



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NO. 5 OF 2018

WAN.....1ST PLAINTIFF

COM.....2ND PLAINTIFF

VERSUS

WMW.....DEFENDANT/RESPONDENT

JUDGMENT

1. By way of a plaint dated 13/10/2001 and amended on 29/11/2001, the plaintiffs sued the defendant for orders:

- i. A declaration that the defendant holds the suit parcel of land in trust for the defendants or in the alternative a declaration that the plaintiffs have got beneficial rights and are entitled to the use and occupation of the land perpetually as a matrimonial property.
- ii. A perpetual injunction to restrain the defendant either by himself, servants and or agents from selling, disposing off or in any way dealing with the suit land to the detriment of the plaintiffs.
- iii. Costs of this suit and interest thereto.
- iv. Any other relief that this honourable court may deem fit to grant.

2. It is worth noting at this early stage that this suit was instituted as HCCC No. 363 of 2001. By an Order of Court (Mulwa J) dated 10/7/2017, the matter was transferred to the Environment and Land Court as the court concluded that this was a land dispute. Fast forward to the 24/4/2018 and the court was moved by the plaintiff to have matter transferred to the Family Court on the basis that the same was a matrimonial property case. The parties appeared before court on 12/6/2018 and it is apparent that both parties were in agreement that this is a matrimonial dispute as no objection was raised.

3. It is the plaintiffs' case that the 1st plaintiff and the defendant got married on or around the year 1983. They established their matrimonial home on the property known as Kampi ya Moto/Menengai Block 1/[xxxx] (the suit land).

4. It is urged that the 1st plaintiff was shown this property as her matrimonial home. The 2 cohabited as husband and wife in the said property until 2001 when the defendant deserted the matrimonial home. There are 3 issues of the marriage who include the 2nd plaintiff.

5. It is the evidence of the 1st plaintiff that upon marriage to the defendant, the defendant told his parents that he was bringing her to the land in Nakuru and Rose, the 1st wife, was to take the land at the rural home.

6. The plaintiff added that she has developed the suit land and has constructed a zero grazing stone fence, built a stone house and erected a metallic gate. She has installed a 10,000 litre water tank.

7. On his part, it is the defendants' case that the suit land belongs to him. He bought it in 1981. He has exhibited a share certificate. At the time, he was employed by Eveready Co. and he lived in Nakuru. He bought the land to supplement his income for purposes of education and food needs of his children. He acquired the title certificate in 1985.

8. He reared cows on the farm. At the time he left, the cows were on the farm and the 1st plaintiff used them to educate the children. He never told the plaintiff that the land was hers.

9. The defendant adds that his attempts to settle the 1st plaintiff at his rural home were futile as the 1st plaintiff refused. He has land at his rural home where he can build for her. It is Title No. South Ugenya/Ruwe/[xxxx].

10. Both parties filed written submissions.

11. It is common ground that the 1st plaintiff and the defendant are husband and wife and that the suit land is registered in the names of the defendant.

12. Of determination is whether the suit land is matrimonial property and what share if any should the 1st plaintiff get. I am also to determine what rights the 2nd plaintiff is entitled to in this land if at all.

13. I begin with the last issue which I think should be put behind us as we proceed to resolve and determine the rights of the spouses. This is the issue of the rights of the 2nd plaintiff.

14. In view of the fact that this matter was adjudged to be a matrimonial claim and there was no whimper of an objection from the 2nd plaintiff, this being a claim based on rights of spouses over property acquired during coverture, the 2nd plaintiff's claim is misplaced. There was indeed a misjoinder of the 2nd plaintiff.

15. Any rights over the property be it by way of a claim of the land being held by the defendant in trust for him or any other claim for that matter cannot be adjudicated upon in these proceedings. The 2nd plaintiff would need to separate his claim and file it in the appropriate jurisdiction.

16. Is the suit land matrimonial property? What constitutes matrimonial property was summed up by Musyoka J in **ENK –Vs- JNK [2015]eKLR** where he stated;

“What constitutes matrimonial property is stated in Section 6(1), as read with Section 14 of the Act. It is essentially the property acquired by either spouse during marriage as where the property is acquired jointly, or is registered in the joint names of the parties, the presumption would be that it is to be divided equally between them in the event of divorce. The presumption is rebuttable. Where it is acquired by one spouse or is registered in the name of one spouse, the presumption would be that the one holds the same in trust for the other. The provision in Section 14(a) does not say so, but it is subject to Section 7, so that division of such property will take into account the contribution of either spouse to its acquisition.”

17. It is common ground that the suit land was acquired before the defendant got married to the plaintiff. The question of either direct or indirect contribution by the plaintiff does not arise.

18. The plaintiff's claim then can only be anchored on **Section 9** of the **Matrimonial Property Act** which recognizes contribution through improvement of a property acquired before or during marriage. Section 9 states;

“S 9: Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

19. The 1st plaintiff has testified that upon being married she was settled on this land in a mud and iron sheet house. The defendant deserted her in 2001, sold all the cows leaving only one. She adds that she developed the plot and she constructed a stone house and a stone zero grazing shed. She also erected a gate and installed a 10,000 litre water tank.

20. In rejoinder the defendant states he bought the land for purposes of feeding and educating his children. He reared cows on the land. He left the 1st plaintiff to use the cows to educate the children. At no time did the defendant tell the 1st plaintiff that the land was hers.

21. On cross examination the defendant said he does not know the developments the 1st plaintiff has done on the farm. He has not been paying rates and he does not know if the plaintiff pays the rates.

22. From the foregoing the 1st plaintiff's contention that she has developed the land is not controverted. Indeed the defendant appears to admit that it is the 1st plaintiff and the children who have been on the land and she used the farm to educate the children. This obviously shows she developed the land. Land will not produce if not developed.

23. It's worthy noting that the 1st plaintiff was married after the land was acquired and into a polygamous union.

24. I note that there existed a 1st wife before the 1st plaintiff was married to the defendant. Indeed the property in issue was bought when the 1st wife was already married to the defendant.

25. Under the Matrimonial Property Act, when a man is a polygamist the distribution ought to take this fact into account and follow the principles for division of the property espoused in **Section 8** of the **Act**. That section provides;

“(1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the-

a. 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; and

b. Matrimonial property acquired by the man after the man married 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.

(2) Despite subsection (1)(b), where it is clear by agreement of the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then an such wife shall own that matrimonial property equally with the husband, without the participation of the other wife or wives.”

26. S 8(1)(a) would obviously give the 1st wife and the defendant the right of claim to the suit land to the exclusion of the 1st plaintiff.

27. But the defendant, though having acquired the property before marrying the 1st plaintiff put the 1st plaintiff on this land and she has shown evidence that she developed it. She therefore acquires a right to it under **S 9** of the **Act**.

28. It is preposterous for the 1st plaintiff to lay a claim to the whole land to the exclusion of the defendant (who acquired it single handedly) and ignoring the right to lay a claim by the 1st wife.

29. From the evidence on record and as clearly put by the defendant there is no time that the defendant and the 1st plaintiff had a clear agreement that the 1st plaintiff shall have her matrimonial property with the defendant separate from that of the other wives. Therefore the protection afforded by **S 8(2)** of the **Act** is not available to the 1st plaintiff.

30. The defendant is categorical that his intention to make a matrimonial home for the 1st plaintiff on Title No. Ugenya/Ruwe/[xxxx] was rebuffed by the 1st plaintiff. The defendant maintains he is still ready to build for the 1st plaintiff at Ugenya.

31. Ultimately, and in view of the foregoing, I reach the conclusion that the 1st plaintiff is entitled to a share of land known as Kampi-ya-Moto/Menengai Block 1/[xxxx] through her contribution to its development.

32. It has not been shown from the evidence that the 1st wife could have contributed to the acquisition of the suit land. In the circumstances, I find the 1st plaintiff's suit successful to the extent of the following orders:

1. The 2nd plaintiff's case is dismissed.
2. I declare that the 1st plaintiff has acquired a beneficial interest in LR Kampi-ya-Moto/Menengai Block 1/[xxxx].
3. I declare that LR Kampi-ya-Moto/Menengai Block 1/[xxxx] be shared between the 1st plaintiff and the defendant at the ratio 50:50.
4. I declare that the 1st plaintiff is to retain/occupy the area upon which her current residence sits.
5. Each party to bear its own costs.

Dated and Signed at Kisii this 27th day of November 2019.

A.K NDUNG'U

JUDGE

Delivered at Nakuru this 10th day of December 2019.

R. NGETICH

JUDGE