



REPUBLIC OF KENYA



**KENYA LAW**  
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**BMI v JIM (Civil Suit E011 of 2011) [2023] KEHC 17972 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17972 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL SUIT E011 OF 2011**

**RK LIMO, J**

**MAY 24, 2023**

**BETWEEN**

**BMI ..... PLAINTIFF**

**AND**

**JIM ..... DEFENDANT**

**JUDGMENT**

1. This is a Matrimonial Cause matter involving BMI and JIM who got married under Kamba Customary Law in 1990 and got blessed with 3 issues of marriage.

Their marriage however hit the rocks and got dissolved on 29<sup>th</sup> November, 2021 vide Mwingi PMC Divorce Cause No. E004 OF 2021.

2. By a Plaint dated 9<sup>th</sup> December, 2021 before this court the plaintiff seeks the following reliefs.
  - i. Subdivision of matrimonial properties.
  - ii. General and Special damages for the period they were together.
  - iii. Costs and interests of the suit.
  - iv. Any other relief.

3. The Plaintiff Case

In her witness statement dated 21<sup>st</sup> October 2022, the Plaintiff averred that she got married to the Defendant in 1990 and that the two had been living together as husband and wife until 2017 when they began experiencing difficulties. That the Defendant thereafter abandoned his family including his three daughters. That the Plaintiff took up the role of raising their daughters alone. She stated that the two had bought properties together in the subsistence of their marriage which included;

- a. Plot No. Kalwa 1164



- b. Plot No. Kalwa 1199
  - c. Plot No. 1213
  - d. Unsurveyed land at Matamisiy River
  - e. A motor bike
4. She also stated that the two bought livestock together which the Defendant sold as well as plot no. 1164-9a. She also stated that the Defendant kicked her out of their matrimonial home.
  5. In her further pleadings dated 10<sup>th</sup> January 2022 and filed on 12<sup>th</sup> January, 2022, the Plaintiff stated that she did farming with the Defendant from which they sold farm produce and used the proceeds to purchase the parcels of land. She also denied the Defendant's assertion that her cattle died from drought related causes stating that their matrimonial home was situated in an area that had enough pasture.
  6. In her Oral testimony in Court, the Plaintiff testified that the Defendant was her former husband whom she divorced vide Divorce Cause No. E004/2021 at Mwingi PM's Court. She tendered the Divorce Judgement as P Ex 1.
  7. She claimed that after she got married she made contribution towards development of Plot No. 1199 at Kalwa and that she lived in the matrimonial home situated there with her family until the Defendant kicked her out and married another wife. She claims that she buried her deceased children in that plot and hence the attachment. She told this Court that the Defendant can put up another home with his other wife in a separate property and accused him of taking away his six cows, 3 donkeys and goats.
  8. PW2 Mary Ngali adopted her witness statement dated 21/10/22 as her evidence in chief and further stated that the Plaintiff's and Defendant were her parents. She told the court that the Defendant had threatened to kill the Plaintiff with a panga. She also stated that both her parent contributed towards her secondary school education.
  9. Japheth Kilonzo (PW3) told the court that the Plaintiff and the Defendant were his in-laws. He stated that an elders meeting had been held in relation to the dispute between the parties and the Defendant agreed to give the Plaintiff a parcel of land. He stated that the Defendant chased the Plaintiff away and married another wife who he lives with at the party's matrimonial home. He also stated that the Defendant took away the Plaintiff's cows.
  10. The Defendants Case  

The Defendant filed a defense dated 5<sup>th</sup> January 2022 in which he denied allegations raised by the Plaintiff against him. He also averred that the Plaintiff had 6 cows and 3 donkeys which perished due to drought in 2021. He acknowledged owning land parcels No. 1199, 1213 and 1207 which he claimed to have bought before marrying the Plaintiff. He also denied owning the alleged parcel near Mitamisiy River.
  11. In his oral testimony, the Defendant adopted his witness statement dated 5<sup>th</sup> January 2021 and proceeded to tell the court that he gave the Plaintiff 4-6 acres of land when the two separated. That he remarried and was currently living with his new wife in the party's former matrimonial home. He stated that he sold the parcel at Kalwa but stated that he was ready to give his wife one of the properties listed by the Plaintiff. The Defendant denied threatening the Plaintiff, he also acknowledged the Plaintiff's contribution towards their matrimonial home. He denied the allegation that their children were buried on the same parcel where the matrimonial home was. He also stated that the two had 18 cows but he



- sold some and put the money towards paying school fees for the children. That he had 2 donkeys and he was willing to give her one. He also stated that he was ready to build a home for her.
12. This Court has considered the Plaintiff's Case and the response made by the defendant.
  13. The Plaintiff's case is premised on division of what she considers to be matrimonial property. Her case is that she was married to the Respondent and that the two acquired property together but their marriage broke down and the two divorced in 2021.
  14. The Respondent does not dispute the Plaintiff's claim on the Matrimonial Property. He stated that he is willing to put up a new home for the Plaintiff albeit in a separate property.
  15. Division of matrimonial property is provided for under section 7 of the *Matrimonial Property Act* which provides;

“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.”
  16. The *Matrimonial Property Act* under Section 6 further provides that Matrimonial Property includes;
    - a. The matrimonial home or homes
    - b. household goods and effects in the matrimonial home or houses or
    - c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage
  17. Under Section 2 of the Act, ‘Matrimonial home’ has been defined as: -

“any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”
  18. A property can be termed as Matrimonial Property if it is shown that it was acquired/or developed during the subsistence of marriage between the parties.
  19. In the case of *ENN vs. SNK* [2021] eKLR the Court held that a matter regarding division of matrimonial property ought/shall have the following facets proved by either party;
    - i. The fact of a valid, legal, regular marriage in law
    - ii. Dissolution of such marriage by/through an order of the Court
    - iii. That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage
    - iv. Contribution by each party to the acquisition/development
  20. A similar view was adopted in *P.O.M vs. M.N.K* (2017) eKLR the where the court held that;

“This is a suit for division of matrimonial property. The legal regime governing such endeavor is the *Matrimonial Property Act*, Act No. 49 of 2013. The relevant provisions are to be found in Part III thereof. According to those provisions, in particular section 7, such property is to be divided upon divorce or dissolution of the marriage. 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. A party, who



moves the court for orders relating to division of matrimonial property, or declarations thereon, must strive to bring his case within the prerequisites stated above.”

21. The Law contemplates under Section 2 of the *Matrimonial Property Act* that contribution means both monetary and non-monetary contribution. Monetary contribution includes inter-alia actual money contributed to purchase the property or building materials while non-monetary includes the following: -
  - i. Domestic Work and Management of the matrimonial home.
  - ii. Child Care
  - iii. Companionship
  - iv. Management of family business
  - v. Farm Work.
22. The first two facets of the requirements are not in contention, both parties agree that they got married under Kamba customary law in 1990 and they were blessed with 3 issues. Their marriage was then dissolved on 29<sup>th</sup> November 2021 vide Mwingi PMC DC No. E004 of 2021.
23. The Court of Appeal in *TKM v SMW* [2020] eKLR 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.”
24. The contribution of each spouse in respect to the acquisition and/or development must be scrutinized objectively with a view to ensuring that there is fairness in the division of matrimonial property. It is not automatic that because 2 people are married the matrimonial property will be divided at the ratio 50:50 upon divorce. Each party must reap where he or she has sown.
25. In this matter, there is a dispute in relation to what the properties constitute matrimonial properties and the contribution of each party to their acquisition. In the Plaintiff’s view, she is entitled to a share in the following properties;
  - a. Plot No. Kalwa 1164
  - b. Plot No. Kalwa 1199
  - c. Plot No. 1213
  - d. Plot number Plot no. 1207
  - e. Un-Surveyed land at Matamisyi River
  - f. A motor bike
26. This Court has considered the Plaintiff Case in the light of the above decisions. The Plaintiff primarily wants to be allocated Parcel No. Kalwa 1199 which is where their Matrimonial home was situated prior to the separation and the attendant divorce. She had listed other properties which she claimed she contributed towards their purchase but her claim was mainly on parcel No. 1199 which she passionately claimed she contributed in putting up a house and even buried her deceased children there.



27. The Defendant on the other hand claimed that he acquired the said property alone but conceded that the Plaintiff was a hardworking woman and contributed towards construction of the matrimonial home during the 30 years they were married. He however, was reluctant to have her take the home insisting that he was ready to put up another home for her. He however, could not explain what was hard in putting up another matrimonial house for the other wife. In my view, the practice by men chasing away their wives from their matrimonial home they both put up together with a view to bringing in another wife is simply not fair or just. The Defendant had the means and capacity to marry another wife because Kamba customary law allows marriage of more than one wife but, he also had capacity or ought to have capacity to put up another house or home for the 2<sup>nd</sup> wife. This Court finds that the Plaintiff has established her entitlement on Parcel no. 1199 together with the matrimonial home thereon to the required standard in law. She has proved her claim against the Defendant.
28. In the premises, this court finds that in the interest of justice, the Plaintiff shall have that property described as Kalwa 1199 together with the matrimonial home. The Defendant can have the other properties listed under paragraph 7 of the plaint and is at liberty to put up a new home for his second wife in any of the listed properties in Paragraph 7 other than Parcel 1199. I will not make any order as to costs so each party to bear own costs. I will also give the Defendant 45 days to make arrangements to move his other family to pave way for the Plaintiff to take occupation of Parcel 1199 and the matrimonial home. The Plaintiff is given liberty to apply for further Orders to execute this judgement.

**Dated, Signed and Delivered at Kitui this 24<sup>rd</sup> day of May, 2023.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

