



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL CASE NO. 2 OF 2014**

**K K.....PLAINTIFF**

**VERSUS**

**K N.....DEFENDANT**

**JUDGMENT**

The plaintiff filed the case herein after having previously filed a civil case in the Kyuso Magistrate's Court wherein, after witnesses were fully heard by the trial court, the trial magistrate delivered a judgment on 10th November 2013 dismissing the case and concluding as follows:-

***“It is obvious that this is a suit of division of matrimonial property which is the preserve of the High Court see section 3 of the Matrimonial Causes Act. As such this court does not have jurisdiction and this suit stands dismissed with no order as to costs. Parties are advised to file a suit at the High Court.”***

Consequent upon the above decision and direction of the subordinate court at Kyuso, the plaintiff filed the present suit through a plaint dated 29th May 2014. On 16th June 2014, wherein that she had been married to the defendant under customary laws and practices, and that around 1974 customary dowry was fully paid to her parents. She claimed that she had one child with the defendant called M K. She further claimed that during their marriage, the plaintiff acquired properties through her labour constituting one shop, a 20 acres parcel of land, a permanent living house, a posho mill, 5 cows and 10 goats. She claimed that the defendant had harassed her severally and in 1987, chased her out of their matrimonial home because she could not bear more children.

She further claimed that she tried to arbitrate the issue through elders, the chief and also the DO in Kyuso, but that the defendant refused to let her go back to the matrimonial home, necessitating the filing of this suit. She thus asked for sub division of the aforementioned items, between her and her husband the defendant, general and special damages for the period they were together, costs and interest of the suit, and any other relief that the court deemed fit to grant.

In response, the defendant filed a statement of defence on 7th July 2014. He admitted that the plaintiff was his wife, and that the Provincial Administration had arbitrated over their disputes but denied that he had neglected or refused to allow the plaintiff back to the matrimonial home. He stated also that he was a polygamous man with three wives, the plaintiff being the 2nd wife who deserted the matrimonial home for no reason in 1987 that since been living with their daughter who was a teacher and a divorcee.

He stated that the plaintiff carried away all property when she left the matrimonial home which she set on fire and also claimed that she received dowry from the family of the husband of the daughter without the defendants knowledge. He further stated that under kamba customary law, the plaintiff was still his wife

and that he was barred from subdividing his property in his lifetime whether or not it was acquired jointly or not during marriage. According to him, the plaintiff was guilty of willfully deserting and neglecting him and her matrimonial obligations. He lastly claimed that the plaintiff had Kyuso Principal Magistrate's Court Civil Case No. 18 of 2012 relating to this same issue which had been concluded. He asked that the suit be dismissed with costs.

During the hearing of the case only one witness the plaintiff herself, testified on the plaintiff's side. The defendant gave his testimony and called one other witness.

In her evidence the plaintiff PWI E K K testified that she was the wife of the defendant and that they had one daughter. According to her, during their marriage and cohabitation they acquired property together such as a shop, cows and goats and land.

However the defendant chased her away and retained the cows, the shop as well as the land.

According to her she educated their only daughter who was now a primary school teacher. She stated that she wanted to get a share of the property and a share of the land which the defendant now occupied and the shop, because this was matrimonial property.

She stated that she had initially taken the matter to the clan elders and filed a civil case in the court at Kyuso and the court transferred the case to the High Court, which was the reason she came to this court.

She stated that she was now old with nobody to take care of her. She said that the clan had agreed that she gets part of the property, and relied on a document which was in Kikamba language but translated into English, purported to be minutes of the clan meeting where they agreed that she should get a share of the properties. (The document was accepted by counsel for the defendant Mr. Ngata Mbaluka to be used in the case as part of the documents relied upon).

In cross examination by Mr. Ngala for the defendant, she stated that she did not go to school and could not remember the date of her marriage, but maintained that they lived with the defendant for about 36 years and that she was chased away by him in 1987. She admitted that the defendant had two other wives and that she was the 2nd wife. She said that they had only one daughter who was a married school teacher. She maintained that she paid School fees for her daughter, but admitted that the defendant paid part of the fees.

She maintained that she was instrumental in building the shop and buying the farm. She denied finding the defendant already with a shop, but stated she could not say exactly when the shop was bought. She maintained that when she married the defendant he was property less and that he was a drunkard. She stated that at that time of marriage the defendant had separated with his first wife who came back later. She denied burning down the granary when she left and maintained that she was chased away by defendant who according to her even broke her, teeth.

She stated that she did not live on land that was bought by the defendant. She stated that she could not remember the purchase price for the shop. She agreed that the defendant paid bride price for her and said that she was aware that under Kamba customs, she was still a wife of the defendant. She admitted that it was not true that under Kamba customs a married man could not share property when still alive. She stated that indeed she had filed a case in Kyuso Magistrate's court in which the defendant was one of the defendants. She stated that that case was against some women and that the defendant was the only man named in that case. She denied that she was awarded 100,000/= at Kyuso and denied of having a land case at Kyuso with a lady neighbour. She denied that her daughter told her to withdraw this case. She stated that she was married during Kenyatta's presidency but could not remember the year or dates because she did not go to school. She said that she was not just a house wife and also denied burning the house and granary. She denied also that the defendant put at her current residence because he loved his daughter. She said that the defendant did not own cows, but admitted that the defendant used the cows to educate his children. She stated that because the defendant had messed up with her life, even if bride price had not been paid back to him, she was entitled to share of the property. She maintained that the

defendant had refused to give his daughter land.

She said also that when they went to the clan the defendant insisted that she should not go back to his house. When referred to the document, said to be minutes of the clan meeting she maintained that the meeting was with regard to sub division of land. She said that she was given authority by the clan to go to court.

She admitted that if she died presently, it would be the defendant who as her husband, would bury her but maintained that she was entitled to her a share of the matrimonial property for her use. She stated that she wanted to get the farm which she bought currently occupied by the younger wife of the defendant which was now plot No. 410. She admitted that the plot was registered in her own (Plaintiffs) name. She said that she did not want more questions on which land she wanted. She also said that she was not pursuing cows, but that she wanted the farm and her shop. She maintained that the plot should not be divided to the 3 wives, as it was her property and sweat.

At this point, the plaintiff closed her case as she said that her other witness was sick and would thus not call her.

DW1 was D K N the defendant himself. He stated that he was a business man operating a shop which he had now closed because he was unwell. It was his evidence that he had 3 wives and that the plaintiff was his 2nd wife. He stated that he married his first wife in 1928, later changed to 1942. With regard to the plaintiff Kathini, he said he married her in 1965 and sought to correct what he had said in his written statement that he married her in 1962. He also sought to correct his statement which indicated that he had married his 3rd wife in 1965.

He said that the plaintiff sued him on issues he did not understand. He said that since the plaintiff lived on her own she should not get any share of his property. He stated that he married the plaintiff because his 1st wife did not get children, and the plaintiff bore two children who died and later a daughter who was alive. The third wife had 8 children.

He denied chasing the plaintiff away and stated that he merely went to Mombasa to look for wealth and on coming back, he found that she had sold all the food and the chicken though did not sell the cows. She also burnt the house in which there was money and documents and went away the key for the posho mill which she later returned.

He stated that he bought land for the plaintiff's daughter which the plaintiff was now living on, which was plot no 410. According to him each wife had a separate plot of land and he also had a separate plot. It was his evidence that though the first wife did not get children, she traditionally married another woman who bore 6 children.

On division of assets, he said he bought a shop in 1952 from on Kisumu before he got married to the plaintiff. Later he build a back house and also built other houses in 1957 when he was doing business of taking cows to Nairobi and Mombasa. He reiterated that he married the plaintiff in 1958 and that they cultivated together but was surprised that when he travelled on business she sold the produce.

It was his evidence also that he educated their daughter who did well in standard eight but that when she went for further academic studies and to college, the plaintiff ran away from home. He complained that he incurred expenses of 50,000/= for buying clothes for the daughter, but the plaintiff burned the clothes in her house.

According to him, as a result of his disagreements with the plaintiff the daughter got married while in Kisumu and did not come back home but the plaintiff prevented the daughter from allowing him to get bride price. He was however given 6 cows and one bull the bull being for slaughter to be eaten. He testified that he then ordered that the livestock be given to the plaintiff as he did not want the cows to be shared with other children. He complained however that the plaintiff persuaded her daughter to leave her husband and that she returned the bride price.

He stated also that he could not under kamba customs divide the shop or property to his wives while alive and denied that clan members had met and divided the property. He maintained that he could only divide land among wives while alive, and that the shop could only be inherited after his death. He stated that he had children in school and that if the shop collapsed it would be difficult for him to educate the children. He blamed the plaintiff for throwing a tortoise in his well, and emphasized that none of his wives helped him in the running of the business. He stated that he could not divide the shop nor give the plaintiff portion of the houses.

In cross examination, he said he paid 8 cows, that 6 goats and 500/= as bride price for the plaintiff when they married. He complained however that the plaintiff turned out to be like poison and incited her daughter not to give him any assistance while he had educated her. In addition, the plaintiff returned the bride price for her daughter without consulting him.

He said that when the plaintiff was married by him, he had property which enabled him to pay the bride price. He denied marrying a total of 5 wives and said that, if he had relationships with more than 3 wives, then the others were merely lovers.

He denied chasing the plaintiff wife and marrying another to occupy her matrimonial bed. He denied owning only one plot which they bought together with the plaintiff and also denied that the other properties were inherited from his father. He maintained that the plot on which the plaintiff and her daughter lived was his. He maintained that he divided the land among the wives and that the plaintiff was living on his land. He said however that he did not divide the land in four portions for the children. He said that he did not give land to the daughter of the plaintiff because the mother had left the home. He admitted that the daughter of the plaintiff did not have a separate piece of land.

DW2 was J N M a businessman at Kyuso and a cousin of the defendant. It was his evidence that he was about 1 ½ years older than the defendant and was aware that the defendant had married 3 wives, the eldest being N, the 2nd being K the plaintiff, then the 3rd wife. He testified that he was present during the marriage of the defendant to the plaintiff and participated in taking liquor with elders.

He denied that the shop was owned jointly between the plaintiff and defendant. He said that the shop was bought by the defendant in 1952 when he and the defendant used to sell cows at Thika and that the plaintiff was married later when the shop was already there.

He stated that the defendant had two farms given to him by uncles. He stated also that the plaintiff had left the defendant and lived at Meru for a long time after they quarreled. He denied that the defendant chased the plaintiff away. He stated that he was born in 1939 and was familiar with kamba customs and traditions. According to him under kamba customs, a man's property was divided when one died with each wife given land and cows. He stated that the claim by the plaintiff for the shop was a way to starve the defendant to death.

With regard to the clan dividing the property, he said that allegation by the plaintiff was not true. According to him, the document relied upon by the plaintiff was written for her by a person at Mwingi town. According to him, the shop could only be divided among 3 wives not between the plaintiff and defendant. He said that the plaintiff was married in 1965 and that it was a mistake if his statement indicated that she was married in 1958. He attributed that mistake to a lengthy time lapse.

In cross examination, he denied living at Mivukoni when the shop was bought. He stated that he merely used to go there for a week and come back. He said that land was given to the defendant by M K and N, after he slaughtered a goat for them. He stated that the other two people present were relatives who attended merely to eat meat.

He denied that the plaintiff moved from place to place. He denied that the plaintiff bought cows with the defendant. He said that the plaintiff displayed bad conduct by burning the house. He said he did not know what the plaintiff went to do to Meru. He said that he identified the plaintiff after the burning at the road where there were many people, because she was the wife of the defendant. He agreed that he was given

money to come to court.

He stated that he had 3 wives each with a house, goats and cows. He denied that two wives of the defendant slept in the same house. He maintained that the defendant bought land and gave the same to the plaintiff which land had even mango trees. He said that the land was initially bought for N but was later given to K the plaintiff. He stated that N was a wife of one M and maintained that the defendant bought the two plots not the plaintiff.

He stated however that the defendant could not solve any problems relating to the land because the plaintiff had many issues. He maintained that the land was given to the defendant for free by the father of this witness. He stated that according to kamba custom, if a woman left the homestead after burning the house nobody would give her property.

After the close of the defence case, the plaintiff elected not to make any submissions and asked the court to make its decision. Mr. Ngala learned counsel for the defendant said that he had not read the Matrimonial Property Act of Kenya, and left the matter to court to make a decision.

This case was filed in this High Court after a full hearing was conducted in the magistrate's court at Kyuso. The learned magistrate dismissed the case on the ground that he did not have jurisdiction and to deal with the case, advised parties to come to the High Court. That's how this case ended up in this court.

In fairness, the issue of jurisdiction should have been brought up at the magistrate's court earlier for the court to make decision whether or not it had jurisdiction. The parties and court's time were spent in going through a full trial before a decision on jurisdiction was made. Having said so, the dismissal of the case by the Magistrate's court on the ground that it did not have jurisdiction, was not a bar to proceedings being filed in a proper court with jurisdiction. Counsel for the defendant has not raised any issue relating to the decision of the magistrates court. I hold and find that this court can validly entertain this case, as the matter is not res-judicata.

The learned magistrate in advising the parties to come to this court, stated that only the High Court has jurisdiction to entertain matrimonial causes. The section relied upon was section 3 of the Matrimonial Causes Act Cap 152 of the Laws of Kenya which states as follows

**3 “Subject to the provisions of the African Christian Marriage and Divorce Act jurisdiction under this act shall only be exercised by the High Court (hereafter called the court) and such jurisdiction shall, subject to the provisions of this Act, be exercised in accordance with a law applied in matrimonial proceedings in the High Court to Justice in England”.**

**The African Christian Marriage and Divorce (Act Cap 151)** under section 14 provides for the jurisdiction of the subordinate court in the following terms

**14 “Subordinate courts of the first class shall have the same jurisdiction, in the case of marriages solemnized or contracted under this Act, to the Native Christian Marriage Act (now repelled), as is vested in the High Court by virtue of the Matrimonial Causes Act.**

The African Christian Marriage and Divorce Act deals with the validity of marriages as well as procedures for contracting marriages and obtaining divorce. There is no provision therein regarding properties or division of marital properties. The Matrimonial Causes Act however has provisions under Part VI on settlement of matrimonial property. Specifically, section 27 grants powers to the court for the settlement of a wife's property. This section applies only where there is formal divorce or separation orders issued by the court.

The evidence in the present case to me is clear. The plaintiff was married to the defendant under Kamba customs and traditions. The defendant also married two other wives. The plaintiff is the second wife, and has not been divorced but is living separately from the defendant, after they disagreed some years ago. The two have a living daughter who is a teacher with children. The defendant has other children from his

relationship with the first and third wife.

The issue here is that the plaintiff claims that she was chased away from the matrimonial home by the defendant. That she was contributory during marriage to the acquisition of the shop, cows and land. That the defendant has denied her ownership or a share ownership of these assets. She is now demanding that she be given a share of land, as well her entitlement for her contribution to the shop. She says that she is not interested in any share of the cows.

The defendant on the other hand, admits being the husband of the plaintiff under Kamba Customary Law. He states however that all the assets he has were not acquired with the participation of the plaintiff.

According to him, he acquired the shop way before he got married to the plaintiff. As for the land, there was no contribution at all to the acquisition of the same from the plaintiff. In all cases he said that according to Kamba customs, he cannot divide properties to his wives and children before he dies. He however also says that as for land it can be divided among wives as each wife is required to have her own land and house. He states further that the plaintiff is not entitled to a share of the land because she left the homestead after selling all the crops and burning the house, and persuaded her daughter not to assist him in any way after he had educated her. He has complained that the plaintiff further decided to return the bride price of cows of her daughter to the family of her husband, thus making her daughter unmarried without consulting him. According to him, the plaintiff was a difficult woman and a rebel. However he maintained that he gave her plot No. 410 which is in her name and said he could not get involved in the dispute on that plot because the plaintiff has been a difficult woman.

The case has revolved around Kamba customs, though counsel has mentioned the Matrimonial Property Act. I am aware that the Constitution of Kenya 2010 has now provisions relating to rights of spouses during and at dissolution of marriage under Article 45. Personal and customary law under any tradition are acknowledged under Article 45(4)(b).

In my view in the circumstances of this case the Matrimonial Causes Act does not apply because the marriage lifestyle and intention of both parties as at present relates to the application of Kamba customs. There is also neither an existing order for separation or for divorce. In my view therefore in this particular case it is Kamba customs that apply. I find that the plaintiff and defendant are validly married under kamba customary law. Though they live separate, they are still husband and wife.

With regard to Plot No. 410, both the plaintiff and defendant admit that it is in the name of the plaintiff. The defendant says that he is not allowed to distribute or divide his properties during his lifetime under Kamba customs. His witness DW2 said the same. All agree that each wife was to be built a house and given a piece of land to cultivate by the husband.

In my view therefore Plot No. 410 which is agreed by all to be registered in the name of the plaintiff, cannot be said to have been given to her by the defendant otherwise it would not have been registered in her name. She would be merely be using it as an occupant.

In my view the photocopies of documents used at the trial by both the plaintiff and the defendant, since they were not challenged by the parties are admissible. The document that is said to have been done on 8th May 1994 shows that Mrs. K K the plaintiff was sold land by Munyoki Langa for 4,500/=. It cannot thus be said that that land was bought by the defendant. I thus find that Plot No. 410 is land which was bought by the plaintiff on her own, and is therefore her property as envisaged under Article 45 of the Constitution of Kenya 2010. The plot No. 410 thus belongs and is the property of the plaintiff.

Since the defendant himself admitted that the plaintiff is his wife and that traditionally he has an obligation to give her land to cultivate and live on, I find that the plaintiff is justified in asking for land from the defendant. I thus order that the defendant do give the plaintiff land of equal size to that he has given to each of his other two wives for her survival, occupation and use.

I do not believe the story of burning of the house, though I accept that there is a disagreement between the

wife who is the plaintiff and the husband the defendant. I do not believe that the plaintiff is not entitled to be provided for by the defendant under kamba customs.

I find that the claim for division of the shop asset is premature, though the plaintiff as a wife, whether or not she contributed to the acquisition of the shop is entitled to her share just like the other wives when that division is done under kamba customs after death of the husband, if she is by then still his wife under kamba customs. The other claims were not proved and I dismiss them.

I thus find for the plaintiff as stated above. As for costs, I order that each party will bear their respective cost as this is a delicate family matter and the plaintiff and defendant still remain husband and wife.

**Dated and delivered at Garissa this 11th day of July, 2016**

**GEORGE DULU**

**JUDGE**