REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MATRIMONIAL CAUSE 6 OF 2017

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

BETWEEN

GWN.....PLAINTIFF

VERSUS

FNM.....DEFENDANT

JUDGMENT

1. By an Originating Summons taken out on the 10/7/2015 and filed on the 11/7/2017, the plaintiff **GWN** moved he court for **ORDERS**

> ***1) THAT a declaration be made that parcels of land known DUNDORI/LANET BLOCK […] (NEW GAKOE) and DUNDORI/LANET BLOCK […] (NEW GAKOE) are matrimonial properties owned in common by the Plaintiff and the Defendant in shares to be determined by this Honourable Court and are held by either party in trust until the parties respective shares are determined.***
>
> ***2) THAT a declaration be made that the Plaintiff is entitled to peaceful occupation of the DUNDORI/LANET BLOCK […] (NEW GAKOE) without interruption by the Defendant and the Plaintiff is further entitled to protection against the Defendant's interferences by this court.***
>
> ***3) THAT a declaration be made that the Plaintiff is entitled to a share of the proceeds from sale if any of the property known as DUNDORI/LANET BLOCK […] (NEW GAKOE) as the court may determine upon full hearing of this suit.***
>
> ***4) THAT costs of this originating summons be provided for.***

2. On grounds stated on the face of the summons that

> ***a) She is the 2nd wife of the defendant and are blessed with two children***
>
> ***b) That she contributed substantively to the purchase of the two properties Dundori/Lanet Block […] (New Gakoe) and Dundori/Lanet Block […] (New Gakoe).***
>
> ***c) That the two properties were acquired during the subsistence of their marriage, and therefore***
>
> ***d) They form their matrimonial properties***

and further that

> ***e) The defendant should be barred from disposing them without her consent, and***
>
> ***f) That the plaintiff is entitled to peaceful occupation without any interruption from the defendant Dundori/Lanet Block […] (New Gakoe) are,***
>
> ***g) Declaraton that the plaintiff is entitled to a share of any sale proceeds of Dundori/Lanet Block […] (New Gakoe) should it be sold.***

3. It is important to state here that **Dundori/Lanet Block […] (New Gakoe)** was purchased in the year 2003 August during the subsistence of the parties relationship, but registered in the plaintiff's names. Property known as **Dundori/Lanet Block […] (New Gakoe)** was purchased by the defendant in 2017 and registered in his names.

4. Trouble started when he defendant and his legally married wife FNN instructed and gave authority to sell the propery Dundori/Lanent Block […] to a property agent, Keshine Investments Ltd to source for a buyer in March 2017 prompting the plaintiff to file this suit, seeking the declarations in the originating summons, and supported by her averments that she the 2nd wife to the defendant with whom they have sired two children, and that the sale would prevent her from enjoying her interests in the said property.

5. In his Replying Affidavit to the Originating Summons, the defendant denied being married to the plaintiff, acknowledging marriage to only one wife, FNN under Statute but further states that the plaintiff was his mistress with whom he had on and off relations since 1997, and further could not confirm paternity of the two children of the plaintiff.

6. It is the defendant's position that he is the rightful owner of the two properties having purchased them with his own money, without any financial contribution from the plaintiff, despite one having been registered, without his authority, to the plaintiff's names stating that at the time, he was working in Tanzania as a journalist and would send money to the plaintiff to pay the purchase price on his behalf.

7. In his averments in response, the defendant expressed his unwillingness to sell the property registered in the plaintiffs names, but only that which is registered in his name, but categorically denies there being a marriage under Kikuyu Customary Law and rites, between himself and the plaintiff.

8. Both the plaintiff and the defendant filed written submissions, to urge their rival positions.

9. **ISSUES FOR DETERMINATION.**

a) Whether there is a subsisting customary marriage between the plaintiff and the defendant

b) If he answer to (a) above is in the affirmative, whether properties known as Dundori/Lanet Block […] (New Gakoe) and Dundori/Lanet Block […] (New Gakoe constitute Matrimonial properties.

c) Whether this Court (High Court) has jurisdiction to determine the dispute.

10. Applicable Legal Statutes.

1) 2010 Kenya Constitution, Article 45

2) Marriage Act 2014

3) Matrimonial Property Act, 2013

Authorities;

1) Owners of Motor Vessel Lillian 's' Vs. Caltex Oil (Kenya) Ltd (1989) e KLR

2) Samuel Kamau Macharia & another Vs. Kenya Commercial Bank & 2 Others, Application NO. 2 of 2011 (2012) e KLR.

3) Mary Wanjiku Githatu Vs. Esther Wanjiku Kiarie (2010) e KLR.

4) Phyllis Njoki Karanja & 2 others Vs. Rosemary Mueni Karanja & another (2009) e KLR.

5) Hortensiah Wanjiku Yawe Vs. the Public Trustee, Civil No. 13 of 1976.

6) PNN VS. ZWN (2017) e KLR.

7) Dr. Cotran, in Restatemnt of African Law; Kenya Volume 1.

Whether there is a Subsisting Customary Marriage between the plaintiff and the defendant.

11. The plaintiff, at all material times knew that the defendant was married, and entered into a relationship with the defendant in 1997, in what she avers, as a second wife, and for a period of twenty (20) years, she cohabited with him, on and off, as such. The defendant though acknowledging the relationship, he denied ever marrying the plaintiff and therefore in his own testimony, she is his mistress. Though in his testimony he stated to have married his wife FNN under (Statute), he did not produce the marriage certificate to the court.

12. On the other hand, the plaintiff testified that she was married under Customary Law and that the defendant paid dowry, and continues to pay. She too, other than stating so, she tendered no evidence to demonstrate that indeed a customary marriage ever took place.

13. The plaintiff by her advocate Mr. Waiganjo cited**, Section 2** to demonstrate marriage by cohabitation

The Marriage Act 2013 defines "cohabit" in **Section 2** as follows:

> "*means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage".*

14. In **Mary Wanjiku Githatu Vs. Esther Wanjiku Kiarie (Supra),** Bosire, JOA rendered that

> ***"The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law, except where by reason of a written law it is excluded. For instance a marriage cannot be presumed where by reason of a written law it is excluded. For instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under Statute. However in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evidence an intention of living together as husband and wife".***

15. The above was the position taken by the court in the **Hortensiah Wanjiku Yawe VS. The Public Trustee (Supra).**

The Court of Appeal in **Phylllis Njoki Karanja & 2 others Vs. Rosemary Mueni Karanja (Supra)** held that once the presumption of marriage has been established by long cohabitation that has crystallized into a marriage, it is safe to presume the existence of a marriage. It proceed thus

> ***"we are of the view that since the presumption is in the nature of an assumption, it is not imperative that certain customary rites be performed".***

Here, it is safe to note the word "certain customary rites", not all, but certainly some.

16. In the same case, **Hortensia Wanjiku Yawe, Justice Kneller** laid down **three** important and salutary principles regarding proof of a customary marriage, in court, thus

> ***i. The onus of proving customary law marriage is generally on the party who claims it,***
>
> ***ii. The standard of proof is the usual one for a civil action, on a balance of probabilities***
>
> ***iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.***

17. In the Court **of Appeal decision, Eliud Maina Mwangi Vs. Margaret Wanjiru Gachangi (2013) e KLR,** discussing the legal position pertaining to proof of customary law and practices and citing the case **Kimani Vs. Gikanga (1965) EA 735**, when Duffus JA expressed himself, thus

> ***"-------As a matter of necessity the customary law must be accurately and definitely established. This might be done by reference to a book or document of reference and would include a judicial decision--------- or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case".***

18. The above is enshrined in **Rule 64** of the Probate and Administration Rules, to the effect that any party desiring to provide evidence as to application or effect of African Customary Law may do so by production of oral evidence or by reference to any recognized treatise or publication dealing with the subject, in particular, Dr. Cotran's Treatise on African Customary Law, has been admitted and relied on to prove Kikuyu Customary Law.

Dr. Cotran, on the essentials of a valid Kikuyu Marriage, as cited by the Learned Judges of Appeal, in **Eliud Maina Mwangi** Case above stated:

> ***"No marriage is valid under Kikuyu law unless "ngurario raru" is slaughtered, and that there can be no valid marriage under Kikuyu Law unless a part of the "ruracio" has been paid".***

19. It is therefore incumbent upon the party who alleges that a Kikuyu Customary Law marriage took place to prove, by evidence not by a mere statement of "ngurario raru".

Madam J (as he then was) in **Zipporah Wairimu Vs. Paul Muchemi HCC NO. 1880 of 1970**, pronounced himself thus

> ***"it is not for the girl's father to demand ngurario. Although there is not time fixed for it, ngurario must be performed. Both the families of the boy and girl must be present during the performance of ngurario at the girl's home. It must be eaten at the girl's home. It is performed for proclaiming the marriage to members of both families."***

20**.** In its totality, ngurario (dowry) must be performed in the presence of the woman's family and the man's family, for a valid Kikuyu

Customary marriage to be valid, and recognized by both families.

I am bound by the holding of the Learned Judges of Appeal that without those essential ceremonies, being conducted, however long cohabitation maybe, there would still be no prove of a valid customary marriage, and therefore the holding in the **Phyllis Njoki Karanja Case (Supra),** that certain customary rites must be performed.

It is evident that none of the above were performed to validate and graduate the cohabitation between the plaintiff and the defendant to a Kikuyu customary law marriage.

21. The **Marriage Act, 2013, Section 2** speaks of a long term arrangement where an unmarried couple lives together, in a relationship that resembles a marriage. It does not say that that relationship is a marriage it only resembles a marriage.

My very considered understanding is that such type of cohabitation cannot be a marriage, but only resembles a marriage. It is like saying that a monkey resembles a human being! That does not mean that the monkey is a human being.

To that extend, I agree with the defendant's submission, by his advocate Munene Chege that there was no existing valid marriage between the plaintiff and the defendant. The purported cohabitation cannot be recognized as a marriage under any form of customary law without performing of the necessary customary rites to validate the cohabitation and graduate it into a valid Customary marriage.

Whether the suit properties constitute matrimonial properties.

22. **Dundori/Lanet Block […]** is registered in the plaintiff's names. No evidence was adduced by either party of their financial contribution to its purchase. The defendant submitted that he has no interest in selling it at all.

His interest is in **Dundori/Lanet Block […]** which is registered in his names. The plaintiff has also not demonstrated any financial input in the purchase.

23. Article 45 (3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of marriage during the marriage and at the dissolution of the marriage.

Article 68 obligates parliament to pass laws to protect matrimonial property.

Section 7 of the Matrimonial Property Act 2013 provides that

> ***"---------ownership of matrimonial property rests 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".***

Section 9 provides that

> ***"where one spouse acquires property before or during the marriage and the property 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".***

24. Having found that the plaintiff and the defendant are not married under any form of customary marriage, it follows that, pursuant **to Article 45 (3) of the Constitution and Section 7 and 9 of the Matrimonial Property Act,** the plaintiff's declarations in the Originating Summons cannot be availed to her, and specifically in respect of **Dundori/Lanet Block […] (New Gakoe).**

25. There is no evidence whatsoever that the above property is owned in common, or that the plaintiff made any financial (or otherwise) contribution towards its purchase.

To that end, I find and hold that the defendant is absolutely at liberty to deal with this property as he wishes, and without any restrictions or at all. He needs no consent from his mistress, the plaintiff to deal as he may wish.

In the same breath, property **Dundori/Lanet Block […] (New Gakoe)** and registered in the plaintiffs names cannot be sold without the plaintiff's consent as the registered proprietor. It is also not a matrimonial property there being no valid existing marriage between the plaintiff and the defendant.

26. **Section 6 of the Matrimonial Property Act** defines what a matrimonial property is:

> ***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.***

Thus without a doubt, none of the suit properties can be construed to constitute a matrimonial home, as a matrimonial home can only be the

home, the residence of a validly married couple.

Jurisdiction

27. The land mark case, **Owners of Motor Vessel Lilllian 'S' Vs.** ***Caltex Kenya Ltd (1989) e KLR*** *declared that*

> ***"-------Jurisdiction is everything. Without it, a court has no power to make one more step----A court of Law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".***

28. A matter of jurisdiction ought to be raised at the earliest opportunity to enable the court determine if it is seized with the necessary jurisdiction, before it embarks on interrogating the issues in the case.

This matrimonial cause was premised on the presumption held by the plaintiff that there existed a valid customary marriage to the defendant; by virtue of a long period of cohabitation, during which the two properties under dispute were purchased and therefore forming matrimonial properties.

29. In my considered opinion, this court, and the High Court in general, is seized with jurisdiction to interrogate whether the disputants were or are in a marriage, and further to interrogate where the properties purchased during the period constitute matrimonial property.

The cause is not primarily a dispute on title, ownership use and occupation of the suit properties, that being under the purview of the Environment and Land Court, but rather to determine the right to share the said properties acquired during the cohabitation as provided under **Sections 6, 7 and 17 of the Matrimonial Property Act 2013. In particular Section 17 of the Matrimonial Property Act,** provides

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.

30. The above legal provisions grant this court the necessary jurisdiction to deal with the dispute.

It is trite that a court's jurisdiction flows from either the constitution or legislation or both –

> **Samuel Kamau Macharia Vs. KCB & 2 others,** Application **NO. 2 of 2011 (2012) e KLR.**

31. The upshot is that the plaintiff's Originating Summons filed on the 11/7/2017 is devoid of merit and is dismissed, with no orders as to costs.

Delivered, Signed and Dated electronically at Nairobi this 13th Day of May, 2020

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J.N. MULWA

HIGH COURT JUDGE.