



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION HCCC NO 61 OF 2015**

**IN THE MATTER OF MATRIMONIAL PROPERTY ACT 2013 & DECLARATION OF PROPERTY RIGHTS**

**MWG .....APPLICANT**

**VERSUS**

**JGM.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

The Applicant filed Originating Summons dated on 22<sup>nd</sup> October 2015 and sought prayers that the listed properties are declared that both parties hold the properties in equal shares.

The Applicant also sought that properties are sold and the sale proceeds are shared equally between the parties.

The Applicant and Respondent were married in 1963 under customary law and solemnized their union in October in 1965. They were blessed with 4 children. The marriage irretrievably broke down and culminated in divorce that was granted vide **Gatundu Chief Magistrates Court on 9<sup>th</sup> July 2015**.

During the marriage the couple acquired and developed the following properties;

- 1. LR No Ndarugu/Gacharage/[...] –Kiambu County ([particulars withheld] Farm)**
- 2. LR No Ndarugu/Karatu/[...] - Kiambu County ([particulars withheld] Farm)**
- 3. LR No Ndarugu/Gacharage/[...] –Kiambu County ([particulars withheld] Farm)**
- 4. LR No Ndarugu/Gacharage/[...] - Kiambu County ([particulars withheld] Farm)**
- 5. Plot No [...] - Gacharage Market ,Ndarugu Loc Kiambu County ([particulars withheld] Shop)**
- 6. Plot No 1747/[...] Gaitete, Kiambu County ([particulars withheld] Plot)**

The copies of searches evidencing ownership of the properties are marked **MWG 2- MWG 5**.

It was agreed between the parties by mutual consent that the aforesaid properties were/are registered in the Respondent/former husband's name.

**HEARING**

The Applicant (PW1) relying on her affidavit filed on 23<sup>rd</sup> October 2015, she testified that in the 45 years of marriage to the Respondent, she directly contributed and indirectly in the acquisition development and maintenance of the listed properties and continued to do so even after the divorce.

Her contribution over the years during marriage was follows;

She engaged in farming specializing in planting and maintaining coffee bushes, macadamia nuts trees, pineapples, tomatoes, sweet potatoes, arrowroots and other assorted vegetables. She was also engaged in dairy farming and poultry farming.

Later the family moved to Gacharage and begun farming tea bushes and planted, avocado trees, plums, Ribena berries, and planted eucalyptus and wattle trees.

The farming duties entailed planting seeds in seed beds, transplanting on the farm, weeding, spraying, pruning, harvesting the crops.

For coffee and tea planting, pruning, picking, weighing and delivering to the buying centres.

The Applicant helped in hiring and supervision of farmhands.

In dairy farming, she fed, milked the cows and delivered the milk to the hotels.

In poultry farming, she fed, gave water collected eggs and sold in hotels.

In pineapple farming she planted weed mulch, put farm yard manure and harvested. She delivered the pineapples to Kenya Cannery through a Mr William Gatimu.

All the money from delivery and/sale of farm produce, she banked the money in her former husband's account in Kenya Commercial Bank (KCB) Account in Kiambu.

The vegetables were basically food crops for her family's consumption.

In 1969, the Applicant and Respondent managed to save and bought land from the family in a Succession matter which came to 5.8 acres.

They bought 5 shares of Gathaite Farmers Cooperative Limited and were added 2 more acres which came to a total of 10 acres

1973 they sold the 5.8 acres they had bought and bought 14.85 acres Ndarugu/Gacharage/[...] at the time it had 24000 tea bushes. In 1979 when they moved to the said farm as family she added 1600 tea bushes and they totalled to 25,600 bushes.

The Respondent opened a general shop in Gatundu town and she was left on the farm.

In 1976, they bought 5 herds of dairy cattle and she sold the milk. She also started growing passion fruits, which was lucrative.

In 1979, they begun to construct on their Plot No [...].

In 1984, they sold 6 acres, which they exchanged with Mbugua Gakuru's Ndarugu/Karatu [...] and begun to construct their permanent home on Ndarugu/Gacharage/[...].

In 1994, they purchased Ndarugu/Gacharage [...].

In 1998, they purchased 1 acre at Kwa Wangomi (LR Ndarugu/Gacharage/[...])

In 2003, the Respondent used their proceeds to buy 11/2 acres Ndarugu/ Gacharage/[...] and registered in the name of the 2<sup>nd</sup> wife/concubine. That was the beginning of her dispossession of their matrimonial home Ndarugu/Gacharage/[...].

When she protested, the Respondent beat her up, threatened her with death and punished her by selling all the dairy cattle she relied on for upkeep from sale of milk. These circumstances culminated with divorce.

The Applicant is an elderly lady of 72 years who toiled and helped acquire and develop the properties and during the years of marriage with the Respondent 45 years. The threat of eviction from the matrimonial home at Ndarugu/Gacharage/[...]; she has nowhere to move to and fend for herself if evicted from the matrimonial home. She cannot now actively farm the land and has no direct income. That is when this Court granted an injunction on 3<sup>rd</sup> December 2015 through Court Ruling of 21<sup>st</sup> June 2016 restraining the Applicant's eviction from the matrimonial home.

The Respondent (DW1) testified and relied on the Replying Affidavit filed on 17<sup>th</sup> December 2015 and confirmed marriage to the Applicant for 45 years and the ensuing divorce thereafter. He also confirmed that he married LW in 1990 and they have 3 children as stated in divorce proceedings.

The Respondent stated that he inherited LR Ndarugu/Kamwangi/[...] which he sold and bought Ndarugu/Gacharage/[...].

He already sold LR Ndarugu/Karati/[...] due to hard financial situation.

The Respondent stated his 2<sup>nd</sup> wife purchased LR Ndarugu/Gacharage/[...] as shown by her payslip attached as

**JGM-2** (Gross Pay Ksh 11, 180/-) and they agreed that he would be the registered owner. He stated he did not contribute to the said purchase as he was educating the children in secondary and tertiary levels. His 2<sup>nd</sup> wife has built and lived on the said suit property Ndarugu/Gacharage/[...] for the last 10 years.

The Respondent claimed that the 2<sup>nd</sup> Wife retired from **KTDA** Thika factory and significantly contributed to the acquisition of Plot No [...] **Gaitete** as evidenced by early retirement letter of the 2<sup>nd</sup> wife annexed as **JGM- 3 (no indication of how much was paid to employee as terminal benefits who was released from employment on 31<sup>st</sup> December 2002 due to low productivity at Theta Tea Factory Ltd)**

The Respondent deposed that he purchased **Plot No [...] Gacharage Market** Ndarugu location while he was Chief and later developed it and his former 1<sup>st</sup> wife did not contribute for it at all.

The Respondent stated that the 1<sup>st</sup> wife did not contribute to the purchase of the 2 Plots. He stated that the Applicant refused to work from 1980 when he married the 2<sup>nd</sup> wife and was rude and unbearable especially when she learnt that he wanted to give daughters properties. He denied that he threatened to evict her from the matrimonial home. He deposed he had no problem transferring an equal share of properties to the Applicant equivalent to her contribution. As long as he also divides properties to all his children and wives.

The Respondent stated that he married the 2<sup>nd</sup> wife in 1980 and conducted the customary ceremonies. Therefore he has 2 wives and 7 children. The properties belong to him. The Land Parcel [...], he shall share amongst 7 children each 1 acre and his wives 1 acre each. According to him, Land Parcel [...] & Plot [...] belong to him and Land **parcel [...],[...] and [...]** belong to the 2<sup>nd</sup> wife.

PMJ (PW2) testified that he lived with his parents and other siblings as family in Ndarugu/Gacharage/[...] since 1973 as their home. There were/are tea bushes that were planted and maintained and their mother PW1 did most of the farming, dairy farming and grew vegetables. His mother managed all farming activities and supervised casual labourers; picking tea, weighing and taking it to the buying factory. The money was banked in Respondent's account and since he had KTDA card, the proceeds were paid to him but his mother gave labour and managed the farm, and was not paid for all the labour.

He said that CM 2<sup>nd</sup> wife's son had Grower's Authority Number for Parcel [...], LW; Respondent's 2<sup>nd</sup> wife has Grower's Authority Number for Parcel [...], the Respondent has Grower's Authority Number for Parcel [...]. The Respondent is/was paid for tea grown and delivered to the factory, the Applicant who carries out the tea farming does not have Grower's Authority Number, does not access /receive any proceeds for all the work she does.

His father, the Respondent worked as sub chief of Gacharage Sub Location from 1979 – 1990. The properties were occupied as follows;

**LR 1480- CM-** son of the 2<sup>nd</sup> wife resides on the land **LR [...]**- The Respondent and 2<sup>nd</sup> wife reside on the land. When it was bought by his parents, the 2<sup>nd</sup> wife moved from Plot [...] Gacharage to this land **LR [...]**- the 2<sup>nd</sup> wife utilizes the land.

MNG PW 4, MWG PW5 & LW PW3 daughters of the parties, testified that they lived in [particulars withheld] in Gatundu and their parents sold the family land and bought Ndarugu/Gacharage/[...] where they moved to and settled as their home. Their parents worked and purchased Land Parcels [...], [...] & [...] and 2 Plots [...] Gacharage & Gaitete.

They confirmed their mother managed the picking of tea leaves weeding, tea plantations, applying fertilizer, supervising casual labourers and bought tea picking baskets. Their mother carried out farming activities and they participated and helped her in farming, they grew maize, yams, passion fruits, avocados & napier grass etc.

They kept cows for milk and used some of the milk for home consumption and the rest was sold in hotels in Gaitete. Their mother did not access the proceeds from farm produce-The tea leaves were plucked, weighed and taken to KTDA factory and their father who had the Grower Authority card was paid. Their parents did not have a joint account and their mother did not access funds and she was not paid.

LW 2<sup>nd</sup> wife – resides on Parcel 2485, plucks tea at Parcel [...] and uses Plot [...] Gacharage; Christopher, 2<sup>nd</sup> wife's son resides on Plot [...]. Their parents did not agree to transfer of properties to other people.

LWG DW2 2<sup>nd</sup> wife to the Respondent testified that she was married under Kikuyu customary law where 'ngurario' and 'ruracio' ceremonies were performed. From 1980 – 2011 she lived with both the Applicant and Respondent at their matrimonial home in **Ndarugu/Gacharage/[...]**.

The witness stated she had no problem with the Applicant and she did not see/witness the Respondent chase the Applicant with a panga. She was aware of the divorce proceedings between the parties.

She resides on Land Parcel [...] with the Applicant. She was in Court for division of matrimonial property and hence demanded a share of Land Parcel 774 as wife to the Respondent.

She said she worked for **KTDA** factory from **1979 -2003** and was paid Ksh 10,000/ a month and stated that she bought;

1. Ndarugu /Gacharage/[...] (3 acres)in 1996 from one Joseph Mbugua Gakuo;
2. Ndarugu /Gacharage /[...] (2 acres) in 1996 from John Njoroge Karani

3. Plot 1747- Gaitete ( 70 ft by 30 ft) in 1994 from John Ndichu

(The witness did not mention/confirm purchase of Land Parcel 2485 as alleged by Respondent)

The Applicant blocked these properties by filing Cautions against them at the Lands Registry.

The witness told the Court that the Respondent brought her to LR Ndarugu/Gacharage/[...] to the matrimonial home of the 1<sup>st</sup> wife, the Applicant. She asked her if it was ok she lived in their home as her husband's 2<sup>nd</sup> wife and she was ok. They had a session where she was introduced to the family. She cultivated the shamba on [...] until she left to reside in LR [...].

### **DETERMINATION**

The court has considered the written submissions by parties through respective Counsel and the evidence on record. The issues that emerge for determination are;

- a) What properties constitute matrimonial property?
- b) Did the Applicant contribute directly and/or indirectly to the acquisition, development and maintenance of matrimonial properties?
- c) What should be the division of matrimonial property?

### **ANALYSIS**

#### **LAW**

**Section 6 of Matrimonial Property Act of 2013** prescribes what constitutes matrimonial property;

- a) *Matrimonial home (s)*
- b) *Household goods and effects in matrimonial home (s)*
- c) *Any other movable or immovable property jointly owned and/or acquired [by the married couple] during the subsistence of the marriage.*

**Section 7 of Matrimonial Property Act** prescribes what entails the division of matrimonial properties. The provision indicates that in a claim to matrimonial property, the spouses must prove contribution towards acquisition and hence, in proceedings under the said Section; the claimant is by law required to prove or establish his/her contribution to the acquisition of the property and that it is no longer enough for a Party to merely allege that he/she was married and therefore he/she is entitled to the property.

**Section 2 of Matrimonial Property Act Contribution is defined** as;

Domestic work and management of the matrimonial home, Childcare

Companionship, management of family business or property and farmwork,

**Section 93 of Land Registration Act 2012**

**Co-ownership and other relationships between spouses**

*Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.*

#### **CASELAW**

In the case of Esther Wanjiru Kiarie vs Mary Wanjiru Githatu Succession Cause 244 of 2002, the Court held;

*Article 45 (3) COK 2010 now speaks strongly to equality of parties to a marriage....the properties are all registered in the name of the deceased. I am alive that under the repealed land regime, Registered Land Act, one of the overriding interests was a trust including a spousal interest....the 1<sup>st</sup> widow was married under Kikuyu customary law. The burden to prove the trust fell squarely on her shoulders under Sections 107 & 109 of the Evidence Act.*

In the case of Peter Njuguna Njoroge vs Zipporah Wanqui Njuguna Court of Appeal Civil Appeal 128 of 2014 judgment by Kiage JJA referred to the case of Francis Njoroge vs Virginia Wanjiku Njoroge Nbi Civil Appeal 179 of 2009 it was held;

*...division of property must be decided after weighing the peculiar circumstances of each case. As was stated by Court of appeal of Singapore in Lock Yeng Fun vs Chua Hock Chye [2007] SGCA 33:*

*It is axiomatic that division of matrimonial property under Section 112 of the Act is not and by its very nature cannot be a precise mathematical exercise*

## **EVIDENCE**

The Applicant proved through evidence that she was married both under customary law in 1963 and a Christian marriage in 1965 to the Respondent. They divorced 9<sup>th</sup> July 2015 and their marriage was dissolved as required as a condition precedent to division of matrimonial property under **Section 7 of Matrimonial Property Act**.

The properties as listed in the Applicant's Supporting Affidavit filed on 23<sup>rd</sup> October 2015 in Magistrate's Court details the properties highlighted above as properties acquired developed and maintained by both spouses during the subsistence of the marriage spanning 45 years. Although, they are all registered in the Respondent's name only, there an resulting trust by virtue of the Applicant's demonstration of her direct and indirect contribution, the Respondent held her portion in trust for her.

The Applicant's testimony is that these properties were acquired through joint efforts of the couple between 1969 -1979. It is not contested that DW2 2<sup>nd</sup> wife came into the picture in 1980. Although all these properties were acquired during the pendency of their marriage and registered in the Respondent's name, before 1980 obviously, DW2 was not in the picture when majority of the immoveable properties were acquired. DW2 made non financial and/or financial contribution towards these properties acquisition.

The Applicant's contribution to the acquisition, development and maintenance is detailed as highlighted above in the judgment; it is as she testified in court corroborated by all their children who although they are now adults, they lived with their parents while young, witnessed their mother toil and also they participated in the farming activities. The Applicant's contribution was both direct financial contribution and indirect financial contribution as spelt out in **Section 2 & 7 of Matrimonial Property Act**. The Applicant was engaged in planting, weeding, spraying pruning, harvesting, weighing and selling produce in both large scale and subsistence farming. She was engaged in coffee and tea farming and at the same time grew fruits and vegetables for sale and home consumption. Similarly, she reared cows for milk and poultry farming.

The Applicant supervised casual labourers, picked, weighed and took tea leaves to the factory and coffee berries too. All the money was paid to the Respondent's account as he held the KTDA Grower's Authority Card that enabled the bearer to be paid. This evidence was not controverted. Of course, since farming was on suit property LR Gacharage /Ndarugu [...] (Laini Farm) this was/is the matrimonial home and therefore where the family resided. The Applicant did domestic work and managed the matrimonial home, provided childcare to their 4 children, companionship to the Respondent when he lived in the home in addition to farm work.

The Applicant discharged the burden of proof of the direct and indirect contribution to the properties acquired during their marriage.

The Applicant is in her 70s and divorced with no source of direct income and/or livelihood, it is apparent from the record she spent her adult years when she was strong and agile to fend for her family with support from her former husband, she then is entitled to her share of matrimonial property in light of her efforts of labour/farm work and money realised from the sale of farm produce.

The Respondent also has contributed to the acquisition, management development of the properties acquired during the marriage and is also entitled to a reasonable portion of the matrimonial properties. Both parties confirm that there are children of the marriage and the Respondent wishes to allocate them property individually and equally.

With regard to DW2 2<sup>nd</sup> wife of the Respondent; she was not joined to these proceedings as a party formally, she did not file any pleadings and was only called as a witness to testify. The witness has not been subjected to the rigorous process of proof of legal marriage to the Respondent, proof of contribution to properties acquired from 1980 when she came into the scene and proof that there is/has been dissolution of the marriage, as required under **section 7 of Matrimonial Property Act 2012**. In the absence of all these crucial and legal factors, she cannot actively participate in these proceedings as part of a party who is entitled/involved in division of matrimonial property. DW2 shall if she so wishes file and canvass her claim in separate proceedings against the Respondent. The properties DW2 claimed to have bought or contributed to she did not provide cogent evidence of these facts. DW2 also contradicted her testimony she claimed she purchased directly suit properties;

1. Ndarugu /Gacharage/[...] (3 acres)in 1996
2. Ndarugu /Gacharage /[...] ( 2 acres) in 1996
3. Plot [...] - Gaitete (70 ft by 30 ft) in 1994

The witness did not provide details of the vendors or provide sale Agreement of the properties.

DW2 failed to even mention the alleged purchase she made of Land Parcel 2485 as alleged by Respondent in his testimony in Court. DW2 produced payslip **JGM-2** shows gross pay Ksh 11,180 & **JGM -3 (no indication of how much was paid to employee as terminal benefits who was released from employment on 31<sup>st</sup> December 2002 due to low productivity at Theta Tea Factory Ltd)**. These documents are not sufficient evidence of ability to purchase the above mentioned properties.

**DIVISION OF MATRIMONIAL PROPERTIES**

**1. LR No Ndarugu/Gacharage/[...] –Kiambu County (Laini Farm)**

This is the matrimonial home where the Respondent and Applicant resided since 1973 to date and that is where the Applicant conducted farming to maintain her family and also their matrimonial home. The property comprises of 15 acres and shall be divided as follows;

- a) 5 acres to the Respondent
- b) 5 acres to the Applicant- (where matrimonial home is situated is included)
- c) 2 acres to son – PM
- d) 3 acres to 3 daughters of the Applicant & Respondent marriage equally.

**2. LR No Ndarugu/Karatu/[...]- Kiambu County ([particulars withheld] Farm)**

The Respondent testified he sold the parcel of land, no evidence was tendered to show any distribution, investment or allocation of the proceeds of sale. If it is true the parcel was sold then the Respondent shall loose and portion of his 5 acres in Ndarugu/Gacharage/[...] – Kiambu County in any compulsory acquisition or land forfeiture for public utility; that has arisen or may arise or any reduction in the acreage of the land upon survey and/or valuation of the land.

**3. LR No Ndarugu/Gacharage/[...]–Kiambu County (particulars withheld)** The land parcel shall be divided into 2 equal shares between the Applicant and Respondent .DW2 may reside on the Respondent’s portion. The Applicant may sell her ½ share of the property.

**4. LR No Ndarugu/Gacharage/[...]- Kiambu County (particulars withheld)** The land parcel shall be divided into 2 equal shares between the Applicant/Respondent. the Applicant may sell her ½ portion.

**5. Plot No [...] - Gacharage Market ,Ndarugu Loc Kiambu County ([particulars withheld] Shop)** The shop be sold and proceeds be shared equally between the 2 parties , Respondent and Applicant.

**6. Plot No [...] /1 Gaitete, Kiambu County (particulars withheld Plot)** The shop be sold and proceeds be shared equally between the 2 parties, Respondent and Applicant.

**DELIVERED DATED & SIGNED IN OPEN COURT ON 6<sup>TH</sup> NOVEMBER 2019.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**N/A .....FOR THE APPLICANT**

**N/A.....FOR THE RESPONDENT**

**MS JASMINE- COURT ASSSITANT**