her and her husband and the Sipala one is part and parcel of it.

CONCLUSION

46. For the reasons stated above as well as the cited authorities and the relevant section of the law it is hereby ordered that:

(a) The properties held by the 1st Defendant in his name and in particular the Ndivisi/Sipala property comprised in Ndivisi/Mihuu/[...] or in any other name is a matrimonial property for all intent and purposes.

(b) The 2nd defendant is hereby permanently enjoined from occupying or remaining in the above property or in any other property purchased by the Plaintiff and the 1st Defendant during the subsistence of their marriage.

(c) The plaintiff shall have the costs of this suit.

Dated, signed and delivered via Zoom at Kitale on this 5th day of May, 2020.

H. K. CHEMITEI

JUDGE

5/5/2020