



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ORIGINATING SUMMONS NO. 1 OF 2018

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT

AND

IN THE MATTER OF THE MARRIED WOMEN PROPERTY ACT

BETWEEN

GKMPLAINTIFF

VERSUS

DR. MKDEFENDANT

J U D G M E N T

1. The parties were married on 25th December, 1968 in a Church wedding in the U.S.A. They were blessed with four issues. The marriage was dissolved in the year 2012. It was alleged that during the pendency of the marriage, the defendant contracted customary marriages with **HMG (1972), RW(1982) and PW**. Then defendant was said to be having seven (7) issues from these subsequent marriages.

2. On 4th November, 2013, the plaintiff took out an Originating Summons claiming a fifty (50) % share of the matrimonial properties which she set out to be **Meru Town Block 1/[particulars withheld] , L.R. No. 305/particulars withheld] , Ngong Township, (Ngong property) Plot L.R. No. particulars withheld] , Plot No. particulars withheld] , Ongata Rongai (Rongai property) and Plot No. particulars withheld] Gikomba Market**. The defendant replied to the Summons vide an affidavit sworn on 19th December 2018.

3. The plaintiff testified and produced her documents as **PEXh 1(a)-(d) and PEXh 2 (a)-(g)**, respectively. Her case was that she obtained a Nursing diploma in the year 1978. She furthered her studies whereby she gained expertise in quality assurance, cardiothoracic nursing and oncology nursing. She worked as a nurse at various institutions including [particulars withheld] County Hospital District, USA and [particulars withheld] National Hospital.

4. It was her evidence that she not only contributed materially but also offered homely comfort and contribution. She took particular mention of her taking care of the issues of the marriage especially at the time when the defendant had filed for bankruptcy.

5. In cross-examination, she told the court that all the suit properties were purchased during the pendency of their marriage. She could however not recall from whom the properties were purchased. In re- examination, she clarified that she did not participate in the acquisition of **Plot No. [particulars withheld] /Ongata Rongai**.

6. On his part, the defendant testified that he was the sole bread winner of the family specifically during the years 1967-1978. That it is during this time that he acquired **LR. Mwimbi/Chogoria/[particulars withheld]** which he transferred to the plaintiff. That he took a loan from the Industrial Development Corporation with which he bought **Plot No. LR [particulars withheld], Nairobi**. That **Meru Town Block [particulars withheld] & Plot No. [particulars withheld], Gekomba Market** were allotments by the Government of Kenya to him hence the plaintiff did not in any way contribute to their acquisition.

7. It was his further testimony that **the Ngong Property** was a gift to him by a step-brother to HMG whom he had married in 1972. He later developed it with RW. That he solely bought the **Rongai** property but that the same is under litigation as he never got access thereto.

9. In cross-examination, he conceded that he did not have any evidence to show that he ever married HMG or prove of many of his averments. He admitted that the plaintiff contributed to the family expenses.

10. Both parties have filed their respective submissions which I have dully considered.

11. The Summons was commenced under the *Married Women's Property Act, 1882*, which was a statute of general application in Kenya (See *I v. I* [1971] EA 278 and *Karanja v. Karanja* [1976-80] 1 KLR 389). During the pendency of the Summons, Parliament enacted the *Matrimonial Property Act, 2013* (hereinafter "*the Act*") which came into force on 16th January 2014. By dint of *section 19 of that Act, the Married Women's Property Act, 1882* ceased to apply in Kenya. When the summons was heard, the *Matrimonial Property Act* was in force. The applicable law therefore is the *Constitution of Kenya 2010* and the *Matrimonial Property Act, 2013*. (See *P B W v J W C* [2017] eKLR).

12. *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".

13. Analysing the implication of *Article 45(3)* aforesaid in *P N N v Z W N* [2017] eKLR, Kiage JA observed:-

"Thus it is that the Constitution, thankfully, does not say equal rights "including half of the property." And it is no accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better than to simply declare that property shall be shared on a 50:50 basis. Rather, if (sic) set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition".

14. *Section 6 of the Act* provides: -

"(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".

15. *Section 8 of the Act* provides of property in a polygamous marriage thus:-

"(1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the—

(a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and

(b) matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives".

16. The law recognizes both monetary and non-monetary contribution. *Section 2 of the Act* provides:-

"contribution" means monetary and non-monetary contribution and includes—

(a) domestic work and management of the matrimonial ome;

(b) child care;

(c) companionship;

(d) management of family business or property; and

(e) farm work;

(See also *E M N v N M* [2018] eKLR)

17. In the present case, the parties were married in the year 1968. The marriage was dissolved in the 2012. There is no evidence of monetary contribution by the plaintiff in the acquisition of the properties. However, she took care of the children, the defendant and partly managed the family business. She was gainfully employed. Not only did the plaintiff reside with the children in the U.S.A but she also made financial contribution for their upkeep. She also took part in the running of the family Pharmacy.

18. In re-examination, the plaintiff admitted that she did not contribute to the acquisition of **Plot No. [particulars withheld], Rongai**. That being the case, that property will not be subject of this determination.

19. Title **L.R. Nos. Block [particulars withheld], Meru Town** and **Plot No. [particulars withheld], Gikomba market** were allotments by the government to the defendant. The defendant alleged that he had already sold **L.R. No. Block [particulars withheld], Meru Town**. However, he produced no evidence to prove that fact.

20. The defendant alleged that **Plot No. [particulars withheld], Ngong Township** was a gift from his brother in law. That it was a gift from the step-brother of a wife he married in 1972, **HMG** and that he was assisted in developing the same by one **RW**. However, he did not call any of these people to testify or produce any evidence to prove his allegations on acquisition and development.

21. In view of the foregoing, I am satisfied that the properties known as **L.R No. Block [particulars withheld], Meru Town, L.R. No. [particulars withheld], Ngong Town, Plot L.R. No. [particulars withheld]** and **Plot No. [particulars withheld] Gikomba market** were all acquired during the subsistence of the marriage between the parties. I have already made a finding that, the plaintiff participated in their acquisition by way of non-monetary contribution. Accordingly, I hold that the said properties are matrimonial properties under the Act.

22. With regard to distribution of the properties, the defendant contended that since he had purchased and transferred **Mwimbi/Chogoria/[particulars withheld]** to the plaintiff, he was prepared that the same remain in her name and that should be enough for her. **Section 15 of the Act** provides: -

“Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolute to the recipient...”

23. There was no evidence that the Chogoria had been transferred to the plaintiff. The title produced showed that it was still in the defendant’s name. The plaintiff did not include the said property in her case. The court cannot make any orders on it as it was never raised in the pleadings and is therefore not an issue for consideration. In any event, under **section 15 of the Act** aforesaid, the said property is presumed to belong to the plaintiff absolutely if it was bought for her.

24. In **E M N v N M [2018] eKLR**, the court held:-

“..... Having found that the plaintiff provided non-monetary contribution to the acquiring of the four (4) matrimonial properties, it is imperative that the contribution must be measured as compared with that of the defendant.

The defendant generated income which was used to invest for the family, educate the children and provide other needs for the family. The plaintiff on the other hand took care of the family's ten children among other duties. This is not a mean task. It is my considered opinion that the plaintiff's contribution be and is hereby assessed at 45% and that of the defendant at 55%.”

25. In this case, I am satisfied that whereas it was not possible to assess the value of the plaintiff’s contribution, the same must have been substantial. Since it is only **Plot L.R. No. [particulars withheld]** that there was express evidence that it was acquired through a loan paid by the defendant, I am satisfied that the entitlement of the parties to the matrimonial properties is 40:60 for the plaintiff and the defendant, respectively.

26. The upshot is that the plaintiff’s Originating summons dated 4th November 2013 is meritorious and the same is allowed as follows:-

a) A declaration issues that **Plot L.R. No. 32/34/4, Plot No. [particulars withheld], Ngong Township, L.R. No. Block [particulars withheld], Meru Town** and **Plot No. [particulars withheld] Gikomba Market** are matrimonial properties.

b) **Plot L.R. No. [particulars withheld], Plot No. [particulars withheld], Ngong Township, L.R. No. Block [particulars withheld], Meru Town** and **Plot No. [particulars withheld] Gikomba Market** be distributed to the plaintiff and the defendant on 40:60 basis.

c) The costs of the suit is awarded to the plaintiff.

It is so decreed.

DATED and DELIVERED at Meru this 13th day of June, 2019.

A. MABEYA

JUDGE