



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

HCCC NO. 6 OF 2013 (O.S.)

CNG.....APPLICANT/PLAINTIFF

VERSUS

DMN.....RESPONDENT/DEFENDANT

J U D G M E N T

A. Introduction

1. The Applicant/Plaintiff instituted this suit through Originating Summons seeking the following orders: -

a) That a declaration do issue that LR. NGANDORI/ KIRIGI/[...] and LR. KAGAARI/KANJA/[...] within Embu County is matrimonial property jointly purchased by both the applicant and the respondent.

b) That declaration do issue that the registration of the respondent as the proprietor of LR. NGANDORI/ KIRIGI/[...] and LR. KAGAARI/KANJA/[...] is in trust and the same registration be cancelled and a joint registration be ordered in the names of both the applicant and the respondent in equal shares.

2. By consent the parties agreed to adopt the evidence in their statements and annexures to enable the court prepare judgement. The parties were then to file submissions.

B. Applicant's Case

3. It is the applicant's case that he married the respondent in 1997 prior to which they had cohabited as man and wife for a period of not less than 1 year and that they had been blessed with one issue born in 8th July 1997.

4. The applicant further stated that in 1998, she took up tea farming on **LR. KAGAARI/KANJA/ [...]**, which was matrimonial property jointly purchased by the respondent and herself, to supplement her income from selling clothes. The applicant stated that the respondent secretly sold the land **LR. KAGAARI/KANJA/[...]** in 2009.

5. It is the applicant's case that between 1998 and 2009, the parties herein were living in their matrimonial property in plot no. **KAGAAARI/KANJA/[...]** which they had jointly purchased with the developments therein built by proceeds contributed equally.

6. The applicant states that in 2010 the parties herein jointly purchased **LR. NGANDORI/KIRIGI/[...]** and immediately started putting up a permanent residential house but soon after its completion, the respondent started cohabiting with one Edith Kairuthi and chased her out of the home at **LR. NGANDORI/KIRIGI/ [...]**. That the respondent maliciously damaged their house on **L.R. No. KAGAARI/ KANJA/ [...]** which matter she reported to the relevant authorities.

7. The applicant further testified that on the 15/2/2013 the respondent and family members attacked her at their family home on **L.R. No. KAGAAARI/KANJA/[...]**, completely demolishing the house and carrying away all family belongings forcing the applicant to move back to her parents' home in Thिंगingi Village. It is the applicants case that the respondent had persuaded her to register all their properties in his name.

C. Respondent's Case

8. The respondent denied ever having married the applicant either under Kiambu Customary Law or any other law. He stated that he only

had a casual sexual relationship with the applicant, which led to the birth of their son whose upkeep he has been supporting while in the applicant's custody. The respondent further stated that he has been married to Edith Kairuthi Mugambi since 2001.

9. It is the respondents case that the applicant did not contribute to the purchase of his land parcels **L.R. No. KAGAARI/ KANJA/[...], LR. NGANDORI/KIRIGI/[...]** having bought the latter two parcels from Wilson Ndwiga Nthiga and constructed an 8 million bungalow.

10. It is the respondent case that he is the sole registered and absolute proprietor of the said 3 properties and the same should not be divided between himself and the applicant as she is not his wife and thus he seeks to have the applicant's case dismissed with costs.

D. Applicant's Submissions

11. The applicant submitted that a marriage existed between herself and the respondent and urged court to consider the evidence by the applicant's witnesses who all testified to the existence of the marriage and in the alternative that a marriage out of prolonged cohabitation existed.

12. The applicant further submitted that the respondent had not produced any evidence from independent witnesses to dispute her claims not even by his alleged wife whereas the applicant had produced several witnesses who all alluded to the existence of a marriage between the parties herein.

13. The applicant further submitted that she had satisfied the threshold set by section 2 matrimonial property act on the contribution to the matrimonial property. The applicant further submits that her witnesses testified that she lived on **L.R. No. KAGAARI/ KANJA/[...]** for several years and thus contribution in terms of **section 2 a, d and e** had been proved.

14. The applicant further submitted that companionship could be inferred from the fact the respondent regularly visited her during which time they made plans to acquire property together.

E. Respondent's Submissions

15. The respondent submitted that the applicant had not proven the existence of any customary marriage under Kiambu Customary Law and relied on the Court of Appeal decision in **Phylis Njoki Karanja & 2 Others v Rosemary Mueni Karanja & Another [2009] eKLR.**

16. The respondents further submitted that there was no cohabitation or marriage with the applicant and thus there was no way the applicant could have contributed towards the purchase of his properties. He relied on the cases of **Civil Appeal No. 2 of 2000 Peter Ndungu v Sophia Watiri Ndungu, Civil Appeal No. 128 of 2014 PNN v ZWN**

F. Issues for Determination

17. I have identified the issues for determination are as follows: -

- a) Whether the applicant and the respondent were lawfully married, or cohabited together as husband and wife.*
- b) Whether the applicant contributed to the purchase of the properties in question either I monetary or non-monetary form.*
- c) Whether the properties in question are matrimonial properties subject to division between the parties.*
- d) Who will bear the costs of the suit?*

G. Analysis of the Law

18. In this case, for the Plaintiff to prevail, she must demonstrate, on a balance of probabilities that:

- a. She was married to the Respondent when the Subject Property was acquired;*
- b. She made a contribution to the acquisition of the Subject Property.*

19. Whatever system of marriage the Plaintiff alleges; it was incumbent upon her to prove it on a balance of probabilities. In **Gituanja v Gituanja (1983) KLR 575**, the Court of Appeal held that the existence of a customary marriage is a matter of fact which must be proved with evidence. In that case, the Court found that the evidence adduced had proved a valid marriage under Kikuyu customary law as was evidenced by the slaughter of the "ngurario".

20. In **Hortensia Wanjiku Yawe v The Public Trustees, Civil Appeal 13 of August 6, 1976** (Wambuzi, P Mustafa V-P and Musoke, JA) is to the same effect. In this case, Justice Kneller laid down three important and salutary principles regarding proof of customary marriages in Court. These are:

- i. The onus of proving customary law marriage is generally on the party who claims it;*
- ii. The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;*

iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.

21. I am persuaded by the evidence from the applicant and her five (5) witnesses that a customary marriage existed between herself and the respondent. None of the witnesses speak on the formalities carried out. However, I am guided by the decision **Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] eKLR** where it was stated,

“Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.”

22. The progressive tone by the Court of Appeal is well taken. As customs are surely organic, the exact procedures for a valid customary marriage cannot be said to be codified. Even then, there is no denying that certain pre-requisites must be present. However, the failure of certain formalities does not per se invalidate a customary marriage if there is enough evidence to show that a customary marriage was intended and certain substantive pre-requisites performed.

23. In this case, the applicant has in my view proved that a marriage existed between herself and the respondent. The corroborative testimony from her five (5) witnesses corroborate her assertions. The five witnesses were neighbours of the complainant and testified as to the existence of the marriage between the parties, the demolition and eviction of the applicant from the matrimonial home after the respondent started cohabiting with one Edith.

24. The respondent on the other hand has only offered a denial with no corroborating evidence. In the circumstances, I am constrained to conclude that the applicant has demonstrated the existence of a Kiambu Customary marriage between her and the respondent.

25. The Applicant also sought to rely on marriage by presumption. The definitive definition of marriage by presumption in our jurisprudence is provided in the majestic judgment by Nyarangi, JA in **Mary Njoki v John Kinyanjui Muthuru & 3 Others 1985 eKLR** in the following words:

“In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the Yaweand in Mbiti. To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.”

26. As the **Mary Njoki Case** (supra) held, whether or not a presumption of marriage arises in a particular case and whether or not that presumption is rebutted is a question of fact. The person asserting the presumption must put in evidence sufficient evidence which, on a balance of probabilities, demonstrates the quantitative and qualitative elements. Once this happens, it would then be up to the other party to rebut the presumption.

27. What evidence did the Applicant proffer to enable the Court to make the presumption? First, she asserted that she and the Respondent cohabited for not less than 1 year prior to 1996, a time in which she became pregnant leading to the marriage under customary law herein aforementioned.

28. The respondent has not provided evidence to counter assertions by the applicant other than mere denials. The detailed evidence of the applicant was not challenged by the respondent. It is important to note that he did not call any witness or produce any other evidence to counter that of the applicant.

29. From the year 1987 when the customary marriage was conducted, the parties stayed together peacefully for a period of 14 years before the respondent abandoned the applicant. Their son who was born in 1987 was 14 years old at the time the respondent deserted the applicant.

30. The **Matrimonial Property Act, 2013** in **Section 7** 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.”

31. Contribution is defined by **Section 2** to mean monetary and non-monetary contribution. A combination of the above provisions of the Article 45 (3) of the **Constitution 2010** and the **Matrimonial Property Act 2013**, has settled the law on matrimonial property and charted a clear vision for the future.

32. In the case of **PWK vs JKG 2015 eKLR** the Court said;

“Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788.

33. The gist of the above-cited case law is that court ought to interrogate the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties so as to inform the division of matrimonial properties after dissolution of the marriage.

34. In the instant case, having established that there was a marriage between the parties herein, I am persuaded that the applicant played some role in the acquisition of the suit property. One of the applicant’s witnesses testified that he was aware of the plans the applicant and respondent were making of putting up a house on a land parcel they had bought in Kirigi. Further, it is evident that the applicant contributed to the union in non-monetary sense as provided by **Section 2 of the Matrimonial Property Act 2013**. The respondent vehemently denies this but offers no corroborated evidence to his claims.

35. The issue is the extent contribution the applicant made to the purchase of the properties available for distribution being: -

i. LR. Ngandori/Kirigi/[...]

ii. LR. Ngandori/Kirigi/[...]

iii. LR. Kagaari/Kanja/[...]

36. The applicant produced business permits to demonstrate that she carried on business of a boutique from where she earned income. She produced receipts of purchase of stock and statements of her bank accounts which had balances of between Kshs. 84,000/= to over Kshs. 550,000/=. The applicant had a tea farm on LR. Kagaari/Kanja/[...] from which she earned income.

37. The respondent did not adduce any evidence to controvert this evidence.

38. The applicant and her child lived in the couple’s matrimonial home in Embu County on LR. Kagaari/Kanja/ [...] for several years as she did farming and conducted business at Kianjokoma. The running of the tea farm which was an income generating project, the bring up of their son as the respondent worked at Meru was non-monetary contribution to the family investments.

39. The work of the applicant put in the business and the farm was for the benefit of the family.

40. It was held in the case of the case of **VWN vs FN [2014] eKLR** stated the following;

The provisions of Sections 2, 6 & 7 of the Matrimonial Property Act, 2013 breathe life into the rights provided in Article 45(3). The Matrimonial Property Act recognizes that both monetary and non-monetary contribution should be taken into account in determining contribution.

41. I am in agreement with the **VWN** case (**supra**) that the fact that the properties were registered in the name of the respondent will not be used to the disadvantage of the other spouse. There is evidence from the copies of register that the properties were acquired during the subsistence of the marriage between 1997 and 2010. It is assumed that during the subsistence of the marriage, any property acquired and registered in the name of one spouse is held in trust for the other spouse.

42. It is my considered opinion that the applicant has proved that the properties **LR. Kagaari/Kanja/[...]** and **LR. Ngandori/ Kirigi/[...]** were acquired during the subsistence marriage of the parties and that she contributed to the purchase. For all intents and purposes, I find that the said properties are matrimonial properties.

43. The applicant has proved that she contributed substantially to the purchase of the properties in addition to the non-monetary contributions that she made single handedly when she stayed at home in the absence of the respondent who was a civil servant working away from home.

44. The applicant has established on the balance of probabilities that she is entitled to the orders sought.

45. I hereby enter judgment in the applicant’s favour against the respondent as prayed in the originating summons.

46. Each party will meet their own costs of this suit.

47. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Andande for Eddie Njiru for Applicant

Mr. Ithiga for Respondent

Applicant present