



Njoroge v Daudi Alias Ngari

High Court, at Nairobi April 16. 1985

Butler-Sloss J

Civil Suit No 382 of 1982

Cases

Karanja v Karanja [1976] Kenya Law Reports page 307 Statutes

African Christian Marriage and Divorce Ordinance (cap 99) (now cap 151) Married Women's Property Act, 1882 section 17, 28 Registered Land Act (cap 300)

Married Women Property Act, section 17

April 16. 1985, Butler-Sloss J delivered the following Judgment.

By her originating summons, which was filed in court on February 9, 1982 the plaintiff, Joycephine Tibira Njoroge, seeks a declaration that a plot of land at Gilgil is owned jointly by the defendant and herself.

Before proceeding to call evidence, Mr Gachomba, who appears for the plaintiff has asked leave to amend the originating summons, without re-service, in two respects. The first proposed amendment is to introduce, after the words "let Francis Njoroge" and before the words "of Post Office Box Number" to words "also known as David Njoroge Ngari". The second proposed amendment is to paragraph 1 of the orders for which the plaintiff is applying. The plaintiff seeks to introduce, after the word "plaint is to", first line of paragraph, and before the words "No 54" the words " Nyandarua/Upper Gilgil/134 comprising 29 acres formerly part of plot".

Both amendments are allowed, without re-service of the originating summons as amended.

The parties to do summons are husband and wife, and were married by Kikuyu customary law about forty-five years ago. More recently, as appears from a marriage certificate, they were married in the Anglican Church of Kanyariri in the District of Kiambu in the Central Province on August 18, 1962. There was a marriage under the African Christian Marriage and Divorce Ordinance (cap 99) (now cap 151) of the laws of the then Colony and protectorate of Kenya.

The parties lived together until 1974 when, according to the plaintiff, the defendant chased her way. According to the defendant the plaintiff deserted him. During the marriage the plaintiff bore the defendant about twelve children not all of whom survived.

Since 1974, when the parties separated, there have been matrimonial proceedings in which the plaintiff has obtained a maintenance order against the defendant but the plaintiff complains that nothing has been paid under it. The only resource the plaintiff has for the support of the children, who are still dependant on her, and for herself is the share, which she claims to be entitled to in land at Gilgil.

The defendant has first appeared in person, though he arrived a little late, but since the second day of the hearing, he has been represented by comrade Mr Mboya. I have read the affidavit sworn by plaintiff in support of her claim on February 4, 1982 and the defendant's affidavit in reply sworn on March 2, 1982.

From the affidavits I have read, and the evidence I have heard, it appears that after their marriage, the petitioner and the respondent lived and co-habited at Kanyariri on land which belonged to the defendant's father. There was land here on which the parties lived and also land which they cultivated. According to the defendant, the produce of the land and plot was sold and proceeds used to defray medical expenses incurred by the plaintiff in 1961. According to the plaintiff, the produce, including livestock, was sold to raise the deposit needed for purchasing land at Gilgil. According to the defendant, deposit was raised by charging the land at Kanyariri and the plaintiff has nothing to do with it. The land at Gilgil was originally a plot of 36 acres but the defendant sold 7 acres to pay off a debt he owed to the Government, totally reducing the Gilgil farm to 29 acres. It is this www.kenyalawreports.or.ke reduction which made necessary the second of the two amendments to the originating summons.

The plaintiff's case is that not only was the initial deposit paid out of the proceeds of her farming at Kanyariri, but the balance of Kshs 25,000, which had to be paid to the Land Settlement Trustees, by instalments of Kshs 500 per month, was paid out of the proceeds of farming at Gilgil. The plaintiff insists that she put no capital, no actual cash into the acquisition of the land at Gilgil. The plaintiff was never in paid employment, and had no funds to contribute towards purchasing the land. However, by working on the land, running it as a farm, the plaintiff contends that she produced the income which enabled the defendant to pay the purchase price by instalments. It is argued that her contribution was no less a real and substantial contribution for being on interest one. More generally, the plaintiff's claim is based on the joint enterprise principle which is expanded in *Karanja v Karanja* [1976] Kenya Law Reports page 307 and is other contribution. The plaintiff's evidence is that, for a period of about ten years, ending in 1974, the plaintiff cultivated the land and developed it. Together with the defendant, she grew wheat and pyrethrum, and had a herd of some fifteen dairy cows.

The herd was the particular responsibility of the plaintiff, she looked after the cows, milked them and sent the milk to the Kenya Creameries Corporation. I accept the plaintiff's evidence as to her work on the farm since it is admitted by the defendant that he lived in Nairobi and worked as a driver for Abbo Tours, while it is admitted by the plaintiff that the defendant would come home about twice a month, when he would stay for a week and work on the farm, and while this effort on the defendant's part must be recognised on a substantial contribution to the prosperity of the farm, it cannot be accepted as a substitute for the day to day attention which farming requires especially doing farming. This is when the plaintiff's part was of vital importance. It was the plaintiff, on the view I take of the evidence, who provided the continuing work that a farm requires; without the plaintiff, dairy farming would have been impossible. The plaintiff explained that wheat was harvested with the help of hired machinery, and that the hirers of the machinery supplied the workmen to operate it. Apart from that, the work was done by the plaintiff, by the defendant when, from time to time he attended at the farm, by the children of the plaintiff and defendant, when they were not at school, and by a casual labourer.

One of the children of the plaintiff and the defendant gave evidence for the plaintiff. He was David Kihara Njoroge, now twenty-eight years of age and married. He recalled the condition of the land when his family first moved there. Nothing had been developed but in time the entire farm was fenced and few houses were built. His mother, ie the plaintiff, worked on the farm, looking after it, milking cows and also looking after the children.

The defendant strenuously denies that the plaintiff did any work on the farm, and contends that she was never in partnership with him where the farm was concerned. The plaintiff, he maintains, did no more than any wife would do in the way of cooking meals and caring for the children. The plaintiff he says, made no contribution whatever to the acquisition of the farm and should not be allowed to claim an interest in it. The plaintiff deserted him in 1974, and refused to return to live with him though he sent elders to try and persuade her to come back, and even money to enable her to do so. The defendant went as far as to say that even now the plaintiff and her children would be welcome to return to live on the land at Gilgil. That invitation appears somewhat unrealistic and it is not surprising that the plaintiff shall not

accept it. Since the separation between the plaintiff and defendant in 1974, the defendant has acquired two more wives, named Naomi Wanjiru and Muthoni, and by them has had a fertile ten children.

Neither the plaintiff nor the defendant was able to produce any documentary evidence to prove or illustrate the contribution each claims to have made, and the basis of my decision must be the oral evidence that has been given. On that evidence, I hold that the defendant is unfair in attributing the profits of the farm entirely to his own extortion and expenditure and denying completely any part played in it by the plaintiff. His contributions are, in my view, contrary to the weight of the evidence and unrealistic in the context of dairy farming. I am satisfied on the evidence of the plaintiff, and the evidence of the son, David that the plaintiff and the defendant did buy and did not work on the Gilgil farm together in a joint enterprise and that through her work, the plaintiff made substantial contribution towards its acquisition. That contribution must now be recognised.

It was argued by Mr Mboya, on behalf of the defendant that these proceedings, which have been taken under section 17 of the Married Women's Property Act, 1882, could not affect registered land. Mr Mboya relied on two sections of the Registered Land Act cap 300 of the laws of Kenya. He first relied on section 4 which provides that:

“Except as otherwise provided in this act, no other written law and no practice or procedure relating to land shall apply to land registered under this act so far as it is inconsistent with this act”

I do not find that the procedure provided by section 17 of the Married Women's Property Act 1882 is inconsistent with the Registered Land Act. Section 17 merely provides a summary way by which, as between husband and wife, property rights can be asserted. If property is held in the name of one person, even if that property is registered in the name of that person, but another person contributed towards the acquisition of the property then both persons have proprietary interests in the property. If legal ownership is registered in the name of only one of them then that one is decreed to hold the land on trust and beneficially not just for himself but for himself and the other person. There is here nothing inconsistent with the Registered Land act.

The other section on which Mr Mboya relies is section 28 which is to the effect that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall be rights not liable to be defeated except as provided in this act etc. Mr Mboya argues that if I were to hold that the plaintiff was a joint owner with the defendant I should be defeating the defendant's rights as a registered proprietor. It is not however the purpose of section 17 of the Married Women's Property Act to provide a machinery for defeating rights but, on the contrary, to provide a machinery for ascertaining and defining rights. If those rights are ascertained and defined, then the register is designed to serve proprietorship and proprietorship is not designed to serve a system of registration. Section 28 expressly arranges the rights of a proprietor being acquired subsequently to a first registration and acquired by an order of court and it is therefore conceivable that the plaintiff and defendant would acquire joint rights in registered property in succession to the sole right previously enjoyed by the defendant.

Moreover the provisions to section 28 directs that nothing in this case shall be taken to relieve a proprietor from any duty or obligations to which he is subject as a trustee. It would instead be surprising if the summary procedure allowed by section 17 of the Married Women's Property Act 1882 were to be available in respect of any property other than that principal and most important form of property viz registered land, and I see nothing in the Registered Land Act, or anything else to indicate that the summary procedure is so severely restricted in its scope.

Accordingly, I am satisfied, but at law and upon the evidence that the plaintiff is entitled to the relief she seeks in her awarded originating summons of February 10, 1982. I make a declaration that Plot Nyandarua/Upper Gilgil/134 comprising 29 acres formerly part of plot no 54, Upper Gilgil Scheme with the buildings and other developments erected thereon is jointly owned in equal shares by Joycephine

Tibira Njoroge and Francis Njoroge Daudi also known as David Njoroge Ngori, and I order that the costs of this application be taxed if not agreed and paid by the defendant and the plaintiff.

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