



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 3 OF 2011 (O.S.)

PMN.....PLAINTIFF

VERSUS

JNN.....DEFENDANT

J U D G M E N T

A. Introduction

1. The plaintiff instituted suit against the defendant vide originating summons dated 19th January 2011 for a declaration that can be summarised as follows;

a) The properties listed in the aforementioned originating summons with all buildings and developments thereon were acquired by the joint funds and efforts of the applicant and respondent and all registered in the name of the name of or in possession of the respondent are all registered in defendant are owned jointly by the plaintiff and the defendant.

b) That a declaration do issue that that the respondent holds the said properties in trust for the applicant.

c) That the properties be settled for the benefit of the Applicant in such manner and proportions as this honourable Court deems fit and just.

d) That the respondents, himself, his agents and/or servants be restrained from alienating encumbering or in any other manner disposing of the said properties.

e) That the respondent be condemned to pay the costs of this summons and other incidentals thereto.

2. The defendants in his defence denied the allegations in the summons that the listed properties are matrimonial properties and that the plaintiff is entitled to them.

B. Plaintiff's Case

3. The plaintiff testified that she got married to the defendant in 1972 under Mbeere Customary law when she was working at the [particulars withheld]. She further testified that after her marriage the defendant told her to resign and become a housewife, which she agreed to do.

4. It was her testimony that the couple acquired all the properties referred to herein together during the subsistence of their marriage. She further testified that she contributed in developing the properties as she would often source for the building materials and supervise the constructions on their land parcels.

5. It was her testimony that the couple separated with the sometime in the year 2002. She further testified that the defendant started staying with another woman and had already transferred some of their properties to her.

6. The plaintiff's testimony was corroborated by PW2, the defendant's brother who testified further to the plaintiff's contribution in the marriage as well as to the conduct of the defendant during the subsistence of the marriage and after the separation.

C. Defendant's Case

7. The defendant testified that he was indeed married to the plaintiff and after she left her job in the NYS, she became a housewife and took care of their children. He further testified that he is the one who bought all his land parcels and developed them without contribution from the

plaintiff.

8. He testified that their marriage was tumultuous especially after solemnization in 1982. He further alleged the plaintiff became a drunkard after sometime and contributed nothing to the acquisition of the family properties that he had.

9. He further testified that if all the properties were given to the plaintiff as claimed in her pleadings, he would be left a destitute. In cross examination he testified that he fully separated with the plaintiff in 2001 after 27 years of marriage and that they were blessed with 5 sons and also acquired several properties. He further testified that he personally developed some of the properties without the contribution of the plaintiff.

D. Plaintiff's Submissions

10. The Plaintiff submitted that she was entitled to her share of the matrimonial property as she had contributed to the purchase and to the development. She relied on the provisions of **Article 45(3) of the Constitution, Sections 2 & 9 of the Matrimonial Property Act 2013** as well as on the case of **PNN v ZWN [2017] eKLR**.

11. She further submitted that since most of the Matrimonial Property was in the Defendant's name, the rebuttable presumption was that the properties were being held in trust for her.

E. Defendant's Submission

12. The defendant submitted that the Plaintiff was not entitled to half of the matrimonial property as she did not make any wealth or contribute to the acquisition of the properties in issue and that she was only entitled to property to the extent of her contribution. He relied on the case of **PNN v ZWN [2017] eKLR**.

13. He further submitted that the plaintiff did not contribute to the well-being of the marriage as she was a drunkard.

F. The Issues for determination

The issues for determination are identified as follows: -

- a) Whether marriage existed between the parties.*
- b) Whether the listed properties were acquired during the subsistence of the marriage.*
- c) Whether the plaintiff is entitled to any share of the matrimonial properties, if any.*

14. **Section 6 of the Matrimonial Property Act No. 49 of 2013** is defined 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.*
- (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.*

15. **Section 7** of the same Act stipulates that ownership of Matrimonial Property depends on each spouses' contribution. **Section 7** states 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.”

16. **Section 9 of Act No. 49 of 2013** recognizes contribution through improvement of a property acquired before or during the marriage.

Section 9 states as follows: -

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the 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 made.”

17. It is not in dispute that the Plaintiff was married to the defendant and that there was property acquired in the course of that marriage. The defendant admitted the existence of the marriage in the pleadings and in his evidence.

18. The plots cited above are the ones that are free from any encumbrance and form part of the matrimonial property. The defendant maintains that there was zero contribution by the Plaintiff. Section 2 of the Matrimonial Property Act defines “**contribution**” to mean 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;

“family business” means any business which-

a) Is run for the benefit of the family by both spouses or either spouse; and

b) Generates income or other resources wholly or part of which are for the benefit of the family;

“matrimonial home” means any property that is owned leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;”

19. It is not in dispute that the Plaintiff did not make any monetary contribution. However, the many years of working for the family in form of domestic work and management of the matrimonial home, management of the family land and taking care of the children is recognized as non-monetary contribution under Section 2 of the Act.

20. There is no laid down formula for distribution of matrimonial property. The court ought to consider the contribution by the parties towards the property taking into account both distribution. Where the financial contribution of each party is known, it becomes easy for the court to distribute the property in line with **Section 7 of the Matrimonial Property Act**. However, where the contribution is non-monetary, the assessment of the rate becomes a bit difficult. The court has an obligation to assess the contribution each spouse whether monetary or not.

21. **Article 45(3) of the Constitution** provides that parties are entitled to equal rights at the time of marriage, during marriage and at the dissolution of the marriage. Whether the marriage has been dissolved or not, the rights of the parties remains equal under the Supreme Law of the land.

22. The defendant states that he purchased and developed all the properties using income from his salary and from borrowing of funds. He said that he worked as a policeman in various parts of the country and that his wife who was just a housewife who did not contribute any funds towards the projects. He admits that the plaintiff was running some family businesses at their home at Gachuriri and looked after their children when they were of tender age. The businesses included a shop and farming with the aid of irrigation at their farm. He accuses the plaintiff of running down the businesses.

23. The defendant said that later he lived with his five children at his stations of work while the plaintiff stayed at home at Gachuriri. The plaintiff denied that the defendant stayed with the children at his place of work. She testified that she stayed with them in their tender years and they would go to boarding schools at a later age.

24. It was the plaintiff’s evidence that she contributed substantially to acquiring matrimonial properties in that she had income from her farming projects, took care of the properties and supervised constructions on the developed properties. She said she sourced for building materials and did everything required to facilitate the developments of their properties.

25. I have looked at the copies of registers produced by the parties. The properties were acquired between 1988 to 2011 during the subsistence of the marriage for the parties who got married in 1972.

26. I hereby find that the following properties were acquired and developed (where the case applies) during the subsistence of the marriage between the parties: -

a) *Mbeti/Gachuriri/[xxxx]*

b) *Mbeti/Gachuriri/[xxxx]*

c) *Gaturi/Githimu/[xxxx]*

d) *Gaturi/Githimu/[xxxx]*

e) *Mbeti/Gachoka/[xxxx]*

f) *Mbeti/Gachoka/[xxxx]*

g) *Mbeti/Gachoka/[xxxx]*

h) *Nthawa/Riandu/[xxxx]*

i) *Nthawa/Riandu/[xxxx]*

j) *Plot [xxxx] Gachuriri*

k) *Plot [xxxx] Siakago*

27. The plaintiff claims that the defendant has disposed of some of the properties. He has transferred half shares of the parcels of land to a woman he cohabits with one known as EMK namely L.R. Nos. Nthawa/Siakago/[xxxx]. While the case was pending in court the defendant has disposed of L.R. Nos. Mbeti/ Gachuriri/[xxxx] and LR. Mbeti/Gachuriri/[xxxx] for valuable consideration.

28. The defendant admitted that he has transferred some shares of the land parcels above mentioned to Edelena whom he called his business partner. He did not deny that he has sold L.R. Nos. Mbeti/Gachuriri/[xxxx] and Mbeti/Gachuriri/[xxxx].

29. The plaintiff states that there are other huge tracts of land at Mbeere area registered in the name of the defendant but does not know the land reference numbers. It is therefore not in dispute that the defendant has reduced the list of the matrimonial properties by disposing of seven parcels of land. This puts the plaintiff at a disadvantage in the division of the property. The value of the properties sold by the defendant is not known to help the court in the distribution. However, this court will bear in mind this undisputed fact that several land parcels which were matrimonial properties have been sold by the defendant.

30. **Section 9 of the of the Act** recognizes both monetary and non monetary contribution. It was held in the case of ***Federation of Women Lawyers Kenya (FIDA) Vs Attorney General 2018 eKLR*** that: -

“..... the greatest injustice which in my view forms the basis of the Petitioner’s fear as I understood it is that there has been failure to reward or recognize a spouse whose contribution to a family has been or was through being a home maker, performing household chores, bearing children and raising children or a spouse who used his or her resources for the day to day subsistence requirements of the family and thereby deprive himself or herself of the opportunity of acquiring durable property. Historically, majority of these were or are women, hence the Petitioner’s fear that women are disadvantaged. I am clear in my mind that the drafters of the Act were conscious about this, hence the clear definition of non-monetary contribution in the act. The essence of this provision is that court will evaluate the interest of the parties and the property and make a just and equitable distribution of the properties.”

31. I am of the considered opinion that the plaintiff contributed to acquiring of the matrimonial properties by running the family’s business of the shop, through income from the farming project, bearing and raising five (5) children, taking care of the defendant, supervising construction of their properties, attending Land Control boards and purchasing building materials. In her absence, the defendant would not have achieved that level of investments.

32. The plaintiff’s non-monetary contribution is key to the progress the family has made during the subsistence of the marriage. I am in agreement with the holding in the FIDA case that spouses who perform household chores, bear and raise children and “make homes” for the family.

33. In this regard I find that the contribution of the plaintiff in this case entitles her to half share or to 50% of all the matrimonial properties.

34. In her evidence which was not disputed the plaintiff told the court that the matrimonial home where she resided on L.R. Mbeti/Gachuriri/[xxxx]. The children who are all over 18 years reside and use the houses L.R. Mbeti/Gachuriri/[xxxx]. She testified further that she developed a stall on Plot No. [xxxx] Gachuriri which she uses. It was stated that Plot No. [xxxx] Shauri and Plot No. [xxxx] Gachuriri are both registered in the plaintiff’s name.

35. In dividing the matrimonial property, it is imperative to take into consideration these facts so as to minimise disruption of any of the parties in relation to where they have settled and in regard to their occupations that give them income for their subsistence.

36. The valuation report on the properties listed was not availed to the court. The court will therefore consider the sizes and locations of assets in the division of the properties hoping that it will achieve fairness to the parties.

37. The defendant said he owns Plot No. [xxxx] Gachuriri jointly with the plaintiff’s father and has extensively developed it. Further that he gave LR Mbeti/Gachoka/[xxxx] to one Charles Muriuki in exchange of LR Mbeti/Gachuriri/[xxxx].

38. He agreed with the plaintiff that three plots No. [xxxx] Malindi, No. [xxxx] Gachuriri and No. [xxxx] Shauri are matrimonial property registered in the name of the plaintiff. He added that he transferred L.R. Mbeti/Gachoka/[xxxx] to one Charles Muriuki in exchange of LR Mbeti/Gachuriri/[xxxx]. He further said that he transferred LR Mbeti/Gachoka/[xxxx] to a creditor whom he owed money but did not disclose the names of the person.

39. I proceed to divide the matrimonial properties between the parties as follows: -

40. Plaintiff – Penina Mucogo Njuki

i. Mbeti/Gachuriri/[xxxx]

ii. Mbeti Gachuriri/[xxxx]

iii. Mbeti Gachuriri/[xxxx]

iv. Plot No. [xxxx]Shauri

v. Plot No. [xxxx] Gachuriri

vi. Plot No. [xxxx] Gachuriri

vii. Plot no. [xxxx] Malindi

viii. Mbeti/Gachoka/[xxxx]

ix. Plot No. [xxxx] Gachuriri

41. Defendant – Justus Njuki Nyaga

i. Gaturi/Githimu/[xxxx]

ii. Gaturi/Githimu/[xxxx]

iii. Mbeti/Gachoka/[xxxx]

iv. Nthawa Riandu [xxxx]

v. Nthawa/Siakago [xxxx]

vi. Plot No.[xxxx] Siakago

vii. Plot No. [xxxx] Malindi

viii. Nthawa/Siakago/[xxxx]

ix. Nthawa/Siakago/[xxxx]

x. Nthawa/Siakago/[xxxx]

xi. Nthawa/Siakago/[xxxx]

xii. Plot No. [xxxx] Siakago

42. Charles Muriuki

- Mbeti/Gachuriri/[xxxx]

43. Estate of Andrew Nyaga Kamau

- Nthawa/Siakago/[xxxx]

44. Each party to meet their own costs of this suit.

45. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. R. Njeru for Plaintiff

Ms. Nzekele for Okwaro for Defendant