



REPUBLIC OF KENYA



SWG v FMK (Civil Case 004 of 2022) [2023] KEHC 1101 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL CASE 004 OF 2022
CM KARIUKI, J
FEBRUARY 23, 2023**

BETWEEN

SWG APPELLANT

AND

FMK RESPONDENT

JUDGMENT

1. By Originating summons the applicant sought prayers;
 - I. A declaration that LR Nyandarua/Olkalou Central/75XX registered in the name of the Defendant is a matrimonial property jointly owned by the Plaintiff and the Defendant.
 - II. A declaration that the plaintiff is entitled to half share or such larger or smaller share in LR Nyandarua/Olkalou Central/75XX as well be decreed by court.
 - III. A declaration that the defendant holds half share or such larger or smaller share or L.R Nyandarua/Olkalou Central /75XX in trust and for the beneficial interest of the plaintiff.
 - IV. The defendant be ordered to transfer half share or such larger or smaller share of LR Nyandarua/Olkalou Central /75XX as will be decreed by court to the plaintiff.
 - V. In default, the Deputy Registrar be authorized to sign all documents required to effect transfer in place of the Respondent or any other person holding any title or interest on behalf of the Respondent to efect the orders of the court in favour of the plaintiff with regard to transfer of half share or such larger or smaller share of LR Nyandarua/Olkalou Central /75XX that will be decreed to the plaintiff.
 - VI. The costs of the suit be paid by the defendant.
2. On the grounds that:



- I. In 1994, the parties herein got married under the Kikuyu customary law, and thereafter the two established their matrimonial home in Rurii in Nyandarua County in the Respondent's parent's parcel of land.
 - II. During the subsistence of the marriage, the parties were blessed with two children, that is WK and GM.
 - III. In the course of their marriage, the parties acquired through transmission LR Nyandarua/Olkalou Central/75XX, which was registered in the name of the respondent.
3. It was supported by affidavit of Sophia Wambere Gachanja sworn on 30/6/2022.
 4. The same was opposed by the respondent via affidavit sworn on 14/9/2022.
 5. Parties gave brief testimonies and opted to put submissions.
 6. At the time of drafting the judgment only plaintiff had filed submissions.

7.Plaintiff's Submissions

8. It is plaintiff submissions that some issues are not in dispute, that is; The parties were married in 1994 They lived together as wife and husband on the suit land. The parties started living separately from 2002 The Defendant inherited the portion they were using, which portion ended up being suit land. The marriage between the two was dissolved on May 30, 2022.
9. Section 6 of the *Matrimonial Property Act* Provides:
 - “(1) For the purposes of this Act, Matrimonial Property means- the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immoveable property and moveable property jointly owned and acquired during the subsistence of the marriage.
10. It is evident from the parties testimony that their marriage dates back to 1994, and that it was dissolved by court on May 30, 2022. The plaintiff produced a copy of the certificate of official search for the suit land, and it is evident that the Defendant was registered as the proprietor on May 16, 2019.
11. It emerged from the evidence of the parties that the Defendant inherited the suit land from his father. The inheritance was during the subsistence of the marriage between the parties herein, and as such the suit land cannot be excluded from being part of the matrimonial property. See *SN V FM* 2019 eKLR, where the court held; -

“The net effect of the foregoing is that any property acquired during the subsistence of the marriage, including that which is inherited forms parts of matrimonial property. The only time that inherited property is excluded from matrimonial property is if it was acquired before marriage. Property that is inherited during the subsistence of the marriage is not excluded from matrimonial property except if it was acquired before marriage.

I am not alone in this interpretation of the Act. In *ENK vs JNK* [2015] eKLR Musyoka J pronounced himself thus: -

“From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property. Indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property (sic) where the inheritance was before the marriage. In this case, the



asset in question was inherited during matrimony and therefore it forms part of matrimonial property”.

In this regard, I hold that although the suit property was inherited by the defendant from his father, it nevertheless forms part of matrimonial property as it was so inherited in 1995. The marriage between the parties had been solemnized in, or according to the defendant’s admission, he started living with the plaintiff in 1993”.

12. In view of the above holding, the court is urged to find that the suit land was a matrimonial property, despite the fact that it was inherited by the defendant from his father.
13. It was the Plaintiff’s evidence that the suit land comprises of the same portion of land that they were given by the Defendant’s father for their use. The defendant corroborated this evidence, but stated that the portion that they were using was smaller in area than the suit land. It is submitted that the defendant appeared not to be trustworthy when it came to the issue of the size of the land.
14. The defendant was not in a position to state the current acreage of the suit land vis a vis what they were given by his father in 1994. The defendant did not call any of his brothers who inherited their father’s land, to shed light on whether the suit land was bigger than what the parties were given in 1994. It was not possible for the plaintiff to call the Defendant’s brother as a witness or even to get the mutation forms that were used to distribute the Defendant’s father’s land. This is in view of the fact that she was not in good terms with the defendant and that they were living separately, and in addition, her matrimonial home had been demolished. The plaintiff was not among the beneficiaries of the Defendant’s father’s estate, and as such she could not have had access to the information on distribution of the estate. Thus the court is urged to find that the suit land comprise of the portion of land that the parties were given in 1994.
15. The plaintiff’s testimony was that she had made improvements on the suit land, and in particular, planted trees. It was equally the defendant’s evidence that they used to farm on the suit land and they made harvest that would benefit them and their family. It is submitted that the plaintiff thus made contribution to the suit land, in terms with the provisions of section 2 of the Matrimonial Property Act.
16. Section 2 of the Matrimonial Property Act defines contribution to include domestic work and management of the matrimonial home; child care, companionship, management of family business or property; and farm work
17. It is submitted that the plaintiff performed all the above stated contributions. Thus, the court is urged to hold that the plaintiff contributed to the suit land.
18. In Civil Appeal No 142 of 2018 in CWM VS JPM [2017] eKLR the court of appeal held as follows:

“... parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of respondent at the time of such overture. In our view, that contribution, be it domestic work and management of the matrimonial home, child care companionship falls within the definition of contribution under the act”.

Issues, Analysis And Determination

20. After going through the evidence on record and submissions filed, I find the issues are;
 - i. Whether Nyandarua LR Nyandarua /Olkalou Central/75XX is a matrimonial property



- ii. Whether the plaintiff made contribution to LR Nyandarua/Olkalou Central/75XX.
 - iii. Is the Plaintiff entitled to claim LR Nyandarua/Olkalou Central/75XX
 - iv. Who should bear the costs of the suit.
21. It was the Plaintiff's evidence that the suit land comprises of the same portion of land that they were given by the Defendant's father for their use. The defendant corroborated this evidence, but stated that the portion that they were using was smaller in area than the suit land. The defendant appeared not to be trustworthy when it came to the issue of the size of the land.
 22. The defendant was not in a position to state the current acreage of the suit land vis a vis what they were given by his father in 1994. The defendant did not call any of his brothers who inherited their father's land, to shed light on whether the suit land was bigger than what the parties were given in 1994.
 23. It was not possible for the plaintiff to call the Defendant's brother as a witness or even to get the mutation forms that were used to distribute the Defendant's father's land. This is in view of the fact that she was not in good terms with the defendant and that they were living separately, and in addition, her matrimonial home had been demolished.
 24. The plaintiff was not among the beneficiaries of the Defendant's father's estate, and as such she could not have had access to the information on distribution of the estate. Thus, the court is prepared to find that the suit land comprises of the portion of land that the parties were given in 1994.
 25. The plaintiff's testimony was that she had made improvements on the suit land, and in particular, planted of trees. It was equally the defendant's evidence that they used to farm on the suit land and they made harvest that would benefit them and their family. The plaintiff thus made contribution to the suit land, in terms with the provisions of section 2 of the Matrimonial Property Act. Section 2 of the Matrimonial Property Act defines contribution to include;domestic work and management of the matrimonial home;child care,companionship,management of family business or property; andfarm work
 26. In affirming the case of case of appeal of UMM vs IMM [2014] e KLR he discussed the right to equality as provided for under Article 45(3) and whether it decrees an automatic 50:50 sharing. The Supreme court upheld the holding thus:

“I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, Petition No 11 of 2020 -51-the bigger the entitlement. Where there is evidence that anon-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by Article 45(3).”

- (99) We find the above opinions and findings persuasive and it is our finding that the stated equality under Article 45(3) means that the courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done



by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed'

27. The question that arises is whether the suit property where they resided was matrimonial home. Section 6(1), (3) and (4) of the *Matrimonial Property Act*, 2013 provides that: -Meaning of matrimonial property for the purposes of this Act, matrimonial property means—the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage
28. Musyoka J in *POM vs MNK*(2017) eKLR stated that:

“This is a suit for division of matrimonial property...The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made...”
29. Similarly, in the case of *TMW vs FMC* (2018) eKLR, Nyakundi J opined that:

“...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”
30. Section 5 of the *Matrimonial Property Act* provides: -Rights and liabilities of a person Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property. While interpreting Section 5 (*supra*) in *ENK vs JNK* [2015] eKLR, Musyoka J. pronounced himself thus: -

“From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property. Indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property (sic) where the inheritance was before the marriage...”
31. Mbeya J on his part in *SN vs FM* [2019] eKLR held that:-

“The net effect of the foregoing is that any property acquired during the subsistence of the marriage, including that which is inherited forms part of matrimonial property. The only time that inherited property is excluded from matrimonial property is if it was acquired before marriage. Property that is inherited during the subsistence of the marriage is not excluded from matrimonial property except if it was acquired before marriage.”
32. However, Section 9 of the said *Act* provides that: Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse contributes towards the improvement of the property, the spouse who contributes acquires a beneficial interest in the property equal to the contribution made.
33. Therefore, even where the inherited property was acquired before marriage and therefore does not qualify as matrimonial property, if it is shown that the other spouse made contribution towards the improvement of the same property, that spouse acquires a beneficial interest in the property equal to the contribution made.



- 34. It was proved that,The parties were married in 1994They lived together as wife and husband on the suit land.The parties started living separately from 2002The Defendant inherited the portion they were using, which portion ended up being suit land.The marriage between the two was dissolved on 30th May 2022.
- 35. In a marriage of 28 years, the parties lived together for 8 years thus her contribution in that span for living together amounts to approximately 20%, Thus the court finds that in all fairness she should get a share to that extent. Thus, the court makes the orders that;
 - i. The plaintiff will get a share of the suit property to the extent of 20% of the same being her direct and indirect contribution during the subsistence of the marriage.
 - ii. The defendant is hereby ordered to transfer 20% share of LR Nyandarua/Olkalou Central /75XX As Decreed By Court To The Plaintiff.
 - iii. In Default, The Deputy Registrar Be And Is Hereby Authorized to sign all documents required to effect transfer in place of the respondent or any other person holding any title or interest on behalf of the respondent to effect the orders of the court in favour of the plaintiff with regard to Transfer 20% Share Of LR Nyandarua/Ol Kalou Central/75XX That Court Has Decreed To The Plaintiff.
 - iv. Parties To Bear their Costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 23RD DAY OF FEBRUARY 2023.

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CHARLES KARIUKI
JUDGE

