



**ANK v HKK (Civil Cause 17 of 2024)
[2024] KEHC 16411 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16411 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL CAUSE 17 OF 2024
RM MWONGO, J
DECEMBER 18, 2024**

BETWEEN

ANK APPLICANT

AND

HKK DEFENDANT

JUDGMENT

1. The background to this matter is that the applicant alleges that she and the defendant were married in 2002. That the marriage was entered into under Kikuyu Customs; That they were blessed with two children, namely EKK (born 7.9.11) and MNK (born 19.6.2003).
2. The applicant asserts that during their marriage, the couple purchased several matrimonial properties which were registered in his sole name. she asserts that the properties were held by the defendant on behalf of all the family members.
3. The applicant alleges that her relationship with the defendant became strained and they eventually separated. Accordingly, she filed an Originating Summons dated 28th October, 2014 seeking the following orders:
 1. The Honourable court be pleased to declare that the following property which is registered in the sole names of the Respondent herein is jointly owned by the applicant and the Respondent:
 - a. Land Parcel No. Mwea/Tebere/B/4321
 - b. Plot No. Gikuru Market Mwea Scheme.
 - c. Motorcycle Reg. No KXXX 909s.
 - d. Water Pump
 - e. Carpentry Workshop Consisting of:



Two Band-Saw Machines, One Jig-Saw Machine, One Router Bit Set, Water Pump, Black and Decker Jig Saw Machine.

2. The Honourable Court be pleased to order the division of the said property equally.
 3. The Honourable Court be pleased to restrain the respondent from selling, disposing, encumbering or in any other manner from alienating the above said property.
 4. The Honourable Court be pleased to restrain the Respondent from selling, disposing, encumbering or in any other manner from alienating, the above said property.
 5. That the cost of this application be provided for.
4. The application is supported by the annexed affidavit of ANK in which she made the following major averments:
- i. That I and the respondent got married in the year 2002 and lived together as husband and wife under Kikuyu Customary law.
 - ii. That our marriage was blessed with two issues namely:
 - a. EKK-born on 7/9/2011
 - b. NNK-born on 19/6/2003
 - iii. That during the subsistence of marriage the respondent and I purchased the following Matrimonial Properties and on behalf of all Family members and the respondent was registered as the Proprietor on our behalf.
 - a. Land Parcel No.Mwea/Tebera/B/4321
 - b. Carpentry Workshop consisting of the following machines:
Two Band -Saw Machines for wood working, One Jig-Saw Machine, one router Bitz set, Black and Decker Jig saw Machine, Water pump
 - c. Plot at Gikuru Market Mwea
 - d. Motor Cycle Reg. NO. Kxxx 909 S SKYGO
 - iv. That the above said properties were acquired by both of us during the subsistence of our marriage through our joint efforts and has been extensively developed.
 - v. That my relationship with the Respondent is strained and I am apprehensive that he may dispose off or otherwise alienate the said properties and our Children, and I would be rendered destitute and would suffer irreparable loss.
5. The respondent filed a Replying Affidavit on 4th May, 2015 Replying Affidavit with the following major averments:
1. That there were no Kikuyu marital rituals performed between the applicant and me, Kikuyu customary marriage can only be in place where such rituals as dowry have been paid.
 2. That the Applicant was my longtime girlfriend and when we got the firstborn daughter (NNK) she disappeared and never gave me a chance to see my daughter again until I ran into her again in Mwea Town in 2008 and we had an affair where she got the second born son (EKK) in 2011.



3. That the applicant again left me with the children of tender age and disappeared sometime in mid-December 2013.
 4. That I am married to FWK who was of great help with my children when the applicant abandoned them since December 2013 until May 2014 when she came back.
 5. That I was financed by the Equity Bank to purchase Mwea/Tebere/B/4321.
 6. That when I bought Mwea/Tebere/B/4321 I was not cohabiting with the applicant and she was not involved in the transaction.
 7. That therefore the Applicant did not contribute in any way towards the purchase of the same neither has she helped me to service the loan which she did guarantee as my spouse.
 8. That the Applicant is not interested in any of the prayers sought before this court but Mwea/Tebere/B/4321 for she put a caution immediately before filing this matter as it is evident by her annexure "ANK3"; the of official search. She also refused with the original sale agreement of Mwea/Tebere/B/4321 and when I demanded it back, she falsely pressed criminal assault charges against me which she has since withdrawn
 9. That it is misleading for the applicant to allege that she lives and depends on Mwea/Tebere/B/4321 as the applicant lives in a rented house within Mwea town and the said property had no building and is situated within Kerugoya Central Division. There is no farming practiced by the applicant on the said land.
 10. That I do not own motorcycle registration number Kxxx 909S and the applicant has not annexed any evidence to that effect.
 11. That the Plot No. Gikuru Market Mwea Scheme is not specified and even the alleged agreement is not dated and I am a stranger to the averments.
 12. That I bought the water pump long before I met the applicant.
 13. That the tools as listed are worn out time to time and need replacement constantly. The ones I bought with the receipts annexed to the application are no longer in existence.
6. A hearing was held in which only the applicant and the defendant testified.
 7. Parties filed written submissions as directed by the court.

Applicant's Submissions

8. The applicant submits that the grounds given in the supporting affidavit are genuine, and therefore the prayers sought ought to be granted. Further that the defendant utilizes the claimed properties alone without considering her or her interests. Finally, she submits that the originating summons before court ought to be allowed as prayed.

Respondent's submissions

9. The defendant's submissions were three pronged.

Whether the applicant proved that there was marriage

10. The Applicant testified that she and the defendant got married through a customary marriage in the year 2009. She produced photographs of their dowry "ruracio". The Respondent testified that the two



were just friends and that the photographs produced only showed a family visit when the family drank sodas together. The applicant and the respondent both testified that "ngurario"(slaughtering of the ram) was never performed on that day.

11. Thus, the defendant asserts that a marriage was not conducted, and there is no proof of a valid customary marriage between the Applicant and the Respondent.
12. It was submitted that the applicant did not produce sufficient evidence to prove that she had cohabited with the respondent to prove that there was a presumption of marriage. The Respondent testimony was that the applicant was just her girlfriend and she disappeared when they got their first-born daughter and that they later ran into each other again in the year 2011 when they had another affair and the applicant left again in the year 2013.
13. The defendant pointed out that the applicant never called any witnesses to prove their alleged cohabitation, or that it resulted to a presumption of marriage. In the case of *Eva Naima Kaaka & Another v Tabitha Waithera Mararo (2018) eKIR*; the Court of Appeal held as follows:

“ Acts of general repute, are synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends. By their nature they are a determinant of whether a presumption of marriage can be found to exist.”

It was submitted by the defendant that there was no evidence to demonstrate that there were acts of such nature as to give rise to a presumption of marriage.

Whether the property is jointly owned as matrimonial property

14. Section 6(1) of the *Matrimonial Property Act 2014* defines matrimonial property as -
 - (a) the matrimonial home or homes;
 - (b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
15. Although the applicant alleged that the specified properties were matrimonial homes, goods, and effects were jointly owned, she did not produce any documents showing her contribution towards the said properties. What she produced were receipts and agreements which she exhibited. However, none were in her name or showed her involvement in the transactions.
16. The Respondent testified that when he acquired Land Parcel Number Mwea/Tebere/B/4321, they were not living together with the applicant and therefore she was not involved in the transaction which was done in the year 2014. The Respondent also stated that he was financed by Equity Bank to buy the property. The Applicant produced receipts showing truncations done in the year 2012 and equity bank statement belonging to the Respondent showing transactions done in the year 2013. The Applicant did not produce sufficient evidence to prove that she was in any way involved in the transactions for the purchase of Land Parcel Number Mwea/Tebere/B/4321 which was bought in the year 2014 as per the agreement dated 15th February 2014 produced by the Respondent.
17. The applicant produced the logbook of Motor Cycle Registration Number Kxxx 909S which showed that it is owned by Makindu Motors Limited. The Applicant did not produce any title document



showing the Respondent's ownership of Plot at Gikuru Area. Therefore, it is our submissions that the applicant herein is not entitled to the declaratory orders as sought.

Whether the applicant is entitled to the orders for the division of matrimonial property

18. Section 6(3) of the *Matrimonial Property Act* provides that 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.
19. The Applicant testified that she has not filed any divorce proceedings against the Respondent herein and therefore there was no dissolution of marriage. Therefore, the court has no jurisdiction to deal with division of matrimonial property where the parties have not obtained divorce decree.

Issues for Determination

20. The issues for determination are as follows:
 1. Whether the applicant proved that there was marriage.
 2. Whether the applicant is entitled to the orders for the division of matrimonial property

Analysis and Determination

21. In her Originating Summons dated 28th October, 2014 the applicant seeks orders that:
 - a) That the Honourable Court be pleased to declare the following properties which is registered in the sole names of the Respondent as jointly owned by the applicant and respondent; Land Parcel Number Mwea/Teber/B/4321, Plot Number Gikuru Market Mwea Scheme, Motor Cycle Registration Number KMCO 909S, Water Pump, Carpentry Workshop consisting of; Two Band-Saw Machines, One Jig-saw Machine, One Router Bit Set, Water pump and Black and Decker Jig Saw Machine.
 - b) Further, the applicant has sought orders for the division of the matrimonial properties and restraining orders against the respondent from selling, disposing and encumbering or in any other manner from alienating the above-named properties.
22. The main issue for determination, as already stated, is whether the applicant proved that there was marriage, and whether she is entitled to orders for division of matrimonial property.
23. The applicant deposed that she got married to the respondent in the year 2002 and that they lived together as husband and wife under Kikuyu Customary law. She asserts that their marriage was blessed with two issues namely:
 - a. EKK-born on 7/9/2011
 - b. NNK-born on 19/6/2003The children are not disputed.
24. The Applicant testified that they married through customary marriage in the year 2009. She produced photographs in respect of which she testified that it was when they had their dowry "ruracio". The Respondent testified that they were just friends and that the photographs produced only showed a family visit when the family drank sodas together.



25. The Respondent on his part, testified that the applicant was just her girlfriend; He stated that she disappeared when they got their first-born daughter and that they later ran into each other again in the year 2011. At that point they had another affair and the applicant left again in the year 2013.
26. The Respondent did not deny that he had cohabited with the applicant for a long time. He admitted that they had intended to marry, hence the family visit to the applicant's home. Again, he did not deny paternity of the two issues they bore together.
27. Was this proof of marriage?
29. In the case of MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (27 January 2023) (Judgment) the strict parameters for presumption of marriage were stated as follows:
 - a. The parties must have lived together for a long time.
 - b. The parties must have the legal right or capacity to marry.
 - c. The parties must have intended to marry.
 - d. There must be consent by both parties.
 - e. The parties must have held themselves out to the outside world as being a married couple.
 - f. The onus of proving the presumption was on the party who alleged it.
 - g. The evidence to rebut the presumption had to be strong, distinct, satisfactory, and conclusive.
 - h. The standard of proof was on a balance of probabilities.”
30. In the present case the evidence and intention of parties' tilts towards ascertaining that there is prima facie, presumption of marriage between the applicant and the respondent.

Whether the applicant is entitled to the orders for the division of matrimonial property

31. The applicant seeks orders for the division of the alleged matrimonial properties and restraining orders against the respondent from selling, disposing and encumbering or in any other manner from alienating the above-named properties
32. Section 6(1) of the *Matrimonial Property Act* 2014 defines matrimonial property as -
 - “(a) the matrimonial home or homes;
 - (b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”
33. The applicant deposed that the suit properties were acquired by both of them during the subsistence of their marriage through joint efforts and have been extensively developed. She further asserts that her relationship with the Respondent is strained and she is apprehensive that he may dispose of or otherwise alienate the said properties and rendering her and her children destitute.
34. On his part, the respondent argues that the court has no jurisdiction to deal with division of matrimonial property where the parties have not obtained a divorce decree.



35. Section 7 of the *Matrimonial Property Act* grants the court power to divide property only after the dissolution of marriage. That section provides 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.” (Emphasis added)

36. In the case of *T M W versus F M C* [2018] eKLR, Nyakundi J held:

“In the foregoing and in view circumstances of the case at hand, the evidence on record shows that the marriage between the parties herein is still alive and subsisting. The fact that the petitioner seems to have taken a gap period or what I can refer to as sabbatical leave out of the matrimonial home by itself cannot be equated with divorce or dissolution of the marriage. It is very clear from the provisions of the matrimonial property that matrimonial property can only be distributed where the parties to a marriage have officially divorced.” (Emphasis added)

37. The applicant seeks for injunctive relief to restrain the Respondent from selling, disposing, encumbering or in any other manner from alienating, the above said property pending the dissolution of the marriage. The applicant invokes Section 17 of the *Matrimonial Property Act* which provides as follows:

“Action for declaration of rights to property

- (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
- (2) An application under subsection (1)—
 - (a) shall be made in accordance with such procedure as may be prescribed;
 - (b) may be made as part of a petition in a matrimonial cause; and
 - (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

38. In the case of *KM v RMM* [2021] eKLR Limo J held:

“Section 17(2) (C) of the *Matrimonial Property Act* in my view, unclogs the jurisdiction of this court to deal with interlocutory matters touching on declaratory rights to matrimonial property notwithstanding the fact that the marriage between the parties have not been dissolved. The intention of the Law Makers in my view was deliberate and was aimed at preserving the subject matter of the suit or the interest of an estranged spouse, as she or he awaits the process of dissolution of marriage or divorce given the fact that such processes can at times be messy and time consuming.”

Conclusion and Disposition

39. It is clear, and this court is persuaded that the applicant has made out a prima facie case for a presumption of marriage. In such circumstances the court is called upon to make a declaration that the suit properties be preserved as matrimonial property pending the dissolution of the marriage.



40. It is during the proceedings for dissolution of marriage that concrete proof will be availed of the marriage and also of the circumstances in which the property was obtained and held.
41. Accordingly, the orders that commend themselves to the court are those in prayer 2 as follows: That the respondent be and is hereby restrained from selling, disposing encumbering or in any other manner from alienating the properties the subject of the claim.
42. Orders accordingly.

DATED AT KERUGOYA THIS 18TH DAY OF DECEMBER, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Ann Njeri Applicant in person

Otieno holding brief for Makworo for Respondent

Murage, Court Assistant

