



**Salim v Mwero (Environment & Land Case 348 of 2017)  
[2023] KEELC 18315 (KLR) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18315 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 348 OF 2017  
SM KIBUNJA, J  
JUNE 26, 2023**

**BETWEEN**

**MAKUU ALI SALIM ..... PLAINTIFF**

**AND**

**JOHSON MKALA MWERO ALSO KNOWN AS JAMAL MKALA  
MWERO ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit against the defendant through the plaint dated the September 28, 2017 as amended on the November 26, 2020 filed through Ms. A. O. Hamza & Company Advocate, seeking for the following reliefs;
  - a. A declaration that the defendant's interest in the house on plot number 10859 [original number 10824/36] section 11/MN, suit property, has been determined and that he is now a trespasser.
  - b. A declaration that the defendant has reimbursed himself of his contribution in the acquisition of the suit property.
  - c. A declaration that the plaintiff is the sole owner of the suit property.
  - d. A permanent injunction be issued restraining the defendant personally or through his servants or agents from entering, occupying, trespassing into the suit property.
  - e. An order of evicting the defendant from the suit property be issued.
  - f. Costs of and incidental to this suit.
  - g. Interests of costs at court rates from the date of the suit till payment in full.
  - h. Any other or further relief as the court may deem fit to grant.



The plaintiff averred that she was the lawfully wedded wife of the defendant until the February 25, 2009 when their marriage was dissolved before the Kadhi's court Mombasa. That during their marriage they purchased the suit property situated at Bombolulu area through a mortgage facility from Housing Finance Company Kenya Limited of Kshs.2,500,000. They commenced joint repayment of the mortgage in installments until May 2007 when the defendant stopped remitting his part of the repayment, when the amount owing stood at Kshs.1,800,000. That the plaintiff continued making the repayment to completion while the defendant continued occupying the suit property despite their separation. That the plaintiff applied and obtained an order in Kadhi Civil Case No. 51 of 2008 for the defendant's eviction from the suit property, but the defendant appealed against the order in Civil Appeal No. 48 of 2012 [formerly Civil Appeal No. 256 of 2010] on the ground that the Kadhi's court lacked jurisdiction to determine land matters. That the said appeal was dismissed on the 15<sup>th</sup> February 2013. That the defendant's interest in the suit property was determined by his failure to complete paying his monthly instalment for the mortgage, and his continued stay on the premises amounts to trespass. That the plaintiff is losing monthly rent of Kshs.40,000 which she will claim as mesne profits from December 15, 2010 till payment in full.

2. The defendant opposed the plaintiff's claim through his statement of defence dated the November 13, 2017 filed through Ms. Opolu & Company Advocates, inter alia averring that the court is without jurisdiction in this suit that is over matrimonial property. That as the suit property was jointly purchased through mortgage during the subsistence of their marriage, it is jointly owned. That the defendant continued making direct cash payment for the mortgage after he lost his employment with Kenya Ports Authority, and it cannot be true that the plaintiff repaid the mortgage alone. That the plaintiff moved out of the suit property on her own accord and he continued residing there with their six children as it was their matrimonial home. That this suit is subjudice in view of Mombasa High Court Civil Appeal No. 256 of 2010, that concerns the same issues of eviction, trespass and possession of the suit property. That the suit property was not intended to be an income generation premises, but a matrimonial home and mesne profits cannot arise as it is jointly owned. That the declaratory and eviction orders sought cannot be issued without determining the parties' contribution to the acquisition of the matrimonial property that is jointly owned. That due to the failure of the plaintiff to issue notice to sue, then she is not entitled to costs of the suit.
3. The plaintiff and defendant testified as PW1 and DW1 respectively, each adopting the contents of their filed statements and producing the documents in their respective lists of documents as exhibits. The parties are generally in agreement in their testimonies that they were wife and husband having married under Muslim law, until their divorce before the Kadhi's Court on the 25<sup>th</sup> February 2009. That they acquired the suit property in 2004 through mortgage that they had agreed to jointly repay through their salaries' check off deductions. That the suit property is registered in their joint names. The parties are also in agreement that the defendant has all along been in occupation of the suit property even after the plaintiff left after the divorce. They also agree that the plaintiff is the one who has been paying rates and rent for the suit property. That according to the plaintiff, the defendant stopped making the repayments in April 2007 when the outstanding mortgage was Kshs.1,800,000, which she cleared on her own. The defendant disputed that claim testifying that he used to pay more than the plaintiff in the three years before he lost his employment. That he continued making cash payments until he could get no more money. His learned counsel submitted that the defendant had paid in excess of Kshs.500,000, which agrees with yellow marked payments in the mortgage account statement the defendant produced as exhibit totaling Kshs.533,200 for the period between 30<sup>th</sup> July 2004 to 3<sup>rd</sup> April 2007.



4. That after the parties closed their cases, the learned counsel for the plaintiff and defendant filed their submissions dated the 22<sup>nd</sup> November 2022 and 8<sup>th</sup> February 2023 respectively, which the court has considered.
5. The issues agreed by both parties for the court's determinations are as follows;
  - a. Whether this court has jurisdiction to entertain this suit.
  - b. Whether this suit is res judicata.
  - c. Whether the house is a joint property and if so what is the effect?
  - d. Whether the plaintiff is entitled to the prayers sought.
6. The court has carefully considered the parties' pleadings, oral and documentary evidence tendered, submissions by both learned counsel, superior courts decisions cited thereon and come to the following findings;
  - a. That as submitted by the learned counsel for the defendant, the twin questions or issues relating to the jurisdiction of the court, and whether the suit is res judicata have already been determined through this court's ruling of 20<sup>th</sup> May 2021. In that ruling the court at paragraph 5 identified the two issues for determination in the defendant's preliminary objections as first, whether the suit was subjudice due to Mombasa HCA No. 256 of 2010 and secondly, the court's jurisdiction in the matter. The court held as follows on the two issues;

“6. From the material before me, the plaintiff had sued the defendant for divorce before the Kadhi's court. Within that case, she also sued for maintenance, custody of the children, payment of balance of dowry, and any other relief deemed fit. The matter was heard and marriage dissolved. Custody of the children was given to the plaintiff with an order for the defendant to provide for their maintenance. It appears that subsequently there was an application, or suit, filed within the Kadhi's court, seeking orders to have the defendant vacate the house. Those orders were allowed. This prompted the defendant to file the appeal, Mombasa High Court Civil Appeal No. 256 of 2010. There is evidence that the said appeal was dismissed for want of prosecution on the 15<sup>th</sup> December 2017. Given the fact that the appeal was dismissed, I do not see the argument of the defendant that this suit is res sub judice. It cannot be, because there is no other pending suit.

7. The second issue raised is that this court lacks jurisdiction. I have gone through Mr. Opolu's submissions but I have not seen anywhere where he has addressed the issue that this court lacks jurisdiction. I wonder whether this issue was dropped. .... I am thus at a loss as to what exactly the defendant's arguments are on the issue of jurisdiction of this court. On my part, on the face of the pleadings before me, I do not see anything that would prevent this court from having jurisdiction. The prayers sought in the plaint are for a declaration of ownership of the suit property. The other related orders are for a permanent injunction to restrain the defendant from the suit property and eviction. Under article 162 (2) (b) of *the Constitution*, this court has jurisdiction to hear disputes “relating to the environment and the use and occupation of,



and title to land.” This dispute, as far as I can see, relates to occupation and title to land for which this court would have jurisdiction. If it is the submission of the defendant that the issues herein can only be determined at the High Court, tat submissions hold no water. Such issue arose in the case of BWM versus JMC Muranga ELC No. 379 of 2017 (2018) eKLR. In that case, a preliminary objection was raised that the Environment and Land court has no jurisdiction over a matter relating to matrimonial property. Kemei J, dismissed the preliminary objection and held as follows;

“For avoidance of doubt, the court notes that the *Matrimonial Property Act* does not define the court that disputes relating to matrimonial property disputes should be referred for determination. It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this court. The only limitation applicable to this court is that it can only hear such disputes if they involve or relate to occupation, use and title to land. I find nothing to oust the jurisdiction of this court and I proceed to determine the preliminary objection.”

8. I am in full agreement with the above dictum. So long as the question before this court will touch on title to land or occupation of it, this court would have jurisdiction, unless there is explicit exclusion in statute. I have found none in this instance.
9. For the above reasons, I see no substance in the preliminary objection and the same is hereby dismissed with costs.”

In the submission by the learned counsel for the defendant he appeared to agree with the above position where he stated that “It is trite to note that this honourable court made a finding that it had jurisdiction and the matter herein is not res judicata.” The learned counsel for the plaintiff on his part has extensively submitted on the two issues and concluded that “it is clear that this honourable court has jurisdiction to hear the matter in dispute.” I am equally in full agreement with the above position in respect to the twin issues of res judicata and jurisdiction as taken by Munyao J, in the ruling of 20<sup>th</sup> May 2021 and I do not find the need to add anything more.

- b. The parties are not in dispute on their intention when they acquired the suit property through the mortgage in 2004. It was meant to be their jointly owned matrimonial home, and that the mortgage value of Kshs.2,500,000 was to be paid for by both of them. Their joint ownership was further manifested or cemented through their joint registration at the time of applying for the mortgage as per the letter of offer dated 23<sup>rd</sup> April 2004, charge dated June 7, 2004 and transfer document dated the June 7, 2004 and registered on the June 10, 2004.
- c. The fact that both parties lived in the suit property with their children after acquiring it in 2004, to the time the plaintiff left with the children after divorce confirms that the suit property was indeed the parties’ matrimonial home. Both parties also agree that their initial desire



to liquidate or service the mortgage to completion jointly was not realized as the defendant contributed to its repayment only up to April 2007. From the oral and documentary evidence availed, the defendant had by then paid about Kshs.533,200 which is about 21.328% of mortgage value of Kshs.2,500,000.

- d. Though it is not specifically stated on which dates the plaintiff vacated the matrimonial home (suit property), the court will take it to be soon after the dissolution of their marriage on the 25<sup>th</sup> February 2009. The defendant contended that the plaintiff left the matrimonial home on her own free will, but the plaintiff testified before the court during cross examination that “I left the house after the defendant stopped being a Muslim and became a Christian, and started having disputes and I feared the impact it would have on my children.” That testimony by the plaintiff was not disputed, but rather confirmed by the defendant during cross examination when he stated that “I married plaintiff under Muslim law. I am now a Christian.” From the foregoing the court would be hesitant to agree with the defendant that the plaintiff left the matrimonial home out of her free will. The circumstances at home, including the defendant joining another faith, must have compelled the plaintiff to leave the matrimonial home, and that cannot be said to be out of free will.
- e. That from the oral and documentary evidence tendered by the parties, the Kadhi’s Court ruling of 15<sup>th</sup> December 2010 among others required the defendant to vacate from the suit property, effectively settling the issue of who between the parties had the right to use the same. However, the evidence availed to this court further show that the defendant never vacated from the suit property. Indeed, the defendant confirmed in his testimony that the plaintiff has not used the house, suit property, since 2010 when she left. The plaintiff on her part testified that the defendant is living in the suit property with another woman and his other children.
- f. The available evidence confirms that the defendant filed an appeal, being Mombasa HCCA No. 256 of 2010, against the decision of the Kadhi’s court of 15<sup>th</sup> December 2010. The appeal was however dismissed for want of prosecution on the 15<sup>th</sup> December 2017. The legal implication of the appeal being dismissed is that the orders of the Kadhi’s Court in respect of the suit property of 15<sup>th</sup> December 2010 remains unchallenged to date.
- g. The plaintiff contends that she is entitled to the suit property to the exclusion of the defendant for reasons inter alia that she is the one who serviced 90% of the mortgage, and that defendant has used the house exclusively without paying rent despite the Kadhi Court’s order. The defendant has taken the position that he is entitled to 50% of the suit property because it was their matrimonial home and his failure to continue paying his instalments after the first three years was because he had lost his employment. The learned counsel for the defendant has extensively submitted on the legal provisions and decided cases in support of his client’s claim of equality in sharing the suit property. Section 7 of the *Matrimonial Property Act* provides as follows on the division of matrimonial property;

“Subject to section 6(3), ownership of matrimonial property vests in the spouse 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.”

The defendant’s monetary/financial contribution in the acquisition of the suit property has been established to be Kshs.533,200 or about 21.328% of the Kshs.2,500,000 mortgage value. The plaintiff paid the balance being Kshs.1,966,800 or about 78.672% and all the interests. She has also been paying the rates and rent for the suit property without any contribution from the



defendant since April 2007, though it is the defendant who has been in exclusive possession from 2010.

- h. Section 2 of the [Matrimonial Property Act](#) explains what “contribution” is in relation to division of matrimonial property as follows;

“In this Act unless the context otherwise requires-

“Contribution” means monetary and non-monetary contribution and includes-

- a. Domestic work and management of its matrimonial home;
- b. Child care;
- c. Companionship;
- d. Management of family business or property; and
- e. Farm work.”

That the learned counsel for the defendant submitted that his client lived and took care of their children before and after the divorce; offered the plaintiff unwavering companionship for the ten (10) years of their marriage; and after the divorce continued to manage, maintain and improve the matrimonial home; and took care of their children’s education and wellbeing. However, there is no oral or documentary evidence adduced by the defendant upon which to derive such submission, especially for the period after the divorce and plaintiff leaving the matrimonial home. On her part the plaintiff disputed the defendant’s claim that he was staying with their children, testifying that she went with the children when she left the matrimonial home. She testified that the “.... defendant has not been paying rates and rent for the house. I am the one who has continued paying the rates and rent on the house and I have receipts. The defendant has not been taking care of the house and it’s in a bad state.” That testimony by the plaintiff was not rebutted by the defendant when he testified. Indeed, the defendant admitted that “I have not paid any rates for the house since I stopped paying the mortgage.” As it is a fact that the custody of the parties’ children was awarded to the plaintiff in the Kadhi’s court order of 2009, the defendant’s submission to the effect that he has continued to make non-monetary contributions in taking care of the children’s needs and improving the suit property that should be taken into account when determining the sharing of the suit property has no basis.

- i. Section 24 of the [Land Registration Act](#) No. 3 of 2012 on the interest conferred by registration provides that;

“Subject to this Act-

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and



b. ....”

There is no doubt that the plaintiff and defendant had entered into the process of acquiring the suit property through the mortgage financing that was to be paid or serviced jointly. The court has already made a finding in the preceding paragraphs that the defendant only paid or serviced 21.328% of the mortgage, and has used or occupied the suit property with another woman and children at the exclusion of the plaintiff and their three children since 2010. The plaintiff’s suit is in essence challenging the defendant’s claim of 50% entitlement to the suit property. Had the marriage between the parties herein blossomed or continued to grow from strength to strength, probably the fact that the plaintiff paid or serviced the lion’s share of the mortgage would not have arisen as an issue, and they would have continued enjoying their equal rights over the said property for their lives. Now that the parties are divorced, it is necessary to determine the parties’ interests over the suit property, while remembering that the Kadhi’s Court order on possession of the suit property is still alive and only awaits execution.

- j. The court understands the plaintiff’s case to be that the benefits the defendant has obtained by using the suit property with his new family, and without paying rent from 2010, when she and their children left the house, should be taken as enough compensation for all the contribution the defendant had made in the acquisition of the suit property. And the defendant’s case is that though he only paid Kshs.533,200 of the mortgage value, has not paid rates and rent since April 2007 but has continued occupying the house without paying any rent since 2010 when the plaintiff and the children left, he should be awarded half share of the suit property by virtue of the fact that it was registered in their joint names and it was their matrimonial home. At paragraph 13 of the amended plaint, the plaintiff averred that the monthly rental income lost in respect of the suit property was Kshs.40,000. Taking that as the probable monthly rent payable for a house in the category of the suit property, as no other figure was put forward by the defendant, for the period from 2010 to today [2023], it would translate to about twelve (12) years which is equal to 144 months. At the rate of Kshs.40,000 per month, the house would have brought in Kshs.5,760,000. Of course there would have been other costs to be taken care of from that income like maintenance of the property and taxes.
- k. It is important to note the following portion of the defendant’s testimony on his contribution and sharing of the suit property;

“I agree had the plaintiff failed to pay the mortgage after I stopped paying, the house would have been auctioned. My payment for the three years I paid was less than 30% of the mortgage value.

If given time of about six months, I can get the house value and I compensate the plaintiff by refunding her what she paid for the house and 50% of the current value. I cannot agree to be refunded only what I had paid for the house.

Our divorce was granted in 2009 and plaintiff left the house in 2010. I agree the plaintiff has not used the house since 2010 and I have not been paying rent.”

That while the defendant understands that the suit property is still there because the plaintiff continued to service the mortgage to completion, failure to which it could



have been auctioned with the probability of both of them losing their individual contributions up to that point, he does not appear to appreciate the plaintiff's efforts and sacrifice that has enabled him and his new family to continue using the suit property to date. That from the totality of the evidence availed the court finds that the plaintiff has established her claim against the defendant on a balance of probabilities.

- l. That in view of the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya that costs follow the event unless otherwise for good cause directed, the plaintiff is awarded the costs of this suit.
1. Flowing from the foregoing findings, the court enters judgement against the defendant and orders as follows;
    - a. A declaration be and is hereby issued that the defendant's exclusive occupation with his new family of L.R. No. 10859/Section 1/MN, suit property, from 2010 to date is sufficient compensation of his contribution of Kshs.533,200 in its acquisition.
    - b. A declaration be and is hereby issued that the defendant's interest over the suit property has been extinguished and his unauthorized continued occupation thereon amounts to trespass.
    - c. A declaration be and is hereby issued that the plaintiff is entitled to be the sole registered owner of the suit property.
    - d. That the defendant to vacate from the suit property in thirty (30) days from today, and in default eviction order to issue. The eviction of the defendant from the suit property to be carried out in full compliance of the applicable law.
    - e. That upon the defendant giving vacant possession of the suit property or being evicted, a permanent injunction order be and is hereby issued restraining him, his servants and or agents from entering upon, occupying and or otherwise interfering with the plaintiff's use and occupation of the suit property.
    - f. The defendant to pay the plaintiff's costs and interests at the court rates from the date of filing this suit until payment in full.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 26<sup>TH</sup> DAY OF JUNE 2023.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

**In the presence of;**

Plaintiff: Absent

Defendant: Absent

Counsel : M/S Hamid for Hamza for Plaintiff.

Mr. Maithya for Defendant.

Wilson – Court Assistant.

**S. M. Kibunja, J.**

**ELC MOMBASA.**

