REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 11 OF 2018 (O.S)

IN THE MATTER OF: MATRIMONIAL PROPERTY ACT, 2013 LAWS OF KENYA

BETWEEN

MNH……PLAINTIFF

VERSUS

FHM…… DEFENDANT

JUDGEMENT

The proceedings before me are as a result of Originating Summons by the Plaintiff dated 27th April 2018. At its heart, the summons sought for the distribution of matrimonial property and for specifics orders that:

> **1. This Honourable Court be pleased to issue a declaration that all the under listed properties which are registered in the names of the Defendant including bank accounts jointly owned and/or individually operated by the Defendant are held beneficially and/or in trust for the Plaintiff to wit:-**
>
> > **a. Land Reference Number Ngong/Ngong/[particulars withheld] (Developed consisting the matrimonial home).**
> >
> > **b. Land Reference Number Ngong/Ngong/[particulars withheld] (Developed consisting rental units).**
> >
> > **(c)) Joint Equity Bank account, Account Name; FHM & MNH, Account No. […] and Co-operative Bank of Kenya Limited Account Name FHM: Account No.: […]**
>
> **2. An Order do issue declaring that 50% of such other or higher portions of the properties aforesaid, are held by the Defendant in trust and for the beneficial interest of the plaintiff.**
>
> **3. An order do issue declaring that the Defendant is accountable to the Plaintiff in respect all income derived from the said properties.**
>
> **4. An Order that the properties and the income from the same be settled in proportions aforesaid or as the court may order.**
>
> **5. The cost of this summons be provided for**

The Plaintiff's case was supported by an affidavit sworn by MNH on 27th April 2018. The Defendant on the other hand filed two affidavits in response dated 14th June 2018 and 20th July 2018 respectively. At the viva voce hearing, the Plaintiff was represented by Learned Counsel Mr. Nzaku while the defendant represented himself. The matter was dispensed with by written submissions filed by the Plaintiff and Defendant and dated 12th October 2018 and 13th November 2018 respectively.

It is not in dispute that the Parties are husband and wife having met in 1991 and lived together ever since and subsequently solemnized their marriage under **The African Christian Marriage and Divorce Act (Cap. 151) [*repealed*]** on 25th August 2011. Two issues, both adults, have been borne of this union.

It is the Plaintiffs case that L.R. No. Ngong/Ngong/[particulars withheld] and L.R. Ngong/Ngong/[particulars withheld] (the suit properties) which are solely registered in the names of the Defendant were acquired by the joint efforts of the Plaintiff and the Defendant during the cause of their marriage. According to the Plaintiff, she made both a monetary and non-monetary contribution towards the acquisition and development of said properties and as such they constituted matrimonial properties. According to the Plaintiff, prior to the marriage the

Defendant did not own any property other than personal effects. The Plaintiff averred that aside from taking care of the family during the Defendants stay in the United States, she had also engaged in business that enabled her to make a monetary contribution to the purchase and development of the suit properties. The plaintiff further stated that the rental income from one of the Properties was deposited into one of the bank accounts operated by the Defendant who had sole enjoyment to the detriment of the Plaintiff. The Plaintiff alleged that the Defendant had since chased her from the matrimonial home and threatened her life. The Plaintiff went on to intimate that she was apprehensive that the Defendant was in the process of disposing of one of the matrimonial properties and by doing so deprive her permanently the use and enjoyment of the matrimonial properties unless the court intervened and issues the orders sought.

The Defendant's position was that the prayers sought by the Plaintiff were premature and unnecessary. He refuted the allegation that he had put the Plaintiff out of the matrimonial home and instead averred that the Plaintiff had left of her own volition. The defendant admitted that their union had in recent times, been fraught challenges that according to him had been instigated by the Plaintiff. He went on to give his life history and a chronology of how he acquired the suit properties as well as the disputes he had had with his wife and intimated that his decision to pay school fees for his nephew was the bone of contention. The Defendant further denied the assertion that he wanted to dispose of one of the suit properties. According to the Defendant, he made sole monetary contributions towards the purchase and development of the suit properties and registered them under his name as his wife was not in a position to do so since she was a house wife. According to the Defendant, the small businesses the wife engaged in had been started by him. The Defendant alleged that the Plaintiff had failed to demonstrate the source of the funds with which she had used to make her alleged monetary contribution. Additionally, he averred that he had bought LR. Ngong/Ngong/[particulars withheld] and registered it in trust in the Plaintiffs name and yet the Plaintiff had neglected to mention this property at all. As per the Defendant, he had supported is family even when he was in the United States of America when he would send the Plaintiff remittances either monthly or bi-weekly. The Defendant averred that the Plaintiff had not instituted any divorce proceedings and was free to resume her wifely duties if she so chose.

Learned Counsel Mr. Nzaku submitted on behalf of the Plaintiff that in view of the pleadings three main issue for determination arose. The first was whether the suit properties constituted matrimonial properties. The second was whether the Defendant is accountable to the Plaintiff in respect of all the income derived from the matrimonial properties and if the same can be settled in equal proportions. Finally, Counsel asked the court to determine whether the Plaintiff should be maintained by the Defendant during their separation.

Counsel placed reliance on **Section 6 (1) of the Matrimonial Property Act No. 49 of 2013** as to what constituted matrimonial property. **Section 17** of the aforesaid Act was cited in support of the contention that the Plaintiff had the right to apply to the court for a declaration of rights to any property that is contested. It was submitted that the defendant agreed with the Plaintiff that the properties were acquired during the subsistence of the marriage and the issue that arose was the extent of the Plaintiff's contribution. The case of **MO vs AOW [2017] eKLR** was alluded to in support of the Plaintiffs claim for a declaration that the properties in question were matrimonial properties.

As to whether the Defendant is accountable to the Plaintiff in respect of all the income derived from the matrimonial properties and if the same can be settled in equal proportions Mr. Nzaku submitted that the applicable law was contained in the ruling made by Nambuye J (as she then was) in **Z.W.N V P.N.N Civil suit No 10 of 2004[2012] eKLR.** In this case it was held inter alia that property having been acquired during marriage, fell under Section 14 of the Matrimonial Property Act which states that in such a case there was a rebuttable presumption that the property was held in trust for the Applicant. In the absence of such presumption being rebutted, the Applicant was entitled to accountability of the proceeds of the said property said to be held in trust for her by the Respondent.

Finally, on the issue of maintenance, Counsel submitted that in making an Order for maintenance, a court ought to be guided by the provisions of **Article 45(5) of the Constitution** which states: "Parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage." It was further submitted that **Section 77 of the Matrimonial Property Act** empowered the court to make an order of maintenance. The court was thus urged to make an order for maintenance of the Plaintiff. On this limb of submissions, counsel relied on **MEK V GLM [2018] eKLR.**

The Defendant on his part submitted that he was not guilty of neglect as he had provided reasonable maintenance for both the Plaintiff and his family. He submitted that the Plaintiff had abandoned her matrimonial home on her own volition due to no fault on his part and she had therefore forfeited her rights to maintenance. He stated that the Plaintiffs insistence on demanding 50% of the monthly gross rental income was a misapplication of the concept of "equality of the rights" in a marriage. He submitted that the Plaintiff had misled the court in testifying that she had bought the land LR No. Ngong/Ngong/[particulars withheld] which was registered in her name yet she had no means.

It was the Defendant's prayer that the Court review or set aside the preliminary injunctions in force. Further, the Defendant urged the Court to make an order that all the properties listed in this suit, together with LR No. Ngong/Ngong/[particulars withheld] be registered jointly and a declaration made that the same were jointly owned by the Plaintiff and Defendant. The Defendant sought to have the Plaintiff restrained against any interruption of any nature by the Plaintiff of the education of their son and nephew. Finally, the Defendant submitted that each party bear their own costs.

ANALYSIS AND DETERMINATIONS

I have 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. To my mind, two substantial issues are brought to bear by the Parties' arguments. The first is whether the suit properties constitute matrimonial properties. The second is whether in the circumstances the Plaintiff is entitled to the orders prayed for.

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.

The facts at hand and the submissions of the parties' give a very clear account as to the status of the properties. The Plaintiff has listed Land Reference No. Ngong/Ngong/[particulars withheld], Land Reference No. Ngong/Ngong/[particulars withheld] and Land Reference No.

Ngong/Ngong/[particulars withheld] as well as Joint Equity Bank account, Account Name; FHM & MNH, Account No. […] and Co-operative Bank of Kenya Limited Account Name FHM: Account No.: […]. On the other hand, the Defendant contends that Land Reference No. Ngong/Ngong/[particulars withheld], which is solely registered in the Plaintiff's name in trust for both of them ought to be considered as matrimonial property. The evidence at hand supports the assertions that all the suit properties were acquired in the course of the marriage. This is not in dispute. In fact, the Defendant has gone as far as to intimate to the court that the impugned properties ought to be registered jointly in the names of both parties. As there is no dispute as to the status of the properties, there is no doubt in my mind and I therefore do find and hold that the suit properties herein as well as the property land reference number Ngong/Ngong/[particulars withheld] are matrimonial properties.

In determining whether the Plaintiff is entitled to the Orders sought, I shall now focus my attention to answer whether this court ought to issue an order declaring that 50% 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.

Section 7 of the same Act stipulates that ownership of Matrimonial Property depends on each spouses' contribution to wit: -

> **"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**."

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."**

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."**

What the Matrimonial Property Act of 2013 does is formalize and make provision for giving due consideration to both the monetary and non-monetary contribution of parties in a marriage as is evident from the clauses cited in the antecedent paragraphs. This position has been cemented by the Courts in different instances. For starters, in **NWM v KNM (2014) eKLR** it was stated that the court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.

On the place of non-monetary contributions, I echo the sentiments held by The House of Lords decision in **White vs White (200) UKHL 54** where the Court alluded to the greater awareness 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.

Correspondingly, **Section 14 of the Matrimonial Property Act No. 49 of 2013** seemingly gave effect to the Court's position **Njoroge -V- Ngari [1985] KLR, 480**, where the court stated that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property.

In the case of **PWK vs JKG 2015 eKLR** the Court said;

> **"Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. 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 of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788."**

Considering English authorities, the Court in **Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR** appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. In part, the Court held:

> **"It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in Pettit are those of English law of trusts. The House of Lords specifically decided so in Gissing vs. Gissing. According to the English law of trusts it is only through the wife's financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property."**

Nothing reflects my position in this matter than the pronunciations made by Kiage J in **PNN vs ZWN Civil Appeal 128 of 2014 (2017) eKLR**, where he expressed himself in this regard:

> **"I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."**

The logical conclusion flowing from the judicial precedence quoted above is that 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.

Let me now turn to the facts in the instant case. To convince the court of her monetary contribution towards the acquisition of the matrimonial properties, the Plaintiff produced bank statements and receipts of cash sales. She further submitted that through funds acquired from her small businesses, she had contributed to the acquisition of as well as the development of the properties in question. However, to my mind, the evidence adduced by the Plaintiff fell short of the mark. I am therefore not convinced, on the basis of the evidence before me and on a balance of probability, that the Plaintiff's contribution was monetary in nature.

However, this does not end here. At this juncture it is imperative that I establish whether the Plaintiff made a non-monetary contribution, if any. Non-monetary contribution includes: Domestic work and management of the matrimonial home; Child care; Management of family business or property; and Farm work. The evidence adduced in this matter supports the theory that the Plaintiff indeed did take part actively in the management of family business. It is the Plaintiffs evidence that she run small businesses to support the family. This claim has been buttressed by the Defendant who on his part said that on a number of occasions he had started businesses for his wife, including and not limited to selling eggs. Additionally, during the Defendant's sojourn in the United States, it is the Plaintiffs claim that she undertook management of and development of one of the suit properties. This is uncontroverted by the Defendant. Moreover, the union has been blessed with two issues, who from the evidence are now young adults with a bright future ahead of them. This is clear evidence of child care. As if this is not enough, it is uncontroverted that the Plaintiff engaged in farm work, in the form of growing vegetables in greenhouses. The gist of the foregoing is that, on the balance of probability, the Plaintiff indeed made substantial non-monetary contributions in the course of the coverture. She would, in my opinion, be entitled to a portion of the matrimonial properties upon dissolution of the marriage.

Before going any further, I shall now deal with the issue of whether the Plaintiff should be maintained by the Defendant during separation. It is of note that Counsel for the Plaintiff only raised this issue in his submissions. The Originating Summons dated 27th April 2018 makes no mention of any such prayer. The court therefore declines the invitation to make a ruling on this issue at this time.

Having outlaid my findings in the leading paragraphs, I am faced with one final determination. Should this court, in the current circumstances, grant the orders sought by the Plaintiff? I find in the negative.

My reasoning stems from 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."**

So, while the Plaintiff and the Respondent might currently be at loggerheads, I find the request for a declaration on the distribution of the matrimonial property to be rather rash and injudicious. In the absence of concrete proof of dissolution; a decree nisi or a decree absolute, this court is hesitant to make such orders as to distribution of the impugned properties. I can do no better than reiterate the comments made in the decision of this Honorable Court in **T M W v F M C, Matrimonial Cause 3 of 2018 [2018] eKLR** to wit:

> **"I have not seen proof of divorce in form of a decree declaring the marriage between the parties dissolved. As to the document to proof divorce the law recognizes decree Nisi or decree absolute. So far as the language of the matrimonial property Act is concerned it must be obvious that the parties have terminated their cohabitation and there is no likelihood of reconciliation. The court is not a vehicle that encourages the breaking up marriages or setting them asunder. I cannot find better words rather than stating that the family is one of nature's masterpieces. That is the spirit of the constitution of Kenya under Article 45 of the constitution which provides that:**
>
> **"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.**

This entails that the state has an obligation to protect the sanctity of marriages. In that regard, no court in its right mind may encourage destruction of families. Thus if families are not protected or if courts are to give a blind eye on the mischief divorce, the spirit of section 45(1) of the constitution aforementioned will be defeated. I agree with the assertions of my brother W.M. Musyoka. J in MNW v WNM & 3 Others where he stated that "it is against public notice to entertain matrimonial disputes as it would accelerate the break-up of the family involved and that public police favour family unity and should foster peace and reconciliation." Alienation of lands between spouses during unbroken coverture does not augur well for the well-being of the family as a unit.

In the premises, I'm of the view that the Petitioner herein is entitled to a share which may not be equal to that of the Respondent if at all the matrimonial property is to be distributed. The suit property herein cannot be subject to distribution without proof of divorce."

Therefore, cognizant of the fact that spouses are entitled to equal rights at the time of the marriage pursuant to Article 4(3), I shall restrict myself to pronunciations on the rights of the parties in the subsisting marriage. As quoted in the case of **PNN vs ZWN (2017) eKLR**(**supra**):

"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 (emphasis mine). 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."

There is one other point which can't escape my attention before making final remarks on this originating summons. I refer to it as essentials of marriage union. The essentials of a marriage agreement comprise of a myriad of support services which include cohabitation, financial, social, homemaker, food, clothing, Medical needs, housing and other corresponding necessities. The distinctive feature of this essentials in a marriage set up is that if anyone of it is withheld or refused by either party without justifiable cause can be a ground for divorce. It is usually couched in the form of desertion, abandonment and or cruelty. I call these triggers of matrimonial cause's action to demand a breakaway and eventual distribution of property.

What are the circumstances leading to the institution of this suit from my perspective it's the failure of duty of care between the spouses to provide essential support services to their marriage. That duty is prominently spelt out in the unwritten covenant when the union is formed and both agree to live together as husband and wife. It should not be lost that a people who want to live within a marriage relationship must know that it does not come for free. To me marriage is as good and strong depending on the level of investment one puts in as a whole.

In other words in the instant originating summons evidence comes out clearly that there is primafacie inference of negligence on the part of the couples to live up to the measured expectations of a marriage union. One way to look at sustainability of a marriage is through the lens of maintenance until it legally terminates by dissolution, remarriage or death. In the case of **Iyer In Baitahira V Ali Hussain Fissalli Air 1979 Sc362** the court set out a novel and promising approach to justify maintenance during the marriage as follows ***"interest from which could not keep the woman's body and soul together for a day, unless she was ready to sell her body and give up her soul,----------III used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the street''***

It's legally recognized that spouses owe each other a duty of care to provide such maintenance to the extent of protecting themselves from moral or physical harm. Since the plaintiff is still a legal wife to the defendant she is entitled to a just proportionate share of financial resources realized from the matrimonial property for her upkeep and maintenance. Disputes arising out of the marriage are not designed to suspend these minimum guarantees for spouses to treat each other with respect and human dignity.

I take cognizance of the fact that at the moment the plaintiff seems to have left the matrimonial home for another place, in essence they stay separately from each other. There is need for the defendant to provide maintenance for her benefit without necessarily hiding behind the support he gives to the children of the marriage.

I have not been able to assess a correct figure for such a maintenance order for reason that this was not one of the issues expressly ventilated by any of the parties during the trial of this cause. However it can be implied from the evidence and pleadings that the plaintiff operates without any support from the defendant. In this regard short of distributing the matrimonial property an order requiring that the defendant makes provision for the maintenance of the plaintiff is fair and just.

In the upshot, this court finds and holds that suit properties Land Reference No. Ngong/Ngong/[particulars withheld], Land Reference No. Ngong/Ngong/[particulars withheld] and Land Reference No. Ngong/Ngong/[particulars withheld] as well as Joint Equity Bank account, Account Name; FHM & MNH, Account No. […] and Co-operative Bank of Kenya Limited Account Name FHM: Account No.: […] consist of matrimonial properties. Were the aforesaid properties to be distributed, the Plaintiff would be entitled to a share which may not be equal to that of the Defendant. In the absence of conclusive proof of the dissolution of the marriage between the parties, the suit properties herein cannot be distributed.

While i agree with the letter and spirit of the Act on matrimonial property i cannot accept that parties relying on the stipulated statutory

provisions should turn a blind eye in reflecting on the protection of the best interest of the children of the marriage in asserting their property rights. My final view is that presently the Matrimonial Property Act 2013 is grounded on distribution of the marital estate upon divorce.

Each party to bear their own cost of this litigation.

It is so ordered.

Dated, Delivered and Signed in open court at Kajiado this 20th day of December 2018.

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R. NYAKUNDI

JUDGE

In attendance:

Mr. Nzaku for the plaintiff

Mr. F. Hinga Muchoki in person