



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 28 OF 2015

RCC..... PLAINTIFF

VERSUS

TKN.....DEFENDANT

JUDGMENT

The plaintiff instituted this suit by way of Originating Summons dated 2nd November 2015 seeking orders that a declaration be issued that the plaintiff is entitled to a share of the properties acquired by the plaintiff during and or prior to the subsistence of their marriage and that the defendant holds the properties in trust for the applicant, namely land parcel Chemalal Farm Plot No. 31. Further, that an order be issued directing that the matrimonial property being Chemalal Farm Plot No. xxxx be shared in the ration 50:50. She also sought an order declaring that the defendant is not entitled to any share whatsoever in the house on the land parcel No. Chemalal farm Plot No. xxx. In the alternative, an order be issued directing that the matrimonial home be sold and the proceeds be shared in the ration 75:25%. She also sought for an injunction against the defendant in the event the property is awarded to her.

PLAINTIFF'S CASE

The Plaintiff filed her submissions on 21st August 2019.

She submitted that as per the testimony given in court by PW2 the parties were gifted the suit land when they got married. The defendant confirmed that as much as the house that hosted the plaintiff was demolished she used to reside on the land and was doing meaningful developments. He confirmed that when he married the plaintiff he took her to the land. As per the evidence given, the suit land is matrimonial property as per section 6 of the Matrimonial Property Act. The parties got married in 1979 and the property was acquired on 15th January 1982 as per D-ex 1.

The plaintiff cited sections 7 and 2 of the Matrimonial Property Act and the case of VWN versus FN [2014] EKL on contribution to matrimonial property and division of the same. The defendant did not dispute the fact that the plaintiff was the general manager of the house and she was performing her duties to satisfaction. Further, he conceded that the plaintiff is entitled to a portion but not half. The defendant produced a receipt confirming the property was acquired when they had already been married.

She urged the court to interrogate the direct and indirect contribution of each party to the marriage in acquisition and development of the property so as to inform the division of the matrimonial properties after dissolution of marriage.

DEFENDANT'S CASE

The defendant filed submissions on 24th September 2019.

DW1 told the court that he purchased the suit land in the year 1974 through the late Kipkeino Masai whom he had requested to buy him shares at Chemalal farm on condition that upon refund of the purchase price the suit land will be transferred to DW1 which was done in 1977 after getting employed and prior to marriage between the parties which was contracted in 1979. It is clear that DW1 never contributed towards purchase of the said parcel. He cited *Sections 5 and 6 of the Matrimonial Property Act* on the meaning of matrimonial property.

DW1 has proven that the suit land was acquired in 1971, transferred to him in 1977 and got married in 1979 thus it does not qualify to be matrimonial property.

The plaintiff is not entitled to a share in the suit property. The parties must prove the contribution which each made in its acquisition or improvement. She claimed to have made contributions to improvements on the suit land yet what stands on the parcel is the house that DW1 built solely. No other improvement has been made on the suit land. He relied on *Section 7 of the Matrimonial Property Act* and the case of PNN v ZWN.

He reiterated that the suit land is not matrimonial property and the plaintiff is not entitled to the said property.

ISSUES FOR DETERMINATION

- a) Whether Chemalal Farm Plot no. xx is Matrimonial Property
- b) Whether the Plaintiff is entitled to a share of the suit land.

WHETHER CHEMALAL FARM PLOT NO. xxxx IS MATRIMONIAL PROPERTY

Section 6 of the *Matrimonial Property 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.**

In order for the property to qualify as matrimonial property it has to have been acquired during the subsistence of the marriage. It is not disputed that the parties were married in 1979. What is in dispute is the date the suit land was acquired.

Defence Exhibit 1, a receipt no. 3166 is evidence that the suit property was acquired on 15th January 1982 and was transferred to the defendant. The defendant's claim is that he bought the land through Kipkeino Masai who he requested to buy him shares at the farm on condition that upon refund of the purchase price the parcel will be transferred to him. Further, that the same was transferred to him in 1977. There is however no documentary evidence to support these claims. The evidence is in favour of the position of the plaintiff which is that the suit land was acquired during the subsistence of the marriage.

WHETHER THE PLAINTIFF IS ENTITLED TO A SHARE OF THE SUIT LAND

Section 7 of the *Matrimonial Property Act* 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.”

Contribution is defined under Section 2 of the Act as;

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

- (a) domestic work and management of the matrimonial home;**
- (b) child care;**
- (c) companionship;**
- (d) management of family business or property; and**
- (e) farm work;**

The defendant did not dispute the fact that the plaintiff was the general manager of the house. He conceded that she was entitled to a portion of the suit land and not half. He has acknowledged her duties on the farm and as a housewife. I find that she is entitled to a share of the suit property. As to the share of the matrimonial property. I find that a share of 40%, given the plaintiff's contribution, is fair; and to the defendant 60%. The property should be valued at both parties costs and the defendant be given the first priority to refund or pay the plaintiff 40% of its value so as to keep the property if interested in it, and failure to or if disinterested in it, the plaintiff

be entitled to refund or pay him 60% of its value so as to keep it or own it fully.

The valuation should be done within the next 3 months, after which the matter will be mentioned before the Mediation Deputy Registrar for appointment of a mediator to assist the parties in arriving at a refund or payment terms in line with the court's finding. If none of the party meet the term, the property will be sold and the proceeds shared in the given ratio.

Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 1st day of November, 2019.

In the presence of:-

..... for Plaintiff/Respondent

.....for defendant/Applicant

Ms Abigael - Court clerk