



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC . CASE. NO. 512 OF 2013

RAEL MBITHE MWANGANGIPLAINTIFF

VERSUS

JAMES MUTUA MUSEMBIDEFENDANT

JUDGMENT

Pleadings

This suit was commenced by way of a Complaint dated 15th April 2013 whereby the Plaintiff is seeking the following prayers:

- a. A declaration that the Plaintiff is entitled, under the law, to part of the properties acquired during the subsistence of the marriage between her and the Defendant.
- b. A declaration that out of all the properties acquired during the subsistence of the marriage, the Plaintiff is entitled to all household goods, her personal items, L.R. No. Makueni/Masongeleni/183; L.R. No. Matungulu/Sengani/1154 and Plot provisionally numbered 1335 in L.R. No. 8485 Kamulu Housing Co-operative Society Ltd and further orders for immediate possession and or transfer of all the said properties in her favour.
- c. Costs of the suit.

In her Complaint, the Plaintiff stated that on or about 8th January 2002, she got married to the Defendant and that during the subsistence of the marriage, they both acquired various properties which the Defendant registered in his own name. She stated further that she contributed to the acquisition of those properties by paying the money as well as undertaking other duties as a wife. She stated further that among the properties that they acquired during the subsistence of their marriage were all household goods and personal items, L. R. No. Makueni/Masongeleni/183; L.R. No. Matungulu/Sengani/1154 and Plot provisionally numbered 1335 in L.R. No. 8485 Kamulu Housing Co-operative Society Ltd. She further indicated that on or about 26th October 2010, the marriage between the Plaintiff and the Defendant was dissolved in matter number BF10D000815 in the Brentford County Court, London, Britain and the Decree was subsequently made absolute on 13th December 2010. She further stated that she is entitled to the aforementioned properties under the Married Women Properties Act.

The Evidence

Pursuant to leave of the court granted on 31st March 2014, the Plaintiff caused to be advertised in the Standard newspaper a Notice of Summons to Enter Appearance on 8th April 2014 but the Defendant did not enter appearance in this matter. Interlocutory judgment was entered against the Defendant on 12th August 2014 for his failure to enter appearance and file his defence and the matter proceeded for formal proof on 16th June 2015.

The Plaintiff, Rael Mbithe Mwangangi, is the only one who gave evidence during the formal proof. She testified that she lives in the United Kingdom. She further said that she was married to the Defendant in the year 1985 under Kamba Customary Law but that they entered into a civil marriage in the year 2002 before the Attorney General. She stated that she worked at the Ministry of Finance, Computer Department between 1984 to 1994 when she opted for early retirement.

She further testified that her father was allocated a parcel of land in Masongoleni Settlement Scheme i.e Makueni/Masongoleni/183 at a cost of Kshs. 60,000/- which he could not raise. She testified that her father asked her and her sister to raise and pay that sum. She said that since she did not have the money at the time, she asked the Defendant to pay her half share of Kshs. 31,691/- which he agreed to do. She also said that she agreed to refund the Defendant this sum when she received her early retirement package. She further testified that upon receiving her early retirement package of Kshs. 139,000/-, she withdrew Kshs. 100,000/- which she gave to the Defendant as a refund of the Kshs. 31,691/- he had paid for her and to utilize the balance to buy plots. She confirmed that her father was given the parcel of land being Makueni/Masongoleni/183 and a title deed was issued in his name, a copy of which she produced. She further testified that her father decided to subdivide this land into 3 portions out of which he was to allocate one portion measuring 6.07 Ha to her and the Defendant. She confirmed that the subdivision was done while she was away in Saudi Arabia and that in her absence, the Defendant registered this portion of land in his own name. She confirmed that she left for Saudi Arabia in August 1994 to work as a domestic worker.

The Plaintiff further testified that despite her move to Saudi Arabia, she retained her membership at the Customs Employees Workers Coop Savings and Credit Society Ltd (“CUEW”) from which she would take loans and put the repayment amounts in the Defendant’s bank account to enable him to pay off the loans. She testified that through this method, she is the one who financed the acquisition of the parcels of land identified as Matungulu/Sengani/1154 and Plot provisionally numbered 1335 in L.R. No. 8485 Kamulu Housing Co-operative Society Ltd. She further stated that she wrote to her sister who informed her that the Defendant was not paying off the loans in CUEW as they had agreed. She testified that she decided to start remitting the loan repayments directly to CUEW into an account belonging thereto instead of the Defendant.

The Plaintiff testified further that she moved to the United Kingdom with her employer and changed employers and opted to remain in the UK. She further testified that she approached her bank in the UK which agreed to remit money through her account to her account with CUEW to service the loans she had been advanced by CUEW. She further stated that she and the Defendant commenced the construction of their matrimonial home in the parcel of land identified as Matungulu/Sengani/1154.

She also stated that she made plans for the Defendant and their 3 children to join her in the UK which was successful but she further stated that she could not keep up servicing the loan as well as catering for her family in the UK which led to the marriage with the Defendant breaking down and resulting in the divorce in the year 2010. She testified that she tried to contact the Defendant to include her name in the title documents for these properties but the Defendant did not cooperate. She added that the Defendant acknowledged that the Plot provisionally numbered 1335 in L.R. No. 8485 Kamulu Housing Co-operative Society Ltd belonged to her and the Defendant though it appears only in the name of the Defendant.

She further indicated that she is at the age where she should be preparing herself for retirement and sought the assistance of the court to help her get back what was legally hers.

The Issues

I would summarize the issues arising for my determination as follows:

1. What the relationship between the Plaintiff and Defendant was and is.
2. What the Plaintiff's entitlement in the below properties is:
 - a. Makueni/Masongaleni/183
 - b. Matungulu/Sengani/1154
 - c. Plot provisionally numbered 1335 in L.R. No. 8485 Kamulu Housing Co-operative Society Ltd
 - d. all household goods and personal items

The Determination

1. What the relationship between the Plaintiff and Defendant was and is.

It was the Plaintiff's testimony that she was married to the Defendant in the year 1985 under Kamba Customary Law but that they entered into a civil marriage in the year 2002 before the Attorney General. In support of that assertion, the Plaintiff annexed a copy of her Certificate of Marriage which indeed shows this to be the case. The marriage was conducted on 8th January 2002 at the office of the Registrar of Marriages in Nairobi. The Plaintiff further testified that the marriage was blessed with 3 children. I see no reason to disbelieve her.

The Plaintiff also testified that she filed for divorce in the Brentford County Court in Matter No. BF10D000815 where her marriage with the Defendant was dissolved on 13th December 2010. The Plaintiff annexed a copy of the court order from this court. Based on this uncontroverted evidence, I find no difficulty in finding that indeed the Plaintiff and the Defendants were spouses since 1985 to 13th December 2010 when their marriage was dissolved.

2. What the Plaintiff's entitlement in the below properties is:

- a. Makueni/Masongaleni/1832
- b. Matungulu/Sengani/1154 and Plot provisionally numbered 1335 in L.R. No. 8485 Kamulu Housing Co-operative Society Ltd

Article 45 (3) of the Constitution of Kenya, 2010 provides that,

“Parties to a marriage are entitled to equal rights as at the time of marriage, during the marriage and at the dissolution of the marriage”

This Article was buttressed in the Court of Appeal case of Agnes Nanjala William vs. Jacob Petrus Nicolas Vander Goes **Civil Appeal No.127 of 2011** where the court held that,

“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. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends.”

The sharing of matrimonial property between spouses and specifically to the women after divorce was also highlighted in international instruments that Kenya has ratified under **Article 2(5) of the Constitution** which states that the general rules of international law shall form part of the laws of Kenya .

Article 6(1) (h) of the International Convention on the Elimination of All Forms of Discrimination against Women enjoins state parties,

“To ensure on the basis of equality the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposing of property whether free

of charge or for valuable consideration”.

Article 16(1) of the Universal Declaration of Human Rights provides that,

“Married women of full age without limitation due to race, nationality or religion have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution”

and **Article 7(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa** provides that,

“In cases of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the property deriving from the marriage”.

Having highlighted some of these instruments as a guiding factor in this case, I will turn refer to our laws namely the **Matrimonial Property Act, 2013** which came into operation in January 2014. **Section 7 of the Matrimonial Property Act, 2013** is of paramount significance in this case where it 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.”

Contribution as defined by Section 2 means monetary and non-monetary contribution. Non-monetary contribution includes:-

- a. Domestic work and management of the matrimonial home;
- b. Child care;
- c. Companionship;
- d. Management of family business or property; and
- e. Farm work;

“Family business” means any business which-

- a) is run for the benefit of the family by both spouses or either spouse; and
- b) generates income or other resources wholly or part of which are for the benefit of the family;”

When it comes to distribution of matrimonial property, there are a number of decisions which have laid down principles which are used to determine contribution of a spouse towards matrimonial property. It has been held that a spouse's contribution need not only be financial. It can even be in form of giving the other peaceful time as he acquires the property e.g. by taking care of the children of the marriage, taking care of the home or even improvement of the property. The Defendant may not have filed his reply to the Plaintiff's claim but from the pleadings and the evidence tendered by the Plaintiff, it is clear that the Defendant may not have contributed financially but he is the one who identified the properties and acquired the said properties albeit in his names. He also took care of their children since the Plaintiff was away in Saudi Arabia and the United Kingdom.

There is no doubt that the way to go is towards the principle that matrimonial property should be shared on a 50:50 basis. This will be in furtherance of the principles of the Constitution, the International treaties and conventions which have been ratified in **Kenya and the Matrimonial Property Act, 2013**. The Plaintiff herein has demonstrated that she contributed towards the acquisition of the properties in question and has demonstrated that her contribution was financial. The properties were acquired during the

subsistence of this marriage and have been registered in the names of the Defendant. The **Court of Appeal in Muthembwa Vs Muthembwa [2002] KLR 1** made a finding in respect of property acquired during marriage and registered in the name of one spouse, that a rebuttable presumption arises that it is acquired with joint funds. I find that the Plaintiff is entitled to all the above listed properties as follows:

1. The Plaintiff is entitled to half a share of Makueni/Masongaleni/1832
2. The Plaintiff is entitled to half a share of Matungulu/Sengani/1154
3. The Plaintiff is entitled to half a share of the Plot provisionally numbered 1335 in L.R. No. 8485 Kamulu Housing Co-operative Society Ltd.
4. The Plaintiff is entitled to half a share of the household goods and personal items listed.
5. The Defendant to transfer the above stated properties in favour of the Plaintiff as ordered above and in his absence, the Deputy Registrar do sign the transfer documents in his place.
6. The Defendant shall bear the costs of this suit.

It is so ordered.

DELIVERED AND DATED AT NAIROBI THIS 9TH DAY OF OCTOBER 2015.

MARY M. GITUMBI

JUDGE