



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CIVIL SUIT NO. 3 OF 2018 (O.S.)**  
**IN THE MATTER OF THE DIVISION OF MATRIMONIAL PROPERTY**

**BETWEEN**

MM.....PLAINTIFF

VERSUS

JKM.....RESPONDENT

**JUDGMENT**

**Matrimonial Property- Husband and Wife- Entitlement to the family home-The equal share rule-Departure from equality-Division of property-Section 17 of the Matrimonial Property-Section 3A of the Civil Procedure Act-Title to land.**

**HON. R. NYAKUNDI, J.**

**Background**

1. The parties were married on the 24<sup>th</sup> of August, 2013 and they were divorced on the 24<sup>th</sup> March 2015, vide Divorce Cause No. 3 of 2016. Prior to the marriage the parties cohabited in several locations in Watamu. During the subsistence of their marriage, they developed a house on a portion of land known as Plot No. Kilifi/ [Particulars Withheld] (hereinafter referred to as the suit property) gifted to them by the defendant's father.

2. The Plaintiff filed originating summons dated 16<sup>th</sup> May 2018 in which she sought the following orders from the court: -

The Plaintiff MM the former wife of JKM claims to be entitled to all the house erected within her father in-law's compound at Jacaranda, against the Defendant (her former husband). The suit property was acquired during the subsistence of their marriage.

**a. A declaration that the suit property together with the furniture, fittings and furnishings are the sole property of the Plaintiff.**

**b. In the alternative or in addition to the foregoing, a declaration be issued that the Defendant has already received his share of the matrimonial property.**

**c. In the alternative or in addition to (2) above, a declaration that the Defendant made no contribution at all and the money he stole be reckoned as his income or compensation for supervision he gave during the construction of the house.**

**d. Costs of the suit be awarded to the Plaintiff.**

3. In support of her originating summons the Plaintiff filed an affidavit dated 16<sup>th</sup> May, 2018. The Defendant filed no response in opposition of the application. In the said affidavit, it is averred that subsequent to the grant of the divorce orders issued by the court in Divorce Cause No3 of 2016 which dissolved the marriage and a decree nisi issued, the Plaintiff filed an application seeking an injunction order against the Defendant, his servants and agents or any of them from molesting, harassing, annoying her or in any manner interfering with her quiet possession of the suit property pending the hearing and determination of her petition for divorce which application was allowed.

4. She stated that contrary to the injunction order given on 10<sup>th</sup> April, 2017 the Defendant on 24<sup>th</sup> April, 2018 at about 2.30pm prevented

her employee from accessing the suit property. This prompted her advocate to write a letter to the Defendant's advocates asking them to advise the Defendant to refrain from interfering with her quiet possession of the suit property. It was indicated that same was in disobedience of the court orders as the order of injunction had not been vacated nor had the petition been finalized.

5. Further that on 3<sup>rd</sup> of May 2018, while she was away having travelled to Italy, she received information from her employee to the effect that the suit property had been broken into by the Defendant. That the Defendant had taken possession of the suit property claiming that it belonged to him. She was also informed that the Defendant was going to reside on the suit property with his wife and children.

6. When she returned to Kenya on 7<sup>th</sup> of May 2018, she reported the matter to the police in Watamu. She was accompanied police officers to the suit property where she confirmed that indeed the Defendant, his wife and two children had taken possession of the suit property. She averred that he still lives there. It was her averment that upon inspecting the suit house, she noticed that the Defendant had disposed of some furniture and fittings. This is inclusive of a bed, coffee table, sofa set, chair and beddings from the suit property without her consent all in effort to frustrate her.

7. It was averred that the defendant has no interest in the suit property as it solely belongs to her having solely financed the development of the same. She further averred that the Defendant never contributed to the acquisition and development of the suit property. She stated that shortly after the marriage, she left for Italy from where she used to send money for the development of the suit house. She claims that the total sum sent to the Defendant was Kshs. 5, 000, 000/= (five million). That the money was sent with the intention that the house built would match the said value. (She attached copies of western union remittance advices marked as PEX 4.)

8. She alleged deceit on the part of the defendant. She pointed out that the house built is not proportional to the money she channeled to the Defendant in terms of value. Further that during the construction of the suit property, the Defendant would take pictures of other houses and forward them to her. This was a way of deceiving her with regard to the progress made in the construction of their matrimonial home. That the same was done to encourage her to send more money which he then diverted to his own use. It is indicated that she sought the services of qualified valuers to carry out a valuation on the suit property. The valuation report valued the suit property at Kshs. 500, 500.00/-. It was found by the valuers according to the valuation report that the defendant built a house of mud and water which he then rendered with plaster to disguise the material used. (PEX5 is a copy of the valuation report.)

9. It was urged that the defendant having squandered the rest of the money. According to the Plaintiff, he must be deemed to have already received his share of the matrimonial property. Further, in the alternative, he be deemed not to have made any contribution at all as the money he squandered should be taken into account as his income or compensation for the supervision he did during the construction of the house. Lastly, she deponed that the defendant is determined to keep her off the suit property despite the fact that the same was acquired by her sole efforts and funds.

### Submissions

10. The Plaintiff filed submissions in support of the Originating Summons herein. The Learned Counsel, Mr. Ole Kina placed reliance on Article 45(5) of the Constitution, section 6(1), section 7 of the matrimonial Act. He also cited the case of **Civil Appeal No. 128 of 2014 (P.N.N v Z.W.N [2017])eKLR** to advance his contention.

### Issues

11. There are three essential issues in relation to this case namely:

**a. whether the Plaintiff is entitled is solely entitled to the suit property.**

**b. Whether by dint of the monies he is alleged to have been misappropriated, the Defendant is deemed to have already received his share of the matrimonial home and whether the defendant made any contribution to the acquisition of the matrimonial home.**

### The Law

12. It is now an undisputed fact that the Constitution of Kenya, 2010 as well as the Matrimonial Property Act of 2013, provides protection to family property and envisages the principles of non-discrimination and fairness between spouses. The rights of parties during the subsistence of marriage and upon dissolution of the same are encapsulated in terms of **Article 45(1) (3)** of the Constitution. It provides for equal rights principle as follows:

**“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.”**

13. In several cases, our courts have endeavored to interpret the foregoing provisions of law. One of the earliest opportunities to interpret the provisions of *Article 45 (3)* came one year after the promulgation in the case of **Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes, (Civil Appeal No. 127 of 2011)**, where this Court stated as follows: -

**“Article 45 (3) of the Constitution provides that 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. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68**

**Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day.”**

14. Pursuant to the powers conferred to the Parliament, it in its wisdom rose to the occasion two years after that decision and enacted *The Matrimonial Property Act, 2013* in the year 2013. **Section 7** provides:

**“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.”**

15. Contribution is defined by **Section 2** to mean monetary and non-monetary contribution. Non-monetary contribution 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**

16. **Section 6 (1)** of the **Act** provides for that which constitutes Matrimonial Property. It stipulates as follows: -

- a. The matrimonial home or homes;**
- b. Household goods and effects in the matrimonial home or homes; or**
- c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”**

17. I now endeavor to analysis the evidence tendered by the Plaintiff before this court in light of the principles encapsulated in the above-cited provisions of law.

#### **Analysis of the Evidence**

18. The Plaintiff adduced evidence to the effect that during the subsistence of the marriage the father to the Defendant bequeathed to the couple a portion of land where they were to build their matrimonial home. On diverse dates as exhibited by the annexures to the Plaintiff’s supporting affidavit, she sent a quantum of money to the tune of Kshs. 5million for purposes of developing the said property. When she came back to Kenya, she found out that the Defendant had not utilized all the money she sent in the development of the suit property. A valuation was prepared in relation to the current status if the suit property and property was valued at Kshs. 500, 000/=. That is when the Plaintiff concluded that the rest of the money, she channeled to the Defendant was misappropriated by him.

19. The Plaintiff therefore asked this court to make a declaration that the suit property belongs to her in exclusion of the Defendant. The Defendant did not file pleadings in opposing of the application despite having been severally served with originating summons. I have seen the affidavits of service which were duly served to the Defendant. Thus, he therefore elected not to respond to these proceedings. Nevertheless, I note that this court is under an obligation to interrogate the law and the facts of this before rendering its decision, and not just allow the application because its unopposed.

20. In terms of **section 6** of the Matrimonial Property Act, matrimonial property means the matrimonial home, 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. In this regard, the applicant must prove that the suit property was jointly acquired during the subsistence of her marriage with the Defendant. A spouse laying claim and interest to the marital estate upon divorce ought to present evidence on legal or beneficial interest.

21. In the instant case and according to the evidence tendered herein by the Plaintiff, Plot No. Kilifi/[Particulars Withheld] is where the couples’ matrimonial home is situated. However, there is no evidence that the aforementioned property is jointly owned by the parties herein. The court is not able to ascertain whether this property is jointly registered in the names of the parties herein or in the names of any of the parties to infer that the same could be held in trust for the other party. No such proof exists in this case.

22. The Plaintiff did not furnish the court with title documents in respect of the suit property. Neither did she tender evidence in form architectural designs showing the house plans which were approved by the local authority. She has also not produced a certificate of search before court to ascertain the kind of title the couple holds.

23. Under **section 26(1)** of the Land Registration Act the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party

and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

24. Section 26(1) provides: -

**26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except**

**a. on the ground of fraud or misrepresentation to which the person is proved to be a party or**

**b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

25. In the absence of such intrinsic evidence, the Plaintiff cannot be said to have adduced evidence to the required standard of proof, to wit, balance of probabilities.

26. In terms of **section 7** of the Matrimonial Property Act, 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. The Plaintiff labored to provide evidence of her contribution to the acquisition of the suit property.

27. I have noted that it is indeed true that money was sent from Italy by the Plaintiff to the Defendant. However, the evidence on record does not show the court is the intended use of the said monies. According to the Plaintiff, the purpose of the money was to develop the suit land. No other evidence was adduced in support of the claim that the money sent (Kshs. 5, 000,000/=) was all for the purposes of building a matrimonial home.

28. As much as this court sympathizes with the Plaintiff for the loss of such a substantial amount of money, her arguments cannot suffice. Even if this court were to find that the money sent by the Plaintiff to the Defendant was meant for the construction of their matrimonial home, the same cannot suffice when the ownership of the land upon which the matrimonial home was constructed is not ascertained. In the premises, I'm of the view that this limp is once again non-responsive.

29. The question to ponder therefore is whether the suit property is capable of being distributed. The answer is no. In terms of the Land Registration Act and the land Act of 2012, ownership of land in Kenya is proved by way of title documents which can only be acquired upon registration of the same. In the absence of the said title documents, the court is not able to ascertain the registered owner of that particular parcel of land. The family court can only redistribute matrimonial property either held in trust by one of the spouses or jointly owned during the subsistence of the marriage. In my view any movable or immovable property which came into possession of either of the spouses before or during the marriage under the category of gifts, inheritances and that can be described as being of personal nature ought to be excluded from distribution.

**Conclusion**

30. The upshot of the matter is that the Plaintiff failed to provide adequate proof to warrant the grant of the orders sought in her originating summons. I hereby dismiss the originating summons for want of merit.

31. It is so ordered.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of May, 2019.**

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**REUBEN NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Ole Kina for the Plaintiff