



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL SUIT NO. 23 OF 2017 (OS)**

**IN THE MATTER OF MATRIMONIAL PROPERTIES ACT, 2013**

**AND**

**IN THE MATTER OF LR KIIRUA/KIIRUA/[...]**

**BETWEEN**

**SN.....PLAINTIFF**

**VERSUS**

**FM.....DEFENDANT**

**J U D G M E N T**

1. The plaintiff and the defendant were hitherto man and wife until 2016 when they were formally divorced. By an Originating Summons dated 24<sup>th</sup> July, 2017, the plaintiff sought the determination of the questions whether; **L.R No. Kiirua/Kiirua/[...]** (hereinafter “**the suit property**”) was matrimonial property and if so, whether she is entitled to half the share thereof.

2. In her affidavit in support, the plaintiff alleged that the defendant was her husband from 1969 until he divorced her vide **Meru Divorce Cause No. 10 of 2012** on 22<sup>nd</sup> January, 2016; that during the pendency of the marriage, they inherited the suit property from the defendant’s father; that she personally carried out developments on the suit property which were now valued at Kshs. 2,000,000/- and that she was entitled to half the value thereof.

3. The defendant opposed the suit through a replying affidavit sworn on 5<sup>th</sup> September, 2017. He admitted that the plaintiff was his wife but he had divorced her as had been pleaded; that the suit property was inherited from his father but the plaintiff had not contributed to its development as he is the one who developed it as he had been a senior police officer. That the plaintiff was a second wife and that he intended to divide the suit property among his children as the plaintiff had her own property which she had acquired from her father.

4. The matter was determined through *viva voce* evidence with each party calling two witnesses. **PW1** was the plaintiff. She reiterated what she had stated in her supporting affidavit to the Summons. She further stated that she developed the suit property from a loan of Kshs.200,000/- she had taken from a local women group. She admitted having her own property where she settled after the divorce.

5. **PW2 CK**, a sister to the plaintiff told the court that the defendant married the plaintiff when she was very young in 1969 until 2016. That the two lived in the suit property until 2016. That during the pendency of the said marriage, the plaintiff carried out substantial developments on the suit property.

6. **PW3 Tabitha Gatiria Muthuri** told the court that she was a women leader from the area where the parties came from. That she had known them for 40 years. She was a Committee Member in the **Kiirua Women Sisters Group** when the said women group advanced the plaintiff a loan by way of materials to develop a modern house on the suit property in 2001. She was firm that the defendant chased the plaintiff from the suit property with a panga.

7. **DW1** was the defendant. He reiterated what he had stated in his replying affidavit and told the court that, he got married to the plaintiff in 1995 and got the suit property from his father in 1998. That the plaintiff did not carry out any developments in the suit property as the same were carried out by himself. In cross-examination, he admitted that he had stated in the petition for divorce that he was married to the plaintiff in 1969.

8. **DW2 GM**, a brother to the defendant, testified that his brother was married to **ZK** who died in 1991. That the plaintiff only came to the defendant’s home in 1993. That she never made any developments to the suit property.

9. **DW3 John Kithinji** told the court that he was the one who constructed the house on the suit property. That it was the defendant who paid for it. He denied being related to the woman the defendant married after divorcing the plaintiff.

10. Although the parties were directed to file and exchange written submissions, none filed any. The issue for determination is **whether or not the suit property is matrimonial property and if so, whether the plaintiff is entitled to half share thereof.**

11. The beginning point is **Article 45(3) of the Constitution** which 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”.***

Thus, the equality of the parties in a marriage cannot be gainsaid. This equality persists from the time the union is celebrated and subsists until its dissolution. There is no party thereto that is superior to the other.

12. In **P N N vs. Z W N [2017] eKLR**, Kiage JA observed of **Article 45(3) of the Constitution** thus:-

***“Does this marital equality recognized in the Constitution mean the matrimonial property should be divided equally? I do not think so. I take this while beginning from the premise that all things being equal, and both parties having made equal effort towards acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement”.***

13. Pursuant to **Article 68 of the Constitution**, Parliament enacted the **Matrimonial Property Act, 2013. Section 7 thereof** provides:-

***“Subject to section 6(3), 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”.***

14. In **P B W vs. J W C [2017] eKLR**, the Court of Appeal held:-

***“By dint of section 7 ownership of matrimonial property is vested 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. On the other hand section 2 defines ‘contribution’ to mean monetary and non-monetary contribution and includes domestic work and management of family business or property. ... Section 14(a) of the Act is also relevant to this appeal. Under that provision, where matrimonial property is acquired during marriage in the name of one spouse, there is a rebuttable presumption that the property is held in trust for the other”.***

15. To my mind, the net result of the foregoing is that; parties to a marriage are at all times equal from its celebration until its dissolution. However, that equality does not mutate into equal proprietary rights, that is, it does not mean that on dissolution of the marriage the matrimonial property is to be divided 50:50.

16. The parties must prove the contribution, which each made in its acquisition. The contribution is both monetary and non- monetary as is provided for in **Section 2 of the Act** Further, each case is to be determined on its own peculiar circumstances and not a rule of a thumb that the matrimonial property is to be divided 50:50 between the parties.

17. The first issue is whether the suit property is matrimonial property. The plaintiff’s case is that she was married to the defendant in 1969 when she was only 16 years old. That she and the defendant begot 2 children. That it is after she was married that the defendant’s father gave the defendant the suit property. According to her, the defendant’s father could not have bequeathed the defendant the suit property had he not married him. That she thereafter contributed to its improvement.

18. On his part, the defendant’s case was that, the plaintiff came to his life in 1993. That he had another wife, **ZK** who passed on in 1991. That he inherited the suit property from his father and that the plaintiff had not contributed to the acquisition or improvement of the same. That for those reasons, the suit property was not matrimonial property.

19. After observing the parties and the witnesses testify, I was satisfied that, the plaintiff and the defendant had a relationship prior to 1969. Their relationship resulted in the birth of their first born **PK** (now deceased) in 1967. However, they must have started to live together as man and wife in 1993 after the passing on of the first wife, **ZK** in 1991.

20. It is interesting that the marriage certificate that was produced by the plaintiff, did not disclose the date when the wedding was solemnized between the two. But it was clear from that marriage certificate number [...], the two were married when the plaintiff was 46 years while the defendant was 50 years.

21. From the admission of the defendant, the suit property was bequeathed to him in 1995 by his father. By this time, the two had been married and were living together as man and wife.

22. **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 immoveable property and moveable property jointly owned and acquired during the subsistence of the marriage.*

23. While *section 5 of the Act* provides:-

***“Subject to section 6, the interest of any person in any immoveable or moveable property acquired or inherited before marriage shall not form part of the matrimonial property”***

24. The net effect of the foregoing is that any property acquired during the subsistence of the marriage, including that which is inherited forms part of matrimonial property. The only time that inherited property is excluded from matrimonial property is if it was acquired before marriage. Property that is inherited during the subsistence of the marriage is not excluded from matrimonial property except if it was acquired before marriage.

25. I am not alone in this interpretation of the Act. In **E N K vs. J N K [2015] eKLR**, Musyoka J pronounced himself thus:-

***“From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property. Indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property (sic) where the inheritance was before the marriage. In this case, the asset in question was inherited during matrimony and therefore it forms part of matrimonial property”.***

26. In this regard, I hold that although the suit property was inherited by the defendant from his father, it nevertheless forms part of matrimonial property as it was so inherited in 1995. The marriage between the parties had been solemnized in, or according to the defendant’s admission, he started living with the plaintiff in 1993.

27. The second issue is whether the plaintiff is entitled to half the share of the suit property. In other words, should the suit property be divided into 50:50 between the parties. At the beginning of this judgment, I addressed the position that has been pronounced by the Court of Appeal. That there is no general rule that at divorce, the parties to a marriage are entitled to one half of the matrimonial property. Each party must prove the contribution he/she made in the acquisition thereof.

28. In the present case, the plaintiff was categorical that she was the reason for the plaintiff being bequeathed the suit property by his father. That she made extensive improvement to the suit property. That she took a loan from a local women group to extend the house standing on the suit property. Her testimony on this fact was supported by **PW3**. The evidence of the plaintiff and **PW3** was never displaced. I believed their testimonies notwithstanding the testimony of **DW2 and DW3** to the contrary.

29. It was established at the trial that; the plaintiff was a wife of the defendant; that the defendant was gainfully employed as an Inspector of Police who would be at home only one month in each year. That the plaintiff was left at home to take care of the children of the marriage and other children of the defendant and the suit property.

30. It was established that during coverture, the suit property was improved by having piped water, cows, water tanks and the expansion of the matrimonial home to three bedrooms with a flush toilet. All these could not have been possible were it not for the personal effort of the plaintiff who was throughout living thereon. The defendant was away for 11 months in every year. There is no way he would have effected those improvements without the active participation and role of the plaintiff.

31. In view of the foregoing, I make a finding that the plaintiff did make improvements on the matrimonial property. From her evidence, her contribution was both monetary and non-monetary. She gave the defendant companionship, looked after the children of the marriage and others when the defendant was away. She also cared for the plaintiff whenever he came back home on leave. She took a loan for the extension of the matrimonial house from a women’s group and supervised the said extension. She also worked on the land in order to provide for her family.

32. I have taken into consideration that the suit property was a bequest to the defendant from his father. That he was gainfully employed as a police officer of the rank of an Inspector. That he must have been receiving reasonable income from his said employment to be able to provide for his family. That the plaintiff contributed both monetary and non-monetary contribution to the improvement of the suit property. Her contribution was substantial. To my mind, the parties are entitled to 30.70 share in the property.

33. The defendant had indicated in his affidavits that since the plaintiff had her own properties inherited from her father, her claim should not be entertained. He pleaded further in the alternative that since the plaintiff had also inherited some property from her father, he should be allowed to share in the same.

34. The defendant’s contention cannot stand for reasons that, the fact that the defendant had her own separate and independent properties does not disentitle her to a share in the matrimonial property. Secondly, the defendant did not counterclaim and prove that the property the plaintiff had inherited from her father was matrimonial property. He also did not prove that he contributed to its acquisition or improvement. Had he done so, his claim would have been entertained. However, he failed to prove this fact and his contention fails.

35. I have seen the valuation report on record dated 26<sup>th</sup> April, 2018. The value of the property has been put at Kshs.4,000,000/-. The plaintiff’s contribution of 30% thereof translates to 1,200,000/-.

36. Accordingly, I allow the suit and make the following declaration and orders:-

- a) the property known as Kiirua/Kiirua[...] is matrimonial property which was acquired during coverture between the plaintiff and the defendant.
- b) the plaintiff contributed to its improvement and is entitled to 30% share thereof which translates to Kshs. 1,200,000/= value of Kshs.1,000,000/- to which she is entitled to.
- c) the defendant do pay to the plaintiff a sum of Kshs.1,200,000/-, being the value of her contribution to the improvement of Kiirua/Kiirua[...].
- d) the costs of the suit is awarded to the plaintiff in any event.

It is so ordered.

DATED and DELIVERED at Meru this 13<sup>th</sup> day of June, 2019.

A. MABEYA

JUDGE