REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MATRIMONIAL CAUSE NO. 2 OF 2017 (O.S)

(FORMERLY NKR. HC. MATRIMONIAL 11/2016 (OS)

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

TNM......................................PLAINTIFF

-VERSUS-

BMK.................................DEFENDANT

J U D G M E N T

TNM brought this suit by way of an originating summon against her husband BMK seeking the determination of the following issues;

> ***1) Whether the properties acquired by the plaintiff and defendant and held jointly and/or severally by both or either of them and acquired after marriage between the plaintiff and defendant in or about [xxxx] and in particular parcel No. Nyandarua/ Passenga/[xx] can be declared by this court to be matrimonial property;***
>
> ***2) Whether the property Nyandarua/Passenga/[xx] was acquired by the plaintiff and the defendant married another wife and the same should be retained by the plaintiff in respect of her contribution to the acquisition;***
>
> ***3) Whether the plaintiff made contribution towards the improvement of property Nyandarua/Passenga/ [xx] and has acquired a beneficial interest in the property and the same should be vested in the plaintiff solely;***
>
> ***4) Whether the family assets and/or properties mentioned in (1) above can be shared between the plaintiff and the defendant and/or in particular parcel No. Nyandarua/Passenga/[xx] be allocated to the plaintiff as the sole owner;***
>
> ***5) Whether the defendant by himself, his agents, servants and/or persons claiming under him should be restrained by way of injunction from evicting, transferring, alienating, dispossessing, encumbering, subdividing, entering and remaining thereon and/or in any other manner from dealing with the property Nyandarua/Passenga/[xx] without leave or further orders of this honourable court;***
>
> ***6) That this honourable court be pleased to grant such further order and relief as may be just in the circumstances.***

The originating summons was supported by the applicant's affidavit dated 27/04/2016 and a further affidavit dated 10/05/2018.

The defendant filed a replying affidavit on 08/06/2016.

Directions were taken on 20/11/2017 that the matter proceed by way of viva voce evidence. The parties filed their respective statements including witness statements.

PW1 TN testified that she got married to the defendant in 1952 and established their matrimonial home in Embu but in 1964, they left Embu for Ol Kalou where they had bought land Nyandarua/Passenga/[xx] from the Government as evidenced by the allotment letter dated 09/09/1963 in the name of MK. She made payments towards repayments of the loan in respect of the subject land although receipts were issued in the defendant's names (P-Exhibit 2 & 3); that she was a farmer and sold milk and farm produce to repay the loan; that she supplied milk to Kenya Corporation Creameries (KCC).

PW1 further stated that the defendant was in detention till 1958. He had left her with one child. She moved from Embu to Passenger with 5 children and got two others; that the defendant did not assist her in bringing up the children; that he married three other wives with whom he lived in Mwea and would visit briefly and never even attended burial of their first born son, but attended ordination of one of the sons as

apriest. She built a house 25 years on the land 25 years ago without the defendant's assistance; Her sons have also built houses on the land.

Later, she paid for the survey before titles were issued and the process of obtaining titles on 08/05/2002 (P-Exhibit 5); PW1 said that the defendant allowed her to collect the title. PW1 made further payments to County Government of Nyandarua without the defendant's contribution. PW2 is aware that the defendant lives at Wachoro with his younger wife; has another land within Muramati Farmers Corporative Society (P-Exhibit 7) and defendant has a clearance certificate (P-Exhibit 8); that he has land at vi and his inheritance at Shamatta; two plots in Kimbimbi (P-Exhibit 9). PW1 is also aware of a case in Embu CMC 26/1999 involving the defendant's two plots at Wang'uru and another case 97/2000 over the defendant's plots in Ngurubani. PW1 stated that the properties in Embu and Kirinyaga were acquired during the subsistence of their marriage but she has no interest in any other save for Nyandarua/Passenga/[xx]; that though they had never discussed how the defendant's properties should be subdivided, the defendant wants to subdivide the Nyandarua land into plots of 9 acres each and 5 acres for the grandchildren, a decision that PW1 does not agree with. PW1 was only called to the District Officer's office and informed of the intention yet she has not been told that she will share in the other properties that the other wives have; that the other wives have benefited from the other properties whereas she has not.

The defendant ***BM*** admitted that PW1 is the first of his four wives having married her in 1952. Since he worked in Nairobi, he took he to reside with his parents in Embu. He was arrested the same year during Mau Mau and was in prison for 8 years. He bought Passenga/[xx] after he left prison in 1963 as evidenced by the allotment letter dated 17/06/1963 (D-Exhibit 1); that after he was issued with the letter, he was interviewed, found suitable and he paid Kshs.5,000/- and was given a loan of Kshs.6,000/- to buy cows, potatoes, iron sheets and wire to fence the land; that he repaid the loan, built on it. He produced a bundle of 40 receipts (D-Exhibit 2a – f) as proof that he repaid the loan by delivering milk to KCC; that when he finished paying the loan, he was issued with a title which he gave to PW1 to keep. He said that it is his brother LN who first lived on the subject land for two years, then his parents but he could not tell when they left; that his second wife SW also lived on the land for 2 ½ years. She fell sick and he removed her from there; that all that time PW1 was living in Embu and moved to Passenga after his second wife left. DW1 said that PW1 found cows, goats, chicken, vegetables and potatoes on the farm and never bought any cow; that when one was given land, he would be given a cow and potatoes from the Asian; that he hired men to milk the cows for sale. He said that the land is 35 acres and he wants to distribute to all his wives and children; that he had gone to the Land Control Board and obtained a consent to subdivide the land (D-Exhibit 3) and that before that he had sat with his family and they agreed to go to the Board. Though he claimed to have minutes of the meeting he did not produce them. He further said that he is the one who built the house in which PW1 lives and showed the sons where to built. He said that he had 10 acres of land in Mwea but sold it to cater for medical bills when he got stroke. DW1 stated that being a Kikuyu man by tribe, he is responsible for distributing his land to his wives and children.

In cross – examination, the defendant admitted that at the time when land was allotted to him, women were never given land and that the land was paid for through sale of produce from the land i.e. milk and potatoes. He also admitted that he never tilled the land but PW1 and her children live there while he had a garage for repair of bicycles in Embu since 1960 and still carries on that business to date. Although DW1 said he gave PW1 money to build the stone house on the land he could not recall when, how much he gave. He denied having abandoned PW1 for long. He admitted to having other pieces of land though he claimed to have sold some to cater for his medical bills.

Mirugi Kariuki Advocate, Counsel for the plaintiff filed their submissions on 17/02/2020. Counsel listed six issues for determination being;

1) Whether the suit property is matrimonial property;

2) Whether the suit property was acquired before the respondent married his other wives;

3) Whether the plaintiff made contribution in relation to the purchase of the property;

4) Whether the suit property should be declared to belong solely to the plaintiff and her children given the circumstances of the case;

5) Whether a permanent injunction should issue against the defendant;

6) Whether costs should issue.

On the first issue, Counsel cited ***Section 6 (1) of the Matrimonial Property Act (MPA)*** which defines matrimonial property to include matrimonial house or homes, household goods, and effects in the matrimonial home and any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. Counsel cited the case of ***T.M.V. vrs F.M.C (2018) eKLR*** which substantiated ***Section 6 (1) of the Act*** Counsel argued that it was not disputed that PW1 and DW1 got married in 1952 under ***Kikuyu Customary Law*** and the property was bought during the marriage and hence forms part of the matrimonial property and that it has been the home of PW1 and her children for over half a century; that the said property is therefore matrimonial property in terms of the Matrimonial Property Act.

As to whether the property was acquired before DW1 married other wives, it was submitted that DW1 produced a letter of allotment dated 17/06/1963 and therefore the land was acquired between 1958 when DW1 was released from prison and 1963 and by then he was married to PW1. It was submitted that the land was purchased when PW1 was the only wife to DW1 and that DW1 did not deny that fact; that pursuant to ***Section 8 (1) of the Matrimonial Property Act***, the property having been bought when other wives were not married to DW1, no other wife is entitled to the said land except PW1 in terms of ***Section 8 of the Matrimonial Property Act***; It was also submitted that though DW1 claims to be the registered owner and therefore the one charged with deciding how it should be distributed, but that ***Section 14 of Matrimonial Property Act 2013*** gives guidance on such property and there is a rebuttable presumption that the property was held in trust for the other spouse; that the said presumption has not been rebutted and therefore DW1 held the property in trust for the plaintiff.

Whether the plaintiff made contribution to the purchase of the property; Counsel submitted that under ***Section 7 of the Matrimonial Property Act,*** matrimonial property vests in the spouses according to the contributions of each of them. That ***Section 45 (3) of the Constitution*** on the other hand provides that parties to a marriage are entitled to equal rights at the time of marriage, during and at the dissolution of the marriage; that ***Section 2 of the Act*** defines contribution to be both monetary and non-monetary contribution and includes

child care, companionship, farm work, domestic work and management of the matrimonial home. The said section was discussed in ***T.M.V vrs F.M.C (Supra)*** Counsel submitted that the plaintiff has demonstrated that she contributed to the property by farming on the land, selling produce and milk to repay the loan and produced the receipts for the payments though they were issued in DW1's names; DW1 admitted that he lives with his wives in Embu hence PW1 shouldered all the responsibilities of bringing up the children alone; PW1 cared for her 8 children alone; PW1 was the first wife of the Defendant and provided companionship before marriage and continued to offer companionship and commitment to the defendant; that the plaintiff also built both permanent and temporary structures on the land. Counsel cited the case of ***F.S. vrs E.Z. (2016) eKLR*** where one spouse did not reside at home. It was the Counsel's submission that the plaintiff has made immense contribution to the property.

Whether the suit property should be declared to solely belong solely to the plaintiff and her children; It was submitted that the plaintiff lives on the land with her 8 children and they have done extensive developments and the children reside there with their families; that the defendant will not lose anything as the land will be owned by the plaintiff and her children; that the defendant admitted to having many other properties which he did not disclose to the court until it was put to him. On allegation that he had sold one of the properties, he could not produce any evidence. The court is urged to declare the plaintiff the sole owner of the suit property.

Whether a permanent injunction should issue against the defendant? It was submitted that the plaintiff has demonstrated that she has a right to the land and her interest in the land needs to be protected. Counsel relied on the decision in ***M.O. vrs A.O.W. (2017) eKLR*** where the court held inter alia that it would be an exercise in futility to declare a right and not protect it.

On costs, counsel urged that costs to follow the event and the defendant should be instructed to pay the costs and relied on ***NRB HCCC No. 191/2008 Orix Oil Ltd. vrs Paul Kabeu (2014) eKLR.***

In response, Mr. Machage, the defendant's Counsel identified the same issues for determination except that he added one issue, whether this court can distribute property during the subsistence of a marriage.

Respondent's Submissions:

On whether the subject property was matrimonial property; it was submitted that though the plaintiff and defendant got married in 1952, that upon release from prison in 1958, he married another wife SW and that he applied for the land in 1963 as per the letter dated 17/06/1963; that the defendant's brother was the first to settle on the land before he got his own, then his parents and later S who fell sick and he removed her and it is then that the Plaintiff was moved to the land; that under ***Section 6 of the Matrimonial Property Act***, the land should have been acquired during the subsistence of marriage between the parties unless otherwise agreed. Counsel argued that under ***Section 26 (1) of the Land Registration Act***, the defendant having been registered as the proprietor, is the absolute and indefeasible owner of the land on 08/05/2002 subject to any encumbrance, restrictions endorsed on the certificate. It was Counsel's submission that the property was acquired after the defendant had acquired all his wives, and it is matrimonial property.

As to whether the plaintiff made contribution to the land; Counsel relied on ***Section 7 of the Act and F.M.C. (2018) eKLR*** where the court in sharing matrimonial property held that upon divorce, the court had to look at what each contributed.

Counsel submitted that since the parties are still married, the property cannot be distributed and relied on ***T.M.W. vrs F.M.C. 2018*** where the court declined to distribute the property in absence of divorce; see also ***P.W.N. vrs E.M. (2014) eKLR, M.C.K. vrs G.V.K. (2015) eKLR and P.M. vs J.M (2019) eKLR*** whether the plaintiff's contribution towards improvement of the property and acquired a beneficial interest, it was submitted that in ***Peter Njuguna Njoroge vrs Zipporah Wangui Njuguna CA 128/2014,*** Kiage J.A. opined that the Constitution did not give a blank a cheque to married couples to the 50% entitlement in property at the time of dissolution. It was further submitted that the defendant worked as a bicycle repairer where he generated income to pay fees; that the defendant contributed towards of PW1's house the purchase of the land and contributed to taking care of the family just as the other wives did and it would not be fair for PW1 to take the land alone but allow the owner to share it out to his wives who have contributed to the land.

Analysis and determination:

I have duly considered all the evidence tendered and submissions of Counsel. It is not in dispute that the plaintiff and defendant are still husband and wife. They got married in 1952 and have eight (8) children together. It is not also not in dispute that the defendant was detained for 8 years during the Mau Mau and was released about 1958. Thereafter he married three other wives who also have children.

The first issue I wish to determine is whether the subject property, ***Nyandarua/Passenga/63*** is a matrimonial property. ***Section 6 (1) of the Matrimonial Property Act*** defines matrimonial property 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."***

I agree with the definition of Matrimonial property made by my brother J. Nyakundi in ***T.M.W (Supra)*** when he said;

> ***"Firstly I shall determine whether the suit property falls in the category of matrimonial property. Turning to the provisions of***

> ***the Matrimonial Property Act, Section 6 of the Matrimonial Property Act, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Basically for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property. In the instant case, the marriage between parties herein commenced 1993 and was officiated through Kikuyu Customary Law in 2001. The property in question was acquired in 2010 and the same was acquired during the subsistence of the marriage between the parties herein. There is also evidence that the suit property was acquired for purposes of building a family home. As a result, there is no doubt whatsoever that the suit property including the Juja farm forms part of matrimonial property as far as the parties herein are concerned."***

There is no dispute that the plaintiff and defendant married in 1952 under ***Kikuyu Customary Law.*** The marriage is still subsisting. It is also not in dispute that ***Nyandarua/Passenga/ [xx]*** was procured during the subsistence of the marriage; The defendant said that he was in prison for about 8 years from 1952. As soon as he was released which must be about 1959 or 1960, he started to look for land and went through several processes till he was given the letter dated 17/06/1963 (D-Exhibit 1) and the allotment letter was issued to the defendant on 09/09/1963 (P-Exhibit 1). The defendant conceded that at first his brother lived on the land for about two years and then his parents as they awaited to be allotted their own land. Thereafter, the defendant claimed that his second wife stayed on the said land for about 2 years but left after she fell sick. He did not tell the court which years those were. Thereafter the plaintiff moved to the said land and has lived there with her children to date. The plaintiff said she moved to said land in 1964. There is no evidence to the contrary. There is no doubt that the said land is matrimonial property in terms of the ***Matrimonial Property Act 2013.***

Whether the subject land was acquired before the defendant married the other wives;

Section 8 of the Matrimonial Property Act provides for a situation where there is divorce or dissolution of the marriage, the property acquired by the man and first wife, if the marriage is polygamous, shall be retained equally by the wife and husband, as belonging to the two of them. However, if the property is acquired after the second or other wives are married to the man, then the property belongs to the husband and all the wives. The section provides as follows;

"Property rights in polygamous marriages;

> ***1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the;***
>
> > ***a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife, and;***
> >
> > ***b) matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives.***
>
> ***2) Despite subsection (1)(b), where it is clear by agreement of the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then any such wife shall own that matrimonial property equally with the husband without the participation of the other wife or wives."***

As noted earlier, the defendant was issued with the letter dated 17/06/1963 (D-Exhibit 1) and subsequent to that, a letter of allotment was issued on 09/09/1963. It is after that letter that the loan repayment commenced till the title was issued in DW1's names on 08/05/2002. The defendant merely told the court that he married the second wife after he left detention. However, the plaintiff was specific, that the defendant married his second wife SW in 1960. That date was never contested. I do not agree with Mr. Kahiga's submission that the land was acquired between 1958 and 1963. The documents clearly show when the land was acquired. I therefore find that the land in question was purchased after the defendant was married to both the plaintiff and the second wife.

The defendant married two other wives after the second one. It is not known when. It was the duty of the defendant to disclose when he married the others. The plaintiff has lived on the suit land since 1964 without interruption until 2016 when the defendant purported to have it subdivided and given to his other three wives. The plaintiff had lived on the land with her children uninterrupted for about 52 years to the exclusion of the other wives. The defendant did accept that all the three other three wives were settled on other portions of land in Mwea and Embu. In my view, ***Section 8 (2) of the Matrimonial Property Act*** comes into play because even if there was no express agreement between the parties envisaged under ***Section 8 (2) Matrimonial Property Act*** by the partie's conduct and usage of the land, a presumption arises that they had intended that the suit land remains exclusively in the use and for the benefit of the plaintiff to the exclusion of the other wives. From the defendant's own testimony, the other wives have always lived on different parcels of land in Embu and Mwea and still do. The plaintiff has also never laid claim to any land in Mwea and Embu.

The defendant in his testimony stated that being the registered owner and a Kikuyu man by tribe, has the sole right to distribute his property amongst his wives as he wishes. However, ***Section 14 of the Matrimonial Proporty Act*** guides the court on how to deal with land acquired during the marriage but registered in the name of one spouse. In such situations, a rebuttable presumption arises that the said property is held in trust for the other spouse. ***Section 14*** provides as follows;

> ***"Presumptions as to property acquired during marriage;***
>
> ***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."

Guided by the above provisions, I am satisfied that the suit property belongs to the plaintiff and her children.

Whether the plaintiff made contribution towards purchase and development of the property;

Section 7 of the Act provides that matrimonial property will vest in the spouses according to the contribution of either of the spouses and is subject to ***Section 6 (3) of the Act*** where parties determine their property rights before marriage.

Section 7 provides;

""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."

The question of contribution has been the subject of different opinions and controversy because of customary beliefs and the fact that the African Society which was basically patriarchal, all land belonged to the man. The plaintiff said for example that she could not be allocated land as a woman. The Constitution 2010 has to some extent resolved those controversies. ***Article 27 of the Constitution*** frowns on any form of discrimination be it based on sex, race, religion, culture, age, e.t.c. In addition, ***Section 45 (3) of the Constitution*** is very specific on the rights of parties to a marriage and provides ***"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."***

Because of the inequalities and imbalances that existed before the Constitution, the above provisions endeavor to ensure that both genders are protected.

The term contribution is defined in ***Section 3 of the Matrimonial Property Act.*** It provides;

"contribution means monetary and non-monetary contribution and includes;

a) domestic work and management of the matrimonial home;

b) child care;

c) companionship;

d) management of family business or property; and

e) farm work."

Contribution may be in accordance with ***Section 7 or 9 of the Matrimonial Property Act. Section 7 of the Matrimonial property*** vests property in both spouses according to what each has contributed, while under ***Section 9,*** one spouse acquires property either before or during the marriage and it does not become matrimonial property.

On monetary contributions, the plaintiff's testimony was that she sold milk and farm produce in order to pay off the loan. She produced the receipts issued upon delivery of milk to Kenya Cooperative Creameries (KCC) (P-Exhibit 4). The plaintiff also produced the statements confirming repayment of the loan. Though issued in the defendant's names because he was the allottee of the land, the plaintiff told the court that the defendant never lived in that suit property save for 3 months after he left detention in 1958 and that thereafter, he would only visit after a long time. The defendant never really rebutted the plaintiff's evidence. Indeed the defendant did admit that he never tilled the said land nor did he pay for it.

Since the defendant never lived with the plaintiff save for short visits, after giving birth to the children, she cared for them single handedly. PW1 brought up 8 children and provided their needs both physically and emotionally. PW1 also single handedly managed the suit property. The defendant admitted that it is the plaintiff who tilled the land, grazed the cattle together with her children.

When they got married in 1952, the plaintiff lived with the defendant both in Nairobi and Embu and she provided companionship which continued even after release from detention in 1958 upto 1960 when he married another wife.

The plaintiff testified that she single handedly built a stone house on the said land 25 years ago. The defendant's attempt to prove that he assisted the plaintiff in constructing the house was not impressive nor was it convincing at all and hence unbelievable. Further to the above, the plaintiff testified her children have built houses on the said property. This is evidence that the plaintiff has substantially developed the said land. I am in agreement with the court's finding in ***F.S vrs E.Z (2016) EKLR*** where one of the spouses was absent. The court said ***"The respondent was out of the country while the applicant took care of the properties. Nothing was wasted. That amounts to contribution. The applicant was taking care of the properties knowing that she had a recognizable stake over them. The applicant indirectly contributed towards the acquisition of the property. The respondent had faith in her and that is why he allowed her some of the properties to be in her name only. I therefore hold that there was non-monetary contribution by the applicant. She oversaw the purchases and managed the***

properties"

Although the defendant was the allottee of the land, he is said to have only visited the property rarely. The defendant was so rare that he even missed his own son's funeral. I am satisfied that the plaintiff has demonstrated that though the title was not in her name, she repaid the loan to Settlement Fund Trustee and has substantially contributed to the said property. The plaintiff's contribution was both monetary and non – monetary.

Whether the court should declare that the said property belongs to the plaintiff and her children;

In her testimony, the plaintiff demonstrated that the defendant has many other properties known and unknown to her. The said properties were listed at paragraphs 11 – 13 that the defendant settled his wife in Mwea; owns plot]xxx] in Muramati Sacco; Plot No. 20 Kimbimbiu Market, Plot [xxx]Lock Up, Kiosk at Wang'uru Township, Plots [xxx] and B [xxx] at Wang'uru Market (as per judgment in ***PMC 26/1999 BM vrs SW)***; Plot 1231 Wachororo Sub-Location where the defendant resides with his last wife; property in Makutano, land from his parents at Shamata. The plaintiff produced documents in support of ownership by the defendant of some of the properties (P-Exhibit 7 – 11). The defendant generally admitted to owning all the above properties except he claimed to have sold some to cater for his medical bills. However, not a shred of evidence was tendered for example – sale agreements, as proof of the said sales. From the description, the properties are quite valuable and the defendant was not candid enough to avail evidence to prove the acreage or their value.

What prompted the plaintiff to make this application was when in 2016, the defendant sought to divide the suit land into four portions of 9 acres each for all his wives and one of 5 acres for the grandchildren. The plaintiff denied that the sub-division was with her consent. All the other properties were acquired during the subsistence of the marriage between the plaintiff and defendant and are deemed to be matrimonial property unless proved otherwise. The defendant has not indicated whether he will sub-divide and share out the other properties where his three wives and the other children are settled in Mwea and Embu and part of them given to the plaintiff and her children.

The plaintiff has demonstrated that she has a beneficial interest in the suit land being the defendant's first wife.

As noted earlier in this judgment, the plaintiff has occupied the suit land for over 50 years to the exclusion of the other 3 wives she has contributed to its purchase, and developed it. The drafter of ***Section 17 of the Act*** must have realized that sometimes married spouses who do not want to divorce like in this case. may need their rights to property ascertained and protected especially where there is injustice being meted on one of parties as seems to be the case here. The court has jurisdiction to declare rights of parties in a marriage in relation to any property. The defendant set out to subdivide the suit land wherein he has numerous other properties where the other wives live and yet he does not want the plaintiff to benefit there from. ***Section 17 of the Matrimonial Property Act*** provides that a person may apply to a court for a declaration of rights to any property that is contested between the person and a spouse or a former spouse. The purpose of ***Section 17*** was stated in ***PMM vrs ZWM (2017) eKLR*** where Waki J.A. stated; ***"An inquiry may thus be under Section 17 and declarations may be issued, the existence of a marriage not withstanding. As stated by Lord Morris of Borthy Guest in Petit vrs Petit (1970) AC 777;***

> ***"One of the main purposes of the Act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co – ownership of property. All this in my view, negates any idea that Section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property, the question for the court was whose is this? And not to when shall it be given……"***

Whether an order of injunction should be granted;

A permanent injunction will issue one a law suit over the underlying issue or activity has been resolved. When the plaintiff came to court the suit land was under real threat of disposition to the defendant's other wives. Since I have found above that the plaintiff has a right to the land, it is only proper that the said right be protected by the court as courts do not act in vain. I would in that regard echo the observation of Ojwang J. in ***B vrs Ali (2004) eKLR 43*** when he said ***"The court does not and ought not to be seen to make orders in vain; otherwise the court would be exposed to ridicule and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality and for the rights of the people…"***

In the premises, I am satisfied that the plaintiff has made a prima facie case with a probability of success. I am also convinced that damages will not be adequate remedy to compensate the plaintiff if an order of injunction is not granted and lastly the balance of convenience tilts in her favour.

In the end, I make the following orders;

> ***1) A declaration do issue that Parcel No. Nyandarua/Passenga/[xx] was acquired by the plaintiff and defendant during the subsistence of their marriage;***
>
> ***2) A declaration do issue that Nyandarua/Passenga/[xx] is matrimonial property;***
>
> ***3) A declaration do issue that the plaintiff has a beneficial interest in Nyandarua/Passenga/[xx];***
>
> ***4) A declaration do issue that the defendant holds the parcel Nyandarua/Passenga/[xx] for himself and in trust for the plaintiff;***

5) A permanent injunction do issue restraining the defendant, his agents or servants from evicting, transferring, alienating, dispensing, subdividing or remaining on the property Nyandarua/Passenga/[xx] without the leave of this court;

6) This being a family matter, I direct that each party bears its owns its own costs.

Dated, Signed and Delivered at Nyahururu this 15th Day of october, 2020.

....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms Kinuthia holding brief for Mr Kahiga for the plaintiff

Henry Court Assistant