



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 196/2014

T N KPLAINTIFF

VERSUS

F K WDEFENDANT

JUDGMENT

In the Originating Summons dated 2nd December, 2014, the Applicant is seeking for the determination of the following issues:-

- (1) Whether land parcel Nos. Plot No. [particulars withheld] Kiboko ‘A’, Machakos/Kiandani/ [particulars withheld], Agricultural Plot No.[particulars withheld] and five other land parcels whose details are with the Respondent all within [particulars withheld] Ranch Ltd, formerly parcel No. Muputi/Kiima-Kimwe/[particulars withheld], Plot No. [particulars withheld] and one more land parcel within [particulars withheld] Market, plot No.[particulars withheld], Kiboko ‘B’ and plot Nos.[particulars withheld] all within Kyuu Adjudication Section, Mbooni location form part of the matrimonial property, herein after the matrimonial property.**
- (2) Whether the Respondent holds the property above in trust for the Applicant.**
- (3) Whether the above properties can be shared equally between the Applicant and Respondent or as the Court may deem fit.**
- (4) Whether the Respondent himself, his agent and or servant can be restrained from alienating or encumbering or in any other manner disposing of the said properties.**

The Originating Summons is based on the Applicant’s Affidavit who has deponed that

she was married to the Respondent under the Kamba Customary marriage in 1979; that the two were blessed with four children and that she has been in the employ of the [particulars withheld] organization since the year 1980.

It is the Applicant’s deposition that the Respondent ventured into Agri-business in 1987 and she assisted him in the business financially because he was not employed; that they established their matrimonial home at[particulars withheld] market within Makueni County and that the said matrimonial home was built on plot No.[particulars withheld], Kiboko ‘A’ in 1993.

It is the Applicant’s case that they jointly contributed to the purchase of plot No. [particulars withheld], Kiboko “A”; that she directly contributed to the purchase of other properties including the suit properties

and that they built [particulars withheld] Guest House on Plot No.[particulars withheld].

The Applicant deponed that on plot No.[particulars withheld] at Kiboko market, they built [particulars withheld] Guest house with 15 rented rooms and that at the time of their marriage, the Respondent did not won any property.

It is the Applicant's case that the Respondent has denied her the right of access and use of the proceeds from the suit property; that in February 2013, the Respondent deserted her and that the Respondent has unilaterally sold a portion of plot No.[particulars withheld], Kiboko 'A' to unknown people.

Although the Respondent was served with the Originating summons, he neither entered appearance nor filed a Replying Affidavit.

The Originating Summons proceeded as undefended. The Applicant, PW.1 appeared before me on 29th September, 2016 and testified.

The Applicant informed the court that she was married in 1981 under Kamba Customary law; that an affidavit to prove the marriage was sworn by the Respondent and that she later on changed name in the identity card.

The Applicant reiterated the contents of the Supporting Affidavit and produced in evidence the Affidavit to prove the fact that she was married to the Respondent, the birth certificate for their children; the original Title Deeds for parcels of land known as Iveti/Kiandeni/[particulars withheld] and Makindu/Kelii/[particulars withheld] together with the bank deposit slips showing the contribution she made towards the purchase of the suit properties.

It was the evidence of PW.1 that they bought the suit properties jointly with the Respondent through the business they had in Kiboko.

According to PW.1, she wants the suit property shared between them equally.

The Applicant's advocate submitted that this court has the jurisdiction to distribute matrimonial property pursuant to the provisions of **Section 17 of the Matrimonial Property Act, 2013**, that under the said section, a spouse may file a suit for the distribution of matrimonial property whether or not there is a pending cause for dissolution of the marriage and that the Applicant has demonstrated that all the listed assets were acquired during the subsistence of the marriage.

Counsel submitted that the Applicant is employed and made direct financial contribution towards the acquisition of the suit property; that she lived with the Respondent from 1979 until 2013 when the Respondent deserted the matrimonial home and that **Section 14 of the Matrimonial properties Act** provides that where property is registered in the name of one spouse, there is rebuttable assumption that (s)he holds it in trust for the other spouse.

The Applicant's advocate finally submitted that the Applicant should be given at least three quarters of the matrimonial property and should solely be given the matrimonial home for her use and the use by the children of marriage.

The Applicant's evidence is uncontroverted. The Applicant produced in evidence an Affidavit that was sworn on 27th March, 1990 by the Respondent showing that indeed the Applicant was his wife.

The Applicant also produced in evidence the deposit slips showing the part payments she made towards the purchase of the suit property.

Section 17 of the Matrimonial property Act, 2013 provides that a person may apply to court for a declaration of rights to any property that is contested between that person and a spouse, and the application may be made notwithstanding that a petition has not been field under any law relating to

matrimonial causes.

In view of the evidence placed before me, I am satisfied that the Applicant has proved that she is entitled to an equal share to the Matrimonial properties listed in the Originating Summons in addition to the matrimonial home.

For those reasons, I make the following orders:-

- (a) A declaration be and is hereby issued that Plot No.[particulars withheld], Kiboko ‘A’ being the matrimonial home of the parties be held in the sole name of the Applicant.**
- (b) A declaration be and I hereby issued that parcels of land Number Machakos/Kiandani/[particulars withheld], Plot Numbers [particulars withheld] and five others all within [particulars withheld] limited, formerly land parcel Number Muputi/Kiima-Kimwe/[particulars withheld], plot No.[particulars withheld], Kiboko “B” and plots Number [particulars withheld] all within Kyuu Adjudication Section, location are matrimonial property and should be valued by a licenced valuer.**
- (c) A declaration be and is hereby issued that after the valuation of the properties mentioned in (b) above, the said properties be shared between the Applicant and the Respondent in equal shares.**
- (d) The Respondent to pay the costs of the suit.**

Dated, signed and delivered at **Machakos** this 27th day of **January, 2017**.

O.A. ANGOTE

JUDGE