REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO. 544 OF 2012 (O.S)

MKM .....APPLICANT

VERSUS

JOM.....RESPONDENT

JUDGMENT

1. MKM (the Applicant) filed an Originating Summons dated the 13th December 2012 against JOM (the Respondent). The Summons is brought under Order 37 Rule 1 of the Civil Procedure Rules and Section 17 of the Married Women's Property Act 1882. She claims to have a beneficial interest in properties herein referred as parcels Nos. **Wanjare/ Bogiakumu/[...]**(hereinafter referred to as parcel No. 1), **Wanjare/Bogiakumu/[...]** (herein referred as parcel No.5). **Kisumu/Kasule/[...]** (herein referred as parcel No.6), WEST **Kitutu/Bomatara/[...]** (herein referred as parcel No.2), having been his wife and having contributed to their acquisitions and developments she seeks the determination of the following issues:-

i. That, a declaration do issue against the respondent that the applicant is entitled to half share of their six (6) joint properties mentioned above and that the respondent holds the same in trust for himself and for the applicant.

ii. That, both the applicant and the respondent shall be solely entitled to a half share of their developed and undeveloped properties respectively.

iii. That, a declaration do issue against the respondent that the applicant is entitled to half share of the two parcels of land whose Title numbers are unknown to the applicant but which parcels of land are within Kisii Central.

iv. That, their physical location is known to the applicant and that the respondent holds the same in trust for himself and the applicant.

v. That, alternatively to the foregoing a declaration that the applicant is entitled to take the entire developed property: - **Wanjare/Bogiakimu/[...]**(herein referred as parcel No.1) where there is her matrimonial home/house.

vi. That, the respondent shall be granted the entire developed property: - **Kisumu/Kasule/[...]** (herein referred to as parcel No.6) besides having more buildings in it.

vii. That, the applicant shall be entitled to un-developed properties: -**Wanjare/Bogiakumu/[...]** (herein referred as parcel No.5) and **Wanjare/Bomariba/Unknown**, (herein referred as parcel No.3)

viii. That, the respondent shall be entitled to un-developed properties: **West Kitutu/Bomatara**/[...], (herein referred as parcel No. 2) and **Wanjare/Bomariba/Unknown**(herein referred as parcel No.4) respectively.

ix. That, there be an order to the Respondent to release all TITLE DEEDS to both known and unknown properties entitled to the applicant.

x. That, there be an order of permanent injunction restraining the respondent by himself, agents, servants and/or employees from disposing and/selling the suit until this suit is finalised.

xi. That, the cost of this originating summons be borne by the respondent.

xii. That, such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

2. The Summons is grounded on the annexed affidavit of the Applicant on the following grounds :-

(a) That the applicant is a former wife of the respondent having married her under Gusii Customary Laws in the late 1970s and later formalizing the said marriage in the U.S.A. on 19th March 2002.

(b) That the respondent has since divorced the applicant while in the U.S.A. where both parties reside currently.

(c) That the parties agreed in the divorce case to have the sub-division of their Kenyan properties determined by a Kenyan law in a Kenyan court within one year from the said date of divorce which is 3rd April 2012.

(d) That the properties were acquired and developed during the subsistence of the marriage

(e) That the applicant substantially contributed to the acquisition and development of the said properties as most of the time the respondent was in the U.S.A.

(f) That it is in one of the properties that there is a matrimonial house that the issues of the marriage were sired ad brought up.

(g) That the applicant has therefore a valid beneficial interest in the suit properties.

3. Parties relied on their affidavits and also testified. The Applicant averred as follows in her supporting affidavit;in the mid-1970s she was married by the respondent under Gusii Customary Laws.Their marriage has been blessed with the issues of marriage. In the early 1990s the respondent moved to the United States of America leaving me behind and the issues of marriage. During the subsistence of their marriage both parties purchased **Kisii/Wanjare/Bogiakumu/[...],** parcel No. **[...]3362, West Kitutu/Bomatara/[...]**and two (2) more properties of land at **Wanjare/Bomariba/Unknown**.That, in 2001 the applicant moved to the United States of America to join the respondent and the parties proceeded to formalize their marriage in Hennepin County Minnesota U.S.A. While in the United States of America irreconcilable differences arose between us leading to divorce which was issued on 2nd April 2012. In the judgment delivered by the US Court it was resolved between the parties that sharing of the suit properties be done through a Kenyan Court under the Kenyan Law. Her contention is that since she substantially contributed to the acquisition and development of the suit properties she is entitled to a half share of the suit properties. That she also solely took care of the issues of marriage and therefore indirectly contributed to the suit properties. She seeks that a declaration be issued against the respondent to surrender and transfer the property **Wanjare/Bogiakumu/[...]** in which was their matrimonial home/house to the applicant. That the respondent be granted property of land **Kisumu/Kasule/[...]** which is herein referred as parcel No.6 besides it having more buildings to equalize with the applicant. That each party is entitled to one (1) developed property. That she is entitled to property of land **Wanjare/Bogiakumu/[...]** parcel No.5 and **Wanjare/Bomariba/Unknown** parcel No.3. That the respondent be granted **West Kitutu/Bomatara/[...]**parcel No.3 and **Wanjare/Bomariba/Unknown**, parcel no.4

4. The Applicant's in her evidence in Court adopted the contents of her supporting affidavit adding that; her home is in parcel no. 4563, the Respondent destroyed her permanent house and built another house in its place whilst this case was pending. She wants a house where her children can visit. She buried her son called Eric in the said homestead. There is vacant space in the said parcel of land she wants her homestead built in the empty space. That parcels nos. 2145 and 2146 are registered in her name. That her son Calvin has built in parcel no. 1894. The Respondent can share parcel no. 4119 with his children. She was adamant that the Respondent builds for her next to her son's grave in parcel no. 4563.

5. The Respondent in his replying affidavit averred as follows; the 2 unknown parcels of land are the 2 parcels of land registered in the Applicant's name**, WANJARE/BOMARIBA/[...]** and **[...].** The plot of land KISUMU/KASULE/4119 has only 4 houses.That as much as the said properties are acquired during the subsistence of the parties marriage the same were and are of family properties and the same cannot be shared equally between the parties herein as at now the said properties have been distributed and/or earmarked for distribution as herein under indicated i.e;

i. **Plot No.Wanjare/Bogiakumu/[...]**, the maisonette standing thereon on a portion of the same has already been given to Applicant's sons **J** and C and the reminder on which stands the matrimonial house is for and should remain for the Respondent. This parcel of land has been earmarked for **JO.**

ii. **Plot No. Kisumu/Kasule/[...]**, though registered in the name of the Respondent has two sections. The developed and undeveloped section. The undeveloped section is for **MO** while the developed section which has four houses the Respondent proposes that house No. 1 should be for **GO**, house No.2 should be for **JO** house No.3 should be for **JO** and house No.4 should be for **CO**. The Applicant shall have and/or enjoy a life interests on houses Nos. 3 and 4 while the Respondent therein will also have or enjoy a life interest on houses Nos. 1 and 2. **G, J, C and J** are all children of the parties herein.

iii. **Plot No. West Kitutu/Bomatara/[...]** is for **CO**. This parcel of land has been earmarked for the Applicant.

iv. Plot Nos. Wanjare/Bomariba/[...] and **[...]** are currently registered in the name of the Applicant and should remain for her for life and thereafter distributed to joint son's **C** and **J.**

v. Plot No.Wanjare/Bogiakimu/[...] which is adjacent to **Plot No. WANJARE/BOGIAKIMU/[...]** is for **MO.**

He opposed to the mode of distribution of the properties as proposed by the Applicant arguing that mode of distribution of the properties proposed him takes into account the interest of the parties herein and their offsprings and further this is consonant with the larger family of the parties herein and is in accordance with their cultural and traditional values.

6. During his testimony the Respondent stated that parcel no. **[...]** is not their ancestral land but land which was purchased after they sold their ancestral land. Its 0.12 Ha and has a storey building, he lives in the said parcel of land with his current wife. That there is a small space of 20 by 20 feet. That since their divorce they have had a bitter and painful relationship and he is not comfortable sharing a home with the applicant. That there is an adjacent plot parcel no. **[...]** which is 0.28 Ha which the Applicant can build on. That the community suggested that she builds in the said parcel of land which is also occupied by their son C. That parcel no. 3362 is adjacent to parcel no. 4563 and is 0.12Ha, he has built a bigger house in **[...]**, and he has given the said parcel of land to his 4th wife. That the Applicant was his 3rd wife and he has given a portion of parcel no. **[...]** to the son of his 1st wife. He has children from his 1st and 2nd wife, whom he has also catered for in the parcels of land. That he wants to give a portion of the storey house to his son M from the 2nd wife. That parcels nos. **[...]** and **[...]** are already taken. That he will combine with their children and assist her build. He has no interest in 2 parcels of land the Applicant owns. He admitted destroying the house on parcel no. 4563 but said he did so in 2006 before the case started. That parcel no. **[...]** was in his name at first but has been transferred to his 4th wife.

7. Parties filed written submissions. The Applicant submissions reiterated the parties evidence. It was submitted that during the pendency of this case the Respondent altered the status of the properties, by sharing the properties with other persons and even destroyed their matrimonial home. That the Respondent is disinheriting the Applicant and her children. The Applicant submits that since there is space in parcel no. **[...]** the Respondent should build the Applicant a house in the said space worth 5 million and the empty parcel of land 3362 should be given to the Applicant. That in the alternative the parties should share the property equally. The Applicant cited the following; **The Married Women's Act of 182, Section 17, the Matrimonial Act 2013, the following cases; IEBC & Another vs. Stephen Mutinda Mule & 3 Other Civil Appeal No. 291 of 2013, F.S vs. E.Z HCMC No. 16 of 2014 at Malindi, SNK v MSK 5 Others Civil Appeal No. 139 of 2010, AWN vs FMN HCMC No. 10 of 2016 at Nakuru, Aalias AMMS vs RMK HCCC No. 1 of 2012 and PNN vs ZWN Civil Appeal No. 128 of 2014**

8. The Respondent too reiterated his evidence in his submissions. The respondent proposed that the Applicant builds in parcel no. 1894 and that he is willing to contribute Kshs. 1,000, 000/-.

9. Having considered the affidavits, evidence and follows are the issue for determination is;

i. Whether the applicant is entitled to the orders sought in the Originating summons?

The undisputed facts are that; the parties matrimonial home was in parcel no. **Wanjare/Bogiakumu [...]** and that Respondent demolished the house which they occupied with the Applicant during the subsistence of their marriage. That Parcel no. **Wanjare/Bogiakumu[...]** is adjust to parcel no.**Wanjare/Bogiakumu [...]**. That parcel no.**West / Kitutu/ Bomatara [...]** is occupied by their son Calvin. Parcels no. **Wanjare/ Bomariba[...] and [...]** are registered in the Applicant's name. That **Kisumu/Kasule/[...]** is developed with 4 residential houses and is not claimed by the Applicant. It is also not in dispute that the said properties were acquired during the marriage of the Applicant and Respondent. From the evidence adduced the Applicant has a beneficial interest in the properties mentioned as they were acquired during the subsistence of their marriage.

10. At the hearing the Applicant narrowed her interest to 2 properties **parcels nos. [...] and [...]** which the Respondent states are not available. The principles applicable in division of matrimonial property for parties whose cases were filed before the Matrimonial Property Act 2013, where properties are registered in the names of one spouse was stated by the Court of Appeal in the case of in **PETER MBURU ECHARIA v PRISCILLA NJERI ECHARIA, Civil Appeal No. 75 of 2001**. The Court held:

> *"Where the disputed property is not registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim "equality is equity" while heeding the caution by Lord Pearson in Gissing v Gissing."*

> *"In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during a marriage which have come to this Court the Court has invariably given the wife an equal share (see Essa v Essa (supra) Muthembwa V Muthembwa Civil Appeal No. 74 of 2001 and Mereka v Mereka, Civil Appeal No. 236 of 2001). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the Court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property.*
>
> *The Court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband."* I am guided by this Court of Appeal decision.

There is no dispute that these 2 parcels of land were acquired during the subsistence of the parties' marriage. It is not clear the portion each contributed, but it is clear that their ancestral home was sold and the proceeds used to acquire land parcel **[...]**. The history of parcel no.**[...]** is not so clear but currently it's owned by the Respondent's 4th wife. The said properties are occupied by the Respondent and his 4th wife who is not a party suit. The applicant is adamant that she is entitled to a share since her house was built on parcel no. **[...]** before it was demolished. She was very emotional in court over this issue. She has been offered parcel no. **[...]** which is the same acreage as the 2 parcels no. **[...]** and **[...]**. From the title deeds produced in court, parcel no. **[...]** was registered in the Respondent's name in 2011, parcel no. **[...]** was registered in the name of MB in 2016, during the pendency of this case, parcels no.**[...]** and **[...]** were registered in the Applicant's name in 2000 and parcel no.1894 was registered in the name of JO in 1990.

The parties did not hide the fact that after their divorce they do not see eye to eye. Though the applicant is entitled to a share parcel no. **[...]**, would it be wise to have her build a home in an empty space of 20 by 20 feet. In my view it would not be in order, the space is small and is

with the current homestead of the Respondent and his current wife, 2ndly the parties are not friends there is a 3rd party the 4th wife they will always have issues. In my view the better option is to have the applicant take parcel of land no.**[...]**.

11. The next issue I have to determine is should the Respondent contribute to the Applicant's new home. The Respondent admits having demolished the house the Applicant used to live in he is willing to contribute a sum of Kshs. 1,000,000/-. The applicant seeks 5 million. The Applicant is entitled to a decent modest house. In my view the contribution the Respondent should make towards the Applicant house in parcel no 1894 is Kshs. 2.5 Million.The parties have agreed on the other parcels of land. Some will be inherited by their children. The Respondent has no interest in parcels no **[...]** and **[...]** they shall remain in the Applicants name.

Final orders;

i. Parcel no. **Wanjare/ Bogiakumu/[...]** and **Wanjare/Bogiakimu/[...]** is not available for distribution.

ii. The Applicant shall have Parcel no. **West / Kitutu/ Bomatara [...]** .The Respondent shall contribute a sum of Kshs. 2.5 million towards the construction of a house for the Applicant in parcel no. 1894.

iii. Parcel nos**. Kisii Wanjare Bomariba / [...]** and **[...]** which are the Applicant's name shall remain in her possession.

iv. Parcel **No. Kisumu/ Kasule/[...]** shall remain in the possession of the Respondent as agreed by the parties.

v. Each party to bear their own costs.

Dated,signed and delivered on the **1st** day of **March 2019**

R.E.OUGO

JUDGE

In the presence of;

Mr. Onyancha For the Applicant

Ms Mbaka h/b Mr. Soire For the Respondent

Rael Court Clerk