



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**SUCCESSION CAUSE NO. 52 OF 2013**  
**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**  
**AND**  
**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)**  
**BETWEEN**  
**C.W.M.....APPLICANT**  
**VERSUS**  
**J.P.M.....RESPONDENT**  
**JUDGMENT**

1. C.W M filed the Originating summons dated 29/8/2013 seeking determination on the following;

- i. That the applicant having been married to the respondent on 18<sup>th</sup> March 1971 under the African Christian Marriage and Divorce Act which marriage was later dissolved and having contributed substantially towards development of the property i.e. entitled to half share of the property known as Dagoretti/Waithaka/No.[particulars withheld].**
- ii. That the court do order that the property known as Dagoretti/Waithaka/[particulars withheld] be divided into two equal portions and the respondent be at liberty to buy the applicant's share.**
- iii. That in the alternative to No. 2 above property be valued and the respondent be at liberty to buy the applicant's share.**
- iv. Cost of the summons be provided**

2. The application is based on grounds that the applicant and respondent were married under statutory law and that during the subsistence of the said marriage the applicant substantially contributed to development of the matrimonial property which is registered in the names of the respondent; that the respondent is in sole possession of the property and has dispossessed the applicant and she is entitled to a half share by virtue of her contribution.

3. In her affidavit in support Christine avers that she got married to the respondent on 18<sup>th</sup> March 1971 under statute and established out matrimonial home in property known as **Dagoretti/Waithaka/[particulars withheld]**. The marriage subsisted for 18 years and she contributed towards the development of the matrimonial property. That after the dissolution of the said marriage the respondent subdivided the said parcel of land into 5 portions **Dagoretti/Waithaka/[particulars withheld]**. Some of the said portions of land were transferred but retained **Dagoretti/Waithaka/[particulars withheld]** registered in joint names of the respondent and one A.W. That with regards to L.R **Dagoretti/ Waithaka /[particulars withheld]** the same was registered in the respondent's son born from the current wife whereas **L.R. Dagoretti/ Waithaka/ [particulars withheld]** was registered in her son's name. She avers that since the dissolution of the said marriage she has not had access to the matrimonial property as the respondent has had full control of the same.

4. **J P M** in his replying affidavit dated 17/9/2013 avers that he married the applicant in 1971 after cohabiting with her in **Dagoretti/Waithaka/[particulars withheld]** which belonged to his grandfather. Later the said parcel of land was shared out by his beneficiaries making **Dagoretti/Waithaka/[particulars withheld]** and he got Parcel no/ **Dagoretti/Waithaka/[particulars withheld]**. Adding that the applicant deserted the matrimonial home before the said division and that she did not any financial contribution towards the acquisition or development of any parcel of land. That later he subdivided his said portion which he developed with land Parcel no. 1342 having 4 (2 bedroom houses) while still constructing the remaining portion of the said parcel of land adding that he would suffer irreparable damage should the said construction of the said flat be stopped as he had secured a loan from Co-operative bank.

5. The respondent in his further affidavit avers that after the applicant deserted him he was left to cater to his children alone and single handedly educated them up-to college level. That out of the said parcel of land he has given them land as follows; **M W M-1/4 acre, E N M ¼ acre, S W M 1/8 acre, L W W – 1/8, D W M – 1 acre**. He further stated that the timber house he was living in was built by his uncle. But later he constructed 6 temporary structures which were demolished by N.C.C.C since the same were on the road reserve. He added that at the time the applicant deserted the home there was no matrimonial property to be shared.

6. The matter proceeded by way of viva voce evidence. C.W testified that she got married to J.P.M in 1965 under kikuyu customary law at the time both of them were still in school. She however, got pregnant and was forced to leave school. They started staying together and had their first child. That she then got a job as a nursery school teacher at **[particulars withheld]** Day Nursery and then another child in 1966, and S.W in 1968, 1970 she got D.W and in 1979 she got L.W. They solemnized their marriage in 1971. She testified that she helped the respondent while in school as they were staying at his father's shamba. That after school he joined N.T.T.C. At the time they stayed in a wooden house and had some mabati houses for rent on **Dagoretti/Waithaka/[particulars withheld]**. That she was later employed at the ministry of Health at **[particulars withheld]** Kikuyu with the respondent working at **[particulars withheld]** Hall as a health officer. However, the respondent took her back to her parent's home stating there was no love between them. A year later, he married a lady by the name W who was renting one of their rooms. At the time he took her back to her parents he did not give her anything and also did not educate their last child born in 1989. He also chased away the other older children. She stated that she was not aware of any divorce proceedings, as she was not served. That she used all her earnings from her job at the nursery school to run the home and look after the children she wishes to be given something having been married to the respondent for over 17 years having had to leave school while the respondent continued with his education. That the land where they stayed had been given to the respondent by his grandfather and the same was divided between him and his brother.

7. On cross-examination she stated that the said shamba where they stayed with the respondent had been given to them by the respondent's grandfather and the mabati house they had built were no longer there demolished as they were on the road reserve. She also did not have any documents to show she was employed at the nursery. That though the respondent used to be given money he used to be given only 50/- which was not much. That the shamba was not the same as it had been developed.

8. DW1 P M testified that he was married to the applicant between 1966 to 1982 at the time he was in form 2 while she was in Std 6. That he later joined Medical Training College for 3.5 years and was being paid 80/- while in 1<sup>st</sup> year 200, in 2<sup>nd</sup> year and 600 in 3<sup>rd</sup> year. That at the time they were staying in a house his uncle had built for him and he had been staying there before the applicant moved there. The same was built under his grandfather's land No. [particulars withheld] and since his father was deceased the transfer was made to him. He stated that at the time she was not working and was just a housewife. He denied that they put finances together to construct the said mabati structures since the applicant had no money to contribute. He stated that he constructed the 6 rooms but the same were on the road reserve and NCC ordered them to be demolished. That they had issues with the applicant and when he tried to resolve the issue with her and her parents she refused and later on deserted the matrimonial home and carried all items with her except the children. He testified that in 1978 plot [particulars withheld] measuring 3 acres devolved to him and it changed to **Dagoretti/Waithaka Plot [particulars withheld]**. In 2001 he subdivided the said land into 5 portions and gave D and C one acre No. [particulars withheld], K got one acre and he was left with one acre. Later he subdivided his 1 acre into 3 portions [particulars withheld] in order to get a loan. He stated that the portions had changed as there was development and it had 4 units of two bedrooms each and were already occupied. Later on he started making a building a flat which was now complete save for roofing. [particulars withheld] was tied up with a loan at Faulu Bank. He stated that the applicant had not contributed anything towards the development and urged the court to dismiss the case. He added that the applicant was very much aware of the divorce proceedings but efforts to serve her she chased away the process server. That the applicant was given a plot in Kawangware while they were still married which she built and moved to. He stated that he remarried in 1990 after staying single for over 8 years after separating with the applicant.

9. Parties filed written submissions. The applicant in her written submissions gave a summary of the parties testimony and went on and on about the divorce proceedings which I find are not the issues before this court and disregard the same. It was submitted that the respondent had already subdivided the said property and the current spouse had been given a share and that some properties had been registered with his wife and the same had been developed. It was submitted that the respondent did not purchase the said property and leaving her out of the distribution would be erroneous as contribution by the applicant in this case does not apply. She referred to Article 45 of the Constitution which appreciates the institution of marriage and entitles to equal right at the time of marriage during the marriage and at the dissolution of the marriage. Section 2 of the matrimonial Property Act defines what matrimonial property is.

10. It was further submitted that mere registration of the respondent as owner of the said parcel of land does not waive customary trust established by marriage between the parties. That the applicant bore 5 children and run the home which she claims cannot be quantified money wise. The applicant relied on the case of **Karanja vs Karanja [1976] KLR 307** where the court held that when property is purchased jointly by both spouses and registered in the name of the husband with the wife's approval, a resulting trust can be inferred in her favour.

11. It was submitted that Matrimonial Property Act, Section 6(1) defines matrimonial property to mean the matrimonial home or homes;

- a. household goods and effects in the matrimonial home or homes; or
- b. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

Further under Section 9 of the same Act gives avenues that one can acquire interest in a property either, ***“Acquisition of interest in property by contribution, where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other 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.”***

12. The respondent in his submissions challenged the claim that the said parcel of land was matrimonial

property stating that the same was inherited from his grandfather and the same had since been subdivided into many portions which he gave his children with the applicants. Adding that the remaining portion was solely developed by him and his joint owner. He also argued that the applicant did not show that she contributed towards either directly or indirectly towards the acquisition of the said parcel of land. He relied on the case of **Muthembwa vs Muthembwa CA 74 of 2001** where it was held that, “*property exists in the same condition as it was gifted or inherited, no problems arise. The spouse to whom it was gifted should be allowed to retain it...*” That further in Busia HCCC no. 39 of 2012 where the court held that, “**a property gifted to one party did not compromise matrimonial property but belonged to whom it was gifted.**” He added that status of marriage did not solely entitle a spouse to a beneficial interest in a property registered in the names of the other. It was further submitted that the said parcel no **Dagoretti/Waithaka/[particulars withheld]** no longer existed as the same had since been subdivided into several other portions and transferred to various other persons.

13. The parties herein were married under customary in 1965 but separated in 1982. After some time the respondent filed for divorce and the same was granted. It is not in dispute that the applicant fell pregnant while still in primary school and had to move into the respondent’s home in the house provided by his uncle and he was later bequeathed the said land by his grandfather. It is on this said land that it is alleged that the applicant contributed towards the construction of 6 rooms which they rented out. The respondent refutes this claims stating that the applicant was never employed. The applicant however could not adduce any evidence to support that she was working as a nursery school teacher or at the Ministry of health at Kikuyu to have contributed towards the improvement of the said inherited property and as such she does not acquire any beneficial interest in the said parcel of land. From her own testimony she only attaches her contribution to the 6 rooms that were built on the said road reserve the same are no longer there and the respondent in his testimony stated that in 2001 he subdivided the said parcel of land and gifted portions to his children with the applicant. The remainder is what he has used as security for loans and has developed with his 2nd wife. That being the case I find that the applicant is not entitled to share in the said developed property and the respondent should retain the remaining portion of land that he has developed with his 2<sup>nd</sup> wife. On this am guided by the findings in the case of **Echaria Vs Echaria Civil Appeal 95 of 2001**, which in adopting the holding in the case of White vs White 2001 All ELR held: “*Hitherto the courts approaches has been that only those properties acquired during the subsistence of the marriage through the joint contribution, directly or otherwise, if the spouses would be subject to an order to an order under the said section. But in certain instances as in present case..... such property is pooled with other property the couple may have and is developed by joint efforts. The property then ceases to be in its original form and increases in value. 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 should be allowed to retain it*”.

14. The respondent has stated that the applicant had also inherited a plot at Kawangware while they were still married a claim that the applicant did not refute, I find it is only fair and just that the applicant should be satisfied with that one as the respondent has not laid any claims on it. I therefore decline to grant the prayers sought by the applicant; her case is dismissed. Each party to bear its cost. Orders accordingly.

*Dated, signed and delivered this 5<sup>th</sup> day of February 2016.*

**R. E. OUGO**

**JUDGE**

*In the presence of:-*

.....*For the Applicant*

.....*For the Respondent*

**Ms. Charity**

**Clerk**