



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MATRIMONIAL CAUSE NO. 4 OF 2019 (OS)

IN THE MATTER OF THE MATRIMONIAL PROPERTIES ACT, 2013

BETWEEN

PK1.....PLAINTIFF

VERSUS

PK2DEFENDANT

J U D G M E N T

1. This suit was commenced by way of an Originating Summons dated 22nd March, 2019 where by the plaintiff sought: -

- a) a permanent injunction restraining the defendant or his agents from interfering with her title, user, occupation and/or enjoyment of **NYAKI/KITHOKA/[xxxx]**;
- b) permanent injunction restraining the defendant from entering and/or accessing **NYAKI/KITHOKA/[xxxx]**;
- c) a full share of **NYAKI/KITHOKA/[xxxx]**.

2. The plaintiff and defendant have been wife and husband, respectively having solemnized their union on 22nd August, 1998 at [particulars withheld] Catholic Church. Between the years 2006 – 2008, they established their matrimonial home in Meru County. In the course of their union, Land Parcel **NYAKI/KITHOKA/[xxxx]** (“**the suit property**”) was acquired and registered in the plaintiff’s name. Differences arose between the parties and they separated in early 2019 whereby the defendant went to live in **Mikinduri** while the plaintiff remained in the property.

3. In her affidavits in support of the originating summons and testimony, the plaintiff alleged that the defendant has continually threatened to have her and her children evicted from the property. She reported the threats to the police vide OB NO.[xxxx].

4. In his replying affidavit and witness statement, the defendant stated that the suit property was acquired by him. That he had allowed the plaintiff to be registered as proprietor because she was a civil servant and working in the lands office to hold in trust for herself, himself and their children.

5. That the applicant had committed adultery with **DW** and when he complained about it, she kicked him out of their matrimonial home and brought in her lover. She made a false report that he was threatening to murder her and her lover and the police investigated the claim and found it to be false. That she locked both the gate and the main house to prevent him from accessing the matrimonial home. All his personal documents and clothes were in the house and he was unable to do his day to day business.

6. The matter was heard vide *viva voce* evidence whereby the plaintiff reiterated what is already stated above. She stated that the reason for her separation with the defendant was due to the defendant’s violence towards her. She narrated the incidences of such violence meted out to her by the defendant. She produced police abstract reports to buttress her allegations.

7. As regards the suit property, she produced a sale agreement, banks statement and loan confirmation to prove that she is the one who had acquired and developed the suit property. That the only other property she had acquired in the course of their marriage was **MIKINDURI/ATHWANA/[xxxx]**.

8. **PW2 DW** told the court that the plaintiff was her customer in his taxi business and a former landlady. He lived in the plaintiff’s rental houses from 2016 to February 2019 when he left because of the defendant’s threats to him. During the time he lived as a tenant of the plaintiff, he had witnessed several incidences of violence by the defendant towards the plaintiff.

9. **PW3 ROSEMARY MUTWIRI** told the court that she used to wash clothes for the plaintiff and defendant. She had known them for close to 10 years. During that time, she had witnessed the defendant mete out violence on the plaintiff.

10. **DW1 PK2** testified that he had quarreled with the plaintiff for bringing **PW2** to his house. That the suit property was purchased jointly with the plaintiff. That he had developed the same but the receipts had been burnt by the plaintiff. That they had other properties, namely, **NYAKI/KITHOKA/[xxxx], [xxxx] and [xxxx]**, respectively.

11. The plaintiff had framed the questions for determination of the Summons as follows: -

12. On the basis of the evidence on record, the court will now determine the said questions.

a) whether the parties have been husband and wife?

b) whether the defendant contributed in any way in the acquisition of the suit property?

c) whether the plaintiff is entitled to the suit property wholly?

d) whether or not an injunctive order should be granted against the defendant?

e) what order as to costs should be made.

13. The parties were in agreement that they were both married as man and wife through a wedding ceremony undertaken on 22nd August, 1998 at [particulars withheld] Catholic Church. A Marriage Certificate No. [xxxx] dated 22nd August, 1998 was produced in evidence. There was however **Meru CMC Divorce Cause No. 7 of 2019** that was yet to be heard. In this regard, I am satisfied that the parties were husband and wife.

14. Both parties were in agreement that the suit property was their matrimonial property. It is there where they settled and lived after their marriage, acquisition and development. The question that arises therefore is; how was it acquired and the contribution by each party.

15. **Article 45 (1) (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.”

16. Ownership of matrimonial property is provided for under **Section 7 of the Matrimonial Property Act, 2013 (“the Act”)** as follows: -

“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”.

17. The **Act** defines contribution in **section 2** to mean monetary and non-monetary contributions. This includes; domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.

18. It was the plaintiff’s contention that she acquired and developed the suit property solely. The defendant refuted that claim and contended that the same was acquired by him but had allowed the plaintiff to be registered as owner in trust for themselves and their children.

19. At the trial, the plaintiff produced evidence in support of her contention. She produced a sale agreement dated 13th September, 2005 for the purchase of the suit property and a bank statement from Co-operative Bank of Kenya, Meru Branch dated 9th February, 2006 which showed a withdrawal of KShs.300,000/- on 13th September, 2005. This is the money that was paid for the purchase of the suit property. The sale agreement identified her as Kshs. 300,000

20. The plaintiff also produced another bank statement from the same branch dated 1st March, 2010 showing a deposit of KShs.480,000/- into that account and a Loan Advise slip from **Ardhi Sacco Society Ltd** for the said amount. It was her evidence that this was the amount used to develop the suit property. This evidence was neither denied nor challenged by the defendant.

21. On his part, the defendant gave contradictory evidence on this issue. In his Replying Affidavit sworn on 16th April, 2019 in answer to the Summons, he stated that he is the one who acquired the suit property and had allowed the plaintiff to be registered as owner in trust for themselves and their children. That he developed the same with minimal support from the plaintiff.

22. In his witness statement filed in court on 9th May, 2019, he stated that the suit property together with **LR. Nos. Nyaki/Kithoka/ [xxxx], [xxxx] and [xxxx]** were acquired jointly with the plaintiff. He stated that he single handedly developed the suit property.

23. At the trial, he adopted the said replying affidavit and the witness statement as his evidence. He then orally told the court that the suit property was acquired jointly with the plaintiff and that he had contributed to the construction of the house thereon.

24. While the plaintiff’s testimony was consistent, firm and remained unchallenged, the defendant’s testimony was inconsistent and

unproven. The plaintiff produced uncontroverted evidence of the purchase and funds for development of the suit property.

25. On his part, the defendant produced none. His allegation that the receipts for his contribution on the development of the suit property were burnt was unverifiable and an afterthought. He did not state when and where they were burnt. Neither did he state for how much they were. The court did not believe him.

26. For the foregoing reasons, I am satisfied that the suit property was acquired and developed solely by the plaintiff. That the defendant did not show that he had contributed towards its acquisition or improvement. In this regard, I hold that the same should wholly belong to the plaintiff.

27. Although other properties, to wit, **MIKINDURI/ATHWANA/ [xxxx], NYAKI/KITHOKA/[xxxx], NYAKI KITHOKA/[xxxx] and NYAKI/KITHOKA/[xxxx]** were mentioned, there were no orders sought in respect of them. Further, no evidence was led regarding their acquisition or development and for that reason, I make no findings regarding them.

28. On the issue of injunction, it was the plaintiff's testimony that the defendant had been violent towards her on several occasions. She produced extracts of police abstract reports relating to various incidences. She also complained that he had threatened to kill her. This was also reported and had led the police to temporarily bar the defendant from the matrimonial home. Her testimony was corroborated by both **PW2** and **PW3**. The evidence remained firm and unchallenged.

29. The defendant denied the plaintiff's allegation on this fact. However, he did not deny the reports made to the police neither did he challenge them. There can be no logical explanation for an adult, like the plaintiff, to make 3 reports to the police regarding not only assault but also threats of death. The fact that the defendant had not been prosecuted for them is no prove that they were false.

30. To my mind, although the plaintiff and the defendant are man and wife, that relationship has become so strained and had resulted in violence being meted out on the plaintiff. On record is a **P3 Form** dated 3rd July, 2016 whereby the plaintiff alleges to have been assaulted by the defendant that resulted in one of her upper limbs being fractured.

31. Although the defendant denied that the fracture was due to his assault, there was a police report on record to that effect which he never challenged. Apart from that, the totality of the evidence on record which remained unchallenged was that he had meted out extreme violence on the plaintiff. Indeed he had become a threat to the safety and even life of the plaintiff.

32. In view of the foregoing, it is not safe to wait until a fatality occurs before action is taken. Prevention of the same will be better than to cure it. Accordingly, an injunction sought will issue as prayed. Costs will follow the event.

33. In view of the foregoing, I make the following declarations and orders:-

a) The property known as Nyaki/Kithoka/[xxxx] belong to the plaintiff wholly.

b) On a day to be agreed upon, but within 30 days of the date of this judgment, the plaintiff is to allow the defendant in the company of police officers and under the direction and supervision of the OCS Meru Central Police Station, access to the matrimonial home erected on Nyaki/Kithoka/[xxxx] for him to remove all his personal effects.

c) A permanent injunction hereby issues restraining the defendant, his agents and/or servants from interfering with the plaintiff's title, user, occupation and/or enjoyment of Nyaki/Kithoka/[xxxx].

d) A permanent injunction hereby issues restraining the defendant, his agents and/or servants from in any way whatsoever and howsoever, entering and/or accessing Nyaki/Kithoka/[xxxx].

e) The plaintiff will have the costs of the suit.

It is so decreed.

DATED and DELIVERED at Meru this 19th day of September, 2019.

A. MABEYA

JUDGE