



IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL SUIT NO. 20 OF 2016

BETWEEN

GKO.....PLAINTIFF

AND

HOO.....DEFENDANT

JUDGMENT

1. The parties to this suit got married under Gusii customary law in 1994 and were blessed with 7 children. The marriage was dissolved on 8th September 2016 in *Kisii Chief Magistrate's Court Divorce Cause No. 7 of 2014*. The plaintiff then commenced these proceedings by way of a plaint dated 24th November 2016 seeking distribution of the two properties; **CENTRAL KITUTU/MWABUNDUSI**[particulars withheld] (“Plot particulars withheld”) and **CENTRAL KITUTU/MONYERERO**[particulars withheld] [particulars withheld] which she claimed were matrimonial property.

2. In his statement of defence, the defendant contended that the plaintiff’s claim was premature. He further contended that during the subsistence of their marriage, the plaintiff was adulterous, abusive and an absentee wife and mother. He states that she did not contribute towards the acquisition of Plot [particulars withheld] and that he is a stranger to Plot [particulars withheld].

3. The following facts were not in dispute:

The parties married in 1994 and cohabited together until 2013. Their marriage was dissolved by on 8th September 2016.

Plot [particulars withheld] was purchased during the marriage and was registered in the defendant’s name in 2005.

Plot [particulars withheld] is registered in the name of Orango Orango.

4. The main issue is whether the plaintiff has established a case for division of their matrimonial property. Before I deal with the issue I propose to dispose of the issue raised by the defendant that this suit is premature and bad in law.

5. The defendant case was that the plaintiff had not extracted either the decree nisi or the decree absolute after the dissolution of the marriage in *Kisii Chief Magistrates Court Case No. 7 of 2014* entered judgment for dissolution of the marriage on 8th September 2016 before filing this suit. He added that the marriage, having being solemnised under Abagusii customary law, was still in subsistence as dowry had not been refunded in accordance with customary law.

6. The substance of the plaintiff’s claim is division of matrimonial property and the right to matrimonial property accrues to and vests in either spouse according to the contribution of either spouse towards its acquisition during the marriage and the parties are entitled to apply to the court for division upon divorce. **Section 7** of the *Matrimonial Property Act, Act No. 49 of 2013* (“*the MPA*”) underpins this principle and it provides;

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. [emphasis added]

7. The defendant’s argument cannot stand in the face of the aforesaid provisions that entitles a spouse to apply for division of property upon

dissolution of the marriage. In this case, the court had pronounced that the marriage no longer exists. Whether or not the party has extracted the decree or order does not subtract from the legal reality. Since the marriage has been dissolved by a lawful decree of the court, non-refund of dowry cannot be used to invalidate the consequence of the dissolution. I therefore find that this suit is properly before this court.

8. The plaintiff contends that she is entitled to an equal share of Plots 1318 and 847. The preliminary step towards this determination is to ascertain whether the properties are matrimonial properties. Matrimonial property is defined in **section 6 (1)** of the *MPA* as follows:

6. (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.

9. The **section 2** of the *MPA* defines **matrimonial home** as:

Any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

10. According to a copy of the official search for Plot 847 produced by the plaintiff, the property belongs to the plaintiff's father in law, Orango Orango. Since the parties do not have title to this property it is not matrimonial property.

11. The uncontested evidence is that Plot [particulars withheld] was purchased in August 2003. Sabina Nyaboke Bwaringa (PW 2) and Julius Bwaringa Isaboke (PW 3) testified that the plaintiff and defendant bought Plot [particulars withheld] from PW 3 her in the year 2003. The defendant produced the sale agreement dated 27th August 2003 signed between himself, the purchaser, and PW 1 as the vendor. From the evidence of the plaintiff and defendant, Plot 1318 is the property they resided on when they left their parents' home and did so until they parted ways. Although it is registered in the name of the defendant, it was acquired during the marriage and it is the property they resided on during their marriage. It is therefore falls within the definition of matrimonial property within **section 6(1)** of the *MPA*.

12. Since I have found that Plot 1318 is matrimonial property, I must now consider the parties' respective shares. **Section 7** of the *MPA* governs the manner in which matrimonial property is vested as it is, "*according to the contribution of either spouse towards its acquisition.*"

13. **Section 2** of the *MPA* defines contribution as follows;

"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) farmwork.

14. In apportioning the properties, **section 14** of the *MPA* provides as follows;

14. Where matrimonial property is acquired during marriage—

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

(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

15. As provided in **section 14(a)** aforesaid, there is a rebuttable presumption that the property registered in the name of one spouse is held in trust for the other spouse. The party seeking to avoid the trust bears the burden of proving, on the balance of probabilities, that the other spouse did not make any contribution to acquisition or improvement of the property in the manner contemplated under **section 2** of the *MPA*.

16. The uncontested evidence is that the plaintiff and defendant got married in 1994. When they married, they cohabited on their father in law's property before they moved to Plot 1318. During the subsistence of their marriage, they were blessed with 7 children. The plaintiff claimed to have contributed to the acquisition and development of the property. She testified that she had assisted in developing rental houses on the land. In cross-examination, she alluded to a loan she took from her parents to contribute towards the acquisition of the land. She also made reference to a loan she took from [particulars withheld] Sacco Society Limited.

17. In opposition, the defendant testified that he had no other property and in his pleadings averred that he had brought up the issues of the marriage on the property where he resides with them. The defendant further testified that he had been working and had bought land without any contribution from the plaintiff. The defendant produced a copy of his Postbank Passbook to prove that he had the money for which he purchased the property. He produced the sale agreement dated 27th August 2003 and contended that he is the one who signed the sale agreement and paid the purchase price. He complained about her conduct during the subsistence of the marriage saying that she had no interest in contributing to the economic growth of the family.

18. I heard both parties testify and the bitterness and recriminations that led to their separation was still evident and remains. Both parties were stubborn in answering questions and I got the distinct impression that both parties were economical with the truth and were hell bent in denying each other contribution to acquisition and improvement of the matrimonial property. It is true that both parties had problems in their marriage and that is why the magistrate hearing the divorce cause concluded that marriage had irretrievably broken down. The duty of the court in such circumstances is to consider the evidence before it and make findings in light of applicable principles.

19. I have no doubt that the plaintiff made contribution to the acquisition of the matrimonial property. Although the defendant proved direct contribution by showing that he entered into the sale agreement for purchase of the property and paid the purchase price in instalments this alone did not disentitle the plaintiff to a share of the property in light of the definition of contribution in **section 2** of the **MPA**.

20. The parties were married in 1994 and they began residing with the defendant's parents. It is obvious that at this time the plaintiff was assisting with the household and ensuring that the defendant was able to earn income to ultimately purchase Plot 1318. During this time, she was able to bear 7 children which is not a mean feat. Even though the marriage was beset with difficulties, the fact that they stayed until 2008 supports her contention that she supported the family.

21. The defendant claims that the plaintiff was never at home and that he had to hire two maids to take care of the children and when she was, she was abusive and disrespectful to him and their children. This may well be true but that alone does not disentitle her of her contribution as parties must have lived a fairly ordinary life with the normal upheavals of family life where the plaintiff dutifully took care of her family for more than a decade, giving care to all 7 children and participating in the management of the home. I do not discount the fact that the plaintiff was involved in some business and in improving the property once it was purchased by participating in building the houses thereon and taking care of it before they finally separated.

22. The defendant urged the court to dismiss the suit as he lives on the property with the children some of whom are minors and would be rendered destitute if the same is sub-divided. I reject this contention, a spouses' contribution is a vested right and cannot be wished away. Doing the best I can in light of the facts outlined, I find that the plaintiff is entitled to a 40% share of Plot 1318.

23. In conclusion, I make the following orders;

- a. I declare that **CENTRAL KITUTU/MONYORERO/[particulars withheld]** is not matrimonial property.
- b. I declare **CENTRAL KITUTU/MWABUNDUSI/[particulars withheld]** and the developments made thereon is matrimonial property and that the plaintiff is entitled to a 40% share thereof.
- c. The property shall be valued within **ninety (90) days** and sold thereafter and the proceeds shared equally between the plaintiff and the defendant. The costs of valuation shall be shared equally.
- d. In the alternative, either the plaintiff or defendant shall be at liberty to buy out the share entitlement of the other should they deem fit.
- e. Either party shall be at liberty to apply for further and other orders.
- f. Each party shall bear its costs.

DATED and **DELIVERED** at **KISII** this **10th** day of **DECEMBER 2018**.

D.S. MAJANJA

JUDGE

Plaintiff in person.

Mr Obure instructed by Job Obure and Company Advocates for the defendant.