



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL SUIT NO. 42 OF 2016 (O.S.)

EMMA MUSILU
APPLICANT/PLAINTIFF

VERSUS

SOLOMON MUTULA MATIVO
RESPONDENT/DEFENDANT

JUDGEMENT

1. This judgment relates to the Originating Summons dated **5th October, 2016** filed by the Applicant , **Emma Musilu** seeking for **ORDERS THAT:**
 1. **This honourable court be pleased to declare that the immovable property in the Primeland Holdings (K) Limited Share Certificate Number 896 known as Plot No. 7 on L.R. No. 7340/193 Embakasi is the property of the Plaintiff herein.**
 2. **This honourable court be pleased to bar the Defendant from constructing, dealing, leasing, transferring, renting, occupying, using, misusing, charging, wasting or dealing**

in any other manner all that property in Primeland Holdings (K) Limited Share Certificate Number 896 known as Plot No. 7 on L.R. No. 7340/193 Embakasi.

- 3. The costs of these proceedings be provided for.**
- 4. Such other or further relief or orders be granted as this honourable court may deem just and expedient in the circumstances.**
2. The application is based on the grounds thereof and supported by affidavit, further affidavit and reply to defence and defence to counterclaim sworn by Emma Musilu on **5th October, 2016, 15th February, 2017, 16th March, 2018** and **4th April, 2018** respectively.
3. The Respondent did file his defence as well as a counterclaim.
4. The matter thereafter proceeded by way of *viva voce* evidence where the Applicant called two witnesses apart from herself and the Respondent testified and did not call any witnesses.
5. The parties apart from their oral testimony relied on the witnesses' statements and affidavits on record.
6. Before looking at their submissions and the cited authorities it is appropriate at this juncture to summarize their evidence.

PLAINTIFF/APPLICANT S CASE

7. **Pw1 Emma Maina Musila** the Plaintiff testified that she was married to the Defendant under Kamba customary law between 2002 and 2008. The marriage was later dissolved through the customary return of a “rejection goat,” which was received by the Defendant’s family. She explains that although the Defendant was not the biological father of her first child, he accepted both her and the child during the marriage.
8. She avers that during the subsistence of the marriage, they acquired properties, including land at Embakasi purchased in installments between 2006 and 2007 and land at Itetani, Makueni (approximately six acres), which was also acquired partly during the marriage. She maintains that she substantially contributed to, and in some instances solely financed, these properties, though documentation for the Embakasi plot was in both their names due to trust in the Defendant.
9. She further states that following their separation, the Defendant took possession of the properties, developed them and currently occupies one with another woman, thereby excluding her from use and benefit.
10. Additionally, she asserts that she independently purchased motor vehicle **KAR 838M** while employed, without any financial contribution from the Defendant. She denies allegations of desertion, misconduct or misappropriation of funds, maintaining that the Defendant left the matrimonial home and that she later relocated to the US. She contends that she was

unlawfully dispossessed of the matrimonial assets and urges the court to restore to her the property, particularly the Utawala/Embakasi land, on account of her sole contribution and ownership.

11. **Pw 2 Peter Mbithi Musilu** testified that he was a farmer and lecturer at Kabete National Polytechnic. He knows both parties, the Plaintiff being his younger sister and the Defendant her former husband. He confirms that the parties were married under Kamba customary law and that the marriage was subsequently dissolved through a customary process marked by the giving of a "*mbui ya ulee*" (rejection goat).
12. He explained that although dowry is ordinarily refundable upon divorce, no dowry was paid in this case apart from three goats exchanged at the commencement of the marriage, which nonetheless signified a valid customary union and the return of the rejection goat confirmed its dissolution.
13. He said that the parties acquired property during the marriage, including six acres at Itetani, Makueni, initially commenced before the marriage but paid for partly during its subsistence and a plot at Utawala.
14. According to him, the Plaintiff contributed to the Tetani land and solely purchased the Utawala plot, though the Defendant retained both properties and later occupied the Utawala plot with another woman despite allegedly agreeing to transfer it to the Plaintiff. He urges the court to award the Utawala property to the Plaintiff.

15. On cross-examination, he acknowledges that his knowledge of certain matters, including the size and details of the Itetani land, is based on information from the Plaintiff, as he has never visited the property. He further clarifies that he had limited interaction with the parties during their marriage, only visiting them once.
16. He further said that he was not employed by Africa Focus but only participated in short-term seminar and field assignments introduced through the Defendant. He also confirms purchasing a laptop from the Defendant in 2012. Additionally, he discloses his past employment as an accountant at the Law Society of Kenya, his subsequent conviction and imprisonment for two years, and his later release on presidential pardon, maintaining that he has testified truthfully.
17. **Pw3 Michael Musila Musau** testified that he was a transport businessman and younger brother to Emma. He confirms that he knows both parties and that they were married in 2002 under Kamba customary law. He states that the marriage was dissolved in 2008 when Emma returned home and a customary divorce ritual ("*mbui ya ulee*") was performed at Solomon's home.
18. He further avers that prior to the marriage, Emma had a child whom Solomon accepted as his own. He depones that during the marriage, the parties jointly acquired two properties in Embakasi and approximately six acres of land at Itetani, Makueni, around 2004-2006. Upon separation, it was agreed that Emma would retain the

Primeland property, which has rental units, although she allegedly does not benefit from it.

19. He maintains that Emma did not steal any money from Solomon and that the motor vehicle (KAR 838M) is registered in her name, having been acquired without Solomon's financial contribution. He also states that Solomon later confronted Emma at home and subsequently married a former employee.

RESPONDENTS/DEFENDANTS CASE

20. The Respondent **Solomon Mutula Mativo** in his testimony confirmed that he knows the Plaintiff and relies on his statement and affidavit both dated **24th September, 2018**, together with the accompanying exhibits.
21. He said that the Embakasi property was jointly acquired during the subsistence of their marriage, although the parties divorced in 2008, and he currently resides on the said property.
22. He further states that he has not transferred any property to the Plaintiff. Additionally, he maintains that apart from a motor vehicle, there are no other properties, and that the Itetani land was acquired prior to the marriage, to which the Plaintiff made no contribution.

ANALYSIS AND DETERMINATION

23. I have carefully considered the application, the responses thereto and the rival submissions filed by the parties.

24. Upon consideration of the pleadings, viva voce evidence and applicable law, the primary issue for determination is whether the suit property, namely Plot No. 7 on L.R. No. 7340/193 Embakasi (Primeland Holdings (K) Limited Share Certificate No. 896), constitutes matrimonial property and, if so, the respective beneficial interests of the parties herein.
25. **Section 6** of the Matrimonial Property Act No. 49 of 2013 describes matrimonial property to mean the matrimonial home or homes, household goods and effects in the matrimonial home or homes and any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
26. **Section 7** of the Matrimonial Property Act No. 49 of 2013 states that 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.
27. **Section 8** of the Matrimonial Property Act No. 49 of 2013 states that 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.

28. In **NGV v CNV also known as CHM (Matrimonial Cause 6 of 2021) [2022] KEHC 16645 (KLR) (6 December 2022) (Judgment)**, at paragraphs 46 and 47, the court quoted with authority the case of **TMW vs FMC (2018) eKLR** where the court adopted the definition under **Section 6** of the Matrimonial Disputes Act No. 49 of 2013 to hold that ***for property to qualify as matrimonial property, it must have been acquired during the subsistence of marriage unless agreed by both parties that such property will not form part of the matrimonial property. The burden of proof in law lies with the party alleging that such and such property indeed was acquired during the subsistence of the marriage and therefore constitutes matrimonial property. However, the mere fact that property is acquired during coverture does not automatically entitle each spouse or party a share after dissolution of the marriage. One has to prove contribution whether direct or indirect. The onus of proof, however, is subject to a rebuttable presumption of law under Section 14 of 'Matrimonial Properties Act which provides; '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.'

29. The Supreme Court of Kenya in **Petition No. 10 of 2020 Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto [2023]** agreed with Echaria case on the principles applied for distribution of matrimonial property. It stated thus:

“[78] to our minds the finding in Echaria was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse a share of the property.”

The court went on to emphasize that the spouse seeking a share in the matrimonial property has to prove the extent of his or her contribution to the acquisition or development of the property. It stated:

“[83] the guiding principle should be the apportionment and division of matrimonial property may only be done where parties fulfill their obligation of providing what they are entitled to by way of contribution.”

30. From the evidence on record, it is not disputed that the parties were married under Kamba customary law between 2002 and 2008 and that the marriage was

dissolved vide the Kamba customs of what is called the” return of the rejected goat”, ” *mbui ya ulee*”.

31. In terms of the properties, it is evident that the Embakasi property was acquired during the subsistence of the marriage. The payment receipts and other documents shows that it was in their joint names.
32. It therefore means without any contrary evidence that the same was meant to be a matrimonial property for and for the benefit of the then couple.
33. It appears and it was conceded that the same was subsequently developed by the Respondent after the dissolution of the marriage and after the Applicant left for United States. The Applicant as well as her witnesses said as much.
34. I note that there was an order from the court barring the Defendant from charging or selling the said parcel of land or in any way diminishing the value of the land. That order did not stop the Respondent from developing or improving the parcel.
35. It was the Defendant’s case that that is where he was residing at the moment and earning income out of it.
36. In my view therefore the said Embakasi plot is a matrimonial property and ought to be shared equally between the two. There is no doubt that they both contributed to its acquisition. They both worked in various places and did some businesses a fact not disputed by either of the parties.

37. The only issue is on the development which the Respondent carried out after the divorce. I think the best approach is to have the land valued and the Respondent to pay the Plaintiff half of the current market value of the same and in default the Applicant executes against the Defendant including and not limited to disposing the said Embakasi property.
38. As for the Itetani property I did not find any evidence of any contribution by the Plaintiff and I take it that the same was acquired before the marriage and thus remains the Defendant's property. The Applicant's brother confirmed this when he said that he had never been there and this was information he got from the Applicant.
39. The motor vehicle was acquired during the subsistence of the marriage and as at the time of this hearing the Applicant had already disposed it and I do not see any reason to discuss the same for now. In any case there was no evidence that the Defendant contributed anything on its acquisition.
40. On the other hand, I do not find any iota of evidence of the Plaintiff withdrawing the sum of Kshs 100,000 from the account as claimed by the Respondent in the counterclaim and or the household items claimed therein.
41. Consequently, I hold that the only property germane herein is the Embakasi one and that I do find the same matrimonial except the development undertaken by the Respondent as stated above.

42. I order in respect to both the claim and the counterclaim as hereunder;

(a) Prime land Holdings (k) Limited share certificate No 896 known as plot number 7 on LR No 7340/193 Embakasi (80x100ft) and specifically the land minus the developments is matrimonial property and shall be shared out equally between the Applicant/Plaintiff and the Respondent/Defendant.

(b) The above property shall be valued by a valuer agreed upon by the parties or alternatively each party shall appoint its own valuer and in case of any disagreement the Deputy Registrar of this court shall be moved by either of the parties to appoint one and who shall value the same within the next 90 days from the date herein and the valuers costs shall be paid equally by the parties.

(c) The said valuer shall value the parcel of land only and the Respondent shall pay off the Applicant half of the said value of the land within 90 days from the date of the valuation and in default the Applicant shall be at liberty to execute against the Defendant.

(d) Each party shall meet their respective costs.

Dated signed and delivered at Nairobi via video link this 9th day of April 2026.

**H K CHEMITEI
JUDGE**