



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 16 OF 2010**

**IN THE MATTER OF MARRIED WOMEN'S PROPERTY ACT (1882) SECTION 17**

**N M N .....APPLICANT**

**VERSUS**

**P N C .....1ST DEFENDANT**

**GW N .....2ND DEFENDANT**

**JUDGMENT**

1. The application for consideration is the Originating Summons dated 10th May 2010. The applicant seeks the following orders;

- i. That it be declared that the following property known as ***L.R. Kabete/Kibichiku/[particulars withheld]*** now registered in the name of the 2nd defendant is held in trust in equal shares with the plaintiff/applicant.
- ii. That the applicant be registered as a co-owner of the above stated property
- iii. That costs of the application be provided for.

2. In her affidavit in support of the said application dated the 10/5/10 she avers that she got married to the 1st defendant in 1976 through a church ceremony and they were blessed with 3 children namely;

- i. J N 30 years
- ii. B W 28 years
- iii. J M 26 years.

3. They stayed together happily but separated on 26th December 1983 due to the 1st defendant's physically abusing her. After the said separation, she went to stay at [particulars withheld] village where she rented a house for herself and her three children where she has stayed to-date until her children became of age without any assistance from the 1st defendant. That since 1975 when she got married to the 1st defendant she has been tiling and farming in the suit parcel of land ***Kabete/Kichiku/[particulars withheld]*** where she generated some income to support herself and her children. That in 1984 the 1st defendant moved in to the suit parcel of land with the 2nd defendant to whom he has transferred the land barring her access to the same adding that the two were conspiring on selling the same. She avers that she has substantially contributed to the said parcel of land and is entitled to a share of the same adding that

the same is her matrimonial home and should be held intact. She urged the court to issue a caveat on the said land to avoid a sale by the 2nd defendant.

4. P N and G W N aver in their affidavit dated 30/11/10 that they got married to each other in 1985. Initially the 1st defendant was cohabiting with the plaintiff on the suit parcel of land, which was registered in the name of J C M the father of the 1st defendant who died on 4th March 1986 long after the plaintiff had deserted him. That subsequently and pursuant to Succession Cause no. 189 of 1991 at Kiambu Resident Magistrate Court the 2nd defendant was registered as proprietor of the suit parcel of land which he avers was not acquired during the subsistence of the marriage to the plaintiff and she did not contribute towards its acquisition and has not made any investment in the same. They aver that they have no intention whatsoever of selling the same as that is where they intend to bring up their nine children. He avers that the 2nd defendant is the absolute owner of the suit parcel of land and does not hold the same in trust for the plaintiff. They aver that the application is fatally defective and should be dismissed.

5. The plaintiff in her testimony in court on the 1/12/16 reiterated her averments in her affidavit in support of the originating summons. She stated that the suit parcel of land had been given to them by her father in law J C M and the same was to form part of the 1st defendant's inheritance. The parcel of land remained in the names of the deceased until 1991 when she discovered that the same had been transferred into the names of the 2nd defendant. She added that the 1st and 2nd defendant live in the suit parcel of land with their nine children.

6. The 1st defendant in his testimony reiterated his averments in his replying affidavit adding that the suit parcel of land was gifted to the 2nd defendant by his late father before his demise and as such, the plaintiff is not entitled to the same.

7. Parties filed written submissions. The plaintiff in her submissions reiterated the averments in her affidavit as well as her testimony before this court. She raised 3 issues for determination namely;

*i. Whether the suit property constitutes matrimonial property*

*ii. Whether the transfer of the suit property to the 2nd defendant was done fraudulently?*

*iii. Whether the plaintiff should be registered as co-owner of the suit property*

8. On whether the suit property constitutes matrimonial property the plaintiff sought to define matrimonial home as defined under **Section 2 of the Matrimonial Property Act 2013** which states that, 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 attached property. Further Section 6 provides that,“(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.”*

She relied on Civil Appeal No.127 of 2011, **Agnes Nanjala William –vs- Jacob Petrus Nicolas Vander** where it was held, “Having found that the right to equality is inherent and inalienable to all human beings, it matters not that the cause of action accrued before the current constitutional dispensation. We therefore do not find favour with the defendant's submissions to the contrary.”

9. It was submitted that though the matter was filed before the promulgation of the Constitution the same applies. That immediately after the marriage between the plaintiff and 1st defendant got married the late J C M gave the suit property to the couple to settle and they constructed their matrimonial property thereon

and lived and cultivated the said parcel of land for about 8 years before they separated adding that it was evident that that was part of matrimonial property. That the 1st defendant later settled his new wife the 2nd defendant in the said matrimonial home.

10. **On whether the transfer of the suit property to the 2nd defendant was done fraudulently?** She referred to Section 38 of the Law of Succession Act which provides that, “*Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.*”

Further that section 28(a) of the Land Registration Act of 2012 states that, “*unless contrary is expressed in the registered land shall be subject to the following overriding interest as may for the being subsist and affect the same without there be noted on the register –*

*(a) Spousal rights over matrimonial property;*

It was submitted that the 1st defendant and only sister were the deceased’s only children and during the distribution of the estate the 1st and 2nd defendant colluded to have the property registered in the names of the 2nd defendant instead of the same being registered in the names of the 1st defendant with an aim of ensuring that the plaintiff and her children never obtained a share of the suit property.

11. On whether the plaintiff should be registered as co-owner of the suit property the plaintiff relied on Article 45 of the Constitution of Kenya 2010, which provides, “*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.*”

Further that section 2 of the Matrimonial Property Act 2013 defines contribution to mean, “*In this Act, unless the context otherwise requires—*

*“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) farm work;”*

She also relied on Section 8(1) of the Matrimonial Property Act further 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;”*

12. The Defendants raises various issues for determination in his submissions as follows;

*i. Whether land Parcel no. **Kabete/Kibichiku/[particulars withheld]** was acquired during the subsistence of the marriage between the plaintiff and the 1st defendant and hence matrimonial property.*

*ii. Whether the plaintiff contributed towards the acquisition and development of Land Parcel No. **Kabete/Kibichiku/[particulars withheld]**?*

*iii. Whether the 2nd defendant was registered as proprietor of Land parcel no.*

***Kabete/Kibichiku/[particulars withheld] in trust for herself and the plaintiff?***

13. It was submitted that the property subject matter of this suit was registered in the name of the 2nd defendant subject to Succession Cause no. 189/1991 at the Resident Magistrate Court Kiambu and the same never devolved to the 1st defendant. The 1st defendant sought to clarify that there was no evidence to show that the said parcel of land was given to the plaintiff as her cohabitation with the plaintiff ceased on 26/2/1991 adding that no evidence was tendered to show that the plaintiff established matrimonial home in the said parcel of land. That section 7 of the Matrimonial Property Act provides that, “ownership of matrimonial property vests in the spouses according to the contribution of either spouses towards its acquisition.” He relied on the case of **M vs M [2008] 1KLR 247**, where it was held that a woman’s contribution towards acquisition of matrimonial property must be recognized. In the case of **Hazell v Hazell [1972] 1 ALL 923**, it was held that in order to entitle the wife a share in the proceeds of the matrimonial home it was sufficient if the contribution made by the wife to family expenses and wellbeing, progression or otherwise were such as to relieve the husband from expenditure which he would have otherwise had to bear and thereby helping him indirectly. It need not be monetary contribution but bearing on monetary expenditure.”

14. It was further submitted that the plaintiff and 1st defendant constructed their matrimonial home in the suit property and carried out farming to enable them maintain their family as such she argues that she made significant contribution in the management of property and as such is entitled to an equal share of the suit property. That Section 9 provides that a spouse who makes a contribution towards improvement of the property acquires a beneficial interest equal to the contribution made. It is submitted that the plaintiff has brought her claim under the Married Women Property Act and not under RLA section 28 adding that the plaintiff did not acquire any spousal right over the property during her cohabitation with the 1st defendant. It is submitted that the fraud alleged by the plaintiff has not been proved. Adding that when a party alleges fraud one must give particulars in the pleadings. It was submitted that the 1st defendant and his sister renounced their right to the property and had it devolve to the 2nd defendant. That the law with regards to claims under matrimonial property is well settled in **HCCC 9 of 2001 Dianah Njeri Kamau vs Michael Kamau Ngungi** the court in adopting the holding in the case of **Tabitha Wangechi Nderitu –vs- Simon Nderitu Kariuki CA 203 of 1997** where it was held;

*“that a wife has to show that she is married to the husband*

*The property in question was acquired during the subsistence of the marriage. She contributed directly or indirectly to the acquisition of the assets.”* That in the said case the court further adopted the holding in **Cosmas Muthembwa vs Eunice Kyalo Muthembwa CA Bo. 74 of 2001**, “where the property exists in the same condition as at the time it was gifted or inherited no problems arise the spouse to whom it was gifted or inherited no problem arise. The spouse to whom it was gifted should be allowed to retain it.” He also relied on the case of **LKK vs JK 2012 eKLR** where it was held that, “the applicant in this case did not demonstrate how she contributed both financially and to the acquisition and development of the properties in question. The land as pointed out was not acquired during the time of cohabitation of the applicant and respondent.” And in **HCC 52 of 2013 Christine Wanjiku Muthama –vs- James Peter Muthama** the court held that, “the plaintiff did not proof that the property was acquired from the defendants grandfather was matrimonial property.”

## **DETERMINATION**

I have considered the affidavits, evidence, submissions, cases cited. It is not in dispute that the applicant was once married to the 1st defendant but the two parted ways in 1983, though no formal divorce was filed and the 1st defendant proceeded to marry the 2nd defendant.

### **15. Who is the owner of the property in issue?**

The property in issue is said to have belonged to the 1st defendant’s father but he gifted the same to the 2<sup>nd</sup> defendant before he died. Other than the applicant’s evidence there is no other piece of evidence that supports this. The 1st defendant however avers that the said parcel of land was gifted to the 2nd defendant

by his late father before his demise. This is confirmed by the succession proceedings of his late father in Succession Cause no. 189/1991 at the Resident Magistrate Court Kiambu. From the said proceedings, it is clear that the suit property never devolved to the 1st defendant but was given to the 2nd defendant during the said proceedings there was no objection that was raised by the applicant. The applicant did not adduce any evidence that she had contributed or even if gifted to her.

From the fore going it is clear that the said property belonged to the 2<sup>nd</sup> defendant and no evidence tendered has proved otherwise. It is evident that the said property never at any point in time belonged to the 1<sup>st</sup> defendant and as such could not form matrimonial property as per the definition provided under Section 6 of the Matrimonial Property Act which provides, “(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.”*

16. It could be the deceased had wished to gift his daughter in law the 2nd defendant the said parcel of land leading to the distribution as carried out in his succession cause. This is in line with Section 5 (1) which provides that “*Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.*” It there goes to show that the applicant has no legitimate claim over the said property which neither belonged to the 1st defendant nor formed part of any matrimonial property as such the applicant’s Originating Summons dated 10th May 2010 is hereby dismissed. Each party to bear its own cost. It is so ordered.

**Dated, signed and delivered this 13<sup>th</sup> day of July 2017.**

**R. E. OUGO**

**JUDGE**

In the presence of;

**In person For the Plaintiff**

**Absent For the Defendants**

**MS. Charity Court Clerk**