



JM v FM (Civil Case 33 of 2019) [2022] KEHC 16335 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE 33 OF 2019
EM MURIITHI, J
DECEMBER 16, 2022**

BETWEEN

JM PLAINTIFF

AND

FM DEFENDANT

RULING

1. The Plaintiff filed a suit by Plaint dated December 9, 2019 primarily alleging a statutory marriage with the Defendant in 1988 under *African Christian Marriage and Divorce Act*, breach thereof when “about February 2019 the defendant chased the plaintiff away and brought another woman in the house [and] the Plaintiff and left destitute with no where to settle” and therefore seeks relief as follows:
 - a. Defendant be ordered to maintain status quo as it was before the separation with the plaintiff for pigamous marriage (*sic*).
 - b. The defendant be ordered by this honourable court to build a house for the plaintiff and up-keep.
 - c. Declaration that the plaintiff is to equal rights to properties/ investments
 - d. Any other benefit that the honourable court may deem fit to grant.
 - e. Costs of the case.
2. An interlocutory application for interim relief was compromised by the parties so that the suit proceeded to full hearing.
3. The defendant filed a statement of defence on October 22, 2020 where he admits that the parties have contracted a statutory marriage and denied being married to another woman other than the plaintiff herein; that it was the plaintiff who deserted their matrimonial home and it has made it impossible for



the marriage between the two to hold, and that despite the defendant attempts to reconcile the plaintiff has dismissed such attempts to reconciliation with utmost contempt.

4. The matter went for full hearing and the court directed each party to file their submission.

Submissions

5. Both parties filed their submission on 25/3/2022 and the defendant filed his on 30/3/2022
6. The plaintiff avers that there is no dispute that the plaintiff and the defendant were married and stayed for 30 years as husband and wife
7. That the defendant mercilessly chased her away from her matrimonial home after 30 years stay in marriage
8. That she brought the matter to the Njuri Ncheke Council of Elders as evidenced by the council's meeting held on 6/9/2019
9. That she has duly filed a proposal schedule of properties acquired while in stay with the defendant on 13/5/2021 and demands half of the properties which was acquired during their stay of marriage.
10. On the other hand, the defendant avers that this is a matrimonial division matter disguised as a separation matter
11. That the plaintiff has not tendered any evidence to prove that she was chased from the defendant home and another woman was brought. Further she did not tender any evidence that the defendant was living with another woman
12. That some of the demands by the plaintiff are practically untenable in that some of the properties are overtaken by events and nature hence not available for distribution.
13. That the plaintiff is his wife who deserted him at old age despite doing everything to save their marriage.
14. From the forgoing, it is not in dispute that the Parties are husband and wife having met and married under Kikuyu Customary law in 1988 and subsequently married into Christian Marriage on 25/8/1990.
15. It is the plaintiff case that the lists of properties filed in court on 13/5/2021 and dated on the same day were acquired during the subsistence of their marriage. She further alleges that the defendant had since chased her from her matrimonial home and brought in a new wife.
16. The defendant's position was that the suit is an abuse of the court and that the plaintiff is his wife who deserted him during his old age. He does not oppose the list advanced by the plaintiff however he claims that some of the properties are overtaken by events and nature hence are not available for distribution.

Issues for determination

17. The Court has taken time to appreciate the respective parties' positions as elucidated in their verbal testimonies, the affidavit evidence as well as their submissions and will now undertake to decide. Two substantial issues arise from the Parties' arguments. The first is whether the suit properties duly filed by the plaintiff on 13/5/2021 constitute matrimonial properties. The second is whether in the circumstances the Plaintiff is entitled to the reliefs sought.



Determination

18. The question of what constitutes matrimonial property is now well settled in law. 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.
19. The evidence at hand supports the assertion that the properties filed by the plaintiff were acquired in the course of marriage. As there is no dispute with regard to the averred properties, the court would find that that the suit properties are matrimonial properties.
20. In determining whether the Plaintiff is entitled to the Orders sought, the court must consider whether this court ought to issue an order declaring that 50% (as sought by the Plaintiff) or such higher portions of the suit properties are held by the defendant in trust for the beneficial interest of the Plaintiff. Under Section 2 of the *Matrimonial Property Act* No. 49 of 2013, Contribution is defined to mean both monetary and non-monetary contribution. Non-monetary contribution includes: Domestic work and management of the matrimonial home; Child care; Management of family business or property; and Farm work.
21. Section 7 of the same *Act* stipulates that ownership of Matrimonial Property depends on each spouses' contribution.
22. Section 9 of the *Act* recognizes contribution through improvement of a property acquired before or during the marriage in the following terms:

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”
23. Section 14 of the *Act* provides that:

“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.”
24. In determining the distribution of matrimonial property at the dissolution of a marriage, the Trial Court ought to dispassionately scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties. Furthermore, where property is registered in singularly in the name of one spouse, there shall be a rebuttable presumption that such property is held in trust for the other spouse.
25. In the instant case, the plaintiff prays for a declaration of equal rights to the matrimonial property, and he court agrees that she is entitled to a portion of the matrimonial properties upon the dissolution of marriage, to the extent of her contribution to their acquisition.
26. However, the court is faced with the issue whether in the current circumstances of this case, the court should grant the orders sought by the plaintiff? The answer is negative, as the court does not feel served with evidence of the parties' respective contribution to make declarations of rights therein.



27. The court considers that the instant suit is a matrimonial property division matter disguised as a separation cause as some of the prayers sought by the plaintiff are far-fetched, and unmaintainable the constitutional provision of *Article 45(1)* which fully comprehends the importance of the family unit in the following terms:

“45.

(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.”

28. So, while the plaintiff and the defendant may currently be at loggerheads, the court does not consider it to be in the interest of justice to make the orders sought by the plaintiff. In view of the advanced age of the parties herein and the plaintiff has not come out clearly on whether she wants the marriage of the two parties to be dissolved. The Plaintiff's prayers seeks for the maintenance of status quo as it was before the separation with the plaintiff may only amount to an application for maintenance during marriage. The status quo does not resonate as a separation and/or divorce of the parties herein

29. The Plaintiff's claims are further based on the matrimonial property and maintenance. I take cognizance of the fact that at the moment the plaintiff seems to have left the matrimonial home for another place, there is need for the defendant to provide maintenance for her benefit without necessarily hiding behind the guise that the plaintiff left at her own volition.

30. On the evidence, the court does not believe the defendant's explanation that the lady at the home was merely an assistant whom he called in to help when the Plaintiff deserted. The evidence of the parties confirm that the parties had a matrimonial dispute which led to the Plaintiff leaving home and later collecting her clothes according to the Plaintiff's witnesses (and her things according to the defendant's witnesses) under supervision of the Area Chief. The Defendant's witnesses who were his brothers confirmed the Plaintiff's collection of her things in the presence of her brother and supervision of the Area Chief and alleged that the Plaintiff declined all attempt to reconcile with the Defendant. Their testimony only appeared to support the fact that “Joanina who is Muthamia wife [had taken] her things/belongings” If the Plaintiff was not open to any reconciliation, she would not have insisted on remaining wife of the but would have moved for divorce and sought distribution of matrimonial property. It may be expected that a reconciliation is not possible even with Njuri Ncheke elders and the Assistant County Commissioner as testified by the Plaintiff where the husband has taken in another ‘wife.’ The defendant agreed that there was a lady at his home, saying in cross-examination “the lady at home is a person helps me at home; she is a casual worker. I have never married.” When it was put to him that he had lived with the lady for 3 years, he did not deny living with her but said:

“I have never married. I have not performed any traditional or wedding ceremony. I have not paid dowry or visited her family.”

31. On a balance of probabilities, the court considers that the plaintiff who was married to the defendant in a statutory marriage in 1988 could only have left their matrimonial home on compulsion by the circumstance of the presence of ‘another woman’ in the home. The Defendant chased the Plaintiff from the matrimonial home hby his conduct in bringing in another lady into the home, whether as a person to help him with work or as a wife and whether or not he paid dowry, visited her family or performed a traditional marriage ceremony.



32. The *Matrimonial Property Act*, 2013 is grounded on distribution of the matrimonial estate upon divorce in accordance with section 17 thereof which provides as follows:

“ 17. Action for declaration of rights to property

1. A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
2. An application under subsection (1)—
 - (a) shall be made in accordance with such procedure as may be prescribed;
 - (b) may be made as part of a petition in a matrimonial cause; and
 - (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

Distribution of the matrimonial property must be done only where dissolution of the marriage. Division of matrimonial property is provided for under Section 7 of the *Matrimonial Property Act*, 2013 as follows:

7. Ownership of matrimonial property

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.

Orders

33. Accordingly, for reasons set out above, this court finds that, in the absence of a proper proceedings seeking the dissolution of marriage between the parties, the property suit filed herein by the Plaintiff on 13/5/2021 seeking distribution of the matrimonial properties cannot be maintained.
34. The court makes an order for the provision of suitable accommodation, whether by building a house as prayed or otherwise, and for maintenance of the Plaintiff as the wife of the Defendant. There shall be liberty to apply as to the nature of the accommodation and maintenance to be provided. For this purpose the Matter shall be mentioned on 16/1/2023.
35. The prayer for declaration as to equal rights on properties and investments cannot be made on the evidence before the Court.
36. The Plaintiff may file for an appropriate order for maintenance within the marriage set up, whether monogamous or polygamous. The Plaintiff is advised to file suitable proceedings for dissolution of the marriage and distribution of the matrimonial property, if that be her desire.
37. There shall be order as to costs in this matrimonial matter.

Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF DECEMBER, 2022.



EDWARD M. MURIITHI

JUDGE

Appearances:

Parties in Person.

