



**MWN v TIM (Civil Suit 33 of 2017) [2022] KEHC 13771 (KLR)
(Family) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT 33 OF 2017
M THANDE, J
SEPTEMBER 23, 2022**

BETWEEN

MWN APPLICANT

AND

TIM RESPONDENT

RULING

1. MWN the Applicant herein filed the Originating Summons (OS) dated June 7, 2017 against TIM, the Respondent, seeking the following orders:
 1. Spent.
 2. That the Honourable Court be pleased to issue a declaration that the property known as LR No 4148/193 is the Applicants’ joint property.
 3. Spent.
 4. That the Honourable Court does issue orders restraining the Respondent, his agents, servants or employees from selling or transferring charging leasing or in any other way alienation or disposing of the said property.
 5. That the Honourable Court be pleased to order that the said property be valued and sold and the net proceeds be divided between the parties in proportion to their respective contribution to the acquisition and development thereof.
 6. That the Respondent be ordered to pay the costs of the costs of these proceedings in any event.



7. Such relief or order as this Honourable Court may deem fit and just in the circumstances of the case.
2. It is the Applicant's case that the parties were married under Kikuyu Customary law in May 2006 and that the suit property was acquired by the parties during the subsistence of their marriage. The Applicant contends that she utilized income from her salary and businesses, to support the marriage and contributed significant amounts towards the acquisition and development of the suit property. She also made non-monetary contribution towards the development of the suit property. The Applicant further stated that the parties now live apart and that while the marriage is still subsisting, the Respondent purported to marry someone else, with whom he has 2 children. He is now in the process of disposing of part of the property to the detriment of the Applicant.
3. The Respondent opposed the OS vide his affidavits sworn on August 15, 2017 and July 10, 2018. He denied having married the Applicant as alleged and recalls the Applicant pressurizing him to swear an affidavit of marriage. He stated that he was working with the Mt Kenya East Pilot Project for Natural Resources and was the sole bread winner during their cohabitation. He asserted that he purchased the suit property on July 11, 2006 and developed the same without any contribution from the Applicant. He did this by taking loans from various financiers which he paid through his income. He stated that he would send construction funds to the Applicant, whose only contribution was supervising construction. He borrowed Kshs 1,000,000/= from Ukulima Co-operative Savings and Credit Society Limited and paid Kshs 920,000/= into the Applicant's account at Co-operative Bank, Kawangware Branch.
4. The Respondent stated that he became aware that the Applicant's 2 previous marriages and cohabitation through a Life pullout in The Standard newspaper on April 29, 2015. He accused the Applicant of leaving their home without notice, taking with her his motor vehicle xxxx worth Kshs 350,000/= and counterclaimed a return of the same or the value thereof. He also claimed that she took away the household goods he had purchased including furniture, television, home theater and a generator all worth Kshs 853,000/=. The Respondent contended that the Applicant had not proved contribution. Further, that the Application has been brought under a repealed law and is in effect bad in law. He urged that the application be dismissed with costs.
8. By consent of the parties, this matter was disposed of by way of written submissions. After considering the OS, the rival affidavits, submissions as well as the authorities cited, the following issues emerged for determination:
 - i. Whether the Court can presume a marriage between the parties herein.
 - ii. Whether the Applicant contributed towards the purchase and acquisition of the suit property.
 - iii. If so, whether the suit property should be valued, sold and the proceeds be divided between the parties according to their respective contribution.

Whether the Court can presume a marriage between the parties herein

9. The Applicant contended that she was married to the Respondent under Kikuyu customary law and in the alternative urged the Court to presume a marriage between them. She relied on the 'affidavit of marriage' she exhibited. The Respondent's position is that they did not contract marriage under Kikuyu customary law or statutory law. He contended that he did not pay any dowry for her. He further asserted that the exhibited 'affidavit of marriage' does not constitute the essentials of a Kikuyu customary marriage. The Respondent further submitted that the Applicant had been in other



undissolved marriages as indicated in her story in the Standard newspaper. As such she could not contract any valid marriage with the Respondent.

10. The statutory basis of the doctrine of presumption of marriage is contained in section 119 of the [Evidence Act](#) which provides:

' The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.'

11. It is evident from the material placed before the Court that the parties herein were in a relationship and did in fact live together in the suit premises. The Applicant stated that she is in occupation of the same while the Respondent moved to Embu.

12. The Respondent has admitted that he swore the 'affidavit of marriage' but that he was coerced to do so. He stated, 'I remember her pressurizing me to do an 'affidavit of marriage' which was done by my advocates but little did I know it was a scheme thinly veiled to assist the applicant to claim property as an alleged wife.'

13. [Black's Law Dictionary Tenth Edition](#) defines an affidavit as:

' A voluntary declaration of facts written down and sworn to by a declarant, usu. Before an officer authorized to administer oaths.'

14. The elements of an affidavit are that first, the contents therein are facts declared by the deponent. Black's Law Dictionary Tenth Edition defines 'fact' as 'something that actually exists; an aspect of reality.' Second, the declaration of facts is voluntary. Accordingly, every affidavit must be presumed to contain facts and that those facts are declared voluntarily, unless the contrary is proved. Other than stating that he was coerced to swear the 'affidavit of marriage' the Respondent did not place any material before the Court to demonstrate such coercion. Further, the Respondent has placed no evidence before the Court to support his claim that the affidavit was a scheme by the Applicant to claim property as an alleged wife. Indeed, if this were true, one would wonder why several years after, in 2012 and 2015, the Respondent would send the Applicant money for construction of their home as he has alleged.

15. It will be noted that the 'affidavit of marriage' is sworn by both the Applicant and the Respondent on April 4, 2007. The parties stated that they got married under Kikuyu Customary law and have since lived as man and wife. The purpose of the affidavit as stated therein was to enable the Applicant adopt the Respondent's name to reflect her status as a married woman. Notably, the 'affidavit of marriage' was drawn, not by the Applicant but by the Respondent himself. Further, the affidavit was sworn before SKM Wandaka, the Respondent's current advocates. Having stated on oath that he and the Respondent were married under customary law and were living together as husband and wife and further that there was an intention for the Applicant to adopt his name to reflect her status as a married woman, the Respondent cannot be heard to state the contrary. He is bound by the doctrine estoppel which the Court of Appeal in the case of [Serah Njeri Mwobi v John Kimani Njoroge \[2013\] eKLR](#) defined as follows:

The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.



16. The Respondent contended that the Applicant had no capacity to contract marriage with him as she was in undissolved marriages according to the story in the Standard newspaper. A fact that she had not disclosed to him.

17. It is trite law that for the Court to presume a marriage however, it is necessary that the parties have capacity. This was the holding in *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR*, where the Court of Appeal stated:

As Madan, JA (as he then was) said in *Njoki v Muthuru [1985] KLR* at page 882

'The concept of presumption of marriage is not new in Kenya. It was recognized by the former Court of Appeal in *Hortensiah Wanjiku Yawe v Public Trustee in Civil Appeal No 13 of 1976* and by this Court in *Mbithi Mulu & Another v Mitwa Mutunga in Civil Application No Nai 17 of 1983*.'

This presumption arises from long cohabitation and repute between the man and the woman who have capacity to marry and have consented to do so – see *Yawe (supra)*. We consider that the deceased and 1st respondent in this appeal had capacity to marry while the deceased was married to the deceased 2nd appellant under Kikuyu customary law but this was not a bar to him marrying any other woman since customary law of marriages under Kikuyu customs are potentially polygamous.

18. Although the Respondent contended that the Applicant was previously married and had no capacity to contract marriage with him, he did not indicate the dates of the previous marriages. I also note that this issue was not addressed by the Applicant in her submissions.

19. I have read the exhibited pullout of The Standard newspaper of April 29, 2015. It has very scanty details about the Applicant's past life. She stated that she was born to a teenage mother who was shunned by her family. The Applicant described that she had a difficult childhood and ran away from home after her stepfather attempted to rape her. On marriage, the Applicant states that she married at 17 and had a child. That marriage did not last and the child died. At 19 she married again but that the marriage did not last as her husband committed suicide and she was once again out in the cold. No evidence was placed before the Court to demonstrate that the Applicant was still married in 2006 when she and the Respondent got married according to the 'affidavit of marriage'. Indeed, at the time, she was 26 years old according to her exhibited national identity card. In light of this, I find that the contention that the Applicant had no capacity to contract a marriage on account of previous marriages, is unfounded.

20. In the case of *MWG v EWK [2010] eKLR*, relied on by the Applicant, Bosire, JA Stated:

The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife.

21. Duly guided, I find that the Applicant not being in any marriage, and had capacity to enter into marriage with the Respondent or any other person.



22. The Respondent maintained that there was no marriage between him and the Applicant. He relied on the case of *Elizabeth Gachambi v Grace Nduta Kinuthia & another [2017] eKLR* where Ougo, J stated:

An affidavit per se is not proof of marriage or photographs taken at a burial. Being a Kikuyu by tribe the applicant should have called evidence to support her claims that dowry was paid. According to Cotran the essentials of a valid Kikuyu Customary marriage are now documented and codified in The Law of Marriage and Divorce and summarizes them as follows:

- i. Capacity to marry
 - ii. Consent of parties
 - iii. Ngurario
 - iv. Ruracio
 - v. Commencement of Cohabitation
23. I fully agree that the 'affidavit of marriage' is not proof of customary marriage between the parties herein. To conclude that such a marriage did exist would require evidence to be adduced demonstrating the essentials of the same. In the absence of such evidence, I draw the conclusion that no such marriage was contracted between the Applicant and the Respondent.
24. What then was the relationship between the parties? It is evident that the parties lived together in the suit property which was acquired and developed during their period of coverture. They both swore an affidavit in 2007 stating that they were married in 2006 and had lived together as husband and wife since. They stated that the purpose of the affidavit was for the Applicant to adopt the name of the Respondent to reflect her status as a married woman. The Court has found that the Respondent has not demonstrated that he was coerced to swear the affidavit or that the affidavit was a scheme by the Applicant to claim property as an alleged wife. Similarly, the Court has found that the Applicant had capacity to contract a marriage.
25. In view of the foregoing, I find and hold that all the circumstances herein taken together are adequate for this Court to presume a marriage between the parties herein.

Whether the Applicant contributed towards the purchase and acquisition of the suit property

26. It is not disputed that the parties lived together in the suit property. Having found that the parties were married, the suit property was their matrimonial home, within the meaning of Section 6 of the *Matrimonial Act*.
27. The basis upon which matrimonial property is divided between spouses, is contribution. A party seeking a share in matrimonial property must demonstrate that they have contributed to the acquisition or development of the said property.
28. In the case of jointly acquired properties during the marriage, Section 14(b) of the Act provides that there shall be a rebuttable presumption that the parties' beneficial interest in the matrimonial property is equal:

Where matrimonial property is acquired during marriage—

- a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and



- b. In the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.
29. The exhibited sale agreement and share certificate exhibited by the Applicant shows that the suit property was acquired by the parties jointly. A reading of Section 14 of the Act reveals that the Court will make a presumption that joint property that is acquired during coverture, is held by spouses equally. This presumption may however be rebutted by evidence to the contrary.
30. In the case of *O K N v M P N [2017] eKLR*, the Court of Appeal had this to say about this presumption:
- Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See *Kivuitu -v- Kivuitu*, [1991] KLR 248. The presumption is however, rebuttable by either party showing that their contributions were not equal.
31. Both parties claimed to have contributed to the acquisition of the same. The Applicant claimed that she raised funds through her employment and made monetary. She also made non-monetary contribution. She exhibited receipts for building material purchased for the construction of the property amounting to Kshs 1,326,228/=.
32. On his part, the Respondent contended that he alone contributed to the acquisition and development of the matrimonial home through loans. The Respondent stated that he borrowed Kshs 1,000,000/= and deposited Kshs 920,000/= into the Applicant's bank account with Co-operative bank, Kawangware branch, for construction. He exhibited the bank transaction vouchers. This was denied by the Applicant.
33. I have carefully looked at the vouchers. There is a voucher dated November 9, 2012 for Kshs 13,000/= and 2 other vouchers showing deposits of Kshs 20,000/= dated January 6, 2014 and July 9, 2015 respectively. The date on the voucher for Kshs 920,000/= shows the day as 21st and the year as 2013 but the month is not legible. The Applicant's banks statement for the year 2013 has no entry for the amount of Kshs 920,000/= which the Respondent claimed to have deposited. A closer scrutiny of the voucher in respect of this amount shows that the same does not have a bank stamp like the others. In view of this, I am not persuaded that the Respondent made such deposit in the Applicants bank account as claimed.
34. From the evidence on record, it is not clear how much each party contributed towards the purchase and development of the suit property. In the premises, the presumption under Section 14 of the Act that the parties' beneficial interest in the suit property is equal, remains unrebutted. As stated in the case of *O K N v M P N* (supra), in the absence of a rebuttal, the Court will presume that each party made equal contribution towards the acquisition and development of the property.
35. A similar finding was made in the case of In *Peter Mburu Echaria V Priscilla Njeri Echaria [2007] eKLR* where the Court of Appeal stated:
- 'However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim 'Equality is equity' while heeding the caution by Lord Pearson in *Gissing vs Gissing* (supra) at page 788 paragraph c that:
- 'No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the



total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing'.

36. Duly guided, and given that the parties' contribution is unascertainable, I find that this is a proper case where it is equitable to apply the maxim 'equality is equity.' The parties' beneficial interest in the suit property is equal.

Whether the suit property should be valued, sold and the proceeds be divided between the parties according to their respective contribution

37. As the Court considers this issue, it will be guided by the principle set out in Article 45(3) of the Constitution of Kenya, 2010 which provides:

Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage

38. In the case of PNN v ZWN [2017] eKLR, relied on by the Respondent, Kiage, JA. had this to say of Article 45(3):

First, while I take cognizance of the marital equality ethos captured in Article 45 (3) of the Constitution, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage.

39. The learned Judge went on to state:

I will also comment briefly on Echaria Vs Echaria [2007] eKLR. In view of my stated understanding of what Section 45(3) means and what it does not mean, I do not see that taken in context, the analytical approach taken by the five-Judge bench in deciding that case, together with their appreciation of the law on matrimonial property rights leading to the conclusion that division must be based on actual quantifiable contribution was amiss. Holding as I do that contribution must be proved and assessed, I do not find that the central thrust of Echaria is violative of the marital equality principle of Article 45(3). I would therefore eschew any bold pronouncement that it is no longer good law and should be interred.

40. As indicated earlier, the basis for division of matrimonial property is proven contribution. The Court has found that none of the parties' contribution was ascertainable. As such, their beneficial interest in the suit property was found to be equal. It follows therefore that it is necessary in the interest of justice that the suit property be sold and the proceeds shared equally between the parties. To achieve this, a valuation should be done in order to ascertain the market price of the suit property.

41. In the end, after taking into consideration the totality of the evidence and the applicable law as analyzed herein, I make the following orders and declarations:

- i. The Court presumes a marriage between the Applicant and the Respondent.
- ii. The Applicant and the Respondent are entitled to Land Reference Number 4148/193 in equal shares. The property shall be valued and sold and the proceeds of sale shared equally between the parties.
- iii. This is a family matter and the circumstances of the case do not call for an award of costs.

DATED, SIGNED and DELIVERED in NAIROBI this 23rd day of September 2022



M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**

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