



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 13 OF 2019

LNN.....PLAINTIFF

VERSUS

PKN.....DEFENDANT

JUDGMENT

1. The plaintiff has come to this court through a plaint dated 1st November 2019 alleging that she was married to the defendant and that they cohabited as wife and husband commencing 2004 and that the marriage has now been dissolved through Milimani Commercial and Tax Division Chief Magistrate's Divorce Cause No. 364 of 2019.

2. The plaintiff further averred in the plaint that the marriage union between her and the defendant was blessed with two children EW born on 7th August 2001, and CW born on 10th September 2007 and that while the plaintiff worked as underwriter with Jubilee Insurance Company Ltd the defendant had no formal employment but had in the past been hired on errands by his brother who owned a fuel distributorship business.

3. The plaintiff also averred in the plaint that during the subsistence of the marriage the couple acquired Plot No. xx Mwhoko Kimuri Housing Ltd on which they built the matrimonial home which was registered in the name of the defendant, and another Plot No. xx/xx Mwhoko Kimuri Housing Ltd which was adjoining and part of the matrimonial home whose certificate was in the name of the previous owner, and that both certificates of title were in the custody of the defendant.

4. According to the plaintiff, she contributed significantly to the purchase of the two plots and the construction of the matrimonial home, and was exclusively meeting all costs for food, clothing and medical needs for the children, and was the sole breadwinner of the family. According to her, the marriage broke down due to the continued cruelty, bad conduct and violence of the defendant towards the plaintiff and the two children of the marriage. The plaintiff has thus come to this court seeking the following orders –

a) That the court make a declaration that the petitioner (plaintiff) and the respondent (defendant) respective rights to the properties (are) in the following manner –

i) The matrimonial home Mwhoko in Plot No. 19 Mwhoko Kimuri Housing Ltd in the name of the respondent (defendant) shall belong to the plaintiff and the defendant in equal shares.

ii) Plot No. 20 Mwhoko Kimuri Housing Ltd. adjoining and forming part of the matrimonial home in the name of the respondent (defendant) shall belong to the plaintiff and the defendant in equal shares, subject to the provision of the educational and subsistence needs of the children of the marriage.

b) That in dividing the allocation of the said Plot No. 20, Mwhoko Kimuri Housing Limited, the court be pleased to have reserve an amount therefrom, not less than 50% to be held by the plaintiff in trust for the minors to take care of their needs.

c) That the defendant be condemned to bear the costs of this cause.

5. The defendant did not enter appearance or file any response or defence to the plaint, though I was told that he was served.

6. At the hearing of the suit, the plaintiff called one witness who was herself as PW1. She adopted her witness statement and documents

filed by herself as her evidence. She also adopted the averments in the plaint. She highlighted specifically in her oral testimony the expenditure she incurred for the family and the cost of acquiring the two plots, and construction of the matrimonial home, and provision of medical cards for the children. The defendant never appeared in court nor participated in the hearing of the case.

7. After the closure of the plaintiff's evidence, the plaintiff's counsel D. K. Githinji and company filed written submissions, which I have perused and considered. I wish to put it on record at the outset that all the evidence in this case was taken by another Judge now on transfer and I have only written the judgment.

8. This is an undefended suit as the defendant neither filed a defence, nor participated in the proceedings. However, even in an undefended suit, a plaintiff is required in law to prove the claim. This in my view is the meaning of section 107 and 109 of the Evidence Act (Cap. 80). As this is a civil case, the standard of proof is on the balance of probabilities, which means that on the evidence on record the court has to be satisfied that the occurrence of the event was more likely than not if it has to enter judgment for the plaintiff. See the English case of **In Re H and R (minors) House of Lords [1995] UKHL 16**.

9. Though in the plaint it was stated that the plaintiff and the defendant were formally divorced in court in Nairobi Milimani Commercial & Tax Division Chief Magistrate's Divorce Cause No. 364 of 2019, I see no copy of the judgment or court order filed either in the documents relied upon or even in written submissions of counsel. What was filed herein was a typed copy of record in Ruiru PM's Court Criminal Case No. 1621 of 2019 wherein the defendant was convicted of possession of narcotic drugs that is 5 rolls of bhang contrary to section 3(2) of the Narcotic Drugs and Psychotropic Substances Act and sentenced to pay a fine of Kshs 10,000= and in default to serve 3 months (*presume imprisonment*).

10. The divorce cause being a court record in Nairobi, however, I looked for and perused the subject file and found that there was indeed an order for dissolution of the marriage. I thus find that the plaintiff has proved on the balance of probabilities that the marriage between the parties herein was formally dissolved in Nairobi Milimani Commercial & Tax Division Chief Magistrate's Divorce Cause No. 364 of 2019.

11. I now turn to the issue whether the children of the marriage are entitled to benefit from division of matrimonial property. I note that one of the children was born in 2001 before commencement of cohabitation by the plaintiff and the defendant in 2004. I also note that **Nairobi Court of Appeal Civil Appeal No. 81 of 2017 MBO –VS- JOO [2018] eKLR** was relied upon by counsel for the plaintiff who maintains that protection of interests of children, is not the preserve of the Children Court and urges this court to make provision for the children. I have no issue with the decision of the Court of Appeal herein, which is binding on this court. However, in my view, the Court of Appeal merely said that it had jurisdiction to consider constitutional matters on appeal. It did not confer on itself the jurisdiction on matters which are specifically for determination by other courts, like custody and maintenance of children. In any case, every court of law has jurisdiction to interpret and apply the provisions of the Constitution, in a matter before it the way it understands the same. This court will thus be reluctant to make decision on matters that are for determination by the Children Court unless on appeal. I thus find that this court cannot make orders for maintenance of children where such jurisdiction has been conferred on the children court.

12. This being a matter for division of matrimonial property **Section 7** of the **Matrimonial Property Act 2012** provides as follows -

7. 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."

It follows from the above statutory provision that as long as parents are alive, children cannot in their own name get a share of nor be provided for from the matrimonial property as they are not spouses, and can only petition in court to get a parent's share of property when the parent is deceased. Though a living spouse can bequeath his or her determined share of matrimonial property after it has been divided by the court he or she cannot ask that the children be provided for during division of that property. In the present case the children, even assuming that both are issues of the marriage cannot be taken into account in division of the matrimonial property as they are not spouses herein. No provision for the children's education and maintenance can thus be made in this suit.

13. With regard to whether the property in question is matrimonial property, in my view from the evidence on record the plaintiff has on the balance of probabilities proved that it is matrimonial property. This is because **Section 6(1)** of the **Matrimonial Property Act** provides as follows:

6(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 or movable property jointly owned and acquired during the subsistence of the marriage.

From the above statutory definition, there is no doubt in my mind that all the properties listed herein by the plaintiff were acquired during the marriage and fall within the statutory definition above. I find that the two plots and house are matrimonial property.

14. With regard to the proposed division of the property, I will start with **Article 45(3)** of the **Constitution** which provides as follows –

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

In my view the above constitutional provision means that spouses can acquire and own property at time of marriage, during and at

dissolution of the marriage. Thus the rights of a married man and married woman to acquire and own property are equal, and none is superior or inferior to the other.

15. In addition to the above constitutional provisions, which recognizes equality of spousal rights, including equal rights in acquisition and ownership of property, **Section 7** of the **Matrimonial Property Act 2012** provides as follows –

7. 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.”

This means that division of matrimonial property will be determined by contribution, which is either financial or social support.

16. It is also trite that division of matrimonial property can only be done by the court after dissolution of marriage **MNH –VS- FHM [2018] eKLR**. Before divorce or dissolution of marriage only a declaration can be issued by the court but not distribution of assets. In the present case it has already been established that the marriage between the parties herein has been dissolved by the Chief Magistrate’s Court, thus this court has jurisdiction to divide the matrimonial property.

17. In my view the plaintiff has shown from the documents relied upon that is Mpesa records, bank statements and household expenses incurred that she substantially contributed to the acquisition and development of the property, though it was not registered in her name. I find that her proposal for sharing of 50% with the defendant is fair and reasonable.

18. Consequently the plaintiff’s suit succeeds and I make orders as follows-

a) I make a declaration that the plaintiff’s and the defendant’s respective rights to the properties is as follows –

i) The matrimonial home Mwihoko in Plot No. xx Mwihoko Kimuri Housing Limited in the name of the defendant shall belong to the plaintiff and the defendant in equal shares.

ii) Plot No. xx Mwihoko Kimuri Housing Limited adjoining and forming part of the matrimonial home in the name of the defendant shall belong to the plaintiff and the defendant in equal shares.

iii) The costs of the suit are awarded to the plaintiff.

Dated and delivered this 14th day of July, 2020.

George Dulu

JUDGE

Due to the COVID-19 pandemic and the Government regulations made by the Minister for Health, this judgment has been transmitted to parties/counsel through email addresses given: dkgithinji@gmail.com