



**MK v CC (Environment & Land Case 33 of 2022)  
[2023] KEELC 20300 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20300 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 33 OF 2022**

**L WAITHAKA, J**

**OCTOBER 3, 2023**

**IN THE MATTER OF ORDER 37 RULE 8, ORDER 40  
RULE 1 & 2 AND ORDER 51 RULE 1 OF THE CIVIL  
PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF SECTION 6, 9, 12 AND 14 OF  
THE MATRIMONIAL PROPERTY ACT, 2013**

**AND**

**IN THE MATTER OF SECTION 66, 93 & 107 OF THE  
LAND REGISTRATION ACT NO 3 OF 2012**

**AND**

**IN THE MATTER OF SECTION 38 OF THE  
LIMITATIONS OF ACTIONS ACT CHAPTER 22 LAWS  
OF KENYA**

**AND**

**IN THE MATTER OF LAND PARCEL LELAN/KAPTALAM/260**

**BETWEEN**

**MK ..... APPLICANT**

**AND**

**CC ..... RESPONDENT**



## JUDGMENT

### Introduction

1. The applicant herein took up the summons dated May 31, 2019 for determination of the following questions:-
  1. Whether a declaration should issue that the parcel of land known as Lelan/Kaptalamwa/260 which is registered in the name of the respondent is matrimonial property;
  2. Whether a declaration should issue that the respondent holds title to the suit property (Lelan/Kaptalamwa/260) in trust for himself and the applicant in their respective shares as legal owners and cestuii que trust respectively;
  3. Whether a declaration should issue that the applicant and the respondent are entitled to equal rights in the suit property.
  4. Whether the Land Registrar Elgeyo Marakwet should be ordered to rectify the title of the suit property to reflect the applicant and the respondent registered jointly as the proprietors of the suit property;
  5. Whether a permanent injunction should be issued to restrain the respondent by himself his servants, agents and employees from interfering with the applicant's lawful enjoyment and quiet possession of the suit property
  6. Such other orders as the court may deem fit and just in the circumstances.
  7. Costs of the suit/application.
2. The suit/application is premised on the grounds that the suit property was allocated/given to the applicant and the respondent to live as a married couple; that the applicant and the respondent lived happily and built a home on the suit property where they worked hard and contributed to the development of the suit property and that their marriage was blessed with four issues (girls).
3. It is the applicant's case that the respondent and she lived in the suit property until 1981 when the respondent married a second wife, AC.
4. Explaining that the respondent bought another parcel of land in Kapkonga where he resides with his second wife and the second wife's children, the applicant contends that the suit property is for all intents and purposes a matrimonial property and that the respondent holds it in trust for her children (applicant's children) and herself.
5. The applicant states that she is in possession and occupation of the suit property and complains that the respondent has threatened to evict her and her children from the suit property because she gave birth to girls only.
6. The applicant further complains that the respondent has on several occasions destroyed the houses erected in the suit property and evicted her therefrom.
7. Explaining that she was returned to the suit property by clan members and area administrative officers, the applicant states that she is apprehensive that unless restrained by way of the orders sought in this suit/application, the respondent may transfer the suit property to the members of his second house or to third parties thereby exposing her to irreparable loss and damage.



8. The respondent swore and filed a replying affidavit, dated July 5, 2019, in which he inter alia acknowledges that the applicant and he were married under Marakwet customary law from 1965 to 1991 when they parted ways as a result of what he describes as unfaithfulness, irresponsibility and violence on the part of the applicant.
9. *Vide* paragraph 6 of his replying affidavit, the respondent depones that he fled their matrimonial home after the applicant and one LC stormed into their then matrimonial home and threatened to kill him.
10. The respondent explains that in 1991, he instituted a divorce case against the applicant leading to the marriage that existed between them being dissolved in 1994.
11. The respondent confirms the applicant's pleading to the effect that he bought another parcel of land in Kapkonga where he stays with his new wife, AJK, but denies the applicant's contention that he holds the suit property in trust for himself and the applicant.
12. It is the respondent's case that the suit property is not matrimonial property because it was given to him by his mother to hold in trust for himself and his two sisters, PK and JK in equal shares.
13. The respondent further denies the applicant claim that he has discriminated against her family on the ground that she only gave birth to girls.
14. Arguing that the applicant has no legal ground or basis to dictate the way he should deal with the suit property which he terms ancestral property inherited from his mother, the respondent depones that he has discretion to deal with the suit property in the way he wants because it is not a matrimonial property.
15. Terming the applicant's children adults capable of making their informed decision and free to bring individual claims against him if they feel discriminated against, the respondent depones that he has not discriminated against any of his children.
16. Concerning possession and use of the suit property, the respondent denies the applicant's contention that she has been the one in use and occupation of the suit property.
17. According to the respondent, the suit property is in use and occupation by his sister PK, his son KK, his daughter CJKK and himself.
18. The respondent has deponed that the applicant resides in Kapsait Center, plot number 19, where she runs a hotel and butchery business. The respondent has further deponed that the applicant only trespassed into the suit property in May 2019.
19. The respondent denies the applicant's allegation that he has on several occasions destroyed her structures in the suit property and forcefully evicted her from the suit property; that he intends to transfer the suit property to the children of the other family or to third parties and states that under Marakwet customary law, no one is allowed to dispose inherited land.
20. It is the respondent's case that his rights to the suit property are protected by law, in particular, sections 24 and 26 of the [\*Registration of Land Act, 2012\*](#).



## Evidence

### The plaintiff's case

21. When the matter came up for hearing, the plaintiff availed three witnesses namely Charles Kibet Yabei (PW1); Benjamin Too Kiprotich (PW2) and Pamela Jebichii Kiplagat (PW3) who reiterated the plaintiff's pleaded case.

### The defendant's case

22. The respondent who testifies as DW1 reiterated the averments contained in his replying affidavit.
23. At close of hearing, parties were directed to file submissions.
24. At the time of writing this judgment, only the respondent had filed submissions.

### Analysis and Determination

25. From the pleadings filed in this suit, the evidence adduced in support thereof and the submissions by the respondent, I find the following to be the issues for the court's determination:-
  - i. Whether the suit property is matrimonial property;
  - ii. Whether a declaration should issue that the applicant and the respondent are entitled to equal rights in the suit property
  - iii. Whether the suit property is subject to any trust in favour of the applicant;
  - iv. Whether the applicant has made up a case for being granted the orders sought or any of them.
26. As to whether the suit property is matrimonial property, it is not in dispute that the applicant and the respondent lived in the suit property as their matrimonial home before issues arose in their marriage leading to their separation and thereafter divorce. Whilst the respondent has pleaded that he acquired the suit property as a gift from his mother, I do find as a fact that the same was transferred to the respondent during the subsistence of the marriage and at a time when the property was being used as the matrimonial home of both the applicant and the respondent. The property continued to be used as such long after it was registered in the name of the respondent.
27. Vide paragraph 6 of his replying affidavit sworn on July 5, 2019, the respondent acknowledges that the suit property was their matrimonial home. In that regard see that section of the replying affidavit where respondent has deposed as follows:-

“...the applicant and one LC...once stormed into our matrimonial home, threatening to kill me after which I fled out of the matrimonial home in a bid of saving my life”.
28. A matrimonial property is defined under section 6 of the [Matrimonial Property Act](#) (hereinafter referred to as the Act) as:-
  - a. “the matrimonial homes 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.”



29. A matrimonial home is, on the other hand, defined under section 2 of the Act as:-
- “any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”
30. It is the considered view of this court that the facts of this case fit squarely to the facts of the case of *RCL v MKK* (matrimonial cause No 6 of 2020) (2022) KEHC 10719 (KLR) 9 June 2022) (judgment) cited by the respondent’s counsel where Matheka J., inter alia stated:-
- “even if this was inherited property, and in my view it is not, it was acquired during the marriage...when it was gifted as alleged, he was still legally married to the applicant. Matrimonial home was built there. His family lives there surely he cannot be heard to say that the applicant was only living there with his consent. That argument is untenable and only intended to diminish the applicant’s role in acquisition and development of the property.”
31. In *DNK v KM* (2021)e KLR Odunga J. (as he then was) stated/held:-
74. “While interpreting section 5 (supra) in *ENK v JNK* [2015] eKLR, Musyoka J. pronounced himself thus:-
- “From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property. Indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property (sic) where the inheritance was before the marriage...”
75. Mabeya J. on his part in *SN v FM* [2019] eKLR held that:-
- “ 24. The net effect of the foregoing is that any property acquired during the subsistence of the marriage, including that which is inherited forms part of matrimonial property. The only time that inherited property is excluded from matrimonial property is if it was acquired before marriage. Property that is inherited during the subsistence of the marriage is not excluded from matrimonial property except if it was acquired before marriage.
76. It is not in dispute that M/N/xxx was a property of UM (deceased) before his demise. The defendant has stated that UM (deceased) was his grandfather. In the certificate of confirmation dated November 16, 2015, the defendant’s name appears as one of the beneficiaries of M/N/xxx. It is also clear that land No M/N/xxxx was hived off from M/N/xxx and was acquired during the coverture of the marriage. As regards the Mombasa Apartment it was acquired and jointly registered in the name of the plaintiff and defendant during the subsistence of their marriage.
77. Based on the evidence and the above legal provisions and authorities I have no difficulty in finding that the two properties are matrimonial properties.”
32. Persuaded by the above cited authorities, whose holdings I totally agree with, in the special circumstances of this case, where there is evidence that the suit property was acquired during the subsistence of the marriage between the applicant and the respondent and where it is admitted that



the suit property was being used by the applicant and the respondent as their matrimonial home long before it was registered in the name of the respondent and continued to be used as the matrimonial home of the applicant and the respondent long after it was registered in the name of the respondent, I have no difficulty in finding that the suit property is a matrimonial property.

33. In view of the foregoing I return a positive verdict to the question as to whether the suit property, Lelan/Kaptalamwa/260, is matrimonial property.

34. As to whether a declaration should issue that the applicant and the respondent are entitled to equal rights in the suit property, jurisprudence on that issue is to the effect that marriage per se does not entitle parties to a marriage equal rights to matrimonial property; that parties to the marriage have to prove their contribution to its acquisition and/or improvement. In that regard see the case of [PNN v ZWN](#) (2017)e KLR where Kiage JA stated:-

“Does this marital equality recognized in the [Constitution](#) mean that Matrimonial Property should be divided equally” I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement. The reality remains that when the ship of marriage hits the rocks, founders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on the 50:50 mantra. It is not a matter of mathematics merely as in splitting of an orange into two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in *Francis Njoroge v Virginia Wanjiku Njoroge*, Nairobi civil appeal No.179 of 2009; “...a division of the property must be decided after weighing the peculiar circumstances of each case as was stated by the Court of Appeal of Singapore in *Lock Yeng Fun v Chua Hock Chye* (2007)SGCA 33”

35. In the case of [Federation of Women Lawyers Kenya \(FIDA\) v Attorney General & another](#) (2018)e KLR, it was held:-

“The law recognizes equal worth and importance of parties in marriage, thus, the beneficial share of each spouse as the law on division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportion of financial contribution either direct or indirect towards the acquisition of the property. First, the Act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.”

36. In applying the above cited authorities to the circumstances of this case, where the applicant did not adduce any evidence capable of proving that she is entitled to an equal share of the suit property, I find and hold that the applicant has not made up a case for a declaration that she is entitled to an equal share of the suit property. In any event, it is the considered view of this court that it lacks jurisdiction to



venture into the issue of distribution of matrimonial property. In that regard see the persuasive decision in the case of *RW v JMN* (2022) e KLR where it was held:-

“The *Matrimonial Property Act* does not specifically define “court” but it is trite that division of Matrimonial Property is determined by the High Court under its jurisdiction as provided under section 3A of the *Civil Procedure Act* and article 165(3)(a) of the *Constitution* of Kenya.”

37. Arising from the foregoing, I decline to address the issue of the parties’ entitlement to a share of the suit property as without jurisdiction this court cannot venture into it.
38. As to whether the registration of the suit property is subject to a trust in favour of the applicant, the determination that the suit property is matrimonial property has a bearing to this question in that the applicant has an interest in the suit property, namely her undetermined share of the suit property. Despite being the sole registered proprietor of the suit property, the respondent cannot be allowed to deal with the suit property in a manner prejudicial to the applicant’s yet to be determined share thereof. For that reason, I return a positive verdict to the question as to whether the respondent holds the suit property in trust for himself and the applicant.
39. As to whether the Land Registrar Elgeyo Marakwet should be ordered to rectify the title of the suit property to reflect the applicant and the respondent registered jointly as the proprietors of the suit property, despite having found that registration of the suit property is subject to a trust in favour of the applicant I am not convinced that justice would be served by having the property registered in the joint names of the applicant and the respondent. It is the considered view of this court that justice would be better served by registering a restriction on dealings with the suit property prejudicial to the applicant’s interest in the suit property. Registration of a restriction would make the property incapable of being disposed off without consent or participation of the applicant and/or her personal representative.
40. On whether a permanent injunction should issue to restrain the respondent by himself his servants, agents and/or employees from interfering with the applicant’s lawful enjoyment and quiet possession of the suit property; it is the view of this court, that the order is necessary for purpose of giving effect to the determination that the suit property is matrimonial property. Until distributed in the manner provided for in law or it is determined that the applicant has no share to it, the respondent should be restrained from interfering with the applicant’s use and possession of the suit property.
41. The upshot of the foregoing is that the applicant’s case has merit and is allowed in the following terms:-
  1. A declaration do and is hereby issued that the parcel of land known as Lelan/Kaptalamwa/260 which is registered in the name of the respondent is matrimonial property;
  2. A declaration do and is hereby issued that the respondent holds title to the suit property (Lelan/Kaptalamwa/260) in trust for himself and the applicant in their respective shares as legal owners and cestui que trust respectively;
  3. The Land Registrar Elgeyo Marakwet be and is hereby ordered to register a restriction barring the respondent from dealing with the suit property by way of selling, leasing, subdivision, transfer, mortgage or in any other manner disposing off the suit property (Lelan/Kaptalamwa/260) without the written consent of the applicant;
  4. That until the suit property (Lelan/Kaptalamwa/260) is distributed or it is otherwise determined that the applicant has no share in the suit property, the respondent by himself his servants, agents, employees and/or by any means whatsoever be and is hereby restrained from interfering with the applicant’s lawful enjoyment and quiet possession of the suit property.



5. Parties shall bear their own cost of the application/suit.
42. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 3<sup>RD</sup> DAY OF OCTOBER, 2023**

**L. N. WAITHAKA**

**JUDGE**

