



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 90 OF 2013**

**BETWEEN**

**JOSEPH NJOGU NGOYA.....APPELLANT**

**AND**

**DAVID NGOYA NJOGU &**

**PAUL KIMANI NJOGU (Being the Administrators of the Estate of**

**LUCY NJERI NJOGU).....RESPONDENTS**

**(An appeal against the Judgment of the High Court of Kenya at Nairobi (Gacheche, J.) on 17th November 2010**

*in*

**H.C.C. NO. 12 OF 2006 (O.S.)**

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**JUDGMENT OF THE COURT**

1. Sometime in 2006, *Lucy Njeri Njogu, (deceased)*, sued the appellant, her estranged husband, for the determination of her share of matrimonial property being *LR. Dagoreti/Kangemi/253 (the suit property)* and *Motor Vehicle Reg. No. KRM 111*. The suit was instituted by way of an Originating Summons that was filed pursuant to the provisions of the then *section 17* of the *Married Women's Property Act, [1882]*. The deceased sought orders that the said property, which she contended was developed and acquired by the joint efforts of herself and the appellant during the subsistence of their marriage, was matrimonial property that was jointly owned; and that the property ought to be divided in such manner and proportions as the court would deem fit.

2. The deceased claimed that herself and her late mother- in- law, *Nduta Ndekere Gachoka*, contributed Kshs.500 and Kshs.400 respectively and bought the suit property, which was registered in her mother- in- law's name. She further claimed that as the sole bread winner at the time, she built a mud house from the proceeds of her chicken business, where she stayed with her children; that over the years she also developed 44 rental houses (rooms) on the suit property, courtesy of a loan that was advanced to her by the Agricultural Finance Corporation on 15th September, 1980. The loan was however given in her mother- in- law's name, the deceased claimed, and she fully repaid it from the proceeds of her earnings because her mother- in -law was sickly at the time. The deceased further alleged that she purchased a *Motor Vehicle Reg. KBS 22* which she registered in her husband's name. Subsequently her husband sold it and used the sale proceeds to acquire another motor vehicle *Reg. No. KRM 111 (the motor vehicle)*, the deceased asserted.

3. The appellant and the deceased were married under Kikuyu Customary Law in 1963. Subsequently they solemnized their union in church in 1967. They were blessed with 8 children. It is common ground that sometime in 1986 the appellant and the deceased separated. The marriage was eventually dissolved and a decree absolute issued on 7th January, 2009.

4. The appellant opposed the suit. He stated in his replying affidavit that both the suit property and the motor vehicle were not matrimonial property; that the land belonged to his late mother and as such, after her demise on 10th September 1998 he inherited it, having undertaken succession proceedings. As regards the vehicle, he claimed that he bought it in 1993, many years after his separation from the deceased. The appellant denied that the deceased made any contribution towards the purchase and development of the suit land. He alleged that the property was developed by his late mother; that all the loan repayment receipts were in his mother's name; and that the deceased did not produce any document to prove her contribution. The appellant annexed to his replying affidavit copies of the title deed, the loan repayment receipts, the

confirmed grant of representation, the vehicle registration book, among other documents.

5. The matter was heard before **Gacheche, J.**, who ruled in favour of the deceased. In her judgment, the learned Judge stated, *inter alia*:

**“Based on the above evidence I am convinced that the plaintiff played a major role towards acquisition of the subject land and also that the proceeds that the defendant used to acquire the subject motor vehicle were funds derived from the sale of KBB 22 which she had purchased solely. She has been able to prove on a balance of probability that he holds her share in the subject land, which he acquired by way of succession, in trust of her. Having found as I do, and bearing in mind whatever developments on the subject land were all carried out by the plaintiff, I hereby order that she holds 80% share of the subject land. She shall have 50% of the value of the subject vehicle. I also order that she receives 80% of all the rental income emanating from the units which she constructed.”**

6. Being dissatisfied with the above decision, the appellant preferred an appeal to this Court. He contended that the learned judge erred in law: in holding that the suit property and the motor vehicle were matrimonial property; by disregarding the appellant’s evidence; and in her application of The Married Women Property Act, 1882. He urged the Court to set aside the trial’s court’s judgment in its entirety and award him costs of the appeal and in the court below.

7. The deceased passed away on 15th November 2016 before the appeal was heard. Her administrators, **David Ngoya Njogu** and **Paul Kimani Njogu**, sons of both the appellant and the deceased, were substituted as the respondents.

8. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In

***Selle & Another v Associated Motor Boat Company Ltd [1968] EA 123***, this Court stated:

**“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”**

9. In our view, there are two main issues for determination. The first one is whether the suit property and the motor vehicle are matrimonial properties, and the second one is whether the respondent was entitled to a share of the same.

10. **Section 6** of the **Matrimonial Property Act** defines “**matrimonial property**” to mean either the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any movable or immovable property jointly owned and acquired during the subsistence of the marriage.

11. **Section 9** of the **Matrimonial Properties Act** defines what constitutes matrimonial property as property acquired by one of the spouses during the subsistence of marriage in which case the other spouse can acquire an interest in the property by contributing towards its improvement.

12. **The Act** also prescribes what constitutes “**contribution**” to mean “**monetary and non-monetary contributions**”

and 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.”**

13. Further, ownership of matrimonial property is described under **section 7** of the Act as follows:

**“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.”**

14. In her affidavit sworn in support of the Originating Summons, the deceased averred that she contributed directly towards the construction of a two - bedroom matrimonial home and 44 rental rooms with an income of fifty thousand shillings and purchase of the motor vehicle. She also averred that the appellant became an alcoholic and physically abusive and would spend his salary on drinking and never contributed to any expenses in the house. According to the respondent, after their separation, the appellant remarried and has been receiving all the rental income by himself.

15. Having perused the appellant’s replying affidavit and the annexures thereto, the deceased sought and was granted leave to file a further

affidavit. She stated that when she got married to the appellant he was an adult student while her and her mother-in-law were employed in a coffee plantation; that the appellant started to take alcohol and eventually became an alcoholic when he was employed; that she contributed Kshs.500 and her mother-in-law Kshs.400 and they bought the suit property; that the suit property was registered in the name of her mother-in-law; that from her own income she put up 34 residential rooms; that subsequently she obtained a loan of Kshs.20,000 from the Agricultural Finance Corporation and added 10 more residential rooms; that in 1982 she bought a motor vehicle registration number KBS 22 and registered it in the appellant's name; and that this is the motor vehicle that the appellant subsequently sold and purchased motor vehicle registration number KRM 111.

16. The deceased therefore argued that she was entitled to the orders she was seeking since she had substantially contributed towards acquisition of the said properties, whereas the appellant had been a drunkard all through.

17. The appellant responded to the deceased's further affidavit. He denied that the deceased made any contribution towards acquisition of the suit property as well as the motor vehicle. He stated that the deceased was not doing any chicken rearing business as alleged; that his late mother was running a butchery business and solely purchased the suit property and developed it; and that he did not own motor vehicle registration number KBS 22 which he sold to buy motor vehicle registration number KRM 111 as alleged.

18. During the hearing, the deceased told the trial court that the suit land was sold to them by one **Thairu Mubea, DW1**, (who she alleged had since passed away); that together with the appellant they put up a mud house; that using her income from chicken and clothing business she was able to develop some of the residential rooms; that the loan she obtained from the Agricultural Finance Corporation enabled her to add more rooms. The deceased also reiterated her earlier contention in her further affidavit as to how the appellant acquired motor vehicle registration number KRM 111.

19. In cross examination, the deceased told the court that there was no sale agreement between Thairu Mubea as the vendor of the suit property and herself and her mother-in-law as purchasers; that however she knew the vendor and had even delivered part of the purchase price to him.

20. **Janet Nduta Njoya, PW2**, the first born of the appellant and the deceased, told the court that her mother had a chicken farm and a tailoring business; that their father, (the appellant), was in employment from 1969 to 1986 but used to drink heavily; that together with her siblings they used to help their mother in her businesses; and that her mother put up the 44 residential rooms single handedly.

21. Regarding the subject motor vehicle, PW2 testified that her mother had bought motor vehicle registration number KBS 22, that after some time their father sold it and bought another car, which he also sold and used the proceeds to buy motor vehicle registration number KRM 111.

22. **Thairu Mubea, DW1**, testified that he was the original owner of the suit property; that he sold it to **Nduta Ndekere** (the appellant's mother), in 1960 at a price of Kshs.900, that she paid the money by instalments until 1966 when he transferred the land to her; that he did not know the deceased; and that he had never received any money from the deceased.

23. The appellant (DW2), told the court that he had inherited the suit property from his deceased mother, who purchased it from Thairu Mubea in 1960 before he married the deceased. He produced the certificate of confirmation of grant issued to him on 11th June 2002 in **Succession Cause No.2300 of 2000**. The certificate shows that apart from the suit property, the appellant also inherited from his late mother 112 Barclays Bank Shares, 500 Kenya Airways Shares, and sums of money that were in different accounts at Bank of Baroda and Barclays Bank.

24. Regarding motor vehicle registration number KRM 111, the appellant testified that he bought it in July, 1993. He produced the vehicle's registration book which revealed that it was transferred to him on 29th July 1993. He added that he bought his first vehicle sometime after the deceased left him; and that the deceased never purchased any vehicle during the subsistence of their marriage.

25. In the Originating Summons, the substantive prayer by the deceased are for orders: -

***“That a declaration do issue that plot No. DAG/KANGEMI/253 and motor vehicle Reg. No. KRM 111 acquired and developed by the joint funds and efforts of the applicant and the respondent during their marriage was owned jointly by the applicant and the respondent.”***

26. In her affidavit in support of the Originating Motion the deceased deposed, *inter alia*:

***“5. THAT during the currency of my (sic) marriage, we acquired diverse properties namely: -***

***(a) A plot of land in Kangemi better known as DAGORETTI/KANGEMI/253 on which we have erected a two bedroom matrimonial home and 44 rental houses with income of fifty thousand shillings only (Kshs.50,000/).***

***(b) Motor vehicle reg. KRM 111.”***

27. Subsequent to the filing of the replying affidavit by the appellant, the deceased's claim changed materially. She now contended that the suit property was jointly purchased by her and the appellant's mother but she developed it alone; and that the said motor vehicle was not acquired during the subsistence of their marriage but it was another vehicle that was sold by the deceased to raise the capital to purchase motor vehicle registration number KRM 111.

28. As earlier stated, the fundamental issue for this Court's determination is whether the suit property and the motor vehicle in issue were matrimonial property. **Mr Wandaka**, the appellant's learned counsel, submitted that they were not. Counsel submitted that from the evidence of Thairu Mubea, DW1, the suit property was purchased by the appellant's late mother in 1960, before the appellant got married to the deceased. Counsel further submitted that the motor vehicle was purchased by the appellant 7 years after separation from his deceased wife.

29. On the other hand, **Mrs Radoli**, learned counsel for the respondents, urged this Court to find that the two properties were matrimonial property. She submitted that whereas the appellant had inherited the suit property from his late mother, it is the deceased and her mother-in-law who had jointly purchased the same, but the deceased developed the property on her own.

30. With regard to the motor vehicle, Mrs Radoli submitted that both the deceased and her daughter, PW2, testified that the deceased had bought motor vehicle registration number KBS 22 during the subsistence of the marriage, which the appellant sold and used the proceeds to purchase the subject motor vehicle.

31. We have carefully considered all the evidence on record as well as submissions by counsel. There is no dispute that Thairu Mubea was the first registered proprietor of the suit property. The certified copy of the land register (the Green Card) that was produced showed that Thairu Mubea (DW1) was registered as the proprietor thereof on 4th January 1958. DW1 testified that he sold the suit property to Nduta Ndekere in 1960. By then the appellant had not married the deceased. The transfer to Nduta was registered on 28th July 1966. The witness said that the registration of the transfer took long because the purchase price was paid in instalments. The witness further testified that he did not know the deceased and never did she go to his place. He was surprised to learn that the deceased had alleged that he had passed away.

32. The deceased's first affidavit was at variance with her contention in the Originating Motion, that the suit property was jointly acquired by herself and the appellant during the subsistence of their marriage. It is trite law that parties are bound by their pleadings. The originating Summons was never amended. But even if we were to go by the deceased's subsequent affidavits and oral evidence, that she contributed to the joint purchase of the suit property between herself and her mother-in-law, that evidence cannot stand in light of the evidence of the seller, Thairu Mubea, who testified that he sold the land to the appellant's mother in 1960, long before the deceased was married by the appellant.

33. The suit property was registered in the sole name of the appellant's mother. The deceased never raised the issue of her alleged contribution towards purchase of the suit property during the lifetime of the appellant's mother, even after she separated with the appellant in 1986. The appellant's mother was alive until 10th September 1998 when she passed away.

34. The deceased did not produce any documentary evidence to support her contention that she contributed towards purchase of the suit property or its development. The appellant on the other hand produced several documents to prove that his late mother obtained a loan of Kshs.20,000 from the Agricultural Finance Corporation in July 1981 and by January 1984 she had repaid it in full. Looking at the assets that the appellant's mother acquired in her lifetime as shown in the confirmed grant, and which were eventually inherited by the appellant, it is evident that the appellant's mother was an enterprising woman.

35. In our view, therefore, the suit property was purchased and developed by the appellant's mother. The appellant, being the only child, inherited the suit property following the demise of his mother. This was pursuant to succession proceedings in **Succession Cause No. 2300 of 2000**. The deceased did not raise any objection to the appellant's application for grant of letters of administration. It is trite law that such property cannot be described as matrimonial property.

36. Turning to motor vehicle registration number KRM 111, the appellant purchased it in 1993, nearly 7 years after separation from his estranged wife, the deceased. The deceased did not adduce sufficient evidence to prove that she had bought motor vehicle registration number KBS 22 which was sold by the appellant to raise funds to purchase motor vehicle registration number KRM 111. The photograph that she relied upon to prove that she had purchased the said motor vehicle was not of any assistance. The photograph merely allegedly showed her daughter, Janet Nduta, PW2, leaning on an unidentified motor vehicle, whose registration number is not visible.

37. The deceased alleged that she registered the said vehicle in the appellant's name "*because of the respect which I had for him.*"

The appellant said that he was a stranger to the alleged vehicle.

The deceased did not produce the vehicle registration book or any document relating to purchase of the vehicle.

38. There was dearth of evidence to connect the appellant's motor vehicle registration number KRM 111 to the deceased at all. It could not be described as matrimonial property, having been purchased by the appellant long after the marriage was dissolved.

39. In light of the evidence as analysed herein, we are unable to agree with the learned judge that the deceased was entitled to 80% share of the suit property and 50% share of the value of motor vehicle registration number KRM 111. We reiterate what this Court said in **Francis Njoroge v Virginia Wanjiku Njoroge, Nairobi Civil Appeal No. 179 of 2009**, that: -

**"...a division of the property must be decided after weighing the peculiar circumstances of each case."**

40. In view of the foregoing, we allow this appeal, set aside the High Court judgment and substitute therefor an order dismissing the Originating Summons. Although the appellant urged this Court to order that all the monies paid to the deceased pursuant to the judgment of the High Court be paid back to him, we do not think that such an order would be appropriate in the circumstances of this case. The appeal was filed during the lifetime of the deceased, who has since passed away, and the respondents who were substituted in the place of the deceased, are the appellant's children.

41. As regards costs, we order that each party bears its own costs of the appeal as well as costs in the High Court.

Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**