



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC CASE NO. 20 OF 2014

P N M.....PLAINTIFF

VERSUS

H N NDEFENDANT

JUDGMENT

By an amended plaint dated 26th January 2015 and filed on 6th February 2015, the plaintiff sought judgment against the defendant in the following terms:

- (a) A declaration that the defendant holds land parcel No. GATURI/WERU/[Particular withheld] in trust for the plaintiff and should transfer the same to him absolutely.***
- (b) Costs of the suit.***
- (c) Any other relief the Court may deem just to grant.***

The basis of his claim is that the parties lived as husband and wife between 1990 and 29th July 2010 when their marriage was dissolved. During that period, the plaintiff partly stayed in the United Kingdom from where he would send money to the defendant for purposes of purchasing and developing a plot on his behalf. However, upon his return to Kenya in 2008, the plaintiff found that the defendant was living with another man in the house that she had built on land parcel No. GATURI/WERU/[Particulars withheld] from the money sent to her. It is the plaintiff's case that the defendant holds land parcel No. GATURI/WERU/[Particulars withheld] in trust for him particulars of which have been pleaded in paragraph 7 (b) of the amended plaint hence this suit.

By her amended statement of defence, the defendant admitted that the parties were married during the period stated in the plaint and that the plaintiff while living in the United Kingdom sent her money which she consolidated with her contributions and savings to acquire the following properties:

- (a) Vehicle No. [Particulars withheld]
- (b) L.R [Particulars withheld] Ruia Nairobi registered in plaintiff's names
- (c) L.R [Particulars withheld] Ruia Nairobi registered in plaintiff's names
- (d) L.R [Particulars withheld] Ruia Nairobi registered in plaintiff's names
- (e) L.R GATURI/WERU/[Particulars withheld] registered in the defendant's names.

She pleaded that upon his return to Kenya, the plaintiff sold the motor vehicle without her consent or knowledge and has also threatened to sell the other properties in Nairobi. That land parcel No. GATURI/WERU/[Particulars withheld] was registered in her names to hold in trust for herself and the two minor issues of the marriage and the above mentioned properties having been acquired during marriage are matrimonial properties and she is therefore entitled to half of a share of the properties listed (a) (b) (c) and (d) above and with regard to parcel No. GATURI/WERU/[Particulars withheld] which is a small plot measuring 0.10 Hectares, the same was a gift from the plaintiff for her enjoyment and the two children and no trust was noted on the register. She denied having lived with any man in the house adding that it was the plaintiff who came back to Kenya with an elderly white woman by the name Susan with whom they settled in Nyeri. The plaintiff should therefore not have any right over land parcel No. GATURI/WERU/[Particulars withheld] since he sold most of the other properties. The defendant therefore made the following counter-claim:

(a) A declaration that land parcel No. GATURI/WERU/ [Particular withheld] which is the matrimonial home is the property of the defendant and her children.

(b) A declaration that motor vehicle [Particulars withheld] acquired during marriage and sold by the plaintiff is part of the matrimonial property and that the defendant is entitled to half share thereof.

(c) A declaration that the following properties:

1. L.R [Particulars withheld] Ruia Nairobi

2. L.R [Particulars withheld] Ruia Nairobi

3. L.R [Particulars withheld] Ruia Nairobi

now registered in the plaintiff's names are matrimonial properties and the defendant is entitled to half share thereof.

(d) The plaintiff's suit be dismissed with costs.

The parties were the only witnesses with each adopting their written statements as their evidence together with the documents filed. The plaintiff told the Court that the land parcel No. GATURI/WERU/[Particulars withheld] was purchased and developed by the defendant from proceeds sent to her while he was in the United Kingdom during the time that they were married. He added that the defendant did not contribute a single cent towards the acquisition and development of that property and therefore she holds it in trust for himself.

On her part, the defendant admitted that the plaintiff used to send her money from the United Kingdom which she used to purchase and develop their matrimonial home on parcel No. GATURI/WERU/[Particulars withheld] where she lives with their two children. She added that they also have other properties in Ruia although the plaintiff took vehicle No. [Particulars withheld]. She urged the Court to share the remaining properties between them.

Submissions have been filed both by **MR. MUHOHO** on behalf of the plaintiff and **MR. NJAGE** on behalf of the defendant.

I have considered the evidence by both parties as well as the submissions by counsel.

From the evidence, both oral and documentary, the following are not in dispute:

1. That the parties were married in 1990 and have two daughters L N and F W who are now both over 18 years of age.

2. Their marriage was dissolved on 29th July 2010 vide orders issued by the Chief Magistrate's Court Embu in Divorce Case No. 6 of 2009 having broken down irretrievably.

3. Between 2002 and 2008, the plaintiff was living and working in the United Kingdom from where he would send the defendant money part of which the defendant used to purchase and construct a house on land parcel No. GATURI/WERU/[Particulars withheld] which is registered in the defendant's names.

4. Before their marriage was dissolved, the parties also acquired the following immovable properties which are in plaintiff's names i.e.:

(i) L.R [Particulars withheld] Ruia Nairobi

(ii) L.R [Particulars withheld] Ruia Nairobi

(iii) L.R [Particulars withheld] Ruia Nairobi

According to the title deed for land parcel No. GATURI/WERU/[Particulars withheld], it was issued on 13th November 2003 while the properties [Particulars withheld] Ruia Nairobi were acquired on 14th August 2001 as per the copies of share certificates although it is not clear whether any documents of title have been issued with respect to the Nairobi properties.

The following issues are in my view the basis upon which this Court should determine this dispute:

1. Whether the applicable law is the Married Women's Property Act 1882 or the Matrimonial Property Act 2013.

2. Whether the plaintiff gifted the defendant land parcel No. GATURI/WERU/[Particulars withheld] or defendant holds it in trust for the plaintiff.

3. Whether land parcel No. GATURI/WERU/[Particulars withheld] and properties known as L.R [Particulars withheld] Ruia Nairobi are matrimonial properties and if so, how the same should be shared between the parties.

This Court shall not delve into the dispute relating to motor vehicle No. [Particulars withheld] as that would be acting in excess of the jurisdiction vested in this Court by **Section 13 of the Environment and Land Court Act**. The defendant, if she still wishes to pursue her claim in relation to that property, is at liberty to pursue it in an appropriate forum.

The original suit was filed on 18th January 2011 before it was amended and filed on 6th February 2015. The defendant also filed the amended defence and counter-claim on 24th February 2015. The suit was heard and completed on 8th June 2016. The ***Matrimonial Property Act 2013*** received assent on 24th December 2013 and commenced on 16th January 2014. Therefore, by the time the amended pleadings were being filed and evidence was being adduced by the parties herein, the applicable law was the ***Matrimonial Property Act 2013***.

Did the plaintiff gift the defendant land parcel No. GATURI/WERU/5870 or does she hold it in trust for the plaintiff? Although in paragraph 6 (c) of her defence and counter-claim the defendant pleads that the land parcel No. GATURI/WERU "***Was a gift by the plaintiff***" to her, it is clear from her own oral testimony that it was their matrimonial home. In her evidence in chief, she said:

"The land parcel No. GATURI/WERU/[Particulars withheld] is registered in my names. He used to send me money which I used to purchase the land. It was to be our matrimonial home. So I bought the land and constructed our home. We have two children. We all live in that house".

It is also clear from both the plaintiff's oral evidence and his filed statement that his intention in sending money to the defendant from the United Kingdom was so that she could identify suitable land on which to put up a family home. There is no doubt in my mind that land parcel No. GATURI/WERU/[Particulars withheld] was not a gift to the defendant. Rather, it was acquired during coverture and was supposed to be the parties' matrimonial home. The plaintiff avers that the defendant did not contribute a single cent towards the acquisition and development of land parcel No. GATURI/WERU/[Particulars withheld] and indeed part of his documentary evidence consists of documents detailing various sums of money in British Pounds sent by the plaintiff to the defendant's account with Co-operative Bank in Embu which, as stated above, is not disputed. The defendant has not demonstrated what she contributed other than a bare statement that they acquired the properties in dispute by their "**joint efforts and contribution**". It is however clear from **Section 2 of the Matrimonial Properties Act** that contribution includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work. The defendant may not have provided companionship to the plaintiff. Indeed the evidence from the divorce proceedings suggests that she provided that companionship to another party. Nonetheless, it is clear that while the plaintiff was in the United Kingdom, he entrusted the defendant with the responsibility of identifying and developing land parcel No. GATURI/WERU/[Particulars withheld] into a matrimonial home and also taking care of their two daughters while he provided the finance. The defendant therefore made a non-financial contribution towards the acquisition and development of land parcel No. GATURI/WERU/[Particulars withheld] into a matrimonial home which, by dint of the provisions of **Section 6 of the Matrimonial Property Act**, is among property that is defined as Matrimonial Property. **Section 14 (a) of the Matrimonial Property Act** similarly provides that where matrimonial property acquired during marriage is registered in the name of one spouse, there shall be a rebuttable presumption that such property is held in trust for the other spouse. The defendant did not lead any evidence to rebut that presumption. It is also common knowledge that the registration of land in the name of a party does not extinguish any responsibility owed by him as a trustee – **MUMO VS MAKAU 2004 1 K.L.R 13, KANYI VS MUTHIORA 1984 K.L.R 712** and **MUKANGU VS MBUI 2004 2 K.L.R 256**. Clearly therefore, the contention by the defendant that land parcel No. GATURI/WERU/[Particulars withheld] was gifted to her by the plaintiff is not supported by the evidence on record. A gift of registered land becomes effective upon execution and delivery of the transfer – **THE REGISTERED TRUSTEES ANGLICAN CHURCH OF KENYA MBEERE DIOCESE VS THE REV. DAVID WAWERU NJOROGE C.A CIVIL APPEAL No. 108 of 2002 (2007 e K.L.R)**. In the absence of such evidence of transfer of land parcel No. GATURI/WERU/[Particulars withheld] to the defendant as a gift, I must reject that argument and find instead that the land parcel No. GATURI/WERU/[Particulars withheld] is matrimonial property registered in the defendant's names to hold in trust for herself and the plaintiff.

The same applies to the other parcels of land being plots No. L.R [Particulars withheld] which are situated at Ruia Nairobi and which were all acquired in August 2001 during coverture. The defendant wants half share of those properties. **Article 45 (3) of the Constitution** provides that:

"Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage".

The Court of Appeal recently had an opportunity to consider how to deal with matrimonial property after a marriage collapses in the case of **PNN VS ZWN C.A CIVIL APPEAL No. 128 of 2014 (2017 e K.L.R)**. The Court upheld the decision of the trial Court sharing out matrimonial property equally between the parties although **KIAGE J.A** made it clear that **Article 45 (3) of the Constitution** does not necessarily mean that matrimonial property be shared out equally between the parties.

How then does this Court distribute the matrimonial properties?

1. L.R No. GATURI/WERU/[Particulars withheld]:

It is not in dispute that while the plaintiff sent money to the defendant to purchase the land and construct their matrimonial home, it was the defendant who supervised the construction of the home where she lives with their two daughters. Having found that it is held by the defendant in trust for herself and the

plaintiff, the order that commends itself to me is to direct that it be equally shared. It be valued and then sold and the proceeds be share out equally between the plaintiff and defendant. In the alternative, either of the parties is at liberty to buy out the share entitlement of the other party should they deem it fit to do so.

2. Plot No. L.R [Particulars withheld] – Ruia Nairobi are matrimonial properties acquired during the parties marriage. It is not clear from the evidence if any of them are developed. I would similarly order that they be valued and sold with the proceeds thereof being shared equally between the plaintiff and defendant. In the alternative, either of the parties is at liberty to buy out the share entitlement of the other party should they deem it fit to do so.

3. Each party to meet their own costs.

4. Liberty to apply.

B.N. OLAO

JUDGE

18TH OCTOBER, 2017

Judgment delivered, dated and signed in open Court this 18th day of October 2017 at Kerugoya

Mr. Njage for Defendant present

Mr. Muhoho for Plaintiff absent

Right of appeal explained.

B.N. OLAO

JUDGE

18TH OCTOBER, 2017