



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**MATRIMONIAL CAUSE NO. 2 OF 2017**

**PNK.....APPLICANT**

**VERSUS**

**FKK.....RESPONDENT**

**JUDGMENT**

1. The applicant craves a *declaration* that she is entitled to *half* of all the properties acquired during her marriage to the respondent.
2. The applicant and respondent are now *divorced*. A *decree absolute* was issued by the lower court on 1<sup>st</sup> August 2017 dissolving their customary union.
3. The applicant's *originating summons* is dated 2<sup>nd</sup> August 2017. It is supported by an affidavit sworn on even date.
4. Paragraph 6 of the deposition lists *three* properties: Loc. 7/Gakoigo/xxxx; a land parcel in Ikumbi township within Murang'a South District; and, another land parcel in North Kinangop, Nyandarua County where "[the respondent] resides with [his] 2<sup>nd</sup> wife and family". The reference numbers or details of the titles of the last two properties have not been provided.
5. The applicant's case is that she made *financial* as well as *non-financial* contribution towards the *purchase* or *development* of the properties. In particular, she claims that she partly financed the construction of the "matrimonial property situated on Loc.7/Gakoigo/xxxx".
6. The respondent flatly *denies* the claim. In paragraphs 13 to 18 of the replying affidavit, he avers as follows: firstly, that as at the date of their separation, the couple had not acquired any property; secondly, that the applicant remarried. Her new partner was *MK* of Kangari. The latter is not a party to these proceedings. Thirdly, that all the properties were acquired during his subsequent marriage to a woman with whom he cohabits at Kinangop.
7. The respondent claims that Loc. 7/Gakoigo/xxxx was given to him by his mother. He took a loan to develop rental units on it. He says he was surprised when the applicant entered into part of the property without his consent.
8. I recorded *viva voce* evidence. At the hearing, the applicant admitted that she did not make a *direct financial* contribution: rather her contribution was picking tea; and, that the tea proceeds went into development of the Gakoigo property. She testified as follows-

*"I had contributed to the acquisition of the properties. He has some other properties. I used to pick tea. The proceeds were used to buy the assets. I did not make a direct contribution. This was from 1976 when I moved into the farm until 1987 when our relationship ended. The respondent was threatening to kill me.*

*"I returned in 1996. I was asked to go [to] live in Maragua Loc.7/Gakoigo/xxxx. The title is in the name of the respondent."*

9. When the respondent took to the stand, he refuted the claim. He was emphatic that the applicant did not make any contribution towards the acquisition or development of the Gakoigo property. He stated-

*"The applicant was my wife from 1974. We could not get children. She left after 13 years. It is not true that I was cruel.....She returned in 2010. The plot in issue [Gakoigo] was given to me by my mother. I worked from 1976 but we did not have funds to build. I went to Regional Loans, Kangari, and got a loan in 1986. Applicant left in 1987. I got further funds from Afya Sacco. I was working for the Ministry of Health. I put up 10 rooms measuring 10x10.*

*"Applicant came back in 2010 and moved into the property. I asked her to be collecting rent and [to] submit [it]. Up to 2015 there*

*was no problem. That year she placed a caution [on the property].....Applicant then filed this case. The property was not developed from the tea proceeds. She was not even there.”*

10. The principles applicable in division of matrimonial property, where the properties are registered in the name of one spouse, were restated in ***Peter Mburu Echaria v Priscilla Njeri Echaria, Civil Appeal No. 75 of 2001 [2007] eKLR***. See also ***SNK v MSK and 5 others***, Nairobi, Court of Appeal, Civil Appeal 139 of 2010 [2015] eKLR.

11. A spouse is entitled to a share of the property if he or she contributed to the acquisition or development of the asset. The contribution may be direct or indirect. ***Esther Wanjiru Githatu v Mary Wanjiru Githatu***, Court of Appeal, Eldoret, Civil Appeal 50 of 2016 [2019] eKLR.

12. The evidential burden in this case lay squarely upon the applicant’s shoulders. See sections 107 and 109 of the **Evidence Act**.

13. I will start with Loc.7/Gakoigo/xxxx. The parties got married in 1974 and separated in 1987. The applicant did not contest that the parcel was *donated* to the respondent by *his* mother. From the evidence, the rental rooms on the property were developed from loans obtained in 1986. The respondent proved that he took loans from *Afya Sacco* and *Regional Loans*, Kangari, to put up the buildings.

14. Under cross examination, the applicant conceded that fact. She said-

*“The plot was built in 1988. By that time I had separated from you. I know that the property was put up [through] a loan. I left the marriage in 1987.”*

15. The applicant thus failed to prove that the acquisition or developments were made from tea proceeds; or, that she contributed in any other manner. It is also clear from the evidence that the property was *not* the matrimonial home. The claim for a share of Loc.7/Gakoigo/xxxx is *dismissed*.

16. Like I stated at the beginning, the applicant did not provide the reference numbers for the other two properties. The properties are described in the originating summons simply as *“a land parcel in Ikumbi township within Murang’a South District; and, another land parcel in North Kinangop, Nyandarua County where [the respondent] resides with [his] 2<sup>nd</sup> wife and family”*. The futility of the prayer is self-evident: if the order is granted as prayed, it could apply to any or several properties.

17. Nevertheless, I am satisfied that the applicant has not proved any contribution towards the acquisition or development of the North Kinangop land where the respondent and his current family resides. The claim on that property is equally *dismissed*.

18. However, there is evidence to show that the couples’ matrimonial home was first at Kangari before they relocated to another property in *Ikumbi Township*. The couple also ran a retail business of making sweaters at Kangari Market Plot 45. The business collapsed.

19. In cross-examination, the applicant was emphatic that-

*“We used to have a business of making sweaters and tea. The tea was planted in 1974. Initially it was a few bushes. We added others in 1976 and 1977. Our matrimonial home was in Kangari; We [then] moved to Ikumbi.”*

20. I am satisfied that during the 13 years coverture, the applicant made indirect or non-financial contribution towards the *Ikumbi Township* property. The respondent offered *no* clear rebuttal. I would in the circumstances; and, in the interests of justice, grant the applicant *half* of the parcel in *Ikumbi township within Murang’a South District*.

21. If that property is incapable of sub-division, it shall be valued. Either party will then be at liberty to purchase the other’s interest. In the alternative, the property shall be sold and the proceeds divided equally between the applicant and respondent.

22. The upshot is that the *originating summons* dated 2<sup>nd</sup> August 2017 *partially* succeeds. I make the following final orders-

a) That the applicant is entitled to *half* of the parcel of land in *Ikumbi Township within Murang’a South District*. If the property is incapable of sub-division, it shall be valued. Either party shall then be at liberty to purchase the other’s interest. In the *alternative*, the property shall be sold and the proceeds divided *equally* between the applicant and respondent.

b) That the applicant’s claim for a share of the *North Kinangop land [where the respondent and his current family reside]* is hereby *dismissed*.

c) That the applicant’s claim for a share of the property known as *Loc.7/Gakoigo/xxxx* is *dismissed*.

d) That each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG’A this 14<sup>th</sup> day of May 2019.**

**KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of-***

The applicant (in person)

The respondent (in person)

Ms. Dorcas and Ms. Elizabeth, Court Clerks.