



**VNN v JGT (Matrimonial Cause 21 of 2015)
[2024] KEHC 12015 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12015 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MATRIMONIAL CAUSE 21 OF 2015
DKN MAGARE, J
SEPTEMBER 26, 2024**

BETWEEN

VNN PLAINTIFF

AND

JGT DEFENDANT

JUDGMENT

1. This Judgment is in respect of the Originating Summons dated 8th October 2015 and filed by the Plaintiff.
2. The Originating summons seeks the following reliefs:
 - a. That the Plaintiff Veronicah Nyambura Nderitu being a married wife to the defendant and having contributed to the upkeep of their family, purchase and maintenance of the matrimonial property L.R No. Nyeri/Endarasha/3578 and L.R No. Nyeri/Endarasha/1340 situate at Endarasha, Nyeri County, Charity Medical Clinic in Endarasha and motor vehicle Registration No. KBV 094V Toyota Saloon being their matrimonial properties is entitled to the same under the *Matrimonial Property Act*, 2013.
 - b. That the defendant be ordered to transfer L.R No. Nyeri/Endarasha/3578 and L.R No. Nyeri/Endarasha/1340 to the plaintiff being her entitlement from the matrimonial property and the defendant do sign all necessary papers of transfer and in default the Executive Officer of court do sign the same.
 - c. The costs be provided for.
3. The defendant filed a replying affidavit dated 11th November, 2015 and swore as follows:
 - a. The parties had since divorced through a court process after the marriage irrevocably broke down.



- b. There was no joined property venture between the plaintiff and the defendant at all.
- c. The parties were both employed as health workers earning salaries and the defendant stayed near home looking after the children while the plaintiff worked in Mweiga, Nyahururu.
- d. The plaintiff did not do her wifely duties, domestic work or child care as she was working away and largely unavailable due to overseas trips.
- e. The defendant solely maintained the children including education needs.
- f. L.R No. Nyeri/Endarasha/3578 was the defendant's parents' property only held in trust.
- g. That the said L.R No. Nyeri/Endarasha/3578 was acquired by the defendant's parents after they disposed of their 2 other properties in 2005 and 2008.
- h. That the defendant only settled on part of the houses on the said L.R No. Nyeri/Endarasha/3578 with the plaintiff and children and the rest was used by his parents.
- i. That L.R No. Nyeri/Endarasha/1340 was not in the name of the defendant and was not available to the Plaintiff.
- j. That Charity Clinic had wound up and was not available.
- k. The defendant solely acquired Motor Vehicle Registration No. KBV 094V.
- l. The plaintiff lived a lavish life taking loan and spending on things other than family.

Evidence

4. The Plaintiff testified in court and relied on her witness statement and bundle of documents filed in court which she produced in evidence. It was her case that she was a nurse by profession. It was her testimony that they started staying together with the defendant in 1998 in Kangemi.
5. She testified that they had 2 children, one adopted. That the properties were owned jointly. That with respect to LR No. Nyeri/Endarasha/3578, they sold a property at Kinyati and bought this property using top up from their respective salaries as shown in the pay slips.
6. She also stated that for the motor vehicle, they both used salary savings to buy. That when the defendant took a loan, she shouldered the family expenses. That she was aware the motor vehicle was since sold.
7. On cross examination, it was her case that the defendant educated the children to date. That the defendant took a loan of Kshs. 200,000/- which he serviced but she cared for the children.
8. The defendant relied on his witness statement and bundle of documents filed in court. He testified that he was a Clinical Officer. He stated that the plaintiff petitioned for divorce and the divorce was allowed.
9. It was his testimony that he paid the school fees for the children. He also stated that the title deed was in his name but he held in in trust for the entire family.
10. Further, that in 2007, his parents lived on the suit premises, LR No. Nyeri/Endarasha/3578. That they moved to stay on this land in 2010. That his share in the land was only three-quarters.
11. The defendant also called DW2, John Wandwekia Thiongo who relied on his witness statement. It was his testimony that the defendant was his younger brother.



12. In cross examination, he stated that their father sold property in Othaya and contributed to the purchase of LR No. Nyeri/Endarasha/3578 in 2007. He also testified that the plaintiff and defendant were married and used to stay in the land.
13. He also testified that he stayed with and paid school fees for the 4 children they had with the plaintiff. Further, it was his case that the suit property was acquired during their marriage with the plaintiff.
14. In reexamination, it was his case that he filed and obtained divorce and had produced the proceedings in his evidence.

Submissions

15. The plaintiff filed their submissions dated 31st August 2023. It was submitted that the property was acquired during the subsistence of marriage and was as such matrimonial property. Reliance was placed on the case of *ZWN v PNN* (2012) eKLR.
16. It was further submitted that the plaintiff proved contribution to the acquisition and development of the property in question and was entitled to a share thereof. On this, the Plaintiff relied on the case of *PWK v JKG* (2015) eKLR
17. The plaintiff also urged the court to find nonmonetary contribution to the claimed properties and cited inter alia the case of *FIDA v Attorney General and ISLA* Nairobi High Court Constitutional Petition No. 1643 of 2006.
18. On the part of the defendant, they filed submissions dated 28th November, 2023. It was their submission that all the properties claimed by the plaintiff did not form part of the matrimonial property. They relied on *ENK v MNNN* (2021) eKLR to submit that the plaintiff should not benefit from the property save for the motor vehicle.

Analysis

19. The issue before me for determination is whether the properties disclosed in this suit are matrimonial property acquired during the subsistence of the marriage and therefore sharable between the plaintiff and the defendant.
20. In my view, marriage is anchored inter alia, on love, affection and sympathy and exists like a rolling wheel gathering property rights traceable to the spouses individually or collegially, after a stall. This view was also contextualized in the thoughts of Margaret Puxon, in her Article *Ownership of the Matrimonial Home* (1963), 107 Sol. J. 204, thus:

Marriage is a partnership of love, affection and sympathy which should come to an end when these perish. When the parties wed, the husband and wife vow in the wedding ceremony, "with all my worldly goods I thee endow," and the joint ownership should be jealously guarded both by written law and by popular sentiments. Consequently, when the husband and wife part, there should be a separation not only of heart and hand, but of goods as well, and unless there is such a separation, there should be no divorce.
21. Section 6(1)(c) of the *Matrimonial Property Act*, 2013 defines matrimonial property to include: any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
22. Under Section 7 of the *Matrimonial Property Act*, it is provided as follows:



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 ...

23. From the evidence available in court, it is clear and indeed not in dispute that the parties were married and only parted ways from the marriage pursuant to Divorce case No. 9 of 2014 leading to a divorce decree on 2nd October 2015. This brings their dispute within the framework of the *Matrimonial Property Act*, 2013.
24. The law on the division of the property acquired during coverture in Kenya appears to be anchored on the proof of a party's claim on the matrimonial property and considers monetary and nonmonetary contributions. A party to a matrimonial dispute cannot base his or her claim on the matrimonial property on 50:50 basis without demonstrating how their respective claims is arrived at. It is not an automatic entitlement conferred by virtue of the marriage.
25. In this case, the plaintiff does not just seek a portion of the alleged matrimonial property. She seeks that the whole of the property be transferred into her name. The objective of this court is to do justice to the parties. As such, the parties must not only state their case but also lead evidence to prove the averments therein. The question of matrimonial property and contribution of the spouses towards acquisition thereof is a matter of fact and which must be proved by evidence to arrive at a fair and equitable division of the acquired matrimonial property guided by the provisions of Article 45(3) of *the Constitution* and the *Matrimonial Property Act*.
26. In the case of Joseph Ombongi Ogentoto Vs Martha Bosibori Ogentoto (2023) eKLR, the Supreme Court stated inter alia as follows:

In the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of Article 45(3) of *the Constitution*. To hold that Article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.
27. On contribution, I think the law recognizes the presence of spouses in marriage and their contribution whether monetary or non-monetary as part and parcel of their role during the subsistence of marriage. I am alive to the fact that each case must be determined based on its own peculiar circumstances and based on the evidence presented. Indeed, the Court of Appeal had this in mind in TKM v SMW [2020] eKLR where it is stated as follows:

“We bear in mind the edict in Muthembwa v. Muthembwa (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.”
28. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the *Matrimonial Property Act*, 2013 in the following terms:

In this Act, unless the context otherwise requires—



“contribution” means monetary and non-monetary contribution 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.

29. It is clear to this court that the *Matrimonial Property Act* of 2013 recognizes and formalizes both the monetary and non-monetary contribution as can be demonstrated from the circumstances of a given set of facts and evidence. In *NWM v KNM* (2014) eKLR, the court stated that the court must give effect to both monetary and non-monetary contributions that both the Applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property. Similarly, the House of Lords in *White vs White* (200) UKHL 54 underscored the greater awareness of the value of non-financial contributions to the welfare of the family.

30. It is my considered view that the non-monetary contribution often-times cannot be quantified. It is thus imperative upon this court to determine the issues in relation to the properties in this suit that were registered in the sole name of the defendant; as far as the doctrines of contribution and presumption of trust are concerned. I am fortified by Section 14 of the *Matrimonial Property Act* as follows: -

Presumptions as to property acquired during marriage where matrimonial property is acquired during marriage -

- a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- b. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

31. Similarly, in the case of *PWK vs JKG* 2015 eKLR the court stated as follows:

“Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in *Gissing vs Gissing* [1970] 2All ER 780 Page 788.”

32. Consequently, on my perusal of the pleadings and evidence filed by the parties, I note that L.R No. Nyeri/Endarasha/3578 is registered in the name of the defendant only. L.R No. Nyeri/Endarasha/1340 on the other hand is not registered in the name of the defendant. The plaintiff did not provide evidence that would connect the defendant to the said property in terms of ownership. It was upon the plaintiff to prove her contribution whether monetary or nonmonetary. However, I do not accede to the position by the defendant that the property was registered in his name but held in trust for his parents and siblings. I say so because it was the common position of the parties that they established there home on the said parcel. No other home was said of the parties.



33. However, as the plaintiff was not a co-registered owner, she had the burden to prove contribution. During coverture, the parties stayed and raised their children on the said property. There was however credible evidence by the defendant and which was largely uncontroverted, that the plaintiff out of her own making or the making of the hostility in their marriage deserted the home and the defendant took physical and actual custody and in fact educated the children including at the time of the plaintiff's testimony in court in March 2018.
34. As to the alleged Charity Medical Clinic and motor vehicle Registration No. KBV 094V, no evidence was produced to show the plaintiff's entitlement in the clinic and it was also not in dispute that the motor vehicle was sold. The defendant testified and produced a sale agreement that he sold the motor vehicle in order to pay school fees for the children. This was not rebutted. Therefore, to the extent and circumstances of this case, the evidence produced by the plaintiff in support of her case was not sufficient to establish contribution.
35. The plaintiff therefore, failed to prove her case to the required standard. The same fails.

Determination

36. In the upshot, I make the following orders: -
- a. Plaintiff's suit lacks merit and is dismissed.
 - b. This being a matrimonial property dispute, each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT NYERION THIS 26TH DAY OF SEPTEMBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of

Plaintiff – present

Mr. Ng'ang'a for the Defendant

Court Assistant – Jedidah

