



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**MATRIMONIAL NO.1 OF 2017**

**JWM.....PLAINTIFF**

**V E R S U S**

**MMM.....RESPONDENT**

**JUDGMENT**

**JWM (plaintiff)** filed the Originating Summons dated 31/1/2013 seeking the following orders:

- (1) That a declaration do issue that provides that properties known as Nyandarua/Ndemi xxxx, measuring about 6.1 Ha, Nyandarua/Ndemi xxxx measuring about 2.6 Ha and Nyandarua/Ndemi xxxx measuring about 8 Ha with all buildings and developments thereon were acquired by the joint funds and efforts of the applicant and the respondent during their marriage and registered in the name of the respondent are owned jointly by the applicant and respondent;*
- (2) That the same be divided equally between the respondent and the applicant in such other just and equitable manner and proportion as this Hon. Court deems fit;*
- (3) That premised on the foregoing, the respondent be constrained by the Hon. Court to allow the applicant and her children to enjoy in equal shares quiet occupation/possession of that section of the properties known as Nyandarua/Nderu xxxx, xxxx and xxxx as the court will so direct that they occupy in (2) above;*
- (4) Prayer is spent.*

The facts upon which the Originating Summons is founded are set out in JW's (plaintiff) affidavit dated 31/1/2013 and her statement filed in court on 29/10/2013. PW1 adopted the said affidavit in her testimony and her statement filed in court on 29/11/2003. PW1 stated that she first got married to the defendant's brother who died in the 1950s during the Mau Mau insurgence. By then she had 3 children; that her father in law insisted that she remains in his home. Later, she started cohabiting with the defendant in 1961 and underwent Kikuyu customary marriage and they were blessed with 8 other children; that they jointly acquired some properties between 1965 and 1982 i.e. Nyandarua/Ndemi xxxx (6.1 Ha), xxxx (2.6 Ha) and xxxx (8 Ha). That they started having problems about 1985 and the defendant started to physically abuse her. He moved out of the matrimonial house and built for himself a hut and in 1990, he married another wife, MN and took her to PW1's matrimonial house contrary to Kikuyu Customs and PW1 was forced to reside in a store; that the defendant refused to provide for her and her children and only allowed her to cultivate 1½ acres out of the 16.7 Ha. Due to continued conflicts with the defendant, elders sat and agreed that the defendant provide her with enough land to cultivate but he continued to frustrate her.

In 2002, PW1 got information that the defendant was planning to sell the land and she reported to the District Commissioner Olkalou who advised her to place cautions on the land. The harassment continued and in 2010, she sought legal aid as a result of which this suit was filed.

**Steven Muraguri Wakahiu, (PW2)** Senior Chief of Ndemi Location confirmed that he knows PW1 as the wife of M the defendant for the 30 years he has been their chief. PW2 testified that he had visited their home when some issues arose and that M used to refer to PW1 as the wife. He was aware that the defendant got married to another wife and from then, PW1 and the defendant have had problems which he has been called upon now and then to resolve. He produced minutes of a meeting he attended where the defendant wanted PW1 to leave her house for the 2<sup>nd</sup> wife P.Ex.3 but PW1 wanted the defendant to build a house for the 2<sup>nd</sup> wife.

**PW3 ZGM** is an older brother of the defendant. He confirmed that PW1 was first married to his elder brother, EM who died during struggle for freedom in Kenya; that PW1 later married the defendant. They got children and acquired property together before the defendant got married to a second wife. He was involved in a dispute between PW1 and the defendant whereby the defendant was denying PW1 a place to farm and it was resolved that they both farm their land.

**MMM**, the defendant (DW1) adopted the replying affidavit he had filed in court on 27/6/2013. He admitted that PW1 was first married to his brother in 1949, they got 3 children and when he died, he took up the care for the children; that PW1 lured him and they got a child in 1961 and another 5 children but she got another child with his brother; that PW1 has never treated him as a husband, does not cook for him and influences the children to disrespect him and was asked to pay her a sheep for disrespecting him; that he has provided for her and her children; given them shelter and educated the children. He denied that the properties in dispute were jointly obtained or that PW1 contributed to them; that his wife N is the 4<sup>th</sup> wife, having married three others but they had been sent away by PW1; that he built a house for the new wife; that PW1 has defied the elders and refused to be resettled; that he has treated PW1 well but she has been cruel and neglected him.

**DW2 Wanjau Mwangi Wambugu** a friend of the defendant confirmed that PW1 is a wife to the defendant. He said that in Kikuyu Custom, one can marry as many wives as he can manage and that they have to share the husband's property equally. He confirmed that the defendant bought the land in 1965 when already married to PW1 and that both used to till the land for a living.

I have considered the testimonies of all the witnesses and the submissions of counsel. There is no dispute that PW1 is the wife of the defendant. The defendant admitted that he married her in 1956 after her first husband who was his elder brother died during Mau Mau Insurgence. They have lived as husband and wife since and have six children from their union. All the witnesses who testified confirmed that fact.

It is also an un-disputed fact that the defendant is polygamous, having married another wife, N. The defendant did not tell the court exactly when he got married to the 2<sup>nd</sup> wife but PW1 said it was in 1990. That was not disputed by the defendant.

It is also common ground that the plaintiff and defendant have not been living in harmony. The plaintiff (PW1) stated that the defendant (DW1) started changing in 1985, moved out of their matrimonial house and later married N. PW2, the Chief of the Ndemi Location and PW3, the defendant's older brother were aware of the disputes which have arisen between the plaintiff and the defendant over use of the land following the coming into their lives of the defendant's wife N. In their testimonies, PW1 and DW1 blamed each other for their problems but it is not for this court to determine exactly what transpired or who is to blame for their woes. PW2, the chief presided over a dispute where the defendant wanted PW1 to leave her house for the 2<sup>nd</sup> wife; the other allegation is that the defendant had denied PW1 a place to cultivate. PW3 who was also involved in the dispute stated that the defendant was denying PW1 a place to cultivate. The defendant says he built a house for N and that he provides for PW1 and she lives on his land. These issues must be the reason why PW1 preferred this application for the court to determine and subdivide the matrimonial property and give PW1 her portion even though the marriage is still subsisting.

According to PW1, the three pieces of land were acquired before the 2<sup>nd</sup> wife was married to the defendant. The defendant never specifically said when he acquired the property. DW2, the defendant's friend said he knew that the pieces of land were acquired in 1965. DW2's evidence therefore corroborated PW1's evidence that the lands were acquired well before the 2<sup>nd</sup> wife was married.

The defendant contends that he acquired the said property single handedly without the help of PW1 and that he has a right to share the property amongst all his wives as he wishes. DW2 also contends that a Kikuyu man can marry as many wives as they wish and that the wives would share the husband's property equally.

During cross examination of the defendant, he admitted that he used to cultivate the said land together with PW1 and their children. DW2 also added that the defendant, PW1 and their children used to till the land and harvest from it for their livelihood. The defendant did not specifically state that he bought the land from a salary or from proceeds from the land.

I have seen from the exhibits produced by PW1 that the lands were bought on loan from Settlement Fund Trustee (SFT) and most of these lands were on loan from the SFT (Government) and were paid for by proceeds from the sale of produce from the farms. Even though DW2 said that the defendant worked, the court has no idea what type of work he did and whether he could have paid for the land. It is more likely that the lands were paid for from proceeds from farming on the pieces of land and no doubt both PW1 and DW1 worked on the lands.

This Originating Summons was filed in court on 1/3/2013 when the current Matrimonial Property Act 49 of 2013 had not come into force. The commencement date of the above Act is 6/1/2014.

The applicable law as relates to rights and responsibilities of spouses in relation to matrimonial property upto January, 2014 is therefore the Married Women Properties Act 1882 (MPWA); the Constitution and especially Article 45(3), and Section 93 of the Land Registration Act.

I will set out the relevant provisions relating to the rights and responsibilities of the spouses.

**Section 17 of MPWA 1882** provides in relevant part as follows:

***“If any question between husband and wife as to the title to or possession of property, either party....may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice.....and the Judge of the High Court may make such order with respect to the property in dispute, and the costs of and consequent on the application as he thinks fit.”***

Article 45(3) of the Constitution 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.”***

The above Article is echoed in Section 93 of the Land Registration Act No.3 of 2012 which provides:

**“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of the marriage for the ownership and use of both spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the MP Act.”**

I note that though this Originating Summons is expressed to be brought pursuant to Section 17 of the **Married Women Properties Act, 1882**, the applicant made their submissions and invoked the provisions of the Matrimonial Property Act 49 of 2013.

To the Contrary, the respondent’s counsel confined themselves to the provisions of the MPWA. Both counsel never addressed the court on which was the applicable law.

It is the respondent’s submission that the Originating Summons is incompetent because the parties are still married and hence the issue under Section 17 has not ripened. Below are the different views that had been taken by different courts for example in **Hezhuo Ying v Qiu Wen Ren, Mombasa HCC.No.128/1994 (OS)** J. Ringera in considering the section said:

**“Notwithstanding the case of I v I (1971) EA 278, Karanja v Karanja (1976) KLR 306 and Essa v Essa (Supra) all of which involved divorced husbands and wives, the English Act does not apply to couples in respect of whose marriage a decree absolute has been issued.”**

In the above case, it was J. Ringera’s view that Section 17 only applied to existing marriages.

In **Peter Ndungu Njenga v Sophia Watiri Ndungu (2000) eKLR**, the court stated **“The learned Judge had no jurisdiction to alienate suit lands between spouses during their life time or unbroken coverture and he ought to have dismissed the suit.”**

In the above case, the court held that Section 17 of MPWA does not apply to subsisting marriages.

With the coming into force of the Matrimonial Property Act, 2013, Parliament clarified what contribution means and who owns matrimonial property.

Section 2 of the Act defines contribution to mean both monetary and none 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.**

Section 7 of the MPA then provides:

**“Subject to Section 6(3) ownership of matrimonial property rests 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.”**

Article 45(3) of the Constitution recognizes that, parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at dissolution. That provision has been interpreted to mean that parties go into the marriage as individuals but bond to form one unit where they enjoy equal rights and in the event they want to dissolve the union, they are entitled to equal rights. Justice Musyoka in **L.N.N. – vs- P.M.M. HCC.61/2013 (NRB)** said at paragraph 12:

**“When parties enter into marriage, they do so on the understanding that their union would be permanent, until death. They never contemplate dissolution thereof, and they build their lives around that notion. They then have children and begin to acquire property believing that they would be together for life. The property is acquired for the benefit and betterment of the family. It is generally regarded as family property. It is into this union then that the notion of equality is implanted by the Constitution and the Matrimonial Property Act. It is then reinforced by the Christian notion that upon marriage husband and wife become one flesh. By extension, it would mean that whatever property one spouse acquires during marriage is intended to be shared with the other spouse. Upon dissolution of the marriage, it would follow, by virtue of the equality principle stated in Articles 45(3) of the Constitution, that the estate would be shared equally between them.”**

In **P.N.N. v Z.W.N. C.A.128/2014** Waki, Azangalala and Kiage J.A. considered the applicability of Section 17 MPWA and the Constitutional provisions in an application under Section 17 MPWA which includes Article 2(5) and (6) of the Constitution and general rules of International Law, all the International Legal Instruments which were ratified by Kenya upon the promulgation of the Constitution. Article 16(1) of the **Universal Declaration of Human Rights**; Article 16(1) on the **Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)** all provide for rights of both spouses at marriage, during marriage and at dissolution.

The Court of Appeal also held that Section 17 of the MWPA did not only apply when the marriage was dissolved but even where the marriage was still subsisting, adopting the position taken in the English case of **Hichens v Hichens (1945) I ALL ER 787**.

**“35. It was held by the English Court of Appeal, that since the Court had the power, at the time when the marriage still subsisted, to direct an inquiry under the Provisions of the Married Women’s Property Acts 17, such an inquiry must proceed, notwithstanding the dissolution of the marriage by a decree absolute; but the court on receiving the report of the registrar, might take into account the fact that there had been a dissolution of the marriage by a decree absolute. See also *Fribance vs. Fribance* (1955)3 ALL ER 789.**

**36. An inquiry may thus be made under Section 17 and declarations may be issued, the subsistence of the marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in *Pettit v Pettit* [1970] AC 777:-**

**“One of the main purposes of the Act of 1882 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 negatives 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 whom shall this be given”.**

**Court further noted that the purpose of the Section is not to defeat rights but to provide a machinery for ascertaining rights and once ascertained, then the register would be changed to take account of them.**

**The court further upheld the decision of the lower court to adopt Section 17 since in this matter, P had already moved in with another woman and transferred part of the disputed property to her. The parties had to come to terms with the reality that they were no longer going to share or enjoy joint ownership of whatever property they may have previously owned and therefore the wisdom in putting their house in order.**

**From the evidence, it is clear that the respondent has moved to a different home with his second wife and it will be right to acknowledge that there has since not been joint ownership of whatever property they may have previously owned thus calling upon court to put everything in order.”**

Bearing the above finding in mind, I now turn to the case before me. I have already analyzed the evidence tendered before this court. There is no doubt that the three pieces of land which are registered in the names of the defendant were acquired during the marriage of PW1 and defendant. The lands were acquired jointly and both cultivated the lands to earn a living. Their matrimonial home stands on Plot.1346. The defendant has brought his 2<sup>nd</sup> wife N and settled her therein. It is evident that though PW1 and DW1 still live on the same land, the relationship between PW1 and DW1 has deteriorated since about 1985 and especially with the defendant’s marriage to another wife. There is obvious threat to the said property being alienated to the 2<sup>nd</sup> wife, with the settling of the 2<sup>nd</sup> wife on the said property.

In view of the above findings, I do declare that the three properties are matrimonial property.

In view of the bad blood between PW1 and the defendant, even though the marriage is still subsisting, it does not subsist in deed and I will not hesitate to order that the property be subdivided. As earlier noted it was not clear what each of the spouses put into the purchase of the property.

I therefore adopt the finding in *Echaria’s case* where the court said:

**“However, in cases where each spouse has made substantial but unascertainable contribution, it may be equitable to apply the maxim ‘equality or equity’.”**

In *P.N.N. v Z.W.M. [Supra]*, the Court of Appeal agreed with the High Court by subdividing the property between the spouses.

Guided by the above decision, I find that PW1 is entitled to half of the matrimonial property.

In the end, I make the following orders:

**(1) A declaration do issue that properties known as Nyandarua/Ndemi/xxxx, xxxx and xxxx with all developments thereon are matrimonial property owned jointly and equally by the plaintiff and defendant;**

**(2) That the said property will be subdivided as follow:**

**(i) The plaintiff will be entitled to Nyandarua/Ndemi/xxxx (8 Ha) where the Matrimonial home stands;**

**(ii) That the defendant is entitled to Nyandarua/Ndemi/xxxx and xxxx which measures 8.7 Ha which is slightly bigger than Plot.xxxx;**

**(iii) The defendant is restrained from interfering with the occupation/possession and enjoyment of plot xxxx by the plaintiff and her children;**

**(iv) Being a family dispute, each party will bear its own costs.**

**Dated, Signed and Delivered at NYAHURURU this 4<sup>th</sup> day of April, 2019.**

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Ms. Karuga holding brief for Mrs. Mbeche for plaintiff

Ms. Kiumbuku for respondent

Mbiyu – Court Assistant