



REPUBLIC OF KENYA



KENYA LAW
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**JMK v DKM (Matrimonial Case E001 of 2020)
[2022] KEHC 15650 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MATRIMONIAL CASE E001 OF 2020
MM KASANGO, J
NOVEMBER 24, 2022**

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT 1882

BETWEEN

JMK APPLICANT

AND

DKM RESPONDENT

JUDGMENT

1. The applicant JMK (Former wife) was married to the respondent DKM (former husband) under Customary Law in 1970. That marriage was solemnized on 6th April, 1991 at the [Particulars Withheld] Church in Kiambu County. Respondent stated in his evidence and it was not denied by applicant that their marriage was blessed with eight children. Two died and six are alive.
2. The applicant filed this cause seeking orders that:-
 - a. A declaration that the matrimonial property acquired by joint funds and effort is owned jointly by the applicant and respondent;
 - b. That the matrimonial home on L.R. No. Gatamaiyu[Particulars Withheld] be declared as belonging to the applicant and respondent;
 - c. That the court do order the division of the said property;
 - d. That the respondent be restrained from alienating encumbering or in any way disposing of the said property; and
 - e. That the court be pleased to grant such further relief as may be just in the circumstances.
3. The applicant narrated in viva voce evidence how on getting married to the respondent in 1970 they cohabited in a semi-permanent home on the subject property which had been given to them by her



- father-in-law, the father of the respondent. She stated she was married when she was very young. She however did not state what age she was married.
4. The respondent was then employed by the Postal Corporation of Kenya. She was a house wife. She stated:-

“I used to grow vegetables, keep dairy farm (sic) and coffee farming. I had constant orders for my farm produce and this kept me busy throughout.”
 5. The applicant elaborated that evidence by stating that a school ordered her farm produce and she delivered cabbages and kale to that school with a wheel barrow five kilometres away from her home. She also grew French beans for export which she used to deliver at a collection point. Applicant stated:-

“The payment to all the farm produce used to be made to the Respondent. I never used to get a penny. Was never bothered by this as the Respondent was the head the (sic) home.”
 6. Applicant stated that in their farming activity, no labourer was employed but that it was her and the children who did the work.
 7. The family began to construct a permanent house in 1980. Applicant confirmed that the respondent obtained a loan from his employer which was used in the construction of that house and she described her contribution to that construction thus:-

“I fetched water for the construction ... and also cooked for all the workers on the site. We went far to get timber for roofing and other functions as required in the construction site. At all the material time, I was also carrying on farming and selling produce whose account were managed by respondent. I have therefore contributed both directly and indirectly to the construction of the matrimonial home...”
 8. The respondent countered the applicant’s evidence through replying affidavit and by viva voce evidence. He deponed that the applicant was gifted by his father, and also the applicant’s father in-law, with a property Gatamaiyu Nyaduma/(Particulars Withheld). Respondent confirmed that their marriage was dissolved through a divorce cause. The respondent made reference to his sour relationship with the children of the marriage which is indeed not relevant to the matter before me.
 9. By his vivo voce evidence, respondent stated:-

“This ‘shamba’ was left to me by my father in 1959 when he went to subkia. I was then in school. I have lived in that shamba and in 1970 I married the applicant.”
 10. The respondent stated that he began to build a permanent house in 1990. He obtained loan to construct the house from his employer. He was retired prematurely by his employer in 1996. He said that he purchased a pump to assist in irrigation of the farm. He also used to sell cattle feed to earn money to educate his children. In evidence not supported in his pleading, the respondent stated that the applicant became sickly from when they were married, that she was therefore not able to take vegetables for sale and that she and one of their sons began to steal the cattle feed and sell.
 11. Respondent confirmed that his father died on 18th September, 1999.
 12. On being cross examined, respondent stated that when he was working, he used to irrigate the farm on his return home from his employment, upto 11.00 pm. He denied the applicant assisted in the construction of the matrimonial house.



Analysis

13. I have considered the parties pleadings, their evidence and final submission.
14. The facts which both parties confirmed is that they were married traditionally in 1970. On being married they lived on the subject land in a semi-permanent house. During the subsistence of their marriage they constructed the matrimonial house on the subject land. The subject land is registered in the respondent's deceased father. I gathered that information from the evidence tendered because none of the parties provided to this Court a copy of the title or certificate of the subject land.
15. Section 6 of the *Matrimonial Property Act* defines meaning of Matrimonial Property as hereby:-
- “6(1) For the purpose of this Act, Matrimonial Property means –
- a. The matrimonial or homes;
 - b. Household goods and effects in the matrimonial homes or homes; or
 - c. Any other immovable and moveable property jointly owned and acquired during the subsistence of the marriage.
- (2) Despite subsection (1), trust property, including property held in trust under customary law does not form part of the matrimonial property.”
16. The subject title in this case is still registered in the name of the respondent's late father. The fact however is that the parties have resided on the subject land since 1970. Respondent's father passed away in 1999. There was no mention of a succession cause being filed in respect of the estate of the respondent's late father's estate. It is not clear whether the lack of filing succession cause is by design.
17. Section 6 of the *Matrimonial Property Act* recognizes moveable property acquired during the subsistence of marriage as forming part of Matrimonial property which can be subjected to that Act. It is common position of the parties that the permanent house was constructed during the subsistence of the parties marriage. The divergence occurs in how much if any, was the applicant's contribution to that construction.
18. Although the respondent unexpectedly without pleading it stated that the applicant could not have indirectly contributed to the construction of the matrimonial house because she allegedly was sickly, I disagree that indeed was the case. I had opportunity to observe the parties as they testified before court and I got the distinct impression that the respondent was 'building' his case as the hearing progressed. The applicant came across as more credible, truthful witness. I therefore discount that evidence that the applicant did not contribute to the construction of the matrimonial home. Respondent acknowledged that there was extensive farming taking place on the farm. He did not allege he employed anyone to carry out farming thereon. The applicant was a housewife. The respondent would wish this Court to find that the applicant stayed at the home and apart from giving birth to eight children, she stayed at home with hands folded. To the contrary, I find and hold the applicant has proved on required standard of proof that she made direct and indirect contribution to the construction of the matrimonial home. Contribution is defined under Section 2 of the Matrimonial Act as:-

“contribution” means 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.”

19. Monetary and non-monetary contribution of a spouse to acquisition of matrimonial property was discussed in the case *HNM vs. FTS* (2021) eKLR and I find it useful to refer to a passage in that case thus:-

“Furthermore, the Applicant in her submission stated that she took care of the children borne out of her marriage to the Respondent and 6 children of the late 1st wife for the duration of her marriage to the Respondent. She also stated that she kept farm animals and provided companionship to the Respondent. In addition, she stated that they lived in this house with the children and the respondent and that she made the house better. The court was not told that this is not true. This again is recognized contribution which entitles the applicant ownership of the property.

56. Such non-monetary contribution is not illusory or of little or no weight; it is real and tangible contribution and must be given due weight in division of matrimonial property. I must buttress the need for the greater awareness by the courts of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills. The law has taken this a position in providing for non-monetary contribution as a factor of ownership in matrimonial property. In Civil Appeal No. 142 of 2018 in *CWM -vs- JPM* [2017] eKLR, the Court of Appeal recognized this reality and held as follows:-

‘... Parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of Respondent at the time of such overture. In our view, that contribution, be it domestic work and management of the matrimonial home, child care or companionship falls within the definition of contribution under the Act”.

20. The subject immovable property is not registered in the respondent’s name because the succession cause of the respondent’s late father’s estate has not to date been filed. It follows that since this Court cannot deal with the succession matter in this matrimonial case, that the immovable property per se cannot be the subject of the order hereof. To do so may lead to injustice of others who are entitled to inherit from the respondent’s late father’s estate. Section 6(1)(c) however recognizes moveable as forming part of matrimonial property. I find the applicant contributed to the construction of the permanent house which is presently solely occupied by the respondent. A case in point is *FMG vs. MNG* (2019) eKLR where the court stated:-

“40. Similar position was held in the case of *M v M* Civil Appeal No. 74 of 2002 (2008) IKAR, 247 where the Court of Appeal held that:-

“...property inherited and gifted to one spouse before the marriage, and where property exists in the same condition as it



was inherited or gifted, no problem arise. The spouse to whom it was gifted should be allowed to retain it. Problems however arise where improvements are made using matrimonial recourses and then the property ceases to be in its original form and increases in value”

41. From the above provisions and case law, it is clear that the applicant cannot lay claim over the land and the three bedroomed bungalow acquired by the respondent before she got married. Save for the contribution towards its renovation which was in this case admitted to be Kshs.500,000/= out of a total of Kshs.1,000,000/= spent in renovation, there was no other further contribution.” (underlining mine)
21. Rule 30 of the Matrimonial Property Rules 2022 sets out the power of the court while entertaining a claim under *Matrimonial Property Act*. One of the orders the court can make is an order for one spouse to occupy a matrimonial property and such order for occupation can be to the exclusion of the other spouse. That is the order that commends itself to this Court bearing in mind the evidence adduced. To reiterate, the court cannot order the division of the immovable property because the immovable property is still part of the estate of the respondent’s late father. This Court however makes a finding the applicant contributed 50% towards the construction of the permanent house, the matrimonial home. She is entitled to occupy the house and because of the animosity between the parties, which was evident at the hearing that occupation of the applicant shall be at the exclusion of the respondent.

Disposition

22. Following the above finding, I make the following orders in this judgment:-
- a. DKM is hereby ordered to vacate the permanent house, the matrimonial house on L.R. Gatamaiyu Nyanduma/(Particulars Withheld) within 60 days from the date of this judgment.
 - b. In default of vacating as ordered in (a) above, the applicant JMK is granted leave to initiate the process of eviction thereof of DKM at the cost of DKM.
 - c. On DKM vacating or being evicted as stated in (a) and (b) above, JMK is granted leave to take sole occupation of that house.
 - d. Each party shall bear their own costs.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 24TH DAY OF NOVEMBER, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice/Julia

Mrs. Ngetho instructed by J.W. Ngetho Advocates for the Applicant

DKM acting in person: - Present in person

Court

Judgment delivered virtually.

MARY KASANGO



JUDGE

