



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL SUIT NO. 30 OF 2010

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT 91882)

VNK.....APPLICANT

VERSUS

CRN.....RESPONDENT

JUDGMENT

1. The Applicant herein VNK (hereafter referred to as the applicant) filed the Originating Summons dated 8.9.2010 seeking the following Orders:

(i) THAT a declaration do issue that the following Properties “the Properties” acquired and developed by the joint funds and efforts of the Applicant and Respondent during their marriage are Matrimonial Properties.

(a) Plot No. Embakasi Phase II [...] – matrimonial home (a 3 bedroomed house in joint names)

(b) Motor vehicle Registration Number KAP [...] (Registered in Respondent’s Name)

(c) 2 Plots (Unregistered) at Embakasi Market (Share Certificates with the Respondent)

(ii) THAT the Honourable Court be pleased to issue a declaration that the said Properties mentioned above are jointly owned and direct further that the above properties be sold and income derived from the sale be paid to the Applicant and Respondent equally.

(iii) THAT the Honourable Court be pleased to issue an Order directing the Defendant to give possession of Motor Vehicle Registration Number KAT [...] (Registered in the Applicant’s name) to the Applicant.

(iv) THAT the Respondent himself, his agents and/or servants be restrained from selling, alienating, encumbering or in any other manner disposing of the foresaid properties without the Applicant’s written consent

(v) THAT the Respondent be condemned to pay costs and incidentals thereto.

2. The Originating Summons is supported by the Affidavit of the Applicant of even date in which the Applicant has deposed that she started cohabiting with the Respondent as husband and wife since 2004.

3. She also stated that the marriage was blessed with two children namely:

(a) AN born on 9.1.2005

(b) MR born on 31.1.2010

4. Further, that during the subsistence of the marriage, they acquired the above stated properties which she now wishes declared Matrimonial Properties and shared in equal proportions.

5. The Respondent filed a Replying Affidavit sworn on 28.10.2010 in which he denied that he ever married the Applicant. The respondent further stated that he acquired the Properties single-handedly without any contribution from the applicant.

6. The parties filed witness Statements and also gave viva voce evidence. The applicant said in her statement and oral testimony in court that she started staying with the Respondent from the year 2004 and they stayed together for 6 years.
7. She said she contributed Ksh.15,000 towards the purchase of the matrimonial home in 2007. She also said she contributed towards the purchase of two plots at Embakasi.
8. The applicant said she is a property management and supplies business women and through her income she contributed to the purchase of the Matrimonial home.
9. She said the Respondent did not have a stable income and she supported him while he was at the Kenya School of Law preparing for his bar examinations.
10. She said in her Witness Statement that the purchase price for the Matrimonial home was Ksh.3.5 million. They were required to raise Ksh.350,000/- (10% deposit) and they were given possession of the house and they continued to pay monthly instalments of Ksh.44,000/-.
11. She stated in her written statements that in 2009, the Respondent assaulted her and forcefully threw her out of the matrimonial home and she filed Children Case No. 572 of 2009 whereof the Respondent was ordered to pay School fees and Ksh.7,000 in respect of Supplementary Shelter for the minors.
12. The Applicant stated that they also acquired the two vehicles and 2 plots at Embakasi Market during the subsistence of the marriage.
13. She said the Respondent sold the two plots and pocketed the proceeds alone and she is claiming her share of the proceeds of sale of the two plots.
14. She also said the Respondent sold Motor Vehicle Reg. No. KAT 644G which was registered in her name and she reported the matter to the police and the Respondent was forced to refund the purchase price to the purchaser or face Criminal Investigations.
15. She stated that she worked hard to acquire the Matrimonial Properties and she is now seeking a declaration that the Properties are jointly owned and also an order that the same be sold and the proceeds shared equally between them.
16. The Applicant is also seeking compensation from the Respondent from the year 2009 when he threw her out of the Matrimonial home to date.
17. The Respondent also said in his evidence and written Witness Statement that he met the Applicant in January 2004 and they started going out but each used to stay on their own.
18. The Respondent said in April 2004, the Applicant told her she was expecting his child and he immediately took responsibility for the minor but their relationship was never formalized.
19. He said in the year 2010, the Applicant stormed his house and assaulted his house help and she was charged with assault but the case was withdrawn.
20. The Respondent said he single-handedly acquired the house at Embakasi Nyayo Estate Phase II No. [...] from NSSF through tenant purchase scheme.
21. He said he obtained the deposit from GIRO Bank where he had a fixed account through Banker's cheques of Ksh.500,000/- in favour of NSSF.
22. The Respondent said he intended to marry the Applicant but the plans did not materialize as the Applicant used to move in and out of the house and she would disappear to unknown places without any reason of notification.
23. The Respondent said he purchased Motor Vehicle Reg. No. KAT [...] on 29th October 2007 for the benefit of the minor. He said he withdrew the money from his Account at Equity Bank and bought the car from one D KG for Ksh.475, 000/-.
24. He also said he purchased Motor Vehicle Reg. No. KAP [...] from one E M for Ksh.500,000/- which money he withdrew from his Barclays Bank Account.
25. He denied that he was violent to the Applicant and said she moved out of the house for no reason and filed Children Case No. 572 of 2009 claiming Maintenance and Custody of the Minor.
26. The Respondent said he lives in the house with his wife and two children and he is still paying the balance of the purchase price plus service charge and other expenses to date.
27. The Parties filed written submissions in the Originating Summons which I have duly considered. I find that it is not in dispute that the Applicant and the Respondent met in 2004 and they had a relationship.
28. It is also not in dispute that they have two children born on 9.1.2005 and 31.1.2010 respectively. The issues for determination in this

Originating Summons are as follows:

- (i) Whether the Applicant and the Respondent were legally married.**
- (ii) Whether the Properties listed in the Originating Summons can be declared Matrimonial Properties.**
- (iii) Whether the said Properties should be distributed between the Applicant and the Respondent.**
- (iv) Who pays the costs of the suit?**

29. On the issue as to whether the Applicant and the Respondent were married, it is trite law that he who alleges a fact is duty bound to prove the said fact. In the current case, the Applicant said she cohabited with the Respondent for 6 years and therefore a marriage should be presumed.

30. The Respondent denied that they were married and said he intended to marry the Applicant but the plan did not materialize since the Applicant used to disappear to unknown places for unknown reasons.

31. I find that there is no evidence that the parties had a formal marriage or a traditional one.

32. The Applicant is asking this court to presume a marriage and yet she did not call any evidence to establish that the two held out each other as husband and wife.

33. The Court of Appeal in PhylisNjokiKaranja & 2 others v Rosemary MueniKaranja & Another NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR, held 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.”

34. In Mary WanjikuGithatu v Esther WanjiruKiarie [2010] eKLR, Bosire JA, summarized the position thus:

“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.”

35. The Applicant relied on the case of CHRISTOPHER NDERI GATHAMBO Vs. SAMUEL MUTHUI MUNENE [2003] eKLR where the court presumed a marriage after cohabitation of 17 years.

36. However, the case of CHRISTOPHER NDERI GATHAMBO (Supra) can be distinguished from the current case in that there was a long and stable cohabitation and several witnesses testified who said that CHRISTOPHER NDERI GATHAMBO and the deceased were known as husband and wife and they used to visit their respective families as husband and wife.

37. In the current case, no witnesses were called to testify that they knew the Appellant and the Respondent as husband and wife. I also find that the period of cohabitation and the nature of the relationship between the Applicant and the Respondent does not favour the raising of presumption of marriage.

38. I accordingly find that in the circumstances, no form of marriage existed between the Applicant and the Respondent. The only evidence on record is that the two had a relationship which culminated in the birth of the two minors. The relationship was not stable and it gave rise to Children’s case No. 572 of 2009 where the respondent was ordered to maintain the minors.

39. I therefore find that the properties listed in the Originating Summons cannot be declared Matrimonial Properties as it has not been shown that they were acquired during the subsistence of a marriage.

40. Matrimonial property is defined as follows

6. Meaning of matrimonial property

(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.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

41. It accordingly follows that the said properties cannot be distributed between the Applicant and the Respondent. **Section 7** of the Matrimonial Properties Act provides that Matrimonial Property can only be divided if it is established that they were acquired during the pendency of the marriage and only after dissolution of the marriage and in accordance with the contribution of the parties towards acquisitions.

42. The said **Section 7** of the Matrimonial Properties Act states 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”.
(emphasis added)

43. In the Current case, I find that the Applicant has not established that the Properties herein are matrimonial property since there is no evidence of the existence of any form of valid marriage between the Applicant and the Respondent.

44. I also find that even if the applicant establishes that there is a valid marriage between her and the Respondent (which she did not), the Applicant has to show that the said marriage has been dissolved before the Court can contribute Matrimonial Property.

45. The applicant said she contributed Ksh.150, 000 towards the purchase of the Embakasi house. I find that the Applicant is not without remedy as she can still pursue her claim in the ELC Court.

46. I find that the Respondent adduced evidence that is uncontroverted that he bought the cars and the plots at Embakasi Market single-handedly.

47. I accordingly dismiss the Originating Summons dated 8.9.2010 and for reasons that the Applicant and the Respondent do not deny that they are biological parents of two minors. I direct that each party bears its own costs of the Originating Summons.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 8TH DAY OF NOVEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.