



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.297 OF 2013
IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S
PROPERTY ACT (1882)

C A O.....PLAINTIFF

VERSUS

J O..... DEFENDANT

JUDGMENT

1. The Plaintiff commenced her claim against the Defendant through the originating summons dated 23rd October 2013 seeking for the following orders:

- a) A declaration that land parcel **Kakamega/Sergoit/ [particulars withheld]** and the developments thereon was acquired during the marriage between the two parties and through their joint contributions.
- b) A declaration that the Defendant was registered with the title to the said land as trustee for the Plaintiff.
- c) A declaration that the Plaintiff's benefit to the said land is equal to that of the defendant.
- d) That the defendant do pay the costs of the application.

2. The Plaintiff prosecuted the claim through written submission dated 20th May 2016. The Plaintiff's case is summarized as follows:

- a) That her claim falls under the Matrimonial Property Act 2013 in terms of **Section 9** which defines the matrimonial home and **Section 17 (1)** which allows a party to move the court for declaration of rights to any property that is Contested between a spouse and a former spouse.
- b) That the Plaintiff was married by the Defendant through customary law in 1985 and lived in Mombasa, Nairobi and Eldoret before moving to the United States of America.
- c) That both the Plaintiff and Defendant were in gainful employment when they got married. That the Defendant earned a lump sum amount during the 4th All African Games in 1987 which they used to purchase a plot at Tena estate.

d) That later the Defendant lost his employment after they moved to Eldoret and ventured into business but was however not successful.

e) That in an effort to seek for better income for the family the Plaintiff moved to the U.S.A leaving the Defendant to look after their two children. That they later sold the Tena Estate plot and with the proceeds realised bought **Kakamega/Sergoit/[particulars withheld]** which was registered in the Defendant's name.

That they decided to set up their matrimonial home on that land.

f) That in December 1996, the Plaintiff financed the Defendant's trip to the U.S.A for two months and bought him a computer, printer and scanner to open and operate a bureau. The Plaintiff sponsored a similar trip for the Defendant in 1999 and in July 1999 had their two children join her. That in 2009, the Defendant finally joined them in the U.S.A and they settled there as a family.

g) That in 2007, the Defendant returned to Kenya to continue with the construction of the matrimonial home on **Kakamega/Sergoit/[particulars withheld]** to which she contributed USD 50,000 from a loan facility that she was still paying. That the Defendant was accessing the money through an A.T.M. debit card for her Kenyan Bank account that she had given him.

h) That in 2009, the Defendant had informed the Plaintiff that the house was complete and they all travelled to Kenya for a house warming party. The Plaintiff stated that she found the house had not been roofed and that the Defendant had misappropriated the money she had given him. The Plaintiff then withdrew Kshs.588,730/= from her Standard Chartered Bank and cashed a certificate of accounts of USD 10,000 and bought the roofing materials from Eagle Hardware dealers and completed the house.

i) That the acquisition of **Kakamega/Sergoit//[particulars withheld]** was through a family decision to establish their matrimonial home on it. That though the construction of the matrimonial house was done mostly through her financial contribution, the Defendant, who was then unemployed, was the one supervising the works and would contribute money when he had it. The Plaintiff also stated that the Defendant took care of the children between 1995 and 1999.

j) That as their marriage has since been dissolved and they had contributed equally to the acquisition of and developments on **Kakamega/Sergoit//[particulars withheld]**, the same should be sold and the proceeds shared equally.

3. The following are the issues for determination:

a) Whether the plaintiff and Defendant were husband and wife when **Kakamega/Sergoit//[particulars withheld]** was acquired.

b) Whether the Plaintiff contributed to the said property's acquisition and developments thereon and if so what percentage.

c) Whether the Plaintiff is entitled to the prayers sought.

4. The court has considered the grounds on the originating summons, supporting affidavit, Plaintiff's statement, list of documents, written submissions by counsel and come to the following determination:

a) That though the originating summons dated 23rd October 2013 invoked the provisions of **Section 17 of the Married Women's Property Act (1982)**, the provisions of that statute ceased to operate in this country following the enactment and commencement of the **Matrimonial Property Act 2013** which was assented to on 24th December 2013 and commenced on 16th January 2014. The enactment of this Act was in fulfillment to the edict in **Article 68 of the Constitution 2010** that required Parliament to pass Laws to recognize and protect matrimonial property, especially the

matrimonial home. Article 68 of the Constitution states;

" 68. Parliament shall

a)

b)

c) enact legislation-

i)

ii)

iii) to regulate the recognition and protection of matrimonial property in particular the matrimonial home during and on the termination of marriage."

b) That the suit property appear to have been acquired before the promulgation of the Constitution 2010 and this originating summons was also filed before the enactment and commencement of the Matrimonial Property Act 2013. That the parties marriage was dissolved through the decree nisi granted on 19th July 2013 and decree absolute on 6th February 2014.

c) That in the case of **Agnes Najalla William -V- Jacob Petrus Nicolas Vander Goes, C.A.C.A NO.127 of 2011**, the court was dealing with properties acquired before the Constitution 2010 and had the following to say about the right to equality under **Article 45(d)** of the Constitution;

"Having found that the right to equality is inherent and infeasible to all human beings, it matters not that the cause of action accrued before the current Constitutional dispensation."

d) That as was held in **N.W.K -V- J.K.M & Another** [2013] eKLR, a constructive trust can arise from the conduct of a party and the court may infer a common intention therefrom that the property was to be shared beneficially.

The Plaintiff herein has detailed the financial contributions she made towards the development of the matrimonial home on **Kakamega/Sergoit/1077**.

The specific figures of USD 50,000, 10,000 and Kshs.588,750/= were given which totals roughly to about Kshs. 5,000,000/=. Though the Plaintiff did not mention to having made any financial contribution of the acquisition of Tena Estate Plot that was subsequently sold and proceeds used to purchase the suit land, the court notes that both were then in employment. The Plaintiff must have met her share financially in the form of home expenses in addition to non financial contribution. The Defendant did not offer any defence to the Plaintiff's claim and her evidence remains unchallenged. The court would therefore conclude that the Plaintiff and Defendant had contributed equally to the purchase of the suit land and the development thereon.

e) That the value of the suit land and the development thereon has not been ascertained as no valuation report was availed to the court. The Plaintiff's submission under the heading "**conclusions**" asked the court to take the value to be "**in excess of Kshs.10,000,000/=**". The court is of the view that a valuation of the land minus the development (house) and the land plus the development (house) should be conducted by a professional valuer. This will help the parties and the court to have a reliable valuation for purpose of settling the parties entitlement to the suit property.

f) That the provision of **Article 45 (3)** of the Constitution of 2010 which 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".And Section 7 of the Matrimonial Property Act 2013 provides 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."

That in view of the foregoing the the court finds that the Plaintiff has established that she made non financial contribution during the acquisition of th suit land and later made financial contribution of about Kshs.5,000,000/= to develop the matrimonial home thereon.

g) That the Plaintiff and Defendant are equally entitled to the suit land, which was acquired during the time of their marriage, and the home that they developed on the said land through their joint efforts, now that their marriage has been dissolved.

5. That flowing from the foregoing the court finds that the Plaintiff has established her claim against the Defendant on a balance of probabilities and enters Judgment in her favour as follows:

a) That a declaration is hereby issued that land parcel **Kakamega/Sergoit/[particulars withheld]** and the home developed thereon are the matrimonial property and home respectively of both the Plaintiff and the Defendant.

b) That a declaration is hereby issued that the Defendant is registered as proprietor of the said land as Trustee for the Plaintiff.

c) That a declaration is hereby issued that the Plaintiff's and Defendant's interest on the said land and development thereon is equal at 50% each.

d)That now that the marriage between the Plaintiff and Defendant has since been dissolved, a valuation exercise should be conducted giving the following details;

i) Value of the whole land parcel **Kakamega/Sergoit/[particulars withheld]** without the house.

ii) Value of whole land parcel **Kakamega/Sergoit/[particulars withheld]** including the house.

e) That the valuation report be filed in court within the next 30 (thirty) days to enable the court make final orders on how to realise the sharing of the matrimonial property and home.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 13TH DAY OF JULY 2016

In presence of;

Plaintiff ABSENT

Defendant ABSENT

Counsel Mr. Kowino for Opondo for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/7/2016

13th July 2016

S.M. Kibunja J.

Oyugi court Assistant

Mr. Kowino for Opondo for the Plaintiff.

Court: Judgment delivered in open court in presence of Mr. Kowino for Opondo for the Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/7/2016