



REPUBLIC OF KENYA



**KENYA LAW**  
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**IKH & 2 others (Minors Suing through their Next of friend and Mother ASB) v HKH  
(Family Appeal 16'B' of 2018) [2022] KEHC 10720 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10720 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL 16'B' OF 2018**

**JN ONYIEGO, J  
MAY 27, 2022**

**BETWEEN**

**IKH ..... 1<sup>ST</sup> APPELLANT**

**EKH ..... 2<sup>ND</sup> APPELLANT**

**RKH ..... 3<sup>RD</sup> APPELLANT**

**MINORS SUING THROUGH THEIR NEXT OF FRIEND AND MOTHER ASB**

**AND**

**HKH ..... RESPONDENT**

*(Being an appeal from the judgment of the Children court at Tononoka ( Hon V Yator ) dated and delivered on the 28th February, 2018 in Mombasa Civil Children's cause number 3 of 2017)*

**JUDGMENT**

1. IKH, EKH and RKH moved to Tononoka children's court through their mother ASB as their next friend against their father Hussein Kassim Hussein (thereafter the respondent) seeking;
  - a. A declaratory order to be issued to the effect that the defendant (respondent) should not interfere at all with the minors together with their mother ASB occupation of the matrimonial house standing on plot No xxxx Oleander Drive near Nyali primary school Mombasa.
  - b. a permanent injunction be issued restricting the defendant or his agents from interfering with the plaintiffs and the plaintiff's mother from peaceful occupation on the said house/property.
  - c. An order be made to the effect that the plaintiffs be awarded monthly maintenance in the sum of Ksh 200,000 to be paid by the defendant to the plaintiff on or before the 5<sup>th</sup> of each month with effect from the 5<sup>th</sup> January, 2017 now passed.



- d. Costs of the suit.
2. According to the plaint, the plaintiff's mother (hereinafter the appellant) and the respondent contracted their marriage under Islamic law and subsequently got blessed with 3 children now suing their father through their mother.
  3. They stated that they were staying at their matrimonial home Plot No. xxxx which belongs to their father (respondent). They further averred that their father was all along fully responsible in paying their school fees and providing for other expenses inter alia; food kshs 100,000, medical kshs 20,000, employees kshs15,000, electricity kshs 20,000 security kshs15,000, fuel kshs10,000 and misc. kshs 20,000 all totalling to Ksh 200,000 per month.
  4. They went further to state that on August, 2016, the respondent withdrew from; supporting them; paying for security and electricity and even went further to threaten them with eviction from the said matrimonial home. That instead of the respondent giving their mother a lump-sum of Ksh200, 000 per month to plan for their expenditure, he had resorted to paying for those requirements in bits. That the respondent in company of his first wife and her sisters had attempted to evict them from the matrimonial home.
  5. In his defence filed on February 23, 2017, the respondent denied allegations of neglecting his family. He asserted that he was a responsible father and that the amount of Ksh 200,000 being demanded was exaggerated as his salary was amounting to kshs 150,000 per month hence cannot afford the amount claimed. He however stated he was ready to look after his children.
  6. During the hearing, ASB (Pw1) told the court that she got married to the respondent on 8<sup>th</sup> March, 1995 and were blessed with three children. That when they married the defendant had nothing. That they bought their home in Nyali which home the respondent is now threatening to evict them from after having moved to his first wife's residence.
  7. She stated that the said home was registered in the respondent's joint name with his brother. That the respondent used to give her kshs100,000 per month to buy food, salary of kshs16,000 for two maids, paid for the watchman, petrol full tank after every two weeks, kshs5000 per week for vegetables, kshs10,000 for other food stuffs and kshs10,000 for her medical expenses.
  8. It was her evidence that since the respondent left their matrimonial home, he has been giving her kshs40,000 per month for the upkeep of children. She claimed that the respondent was a person of means who owns a company and drives a Land Crusher KBR xxxx worth 7-8 million and Nissan patrol worth 15 million. That the respondent has 4 children with the first wife hence prayed for custody of the children.
  9. On cross examination, she admitted that she also had 3 children from her first marriage. She confirmed that their children are I are aged 19 years and now in Canada, E 17 years and R 13 years. She further confirmed that it was the respondent who was paying school fees for the children including the first son who is in Canada. That everything the defendant has is jointly owned with his brother.
  10. Pw2 AHM a brother in law to the appellant and a brother to the respondent merely confirmed the existence of a marriage relationship between the appellant and respondent and their differences leading to their separation.
  11. On is part, the respondent (Dw1) stated that he was a Director working with [particulars withheld] earning a gross salary of Ksh 200,000 per month. That sometime in 2016, he had differences with the appellant thus forcing him to move out of their matrimonial home. He claimed that he has been paying school fees for the children. He denied that he used to give the appellant Ksh 200,000 per month.



12. He told the court that he used to pay Ksh 40,000 for food, pay for electricity; pay 2000 for fuel per week. He stated that he wanted to evict the appellant from the house so as to let the house which is jointly owned with his brother. He however offered to rent a house of equal status for the appellant and children. On cross examination, he stated that on average he used to give his wife kshs100,000 per month.
13. On re-examination, he stated that the children were schooling at [particulars] where he was paying between kshs83,000 -140 per term while the children of the first wife go to Busy Bee where he pays kshs40,00 per term.
14. After considering the evidence of both parties and oral submissions by both counsel, Hon Yator delivered her judgment on February 28, 2018 thus ordering;
  - a. Should the defendant wish that the plaintiff and the children move from the house they are currently in then he should rent a house of the same standard and size within the Nyali and pay for the rent and any service charge as maybe required.
  - b. Prayers (a) and (b) of the plaintiff fail for lack of jurisdiction of the children's court to deal with matrimonial property.
  - c. The defendant to continue catering for the education needs of the three children as he has always been doing.
  - d. The defendant to provide a monthly financial contribution of ksh 60,000 for the upkeep of the children payable to the plaintiff on or before the 5<sup>th</sup> of every month.
  - e. The plaintiff to cater for the clothing needs of the children.
  - f. The plaintiff to cater for any additional expenses not met by the Ksh 60,000 ordered by the court against the defendant.
  - g. This being a matter brought on behalf of children each party shall bear his/her own costs.
  - h. Either party shall be at liberty to apply.
15. Aggrieved by the said decision, the appellant (plaintiff) moved to this court vide a memorandum of appeal dated March 26, 2018 and filed on March 27, 2018 citing 9 ground of appeal as follows;
  - a. That the trial court erred in law and in fact in granting the respondent the liberty of substituting the appellants' rights to a secure home of their house standing on Plot No. xxxx Oleander Driver near Nyali primary school with one of a rental basis while at the same time the respondent is given the liberty of retaining the entire purchase price of what would be realised upon the sale of the said property known as Plot No xxxx Oleander drive near Nyali primary school.
  - b. That the trial court erred in-law in that it failed to appreciate the fact that notwithstanding the disagreement between the respondent and ASB, it was inconceivable, by that fact alone, to lower and/or adversely compromise on the well-being of the appellants as was done on the judgment of the trial court.
  - c. That the trial court erred in that it failed to appreciate the fundamental principle of law that the wellbeing of minors is dearly and jealously guarded by court of law as indeed minors are wards of the court as the judgment delivered by the trial court completely failed to take due



regard of the wellbeing of appellant vis avis their mother Amina Saleh Buran and their father the respondent herein.

- d. That the trial court erred in that it manifestly failed to appreciate that taking into account that the respondent is a polygamous man, the apparent disparity between the status of the two houses (the house herein being rendered tenants) while the other house enjoys a secured right of occupying their own house would lead to bitterness and anger as favouritism and bias evokes such trait which would be the case herein.
  - e. That the trial court erred in that it failed to take account of the proven character of the respondent who has in the past consistently abdicated on his parental duties as he did to the appellants and who in all the circumstances, would be expected to in the future abdicate on this duty of paying rent which thereby means that it was unreasonable to evict the appellants from their current secure residence to one which would require periodic payments of rent by the respondent which is not capable of any guarantee.
  - f. That the trial court erred in that in all the circumstances it was unfair to allow maintenance of Ksh 60,000 to be paid to the appellants which figure is, in all the circumstances too low and therefore capable of meeting the appellants' maintenance so as to interfere with the lifestyle that the appellants have been enjoying in the past.
  - g. That the trial court erred in law and in fact in holding that it lacked jurisdiction to deal with prayers A and B contained in the plaint filed on January 25, 2017 but instead gave an order that if the defendant would so wish, he could evict the plaintiff from their matrimonial house and rent a house for the plaintiffs.
  - h. That the trial court erred in law and in fact in holding that each party was to bear its own costs when in all circumstances the respondent would have been ordered to pay such costs.
    - i. That the trial court erred in that the judgment is totally against the weight of law and evidence as to represent an erroneous judgment of the court.
16. Before hearing could proceed, parties agreed to attempt an outside court settlement. The court on February 18, 2019 referred the matter to the DR. to facilitate mediation process. On April 23, 2019, parties filed a partial mediation settlement agreement to the effect that;
- a. The father who is the respondent to provide for education needs of the children who are the appellants herein
  - b. The father/respondent to pay monthly maintenance of Ksh 70,000 payable on or before the 10<sup>th</sup> of each month.
  - c. Each party to be at liberty to apply as circumstances change.
  - d. On the issue of shelter /house accommodation the proposal tabled by the respondent to the children to provide alternative accommodation to them in a house of similar standards as the one the children are presently residing in Nyali, the same to be considered by the said children and parties to report back to the mediation within 7 days and the matter to be mentioned for further mediation on 6<sup>th</sup> May,2019 at 3.00 o'clock.
    1. The partial agreement was adopted as an order of the court on 24<sup>th</sup> April, 2019. Parties then sought to proceed by way of viva voce evidence for the court to resolve the disagreed issue. However, on 15<sup>th</sup> April, 2021 parties changed their position and



decided to argue the appeal only on the aspect of accommodation based on resulting trust. They then agreed to file submissions to dispose the appeal.

### **Appellant's submissions.**

18. The appellant through the firm of Gikandi and Co. advocates filed her submissions on May 25, 2021. It was Mr Gikandi's submission that the court erred in law by holding that it had no jurisdiction to deal with issues of matrimonial property. It was counsel's further submission that it was in the best interest of the children that the issue of the matrimonial house come to focus hence Children cannot be exposed to eviction.
19. Mr Gikandi asserted that although the house was jointly owned by the respondent and his brother, it was agreed by the two that each would accommodate his family in their homes hence the reason why the brother has not issued any eviction notice. Counsel contended if the respondent was to subject his family to a tenancy arrangement, he will default in paying rent for them immediately. That the court ought to have protected children who are its wards. Counsel contended that there was a constructive trust that the respondent was holding in trust the property for is family.
20. In support of the proposition that the property was held by the respondent in trust for the appellant, the court was referred to the case of *NWK vs JKM* and another (20213) e KLR. Counsel further referred to article 53 (2) of *the Constitution*, Article 3 (1) of the UN convention on the rights of a child and the case of *MA vs R O O* HCC C. Appeal 21/2009 to advance the proposition that in every decision made concerning a child the best interests of a child must be taken into account.

### **Respondent's submissions.**

21. Through the firm of Khatib and Co. advocates, the respondent filed his submissions on June 15, 2021. Learned counsel submitted that after mediation proceedings, the only issue that remained for determination was that of shelter or accommodation. Mr Khatib submitted that the property in dispute being a joint property between the respondent and his brother cannot be subjected to the element of constructive trust. Counsel submitted that issues of ownership of property cannot be raised in a children court. In support of that position, the court was referred to the case of *MJK vs FML* (2019) e KLR.
22. Basically, counsel supported the trial court's position that it had no jurisdiction to determine ownership of matrimonial property.

### **Determination**

23. This is a first appeal and as the first appellate court, it is duty bound to reconsider, re- evaluate and re- examine the evidence presented before the trial court and make an independent conclusion or determination with a caution that it did not have the advantage of listening to or assessing the demeanour of witnesses. See *Selle and another Vs Associated boat company limited and others* ( 1968) E.A 123wehre the court held that;

“...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 re-trial and the principles upon which this court acts in such an appeal are settled. Briefly put they are that this court must re-consider the evidence, re-evaluate it 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”.



24. The appellant adduced 9 grounds of appeal. The nine were later reduced to four during mediation sanctioned by this court with parties' concurrence. The rest of the issues were mediated upon and a settlement agreement made and subsequently adopted as the order of the court. Parties agreed to proceed with the only disputed issue of shelter/ accommodation for the children.
25. There is no dispute that the appellant who is the mother to the children herein and the respondent got married sometime 1995. Apparently, the respondent has a first wife with four children while the appellant had just walked out of her previous marriage with three children whom she moved out with.
26. Due to irreconcilable differences between the appellant and respondent, the respondent moved out of their matrimonial home located on Plot No xxxx jointly owned by himself and his brother a business partner.
27. The appellant told the court that the respondent has threatened to evict her and the children from the matrimonial home thus exposing them to ridicule and insecurity. She told the court that the respondent's partner had not demanded for vacant possession of the premises as claimed and that it was not in the best interests of the family to move the children out of their matrimonial home.
28. In his submission, Mr Gikandi was of the view that getting the respondents an alternative accommodation is not a viable solution and that it will not serve the best interest of the children.
29. On the other hand, Mr Gikandi maintained that applying the principle of constructive or resulting trust the respondent is deemed to be owning the property in trust for his family.
30. The appellant herein has brought this suit on behalf of her children. She is claiming that the court erred by stating that it had no jurisdiction to hear a dispute over matrimonial property yet it had. A perusal of the prayers in the plaint clearly show that the appellant and her children wanted an order restraining the respondent from interfering with their quiet occupation of the subject premises. From Gikandi's submission and reference of the case of *NWX Vs JKM* (supra), he is purely arguing a case of matrimonial property dispute touching on ownership of matrimonial property and parties' ownership rights thereof.
31. Indeed, from the tone of the pleadings, the appellant (mother to the children) is mixing children issues with matrimonial property issues. As the learned magistrate correctly stated, the issue of who owns the matrimonial property and therefore who should occupy the same is a matter to be resolved under the provisions of *matrimonial property Act*. It does not matter whether the appellant and the respondent have finally divorced or not. Any declaratory orders over ownership of the subject property can aptly be dealt with under section 17 of the *Matrimonial Property Act* before divorce.
32. In the case of *A K K vs P K W* civil appeal No 61/19 Nairobi the court had this to say;

“A plain reading of section 17 enables a spouse subsistence of a marriage notwithstanding to make an application for declaratory orders. It further states that that application maybe made as part of a petition in matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the high court under section 17 of the Act”



33. In *PWN vs ZWN* (2013) e KLR Waki J A had this to say;
- “an inquiry may thus be made under section 17 and declarations maybe issued, the subsistence of a marriage notwithstanding. As stated by lord Morris of Bartly -*Guest in Patit vs Patit* (1970) AC 777;
- “One of the main purposes of that Act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this “and not to whom shall be such”.
34. In view of the wisdom derived from the above authorities, it’s clear that declaration over property rights on any matrimonial property is not for the children court to determine. In fact, the children on whose behalf the suit was filed and appealed cannot claim beneficial interest over the property of a parent while the parent is alive unless it borders on ancestral land which is not the case here for constructive or customary law trust to apply.
35. In the case of *LNN Vs PKN* (2020) e KLR Dulu J held that ;
- “It follows from the above statutory provision that as long as parents are alive, children cannot in their own name get a share of nor be provided for from the matrimonial property as they are not spouses, and can only petition in court to get a parent’s share of property when the parent is deceased”
36. It is therefore clear that the children herein cannot demand that they have a stake in their father’s or parent’s property. All that the law expects the respondent to do is to meet his obligation as a parent under section 23 which includes; the right to maintain the children and in particular provide adequate diet, shelter, clothing, medical care , education and guidance among others.
37. Under section 23, one of the key responsibilities of a parent against a child is to provide shelter. The respondent owns the home in question jointly with his brother who has indicated that the home be let out or sold so that they can share the benefits.
38. The respondent is ready to pay rent for an equally good house that meets the same standard within the same environment in Nyalı. He is ready to pay rent and meet necessary attendant expenses. From the evidence, it would appear that only one child is below 18 years. If the situation demands that their parent’s property which is co-owned with a 3<sup>rd</sup> party has to be sold to enable the other partner realize his benefits, he cannot be held at ransom at the convenience of his co-partner’s family.
39. However, there is the question whether the respondent’s reason given for moving out the children from the matrimonial home is realistic and genuine. There was no proof tendered to show that the respondent’s partner wants the property sold or rented out. Why this particular house and not the one occupied by the first wife under similar ownership arrangement. Whereas the respondent has a right to dispose his property, the same must take into account the interest of the children in getting reasonable accommodation which he is ready to provide.
40. To balance both interests and to avoid inconveniencing children from their routine and accustomed environment, it will be fair for the respondent to accommodate them up to the time the property is sold with proof of transfer or upon the subjects’ attainment of the age of majority. In case of need by the partner to have the property let out, they can agree for the respondent who is ready to rent a house



of similar status to pay him his half share of rent to enable the children attain the age of majority by which time they will no longer be children dependent on the respondent hence the respondent shall be at liberty to relocate them if he wished as he will be under no obligation to provide shelter.

41. I do not find any prejudice in the respondent paying his partner his half rental entitlement to enable the children continue staying in the same premises until they attain age of majority. In case the house is to be sold, the respondent can get them an alternative but equally good house equal to the status currently being enjoyed.
42. For the above reasons stated, I is my finding that the appeal herein partially succeeds in terms of the partial mediation agreement adopted as an order of the court and partially fails to the extent that the children court had no jurisdiction to entertain issues of ownership and property rights over matrimonial property.
43. Accordingly, order Number (d) of the judgment is substituted with the order that the father/ respondent to pay monthly maintenance of Ksh 70,000 payable on or before the 10<sup>th</sup> of each month in compliance with the mediation settlement agreement.
44. For avoidance of doubt, the rest of the orders of the trial court shall remain in force save for order Number A which is substituted with the order that;
  - i. The children shall remain in their current matrimonial property until the house is sold upon proof of transfer documents by the respondent or upon attainment of the age of majority by the youngest child.
  - ii. In the event of sale of the house, the respondent to rent out a house of the same standard and size within Nyali and pay for the rent and any service charge as may be required.
  - iii. In the event that the house is to be rented out so as to benefit the partner in ownership, then the respondent shall reimburse the partner half of the payable rent as the partner's entitlement to enable the children continue staying in the matrimonial home until the youngest child attains age of majority.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27<sup>TH</sup> DAY OF MAY, 2022.**

.....

**J. N. ONYIEGO**

**JUDGE**

