



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**CIVIL CASE NO. 41 OF 2011**  
**IN THE MATTER OF THE**  
**APPLICATION UNDER MARRIED WOMEN PROPERTIES ACT 1882**

**MWM.....PLAINTIFF**

**VERSUS**

**JMN.....DEFENDANT**

**JUDGMENT**

1. In 1987 the respondent JMN acquired plot No. [xxxx] in Chieko Housing Limited. The plot was to be excised from LR No. [xxxx] at Kasarani Road, Nairobi. The applicant MWM gave evidence that she got married to the respondent in 1994 under Kikuyu customary law. The respondent's case was that he took her as a wife in 1995. Whichever is the date, it is common ground that the couple lived together until 2010 when the applicant left with the two children they had got. At the time, the plot had been developed and was being used both as their residence and as rental premises. The applicant's case was that she had contributed to the construction of the plot. The respondent's case was that he constructed the plot between 1988 and 1994, before he married the applicant; that the applicant did not at all contribute to the construction.

2. The applicant works for [particulars withheld] as a permanent environment labourer. When the respondent bought the plot he was working for the [particulars withheld]. He retired in 2005. He has other families.

3. On 20<sup>th</sup> February 2004 the respondent wrote to Chieko Housing Limited and sought to have the applicant and her two children to become co-owners of the plot. Paragraph 12 of his replying affidavit sworn on 15<sup>th</sup> April 2015 has the reason why he made the decision. It states as follows:-

**“12. THAT I wish to confirm that I am the one who wrote a letter to Chieko Housing Ltd to add the names as per copy attached of the letter dated 29<sup>th</sup> February 2004. The reason for writing the letter was to protect my family in case I pass away or die so that no one could come and claim that plot. The reason for my fear was that I had another wife whom I had divorced and filed a case at Muranga Law Court Case No. 158/2003 and I appealed in High Court No. 61 of 2004 in Nairobi. I thus did not want the said previous wife to claim the plot in case I died.”**

4. In the amended originating summons filed on 16<sup>th</sup> March 2015 under **section 17** of the **Married Women Property Act, 1882** the applicant asked for a declaration that the plot was co-owned by the two, and that the respondent and/or his agents be restrained from selling or disposing off or dealing with the property within the written consent of the applicant.

5. I note that the issues of matrimonial property are now governed by the **Matrimonial Property Act, 2013**. This **Act** repealed the **Married Women Property Act, 1882**.

6. Since the couple is not divorced, matrimonial property between them cannot be shared. Under **section 17** of the **Matrimonial Property Act**, an action can be brought for the declaration of the rights of either party to matrimonial property they are disputing over. I consider the present amended originating summons to be such action by the applicant.

7. Matrimonial property is defined by **sections 2 and 6** to be any property acquired by the couple during the existence of their marriage. This

property includes matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any movable or immovable property jointly owned and acquired during the subsistence of the marriage.

8. Under **section 7** of the **Act**, 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 is common ground that the spouses herein have not divorced, so therefore the property between them cannot be divided.

9. In **section 2** of the **Act**, contribution may be monetary or non-monetary. It may be direct or indirect contribution. Contribution includes domestic work and management of the matrimonial home; child care; companionship; management of family business; and farm work.

10. Under **section 14(b)** of the **Act**, where matrimonial property is acquired during the marriage in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

11. I have indicated in the foregoing that the respondent bought the plot before he married the deceased. She played no role in the acquisition. In 2004 the respondent introduced the applicant and her two children into the ownership of the plot. The four became co-owners. The plot has 4 shops, 3 residential houses, and two extensions. They have tenants.

12. The applicant swore an affidavit and produced documents to show that in June 1987 she and the respondent paid Kshs.12,120/= towards the purchase of the plot. That was not true as she later, during oral testimony, conceded that she played no role in the acquisition of the plot. She was therefore not a reliable witness. She produced a document to show she got a loan facility on 29<sup>th</sup> January 2008 of Kshs.100,000/= which she used to develop the property. The couple separated in 2010 when the property was already developed. She did not say at what point of development the plot was in 2008. Certainly, the developments on the plot are well in excess of Kshs.100,000/=. The respondent stated that the development was between 1988 and 1994. He stated he married the applicant in 1995. The applicant stated she was married in 1994. On the evidence available, I find that the plot was substantively developed before the respondent married the applicant. Subsequent to the marriage, however, each spouse had an income that was spent on the family. Everything was working well, to the extent that in 2004 the respondent had no problem introducing the applicant and the children into the ownership of the property. I consider that contribution may be direct and indirect; it may be monetary or non-monetary.

13. In the peculiar circumstances of the case, I declare that the respondent is entitled to half of the value of the plot No. [xxxx] together with its developments. The applicant is entitled to the other half of the value of the plot and its developments.

14. The rent deposited into the joint account will be shared in the same ratio. The parties shall within 30 days from today agree on how future rent shall be collected and applied.

15. The respondent and/or his agents are hereby restrained from selling, transferring, leasing, charging, and/or otherwise disposing of the plot No.[xxxx] Cheiko Housing Limited.

16. This is a family dispute. Each party shall bear own costs.

**DATED and SIGNED at NAIROBI this 5<sup>TH</sup> day of FEBRUARY 2019.**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 7<sup>TH</sup> day of FEBRUARY 2019.**

**ALI-ARONI**

**JUDGE**