



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL CASE NO. 8 OF 2014(OS)
IN THE MATTER OF: -
MATRIMONIAL PROPERTIES ACT

AND

ARTICLE 45(3) OF THE CONSTITUTION OF KENYA

AND

ORDER 37 OF THE CIVIL PROCEDURE RULES

BETWEEN

CKK.....PLAINTIFF

AND

PM.....DEFENDANT

JUDGMENT

Matrimonial property

1. In the Originating Summons (OS) dated 15th May 2014, the Plaintiff posed the following questions for determination by the court: -
- Whether the plaintiff and defendant have been and are husband and wife.
 - Whether the plaintiff is entitled to share equally or get whole share of all or part of the properties in the attacked schedule of properties all registered in the name of the defendant acquired during the subsistence of the plaintiff and defendant's marriage.
 - Whether the plaintiff contributed wholly or partly to the acquisition of the properties attached in the schedule.
 - Whether as result of repayment of the loans the plaintiff is entitled to sole ownership of some of the properties in the schedule of properties
 - Whether the defendant should forfeit his shares in the matrimonial property herein to the extent of the properties he has disposed without sharing proceeds with the plaintiff
 - What is the plaintiff's equal and equitable share in the marriage under Article 45(3) of the Constitution of Kenya.
 - What is the order as to costs.

Plaintiff: I am married to you. Defendant: I am not

2. The Plaintiff in the OS, affidavit in support and submissions filed herein claims that she has been married to the Defendant under Tharaka Customary law since 1997. She also claims that the Defendant paid 5 heads of cattle as dowry in 2006. She stated that during the subsistence of marriage they were blessed with one daughter, PG and also acquired properties in the schedule filed herein.

3. The Defendant denied any marriage to the Plaintiff. He denied ever paying any dowry as alleged or visiting the family of the plaintiff for any introduction of himself or of any of his family members. Instead, he argued that he married his first wife MW in the year 1987 under African Christian Marriage and Divorce Act and were blessed with 5 children. She passed on in July 2001 and he contracted another marriage with LWN under African Christian Marriage and Divorce Act in March 2002. The latter marriage is blessed with one child, GK. The Defendant however admitted having sexual affair with the Plaintiff as a result of which PG was born.

4. The plaintiff further averred that she contributed towards purchase of land parcels indicated in the schedule; some of which she purchased through loans which she is still repaying. Except, however, the said properties were registered in the name of the Defendant. She contended that the Defendant has secretly and fraudulently sold some of the properties.

5. The Defendant admitted having sold some of the properties listed by the Plaintiff except Plot No. xxxx Marimanti which is the only remaining property. He stated that, on the plot is a petrol station from which business he gets money for his food and medical bill. He denied acquisition of any of his properties with the plaintiff as they were not married.

Presumption of marriage

6. The Plaintiff has pleaded customary marriage. Section 43 of the Marriage Act provides as follows: -

43. Governing law for Customary marriage

(1) A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

(2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.

7. The Plaintiff claimed that dowry was paid by the defendant under Tharaka customary law. She stated that the Defendant paid 5 heads of cattle in dowry- which was counted as 35 goats. Her witnesses DMM stated that he has known the plaintiff and the defendant as husband and wife since they got married in 1997. He also attended the dowry payment celebration known as ruracio. He also was given Kshs. 10,000 by the defendant at his petrol station at Marimanti to take to the parents of the plaintiff. He averred that two employees of the defendant namely K and G witnessed this. He also stated that the defendant had chased the plaintiff away at one time and he had to pay a Nthenge- a reconciliatory payment- on 4th May 2008, before being allowed to take the plaintiff back. They reconciled and went back to living as husband and wife.

8. MMM, the uncle of the plaintiff stated that on 2nd August 2006, he received the dowry paid by the defendant for his marriage to the plaintiff. He so received the dowry since the father of the plaintiff was already deceased and he was in charge of such matters for the family. He corroborated the evidence of DM in all respects; dowry payment, Nthenge payment and gift of Kshs. 10,000 to the mother of the plaintiff. He concluded that once dowry is paid, the marriage is presumed. He also stated that these two are still married as no divorce in the Tharaka way has been witnessed. He also averred that he has been visiting the two at their matrimonial home and he never saw any other woman there.

9. The two employees of the defendant K and G stated that the defendant introduced the plaintiff as his wife. They also knew and regarded the two as husband and wife. They stated that they took cows as part of dowry to the plaintiff's home upon instructions by the defendant.

10. The defendant has admitted having sexual affairs with the plaintiff but not being married to the plaintiff. He was of the opinion that in law he could not transact another marriage while there was a subsisting monogamous marriage. He has relied on section 11 of the Marriage Act.

11. I have considered the evidence on presumption of marriage. I have also considered the evidence by the Defendant. He has relied on section 11 of the Marriage Act. The section provides as follows: -

Subsisting marriages

Subject to [section 8](#), a married person shall not, while—

(1) in a monogamous marriage, contract another marriage; or

(2) in a polygamous or potentially polygamous marriage, contract another marriage in any monogamous form.

12. What does the evidence portend? The evidence available shows that the defendant and the plaintiff started cohabiting in 1997. At that time, the defendant was already married to his first wife MW to whom he got married in the year 1987 under African Christian Marriage and Divorce Act. However, evidence show that after his first wife died in 2001, he continued to cohabit with the plaintiff and eventually paid dowry for the plaintiff in 2006. The witnesses stated in their filed statements that all this time they regarded the two to be husband and wife. Of importance is that during the cohabitation with the plaintiff, he contracted a monogamous marriage. The plaintiff and the defendant had

cohabited for a considerable period of about 5 years at the time he contracted another monogamous marriage in 2002. Such long cohabitation results into a presumption of marriage. The facts of this case therefore, presents quite a peculiar scenario and a question may be asked whether he could in the circumstances contract a monogamous marriage in 2002. It appears the defendant does not care about what the law says or what it permits or prohibits. In such circumstances, the defendant should not reap from his wrongdoing or get the benefit of the law. Accordingly, I find that the defendant and the plaintiff are husband and wife. But, I should add- and this will be important in the determination of questions on division of matrimonial property- that, from the evidence adduced, the marriage between the plaintiff and the defendant still subsists save only that the defendant deserted the matrimonial home.

Declaration of rights in matrimonial property

13. Contrary to misplaced arguments I have heard from some legal commentators, an action for declaration of rights to, and protection of matrimonial property may be filed by a spouse during the subsistence or after termination of marriage. Rights in matrimonial property are property rights protected under article 40 of the Constitution. These are rights amongst rights declared by the Constitution in article 45(3) that:

(3) 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.

Such rights may be subject of judicial proceedings for declaration and protection of rights under article 22 and 23 of the Constitution. And, such proceedings for recognition and protection of rights may be initiated any time as may be necessary. See article 23(3) of the Constitution which lists a *declaration of rights* as one of the reliefs a court may grant in an application for enforcement of rights.

14. A more pointed constitutional provision on matrimonial property rights in land is article 68(1)(c)(iii) of the Constitution which gave Parliament a peremptory command to enact legislation: -

to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage; [Underlining mine]

15. The foregoing provision is clear that recognition and protection of matrimonial property rights may be applied for during and after termination of marriage. Therefore, I take the view that constitutional philosophy emerging from provisions on matrimonial property rights buttresses that such rights are property rights and may be a subject of application for declaration and protection of rights any time by any spouse as the need arises.

16. Thus, Section 17 of the Matrimonial Property Act provides for: *Action for declaration of rights to property* as follows: -

(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application in subsection (1)-

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes. [Underlining mine for emphasis]

17. To me therefore, the belief say that declarations and protection of matrimonial property rights can only be entertained after termination of marriage is an exhibition of unpardonable ignorance of two truths which lie in plain eye-sight, that is; (1) that the Constitution and statutory law; and (2) the realities of life demands that recognition and protection of matrimonial property be available at all times to any spouse who feels the need to so apply. The cardinal objective of such proceedings is to preserving the property of marriage and rights therein; prevent dissipation of the property and down-trod of rights by one or more of the spouses. I will, therefore, answer questions on declaration and protection of matrimonial rights and not those relating to division of matrimonial property rights, for reasons I shall record later.

Matrimonial property

18. The evidence adduced by the plaintiff was not controverted that the properties listed were acquired during the subsistence of their marriage. Therefore, the properties listed in the schedule filed herein are matrimonial properties. The properties were however, registered in the name of the defendant. Here, section 14(a) of the Matrimonial Property Act is relevant for it decrees that: -

Where matrimonial property is acquired during marriage-

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

Accordingly, I declare that the defendant holds these properties in trust for the plaintiff. The proportion of the beneficial ownership to be determined upon termination of marriage.

Protection of matrimonial property

19. As I have stated earlier, protection of matrimonial property serves a noble purpose; preservation of matrimonial property so as to prevent dissipation of the matrimonial property to the detriment of one or more of the spouses. As I have declared that the plaintiff has beneficial proprietary rights in the matrimonial properties herein capable of being protected in law, I direct that the orders I issued on 11th February 2016 shall remain in force unless otherwise ordered by the court.

Division of matrimonial property

20. It is time to repay my debt. I made a promise; that I will only declare and protect the plaintiff's rights to and the matrimonial property herein but not division thereof. These are my reasons. First, the evidence show that the marriage between the plaintiff and the defendant still subsists. The law permits division of matrimonial property if the spouses are divorced or their marriage is otherwise dissolved. See section 7 of the Matrimonial Property Act on ownership of matrimonial property as follows: -

7. 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.

21. Second, the plaintiff is entitled to a part or some of the properties listed. But, it is a fact that the defendant was married before he married the plaintiff. He also married another wife in a monogamous marriage whilst he was married to the plaintiff. Matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife. Similarly, matrimonial property acquired after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives. See section 8 of the Matrimonial Property Act. In such mix as in this case, my view is that proper evaluation of questions of contribution and proportion of ownership of the matrimonial property should be done after termination of marriage. And, I am sure, the other wives cannot be ignored in such proceedings. For those reasons, I will not determine division of the matrimonial property herein.

22. Given the nature of these proceedings, I order each party to bear own costs.

Dated signed and delivered in open court at Meru this 2nd day of December, 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

Rimita for plaintiff

Kijaru for defendant – absent

F. GIKONYO

JUDGE