



**ANM v JWK (Civil Appeal 180 of 2007) [2022] KEHC 12402 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12402 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 180 OF 2007  
RN NYAKUNDI, J  
JULY 29, 2022**

**BETWEEN**

**ANM ..... PLAINTIFF**

**AND**

**JWK ..... DEFENDANT**

**JUDGMENT**

**Coram: Hon. Justice R. Nyakundi**

**M/S Magare Musundi & Co. Adv for plaintiff**

**M/S Maathai Maina & CO. Adv**

1. The originating summons was based on the grounds on the face of it and supported by affidavit sworn by the plaintiff on October 26, 2007 for the following orders:
  - a. A declaration that the plaintiff is entitled to her matrimonial home on parcel number Eldoret Municipality block xx/ King'ong'o /3xxx and half or more than half of the whole share of matrimonial property which consist of three motor vehi9cles registration numbers KAQ xxxA toyota hiace, KAR xxxx toyota hiance and KAT xxxR toyota hiace, 3 lock up shops 42 at main market which property was acquired by joint efforts of the plaintiff and the defendant during the subsistence of their marriage but registered in the sole names of the defendant in trust for himself and the plaintiff.
  - b. For an order that the defendant do transfer parcel number Eldoret municipality block xx/ King'ong'o /3xxx and half or more than half of the said matrimonial property which consist of three motor vehicles registration numbers KAQ xxxa toyota hiace, KAR xxxx toyota hiance and KAT xxxr toyota hiace, 3 lock up shops number xx at main market to the plaintiff within 1 month from the date of the judgment or such period as the court may deem fit in the circumstances, failing which the deputy registra do sign all the necessary documents to ensure that the plaintiff's entitlement is transferred to her.



- c. That the defendant to pay the costs of the suit.

### **Plaintiff's Case**

2. A witness statement by the plaintiff dated October 23, 2015 was submitted. The plaintiff averred that she entered a marriage covenant with the defendant under Kikuyu customary law on November 5, 1995 at her parents' home in Muranga. That she met the defendant while he was an hawker in Eldoret while she worked at Eldo matt supermarket where she resigned upon the defendants request. That they started selling second hand clothes .
3. That on November 9, 1995 the defendant in the company of his family and friends visited her family home in Muranga and took photos with her relatives. That together with the defendant they established a matrimonial rental home in pioneer estate Eldoret
4. The plaintiff stated that the marriage was blessed with two children; SWW born on September 26, 2006 and PKW born on August 21, 2001. That she lives with her children in their matrimonial home in Kahoya estate while defendant cohabits with another woman
5. Plaintiff states that they borrowed loans from self-help groups and later cooperative bank and stated a lucrative business which enabled them to buy a plot Eldoret municipality block xx/King'ongo'/3xxp and build a three bedroomed house in 1999
6. Plaintiff desponds that with their joint effort they bought lock up shops No xxx and No xx. That in 2002 they started a transport business jointly and purchased three motor vehicles; KAT xxxR, KAR xxxx and KAQ xxxA.
7. Plaintiff states that they enjoyed their marriage till 2004 when she noticed drastic change of behavior of the plaintiff through lavish spending of money, drunkenness and spending weekends with different women. That the defendant committed adultery by cohabiting with different women. That the defendant deprived the plaintiff of her rights as a wife and she has suffered immensely both physiologically and physically. That from 2004 the defendant has treated her with extreme cruelty and this worsened when he got involved with the series of illicit affairs. That he threatened to kill her and caused her to have sleepless nights. That in 2004 and 2006 he assaulted her and both matters were reported to the police. That in 2006 he chased her from her place of work and it took intervention of elders for her to go back. That he colluded with his police mistress to have her arrested. That the defendant maliciously damaged her household goods causing disorder in her house. That the defendant insulted her using vulgar language. That the defendant chased away her house girls and workers subjecting her to extra work. That the defendant failed to provide for the family.
8. That parents and elders from both sides have held several meetings in the hope to salvage the marriage to no avail. That the marriage has broken down and the plaintiff's hope to recover it have failed. That she prays for half of matrimonial properties
9. The plaintiff filed submission dated April 9, 2022. The plaintiff submits that she single handedly raised her children when the defendant disappeared .That the fate of the marriage was sealed under the hand and seal of court on October 9, 2018 *vide* Eldoret HCA 144 of 2008. That the wealth they acquired are now the subject of this decision .That given the various changes that have occurred over most of the other properties in spite of an order to maintain status quo, plaintiff will only be interested in lock up shop no 42 and their matrimonial house. That the plaintiff contributed to the acquisition of the suit property as the defendant never had money.



10. The plaintiff submits that she also bought the adjacent land Eldoret municipality block 21 3xxx where the defendant resides with his concubine. That the plaintiff contributed to the acquisition of the property. That the defendant had not disclosed whereabouts of other properties especially the vehicles. That the vehicles have not been sold as the defendant still pays for insurance
11. Plaintiff averred that she paid for the motor vehicles. That all the income was generated from her activities which contributed to more matrimonial property. That the defendant did not produce evidence of his own contribution to purchase of the properties
12. The plaintiff submits that the defendant alleged that she was not his wife and cannot be given lock shop No xx since the city council has not given its consent. That the issue is moot since it is not transfer of ownership but contribution. That the issue of trust does not require consent or any action that the issue of marriage was already settled in HCCA No 144 of 2008. That the court below found there was no marriage but the high court found that there was marriage to be annulled for it being irretrievably broken down. That by the judgment of October 9, 2018, the court allowed the divorce. That the court concluded the matter awarding costs to the plaintiff herein and that court do not award costs where parties continue being married to each other. That if the marriage ought to be annulled then equity treats the marriage as having been annulled. The plaintiff relied on the case of *kiplagat kotut v Rose Jebor Kipngok* and *Adan v Farah and 3 others* civil suit 100 of 2016 where court held equity treats as done that which ought to be done. That equity follows the law that one the court pronounce itself that the marriage ought to be annulled there is no room for speculation.
13. The plaintiff submits that they bought matrimonial home land parcel No Eldoret municipality /block 21 /3xxx during the pendency of marriage. That the defendant was evasive to where the matrimonial property was. That both parties agree its where the plaintiff stayed since I was bought.
14. The plaintiff submits that they bought 3 lock up shops names 102,42 and 103. That the defendant was only interested in lock up shop No 42 where she was working from.
15. The plaintiff submits that they bought three cars together. That the defendant alleges to have sold them without evidence to that effect.
16. The plaintiff averred that she bought other properties including where the defendant stays. That the defendant has duty to prove special knowledge under section 112 of the *Evidence Act*; in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.
17. Plaintiff further submits that *Matrimonial property act* section 2 defines with clarity what it constitutes and section 7 further explains that the property vests on the spouses according to their contribution upon divorce. That she solely raised the money to pay for the land in the matrimonial home and built a house. That she single handedly bought the motor vehicles. That she was able to demonstrate she paid for all the vehicles. That the defendant was the account holder where the plaintiff deposited the money from the lock up shops. That if she had not deposited the money nothing could have been harder than him producing a statement to the contrary.
18. The plaintiff avers that she single handedly took care of the children and the matrimonial home as the defendant had become bankrupt and was so declared in 2008. That she singlehandedly runs the lock up shops repaying for purchase of motor vehicles with proceeds from her business as the defendant is illiterate and could not manage the business. That the defendant did not tender any evidence of his contribution.



19. The plaintiff consequently pray the court orders that the plaintiff retain the whole of parcel no Edoret municipality/block xx/3xxx and that she gets lock up shop xx which she had invested all her life in.
20. The plaintiff prays for costs

### **Defendant's Case**

21. The defendant tendered a witness statement. The defendant states that after school he joined [Particulars Withheld] company which he worked until July 30, 1992, That he accumulated enough money to start my business of clothes and shoes in Njoro town. That on January 2, 1996 he shifted to Eldoret and started the same business. He was allocated lock shop No xx by the municipal council of Eldoret. That the business did well and he managed to buy nissan matatu KAQ xxxA which started operating Eldoret –Bungoma road. That the matatu was involved in a serious accident on May 1, 2003. That one passenger died and others got injured. That he got sued and all cases fell upon him that she spent a lot of money which resulted to his business going down. That he decided to apply for a loan of Ksh 700,000 from Eldo photo self group on August 11, 2003. That the loan assisted him boost the business. That he took a loan with Equity bank to assist him repay the motor vehicle That on May 8, 2008 motor vehicle KAR xxxx was involved in an accident and he was sued by five passengers.
22. The defendant states that on November 3, 2008 so many suits were on him auctioneers started coming for whatever I had. That they proclaimed whatever was remaining in his lock shop No xx. That he started experiencing health problems which later on September 11, 2009 proved that he had developed diabetes. That he was therefore declared bankrupt. That he remained bankrupt for 4 years and the little he could manage went to his kids school fees. That an order from the high court kicked him out of his house. That he took a loan from Jikaze self-group which helped him lift the bankruptcy.
23. The defendant states that the plaintiff never contributed towards the purchase of that parcel of land known as Eldoret municipality/block xx (King'ong'o) 3xxx neither did she ever contribute anything inform of monetary or otherwise in the starting and running of the business. That she wants to reap where she didn't sow. That he started taking more loans from Biashara Pamoja sacco which enabled him go back to business. That all he has have been from all those loans he has taken since lifting of the bankruptcy. That the court return his parcel of land so that he can finish up the house renovation and fencing as it was not in good state. That he wants to develop the plot to support his children
24. The defendant filed submission dated April 21, 2022. He submits that in the High Court civil appeal No 144 of 2008 on October 9, 2018 Lady Justice H A Omondi stated in her judgement that there was marriage which ought to have been annulled as it had irretrievably broken down. That the judge indicated that the marriage needed to be annulled but the court did not annul it. That matrimonial property cannot be shared while the marriage is still subsisting as in *PWM v EM* 2014 Eklr where Justice Ngaah Jairus stated that 'matrimonial property is not subject to division in the life of marriage between the spouses.'
25. The defendant disposed that section 6 of the *Matrimonial property act* provides that matrimonial property include any immovable and movable property jointly owned and acquired during the subsistence of the marriage. Section 6 (2) further states that property held in trust under customary law does not form part of matrimonial property. That the plaintiff has not demonstrated that when these properties were acquired, they were married and living together as husband and wife. That the plaintiff did not call any witness to support her evidence that they were married since November 5, 1995. That there was no marriage certificate that was produced, nor was there any evidence that customary marriage had been entered. That the birth certificate of their kids was not proof of marriage nor was it sufficient evidence that the parties herein were cohabiting as husband and wife.



26. The defendant submits that the plaintiff claims she was employed at Eldomatt yet she did not adduce any evidence. She never stated for how long she was employed during the subsistence of their marriage. In order to prove that she was working with the defendant she produced photographs which photographs do not have evidentiary value for failure to comply with the provisions of section 106B (4) of the *Evidence Act* cap 80 for lack of certificate. That the bank statement that were produced in relation to the defendant Equity bank were not certified by the bank as true copies and further was no compliance with the provision. That the bank slip and evidence in which she alleged, that she was banking money into the defendant account, which money was from the business they were jointly working but one of the account was denied as non-existence by the defendant and the plaintiff did not prove that the name and signature in the bank slip belong to her. That the money was deposited in his account by an employee Ann. That the plaintiff was desperate and forged the documents.
27. The defendant submits that he was the one who purchased the parcel of land Eldoret municipality block xx/kingongo/3xxx and the motor vehicles. That he took loans to purchase the property. That he tendered evidence to prove his claims that the vehicles were involved in accidents therefore attached hence not available to be shared.
28. The defendant averred that the plaintiff did not do any improvements on the property that were acquired by the defendant as provided for under section 9 of the *Matrimonial Property Act* No 49 of 2013. That article 45(3) of the *Constitution* of Kenya 2010 provides that parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution. That it doesn't mean that the parties are entitled to equal shares if one did not contribute. That the property should be distributed at the rate of 90 :10%
29. The defendant submits that the lock up shop should not be shared as it is not matrimonial property. That he is just a tenant and not owner of the property thus cannot freely deal with the property without consent and permission of the owner.
30. The defendant submits that the plaintiff did not make any contribution to buy the motor vehicles thus cannot claim a share of it. That the vehicles were involved in accidents and have since been attached. That the plaintiff cannot purport to say that she wants to share the benefits but doesn't share the liabilities.
31. The defendant finally submits that the plaintiff has not proved her case to the required standard and has failed to prove that during acquisition of these properties they were married and living as a couple and that the marriage between them was dissolved
32. The defendant urges the court to proceed and dismiss the suit with costs to the defendants

### **Determination**

33. I have analysed the originating summons, the rival affidavits and the submissions filed by counsels for the opposing parties and I find that the main issues for my determination are;
  - i. whether there exists a marriage between the parties and if so,
  - ii. what property is available for distribution/division and on what ratio?
34. As regards the 1<sup>st</sup> issue, it is important to note that vide the divorce cause in Eldoret SRMCC No 902 of 2007, the trial court when dealing with the issue of divorce between the parties herein t pronounced itself and held that there was no marriage to be annulled. The plaintiff being aggrieved by the said



decision appealed to the High Court in civil appeal No 144 of 2008 and the court in its judgement delivered on October 9, 2018 held,

“Although the essentials of Kikuyu customary marriage were not met, I am persuaded that the parties cohabited and by their conduct presented themselves and regarded each other as husband and wife. Indeed the trial magistrate ignored the evidence and pleadings where the respondent stated that the appellant frustrated the marriage(not friendship) and acknowledge that their marriage (again not friendship) had broken down irretrievably due to what he termed as cruelty and infidelity by appellant. A party cannot depart from its pleadings and wax a new line of denial when he had acknowledged that status, even referring to the house they had shared as the matrimonial home.

Consequently, I find that the trial court ignored the evidence presented and the legal jurisprudence on presumption of a marriage by cohabitation. The judgment is set aside and I make a finding that there was a marriage which ought to have been annulled on grounds that it had irretrievably broken down. To that extent, the appeal succeed and the costs of the appeal shall be borne by the respondent.”

35. On one end, the plaintiff argues that based on the High Court decision, the court appreciated that there existed a marriage between the parties herein but the same had irretrievably broken down and as such the only next cause of action would be the division of the matrimonial property that were acquired during the subsistence of the marriage.
36. The defendant on the other hand has maintained that the marriage has never been dissolved. He argues that from the wording of the holding and particularly the statement “....there was a marriage which ought to have been annulled....”, the honourable judge was indicating that the marriage needed to be annulled on the grounds that it had irretrievably broken down but the same was not done and as such, the matrimonial property cannot be shared while the marriage is still subsisting.
37. In determining the first issue, this court takes cognisance of the fact that, the High Court while sitting on appeal in the divorce case between the parties did not dissolve the marriage although it appreciated that the marriage had irretrievably broken down.
38. The Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, [2014] eKLR, while dealing with the issue of interpretation of the *Constitution* held that a purposive interpretation should be given to statutes so as to reveal their true intention. The court held:

“In *Pepper v Hart* [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

“The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the



true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted’.”

39. An interpretation of the above decision then means that in addressing the instant issue, this court should look at the intents and purposes of the *Matrimonial Property Act*.

Section 7 of the *Matrimonial Property Act* provides that;

“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.”

40. From the above provision, it is clear that division of matrimonial property can only be done after dissolution of marriage either through a divorce cause or any other dissolution. It is important to note that in this case, it has been established that the parties herein ceased to be married and parted ways many years ago. It therefore follows that since there is no longer a marriage between the parties herein and it is immaterial whether the parties divorced legally.
41. From the conduct of the parties, the proceedings in the divorce cause in the lower court and the subsequent appeal, the parties have since moved on with their separate lives and the intention of the *Matrimonial Property Act* is to then divide the properties that were acquired during the subsistence of the marriage.
42. Now, dealing with the second issue, this court in *T M W v F M C* [2018] eKLR held that a trial court is mandated to scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties so as to inform the division of matrimonial properties after dissolution of the marriage.
43. The plaintiff in her submission filed in court conceded that she is only interested in lock up xx and the house situated in Eldoret municipality block xx(King’ong’o)3xxx as she contributed substantially to the acquisition of the same. She further averred that the parties also bought the adjacent land being Eldoret municipality block xx(King’ong’o)xxxx where the defendant now lives with another woman.
44. The defendant on his part submitted that the plaintiff has not demonstrated that when these properties were acquired, they were married and living together as husband and wife. The defendant maintained he bought the land parcel known as Eldoret municipality block xx/King’ong’o/3xxx from the documentary evidence produced in court which showed that he borrowed loans from various institutions which enabled him to acquire the properties.
45. In the end, the court was urged to make the division of the property at the rate of 90:10 in favour of the defendant.
46. As regards the lock up shop number xx, it was submitted that the same cannot be shared by the spouses since it does not fall within the description of property as envisaged by section 6 of the *Matrimonial Property Act* because the defendant is a tenant and not the owner.
47. To this extend, what is left for the determination of this court is whether the properties listed by the plaintiff constitute matrimonial property. Section 6(1) of the *Matrimonial Property Act* No 49 of 2013 defines matrimonial property as- 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.



48. A reading of the provision above would mean that the lock up shop No xx does not form part of the matrimonial property. In any case, no evidence was tendered before court to show the existence of the said shop in terms of a lease agreement or otherwise.
49. On the other issue which is at the centre of this dispute being the land parcel known as Eldoret municipality block xx/King'ong'o/3xxx, it is this court's finding that the said land was purchased at such a time when the marriage was still in subsistence. Section 6 (1) of the *Matrimonial Property Act* is clear that for a 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. The plaintiff submitted that they also bought land parcel number Eldoret municipality block xx(King'ong'o)3xxx where the defendant now lives with another woman. However, no evidence was tendered to support the existence of that property and I will disregard this line of submission.
50. Having found that the only property available for distribution as matrimonial property is land parcel No Eldoret municipality block xx/King'ong'o/3xxx, I find that each party is entitled to equal benefit and protection of the law and they deserve their beneficial share of the said matrimonial home since the same was acquired during the subsistence of the marriage.

In the end, I make the following orders;

- i. That the plaintiff and the defendant are entitled to equal shares of the matrimonial home comprised of land parcel number Eldoret municipality block xx/King'ong'o/3xxx and I hereby direct that the said property be valued and be sold and the proceeds shared between the parties or if agreeable either party is at liberty to buy the half from the other party. Parties to bear their own costs.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 29<sup>TH</sup> DAY OF JULY, 2022.**

.....

**R. NYAKUNDI**

**JUDGE**

