



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ORIGINATING SUMMONS NO. 14 OF 2017

SMM.....APPLICANT/PLAINTIFF

VERSUS

VMG.....RESPONDENT/DEFENDANT

JUDGEMENT

1. The matter before me is a matrimonial cause by way of Originating Summons dated 10th April 2017. The plaintiff is claiming a fifty (50) % share of the matrimonial properties which are

- 1) L.R NO NKUENE/MITUNGUU/[xxxx]
- 2) L.R NO NKUENE/MITUNGUU/[xxxx]
- 3) L.R NO NKUENE/NKUMARI/[xxxx]
- 4) CASH SAVINGS IN BANK ACCOUNTS

2. The plaintiff SMM testified and adopted his affidavit dated 10th April 2017 into evidence where he averred that he married the defendant in the year 2000 under the Meru Customary Law. Their marriage has been blessed with two issues MM born in December 2002 and WG born in 2007 and named after the Plaintiff's mother. In the cause of their marriage they acquired the above mentioned properties. They were additionally involved in farming and buying and selling cereals which was quite lucrative. They agreed that the defendant would open a bank account where she would carry out the transactions for their business. In March 2017 the defendant ran away with their children and denied him access to their business. On 12th march 2017 the defendant raided their cereal store and carted away 170 bags of dry cow peas valued at Kshs. 1,020,000 which she sold and kept the proceeds to herself.

3. **PW2 SM** adopted his statement dated 17th July 2017 where he stated that the plaintiff herein is his nephew. The plaintiff and defendant are husband and wife. Whenever differences arose between them he strove to help them. Both parties acquired property together and started a cereals business. The businesses grew but the defendant alienated the plaintiff and used the money realized for her sole use.

4. **PW3 LEONARD MWANGI** testified that he is the neighbor of the plaintiff herein. He relied on his statement dated 7th July 2017 where he stated that sometime in July 2010 he sold to the plaintiff NKUENE/NKUMARI/ [xxxx].

5. The defendant **VMG** in her testimony relied on her affidavit and statement filed on 5th June 2017 where she indicated that she had never been married to the plaintiff and that he was a casual friend. It was also out of their casual friendship that they were blessed with 2 children MM and WG. The plaintiff herein ignored the welfare of their children and she has been struggling to provide for them. She has always conducted her own business without the involvement of the plaintiff. She managed to buy 3 parcels of land, however at one time she lost her identity card and she allowed LR NKUENE/MITUNGUU/ [xxxx] to be registered in the name of the plaintiff. She managed to develop one plot where they were living together but the plaintiff chased her and the children away and out of their house. They are now house by her brother.

6. During cross examination DW1 told the court that she co habited together with 2002 to 2007. She stayed with the plaintiff because they had a child together.

7. **DW2 GK** testified and adopted her statement dated 6th May 2019 where she stated that she is the sister in law of the defendant as she is married to the plaintiff's deceased brother CM. There has never been talk or a function at their home to discuss marriage between the parties.

She is aware that the defendants brought some properties which are in her names and one other in the name of the plaintiff. The couple however parted ways after the plaintiff became a drunkard assaulted the defendant.

8. I have carefully perused though the evidence of the parties, affidavits, submissions and the pleadings generally and the issues to be determined are:-

- 1) Whether there was a valid marriage between the plaintiff and defendant?
- 2) Whether the Plaintiff has proved that the parcels of Land listed in his affidavit in support of Originating Summons and proceeds in Bank Account No. [xxxx] held in the name of the Defendant at Equity Bank Nkubu form part of Matrimonial property.
- 3) Whether the Plaintiff has proved that he contributed to the acquisition of the said properties either directly or indirectly as defined under section 2 of the Matrimonial Properties Act of 2013.
- 4) Whether the plaintiff has satisfied the requirement of section 7 of the Matrimonial Properties Act which 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.**

9. Parcel of Land No. Nkuene/Mitunguu/ [xxxx] was acquired in 2010 by the plaintiff and the defendant and it was registered in the name of the plaintiff according to PW3 both the Plaintiff and the defendant paid him money towards the purchase of the above property and that it is defendant who said the plot should be registered in the name of the husband the plaintiff herein. PW3 further said that the 1st instalment was made by the defendant and the final payment was made by the plaintiff and he transferred the plot to the plaintiff's name. He said the plaintiff and the defendant are his neighbours and that they developed the plot that is sold to them which development comprise of commercial building with rental rooms as well the parties residence.

10. L.R. NO NKUENE/MITUNGUU/[xxxx] according to certificate of official search dated 31st March 2017 was registered in the name of the defendant on 7th February 2012 while the marriage between the parties was subsisting as evidence shows that it is in 2017 that the defendant moved out of their residence on LR. [xxxx].

11. L.R NO NKUENE/MITUNGUU/ [xxxx] is also shown to have been registered in the name of the defendant on 25th July 2013 and title deed issued on 26th July 2013. The relationship between the parties herein was still subsisting.

12. Concerning CASH SAVINGS IN BANK ACCOUNTS, the Plaintiff testified that they agreed to have the defendant open an account at Equity Bank Nkubu branch into which proceeds of sale of cereals from their business was to be deposited. The plaintiff also said he discovered that the defendant had opened 3 other accounts at cooperative bank, KCB and Family bank all at Nkubu and he suspected that the defendant must have been diverting money from their business and depositing the same in those other accounts. The Plaintiff however, did not provide any evidence of any monies he deposited in any of the defendants alleged accounts and apart from particulars of Account No. [xxxx] Equity Bank Nkubu he did not give the particulars of the other accounts.

13. Whether there was a marriage between the plaintiff and the defendant Justice Kneller In **HORTENSIA WANJIKU YAWE V THE PUBLIC TRUSTEES, CIVIL APPEAL 13 OF AUGUST 6, 1976** laid down three important and salutary principles regarding proof of customary marriages in Court. These are:

- i. The onus of proving customary law marriage is generally on the party who claims it;**
- ii. The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;**
- iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.**

14. It is not in dispute that the plaintiff and the Defendant did not go through any formal form of marriage whether customary, Civil or Christian marriage but it is apparent that they cohabited as man and woman since the year 2000 and it was not until 2017 that the Defendant left their residence on LR. NKUENE/MITUNGUU/ [xxxx]. It is also not in dispute that while they were co-habiting as man and woman they sired 2 issues in the year 2002 and 2007. There is evidence by PW2 and PW3, the husband to Plaintiff's Aunty and their neighbor respectively, who saw them present themselves as husband and wife doing things together including buying a plot and other properties. The evidence of PW4, the mother of the plaintiff corroborates the evidence of the plaintiff as well as that of the defendant that when the two started staying together they resided in her home in Tunyai where the Plaintiff had a house. The sister- in-law to the defendant confirms having known the plaintiff since 2001, she says she used to see them walk together as friends. She confirms that the defendant had her 1st and 2nd born children while staying in Tunyai and she confirms that the plaintiff and defendants relocated from Tunyai from Mitunguu and that in 2016 she visited them in their house in Mitunguu. She also confirms that the plaintiff and the defendant separated in 2017 when the defendant left the plaintiff in their house in Mitunguu. The facts obtaining in this suit fulfils the requirements under section 6 and 7 of the matrimonial Property Act and the holding of the Court of Appeal in **PHYLIS NJOKI KARANJA & 2 OTHERS V ROSEMARY MUENI KARANJA & ANOTHER NRB CA CIVIL APPEAL NO. 313 of 2001 [2009] eKLR**, that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held that:

“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the

presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.”

15. Based on the evidence provided and the length of time the parties relationship lasted, this court finds strongly that there was a marriage and the fact that there was no dowry paid or marriage registered cannot outweigh the fact that there was a marriage. In any case, there is evidence that the parents of the defendant were deceased as at the time she started cohabiting with the plaintiff and PW4 the mother of the plaintiff said she visited the brother of the defendant with the intention of negotiating dowry but she was not given the go ahead.

16. In **CHRISTOPHER NDERI GATHAMBO VS SAMUEL MUTHUI MUNENE NAIROBI HIGH COURT CIVIL CASE 1372 OF 2001** the court observed:

“The claim is [presumption of marriage] on the basis of cohabitation and friendship, agreement and love. They lived together in Nairobi and had a daughter together..... anyone of those actions cumulatively prove the parties intended to marry and held themselves as married hence presumption.”

17. Whether the Plaintiff has proved that the parcels of Land listed in his affidavit in support of Originating Summons and proceeds in Bank Account No. [xxxx] held in the name of the Defendant at Equity Bank Nkubu form part of Matrimonial property and that he contributed towards their acquisition:

18. The defendant argued that the plaintiff did not prove direct or indirect financial contribution to the purchase of the parcels registered in her name and that he was not involved in her businesses.

19. Section 14 of the Matrimonial Property Act (the Act) presumes that property acquired during marriage but registered in the name of one spouse is held in trust for the other spouse. The full text of that Section is as follows:

“Where matrimonial property is acquired during marriage-

a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse: and

b. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

Section 2 of the Act defines contribution towards acquisition of matrimonial property as:

“Contribution” means monetary and non-monetary contribution and includes-

a. domestic work and management the matrimonial home;

b. child care

c. companionship;

d. management of family business or property; and

e. farm work

20. The plaintiff was able to present witnesses who helped prove that he made a monetary contribution to the purchase of the property No LR No Nkuene/Nkumari / [xxxx]. In the interest of justice and of fairness this court shall order that the property be subdivided into equal share between the parties. Regarding the other 2 properties, LR Nkuene/Mitunguu/[xxxx] and [xxxx], this court’s view is that although they are registered in the name of the defendant they were acquired during the subsistence of the relationship between the Parties herein and there is evidence that they were doing business together as well as farming and although there is no evidence of direct contribution by the defendant this court is of the view that he must have contributed in one way or another to enable the defendant acquire the two properties. In that regard this court finds that he would be rightly entitled to ¼ of each of the two properties above. There was no evidence completely that the plaintiff deposited any money in the account held by the Defendant in Equity Bank Nkubu branch or any other bank for that matter and therefore this court cannot make an order on a matter that was not pleaded and strictly proved. Each party will bear their own costs.

21. Regarding issue no. 4, Section 7 requires that matrimonial property is divided when there is a divorce or dissolution of marriage. The provision is couched in mandatory terms and therefore means that unless and until a marriage is dissolved matrimonial property does not crystallize for division. In this case, the plaintiff and defendant are physically separated but they have not shown that they have filed for dissolution of the marriage by way of a divorce cause or judicial separation. Refer to in the matter of division of matrimonial property **HCC No. 30 of 2015** between **EMK** versus **JKZ** Ali Aroni J while quoting **NCK vs GVK HCC No. 66 of 2012 (OS)** held: **“section 7 of the matrimonial property act stipulates that matrimonial property shall be divided if the spouses are divorced or their marriage is otherwise dissolved. For as long as the marriage has not been dissolved the court cannot interfere with matrimonial property.”**

22. Further, there are children between the plaintiff and defendant and the first born child who is 17 years and a student stays with the plaintiff whereas and the 2nd born who is 12 years stays with the mother the defendant herein. The upkeep /maintenance and custody of this children has not been discussed in this cause and rightly so because it can only be done in a divorce, custody and maintenance suit. This court

supposes that the matrimonial property herein is also the resources that the plaintiff and the defendant were using in the maintenance and education of the 2 children. It will therefore be in the interest of those children that when the matrimonial property will be divided between their parents, the parents will be charged with the responsibility of using their shares of the matrimonial property for the welfare of the children.

23. In Kajiado HCC NO. 11of 2011(OS) In the matter of Matrimonial property between MNH vs FHM Nyakundi J, held that:

“In the absence of conclusive proof of the dissolution of the marriage between the parties the suit property herein cannot be distributed. While I agree with the letter and spirit of the act of matrimonial property I cannot accept that parties relying on stipulated statutory provisions should turn a blind eye in reflecting on the protection of the best interest of the children of the marriage in asserting their property rights. My final view is that recently the matrimonial property act 2013 is grounded on distribution of the marital estate upon divorce.”

24. That maybe the reason why section 7 requires that the division is done after conclusion of a divorce cause when the rights and liabilities of the spouses to themselves and to the children have been specified.

25. In conclusion, although this court has declared that the three parcels of land form part of the matrimonial property between the parties herein, the same can only be held in trust by the party who is registered as proprietor to the extent that each is entitled until such time that they will have gone through court process to dissolve the marriage or obtain judicial separation. However, to preserve the interests of each of the parties, this court hereby orders that an inhibition be lodged in the register of each of the parcels in question. Each party to bear their own costs.

HON. A. ONG’INJO

JUDGE

JUDGMENT DELIVERED, DATED, AND SIGNED IN COURT THIS

19TH DAY OF SEPTEMBER 2019

HON A.ONGINJO

JUDGE

In the presence of:

C/A: Kinoti

Applicant/Plaintiff: - Ms Mbogo Advocate holding brief for Murango Advocate for plaintiff.

Mr Muthamia: Advocate for Defendant.

HON A.ONGINJO

JUDGE