



REPUBLIC OF KENYA



**MKM v SKG (Matrimonial Cause E13 of 2021)
[2022] KEHC 3200 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MATRIMONIAL CAUSE E13 OF 2021
RB NGETICH, J
JUNE 30, 2022**

BETWEEN

MKM PLAINTIFF

AND

SKG DEFENDANT

RULING

1. The Plaintiff herein filed Originating Summons dated July 7, 2021 seeking to be allocated 50% of the matrimonial property acquired during the existence of the marriage. She identified the following as the matrimonial property;
 - (a) Ruiru/Ruiru East Block XXXX
 - (b) Ruiru /Ruiru East Block XXXX
 - (c) Ruiru/Ruiru East block XXXX
 - (d) Githurai 45 plot-Plot No. XXXX (upper floor)
2. In response, the defendant filed a replying affidavit sworn on September 23, 2021 by SK, together with a Notice of Preliminary objection dated 22nd September, 2021. The Respondent averred that the marriage between the parties herein was dissolved. The property listed as matrimonial property is inherited property; the defendant is holding the property in trust of the beneficiaries of the estate of the late LWG. He avers that ancestral property cannot be subject to a matrimonial cause under the [Matrimonial Property Act](#) 2013.
3. The Preliminary objection is based on the following grounds:
 - (a) The issue of marriage between the Plaintiff and the Defendant is Res- judicata.
 - (b) The listed properties are not the property of either the Plaintiff or the Defendant.



- (c) That there is no demonstrated dispute over equitable distribution of any other matrimonial property for the honourable court to determine.
4. In response to the Preliminary Objection, the Plaintiff filed a replying affidavit sworn on November 19, 2021 in which she averred that the properties are matrimonial property acquired during the subsistence of the marriage in the year 2016.
5. She stated that together with the children they live in property No. Ruiru/Ruiru East Block 2/21035. She stated that she got married to the deceased in the year 2004 and the same was solemnized in the year 2016. They have lived together as a husband and wife until 2017 when the Defendant left the matrimonial home in 2017.
6. Directions were taken on February 24, 2022 to have the application dispensed by way of written submissions. Both parties have complied.

Plaintiff's Submissions

7. Counsel for the plaintiff submitted that the Notice of Preliminary Objection is misconceived and raises no intelligible issues for determination and submitted the properties in question L.R. Nos. Ruiru/Ruiru East block XXXX, XXXX, XXXX and the upper floor constructed on plot No. XXXX Githurai 45 are matrimonial properties having been inherited by the Defendant.
8. Counsel for the Plaintiff submitted that the defendant sub-divided L.R. No. Ruiru Ruiru East Block XXXX into several portions being: Ruiru/Ruiru East Block XXXX, XXXX, XXXX, XXXX, XXXX, and XXXX, of which most of them have been sold and the remaining portions are Ruiru/Ruiru East block XXXX, XXXX, XXXX.
9. Counsel further submitted that as per *the Constitution* of Kenya 2010 Article 45(3) parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and after the dissolution of the marriage.
10. That Section 5 of the *Matrimonial Property Act* provide as follows:-
“subject to section 6, the interest of any person in any immovable or moveable property acquired or inherited before marriage shall not form part of matrimonial property.”
11. Counsel submitted that the properties were acquired in the year 2014 during the subsistence of the marriage and therefore form part of the matrimonial property and cited the case of *SN v Fm* [2019] eKLR where Justice Mabeya held as follows:-
“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 the 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”
12. Counsel submitted that even though the plaintiff was unemployed, she contributed greatly to the improvement of the matrimonial home through children's care and companionship to the Plaintiff and cited Section 14 of the Matrimonial Property Act; and urged the court to find the Defendant is holding the matrimonial property in trust for the Plaintiff and proceed to share the matrimonial property equitably.



Defendant's Submissions

13. Counsel for the defendant submitted that the suit is res judicata as the marriage between the Plaintiff and the Defendant was dissolved vide Milimani Divorce Cause No. 836 of 2019 and a decree absolute issued on September 16, 2021.
14. Counsel submitted that the property in dispute is ancestral property which is jointly registered in his name and that of his sister and the same is held in trust for the other beneficiaries and argued that the Plaintiff should have filed for a declaration of the rights in the properties contested as per Section 17 of the Matrimonial Act to determine the registration of title and the efficacy of the process of registration of the title to the suit property.
15. Counsel further submitted that this court lacks the jurisdiction to determine the issue of registration of title to the listed properties as the same lies within the Environment and Land Court and argued that allegations of fraud have not been proved on the fraudulent registration of the titles in the names of both the Defendant and SN.
16. That there is no matrimonial property that has been petitioned for distribution or determination and the Plaintiff evicted the Defendant from the matrimonial property that was acquired during the subsistence of the marriage.
17. The Defendant urged this court to find in favour of the preliminary objection and proceed to dismiss the originating summons dated July 7, 2021.

Analysis and Determination

18. Parties herein filed written submissions on both preliminary objection and the main application. I have considered averments and submissions by parties herein. The ground of preliminary objection raised is that the issue of marriage between parties herein is resjudicata as the marriage has been dissolved and properties listed is that they are neither for Plaintiff or Defendant. On the first ground, the matter herein is on distribution of matrimonial property and not dissolution of marriage. This matter is not therefore res judicata.
19. In respect to the second issue I wish to consider whether the Ruiru/Ruiru East Block XXXX, Ruiru / Ruiru East Block XXXX, Ruiru/Ruiru East block XXXX and Githurai 45 plot-plot No. 968 (upper floor) are matrimonial properties.
20. Section 6 of the *Matrimonial Property Act* No. 49 of 2013 defines Matrimonial Property as follows:-
 - 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.

Despite subsection (1), trust property, including property held in trust under Customary Law, does not form part of matrimonial property.

21. It is not in dispute that the properties in question are ancestral. The properties belonged to the Defendant's mother who is now deceased. A grant was issued on 3rd November, 2014. This was before the dissolution of the marriage in the year 2021.



22. I have looked at the grant issued herein on November 3, 2014, the Defendant was apportioned 1 acre of Ruiru/Ruiru East/ Block XXXX the same was not jointly held with Serah or in trust for any other beneficiary as alleged by the Defendant. From the grant, I do note each beneficiary was allocated their share and the Defendant is not holding any of the titles in trust for other beneficiaries.
23. Upon transmission of the said property, the Defendant has sub-divided the portion Ruiru/Ruiru East/ Block XXXX into various plots and registered the title deeds jointly between him and the sister Serah Njoki.
24. This might be a scheme employed by the Defendant to defeat the interest of the Plaintiff.
25. The Plaintiff avers that she has lived in the matrimonial home constructed on Ruiru/ Ruiru East Block XXXX in which she improved the home. She states she still lives on the property. She states the same forms part of matrimonial property. Section 5 of the Matrimonial Act provides:-
- “Subject to section 6 the interest of any person in any immovable or moveable property acquired or inherited before marriage shall not form part of the matrimonial property.”
26. The matrimonial property comprises property acquired during the subsistence of the marriage. Property acquired during the subsistence of the marriage and registered in the name of one spouse is deemed to have been held in trust for the other spouse.
27. Section 7 of the Matrimonial Act 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.”
28. The court is expected to look at the contribution of each spouse in the acquisition of the property while determining the distribution of matrimonial property.
29. Contribution is defined under Section 2 of the *Matrimonial Property Act* to mean 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;
- “Family business” means any business which-
- a) Is run for the benefit of the family by both spouses or either spouse; and
 - b) Generates income or other resources wholly or part of which are for the benefit of the family;
- “Matrimonial home” means any property that is owned, leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;



30. The applicant contends she is a housewife and she contributed greatly to the improvement of the matrimonial home by taking care of the children. The contribution is covered above and entitles her to property acquired during the subsistence of the marriage. I note that there is no evidence of monetary contribution to acquisition of the property by both parties.
31. From the averments herein, the property has been inherited from the defendant's mother. None of the parties herein has proved monetary contribution to acquisition of the property. The applicant alleged that the Defendant has sold most of the properties which were transmitted to him by his mother and she is therefore entitled to a share of the matrimonial property.
32. There is no doubt that during subsistence of the marriage each of the parties herein contributed to management of the property. In my view the property should be apportioned at 50:50.
- 33.
- Final
Orders
1. Production Order is hereby dismissed.
 2. The properties listed hereunder to be distributed to the Applicant and Respondent in the ratio of 50:50.
 - (a) LR no. Ruiru/ Ruiru East Block XXXX.
 - (b) Ruiru/Ruiru East Block XXXX.
 - (c) Ruiru /Ruiru East Block XXXX, and
 - (d) Githurai 45 plot-Plot No. XXXX (upper floor) are matrimonial properties.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU

THIS 30TH DAY OF JUNE, 2022

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RACHEL NGETICH

JUDGE

In the Presence of:

Kinyua – Court Assistant

Ms. Wanjiru Njahia – For the Plaintiff

Mr. Gitau Paul – For the Respondent

