



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 166 OF 2013 (OS)

ESTHER WANJIKU MWANGI.....APPLICANT

VERSUS

1. JOHN MUNENE KANYI

2. MARGARET WANGUI NG'ANG'A..... RESPONDENTS

J U D G M E N T

Introduction:

1. This matter was commenced by way of an Originating Summons dated 25th October 2012 pursuant to Section 17 of the Married Women's Property Act, 1882 and Article 45 of the Constitution.
2. In the suit, the Applicant is seeking for the following orders:
 - (a) **Declaration that LR Number LR. NO. LAKE/KENYATTA/1/1563 acquired while the Applicant and the Respondent were married and through the efforts of the Applicant and the Respondent be declared matrimonial property and that it was therefore jointly owned by the Applicant and the Respondent**
 - (b) **A declaration that the Applicant and the 1st Respondent are holders of the sub divisions to parcel L.R. No. Lake Kenyatta/1/1563 (being LR. NO. LAKE/KENYATTA/1/3692 and LAKE KENYATTA 1/3963) in common.**
 - (c) **An order for the partition or a forced sale of LR NO. LAKE/KENYATTA 1/3962 and the sharing of the proceeds be apportioned in the ration of 5.0 acres for the Applicant and 2.5 acres for the 1st Respondent or in any other manner to be determined by the Honourable Court based on the parties contribution and needs.**
 - (d) **That the cost of this application be provided for.**
3. The Originating Summons is premised on the ground that the Applicant and the 1st Respondent were married under Kikuyu Customary Law in the year 1989; that at the time of the marriage, the Applicant had a male child who was born in 1978 and that in the year 1994, out of the proceeds of labour from their land, the Applicant and the 1st Respondent bought a 10 acre piece of land in Mpeketoni being parcel number Lamu/Lake Kenyatta 1/1563.

4. It is the Applicant's case that when the title deed for Lamu/Lake Kenyatta 1/1563 was issued, it showed that the 1st Respondent was the sole owner even though they had bought the property both of them.
5. In his Replying Affidavit, the 1st Respondent deponed that prior to his marriage to the Applicant, he owned a portion of land measuring 15 acres in Hindi Settlement Scheme which he sold for Kshs.60,000 and used the proceeds to purchase the parcel of land known as Lamu/Lake Kenyatta 1/1563.
6. According to the 1st Respondents' Affidavit, the said land was sub-divided into two portions being Lake Kenyatta 1/3962 and 3963; that he sold one of the parcels of land and used the proceeds to settle a debt they owed the Ministry of Lands and Settlement and that he also used part of the money to settle a debt of 200,000 that he owed AFC Bank.
7. Being a polygamist, the 1st Respondent deponed that he is required to share his property equally between his two wives and that each of the two wives is entitled to utilize 3 $\frac{3}{4}$ acres of the suit property.
8. The 2nd Respondent deponed that she is the 1st Respondent's wife and that land known as Lake Kenyatta 1/1563 belongs to her husband, the 1st Respondent.
9. When the matter came up for directions, the parties agreed to dispose of the Originating Summons by way of viva voce evidence.

The Applicant's case:

10. The Applicant, PW1, informed the court that she was married to the 1st Respondent in 1989 by which time he had been allocated land in Hindi Settlement Scheme. It was her evidence that in 1993, the 1st Respondent sold the land in Hindi Settlement Scheme for Kshs.9,000 which money they used to purchase food.
11. It was the evidence of PW1 that after selling the land in Hindi, they were given land measuring 2 $\frac{3}{4}$ acres by a Mr. Oliver Mpeketoni which they cultivated and harvested food. They also did manual jobs for people and with the proceeds they bought plot number 1563 measuring approximately 10 acres.
12. Because she trusted 1st Respondent, it was her evidence that she allowed the title deed for the plot number 1563 to be issued in the name of the 1st Respondent.
13. It was the evidence of PW1 that they started living and cultivating plot number 1563 in 1994.
14. According to PW1, she moved to Malindi and started living with the 1st Respondent there. By that time, the 1st Respondent was working while she operated a shop in Malindi. They went back to the suit property in the year 2000 after the business she had in Malindi collapsed.
15. It was the evidence of PW1 that in 1996, the 1st Respondent informed her that he had sub-divided the suit property and sold a portion thereof. It was her evidence that using the proceeds, the 1st Respondent bought a car which he was to use as a taxi in Malindi town. However, the car broke down whereafter they relocated to the suit property and continued cultivating the land which they had left in the hands of a caretaker.
16. PW1 informed the court that in the year 2008, she borrowed Kshs.50,000 from Kenya Women Finance Trust for the purpose of her horticultural business. She used the money to put up her tomato farm.
17. In addition, the Applicant informed the court that she borrowed a further sum of Kshs.120,000 from Kenya Women Finance Trust for the purpose of developing the land.
18. Through her initiative, the Applicant obtained materials worth Kshs.300,000 from AMIRAN who also trained her on how to develop and maintain a green house.
19. According to PW1, the 1st Respondent started misbehaving by eloping with young girls. On 27th November 2011, the 1st Respondent left the suit property and stopped supporting the family.
20. Because the 1st Respondent sold 2 $\frac{1}{2}$ acres of the suit property, it was the evidence of PW1 that she is entitled to 5 acres of the remaining piece of land.
21. In cross examination, the Applicant, PW1, informed the court that when she married the 1st Respondent, they lived in Hindi on the land that had been allocated to the 1st Respondent by the

Government.

22. It was the evidence of PW1 that she was not involved in the allocation of the land to the 1st Respondent in Hindi. Although the 1st Respondent sold the whole land in Hindi in 1992, it was the evidence of PW1 that he did not use that money to buy any other land.
23. PW1 informed the court that after the 1st Respondent sold the land in Hindi Settlement Scheme in 1992, they worked for people on their farms and managed to purchase the suit property in 1994. It was her evidence that the 1st Respondent sub-divided the suit property and sold 2 ½ acres of the same without her consent.
24. PW1 admitted that by the time the 1st Respondent sub-divided the suit property and sold a portion thereof, they were living together. PW1 further admitted that indeed the 1st Respondent had borrowed Kshs.200,000 from AFC by the time he sold the 2 ½ acres.
25. It was the evidence of PW1 that her marriage to the 1st Respondent was by way of Kikuyu customary law and that although the 1st Respondent is allowed to marry more than one wife, she (PW1) has filed a divorce case and wants 5 acres of the remaining portion of the suit property.
26. PW1 stated that although the 1st Respondent paid dowry to her parents, the said dowry has never been returned. PW1 denied that the 1st Respondent constructed for her father a house and that by the time he sold a portion of the suit property, her father had already died.

The Respondent's case:

27. The evidence of the 1st Respondent, DW1, was that he went to Mpeketoni as a young man in 1985. It was his evidence that he was allocated land in Hindi Settlement area in 1987 whereafter he married the Applicant.
28. After paying dowry, he sold the land in Hindi for Kshs.60,000 and deposited the money in his bank account.
29. It was his evidence that he used to dig wells for people and he would save the money which he used to purchase the suit property in 1994.
30. After purchasing the property, it was the evidence of DW1 that they moved to Malindi town, and while there, he borrowed Kshs.200,000 from Agricultural Finance Corporation for the purpose of developing the suit property.
31. It was the evidence of DW1 that out of the 10 acres, he sold 2 ½ acres and used part of the money to put up a house for the Applicant's father in the year 2005.
32. The evidence of DW1 was that he used the proceeds of the sale of the 2 ½ acres to repay the AFC loan. According to DW1, he is the one who repaid, on behalf of PW1, the loan from Kenya Women Finance Trust and that they used to discuss all their financial affairs.
33. DW1 informed the court that indeed the Applicant was one of the witnesses to the agreement for the sale of 2 ½ acres.
34. It was the evidence of DW1 that the dispute between him and the Applicant started when he married the 2nd Respondent. According to him, he is allowed to marry a second wife under the Kikuyu customary law.
35. Because the 2 ½ acres was sold by both of them, the 1st Respondent informed the court that he was willing to grant to the Applicant 3 ¾ acres of the remaining portion.

Submissions:

36. By the time of writing this Judgment, the Applicant's advocate submissions were not on record.

The Respondents' submissions:

37. The Respondents' counsel submitted that matrimonial property can only be divided amongst spouses once they have divorced.
38. Counsel submitted that it is only upon filing of a divorce that the Applicant can be granted the prayers that she is now seeking.
39. The Respondents' counsel finally submitted that the orders being sought would gravely prejudice

the Respondents because the Applicant would unlawfully acquire the suit property.

Analysis:

40. The first issue that I should determine is whether this court has jurisdiction to determine the issue of division of matrimonial property, and if so, whether the order for division of such property can be made without any evidence that the two parties have divorced or are about to divorce.
41. It is not in dispute that the Applicant was married to the 1st Respondent in 1989. In 1992, the two were blessed with a child who died a few months later.
42. Although the Applicant and the 1st Respondent have been staying together since 1989, as husband and wife, their relationship seems to have taken a turn when the 1st Respondent married the 2nd Respondent.
43. Due to the said marriage or cohabitation, to the 2nd Respondent by the 1st Respondent, the Applicant has filed the current suit pursuant to the provisions of Section 17 of the Married Women Properties Act to have parcel of land number Lake Kenyatta 1/3962 partitioned and the same be apportioned as between herself and the 1st Respondent in the ratio of 5.0 acres and 2.5 acres respectively.
44. It is not in dispute that parcel of land number Lake Kenyatta 1/3962 was acquired and registered in favour of the 1st Respondent during the subsistence of the marriage between the Applicant and the 1st Respondent.
45. Indeed, by the time the suit property was acquired in 1994, it measured approximately 10.0 acres. However, the said property was sub-divided to create Lake Kenyatta/1/3962 and 3963. Plot number 3963 has since been sold to a third party.
46. The jurisdiction of this court is donated by dint of Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act.
47. This court is mandated to hear and determine disputes relating to the environment and the use and occupation of and title to land.
48. The substantive order that the Applicant is seeking in this matter is the division of a parcel of land known as Lake/Kenyatta/1/3962 with a view of having the divided portions registered in the respective names of the Applicant and the 1st Respondent.
49. In so far as the question of sub-dividing the suit property is concerned, I find and hold that this court has jurisdiction to determine that issue.
50. I say so because, the order being sought falls within the parameters of “use, occupation of and title to land,” thus giving this court the jurisdiction to deal with the claim.
51. The suit was filed pursuant to the provisions of Section 17 of the Married Women's Property Act, 1882.
52. Section 17 of the Married Women's Property Act, 1882 provides as follows:

“In any question between husband and wife as to the title to or possession of property either party...may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice...and the Judge...make such order with respect to the property in dispute, and to the costs and consequent of the application as he thinks fit.”

53. By dint of Section 3(1)(c) of the Judicature Act, the Married Women Property Act, 1882 has been applicable in this country until 16th January 2014 when the Matrimonial Property Act, 2013 came into operation.
54. In my view, a spouse can only commence proceedings for the division of matrimonial properties pursuant to section 17 of the Act after filing divorce proceedings or after a divorce has been pronounced.
55. Section 7 of the Matrimonial Property Act, which is not applicable in this case because it commenced after the filing of this suit, has indeed clarified the issue of when an order of division of matrimonial property can be made. According to the Act, such an order can only be made if the spouses divorce or their marriage is dissolved.
56. It would not have been the intention of the law, in this case the Married Women's Property Act,

- 1882, that a spouse would wake up one morning and file a suit in court seeking to have the matrimonial property, including what has been registered in the name of the other spouse, divided before commencing proceedings for a divorce.
57. I say so because matrimonial property, just like children, is supposed to be a unifying factor in the institution of marriage as contemplated under Article 45(1) of the Constitution, and not the source of acrimony and litigation.
58. A marriage, being a natural and fundamental unit of society and the necessary basis of social order, will not hold if courts were to order for the division of matrimonial property on the application of one party, just because the spouses are having disputes over certain issues in their marriage. That, in my view, would be a recipe for anarchy in the institution of marriage and should not be allowed.
59. The Applicant, having admitted that she is married to the 1st Respondent, did not adduce any evidence to show that she has commenced divorce proceedings or that indeed her marriage to the 1st Respondent has been dissolved.
60. Consequently, I am of the view that the suit before me was prematurely filed by the Applicant.
61. On that ground, I strike out the Originating Summons dated 25th October 2012 with no orders as to costs.

Dated and delivered in Malindi this **8th** day of **May**, 2015.

O. A. Angote

Judge