FC v AC (Civil Suit 2 of 2022) [2025] KEHC 119 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 119 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT 2 OF 2022

M THANDE, J

JANUARY 17, 2025

BETWEEN

FC ..... APPLICANT

AND

AC ..... RESPONDENT

JUDGMENT

1. By his Originating Summons dated 29.9.22, the Applicant seeks the following orders against the Respondent, that:

    a. The Court do declare that the property known as L. R. No. [Particulars Withheld] is a matrimonial property and the Estate of VVB (Deceased) is entitled to equal half share in the said property following the dissolution of marriage between AC and VVB on 31.8.2015.

    b. The name of VVB (Deceased) be deleted from the Certificate of Title and in her place the name of the Claimant FC be entered as co-owner of property known as L. R. No. [Particulars Withheld]

    c. In the alternative to prayer 2 above, property known as L. R. No. [Particulars Withheld] be sold and the sale proceeds be divided in equal share between the Respondent and the estate of VVB (Deceased).

    d. Costs be provided for.

2. The grounds upon which the Summons is premised are that L. R. No. 7769 (the suit property) is registered to his parents, the Respondent and VVB (the deceased). The Applicant stated that his parents were married on 13.12.1961 but the marriage was dissolved on 13.8.15 by the Court of Lecce, Italy in Civil Case No. 4049/2015. Further that during the subsistence of the marriage the deceased purchased the suit property using her own money and had it registered in her name and that of the Respondent, her then husband. Following the divorce, the deceased was keen to file a matrimonial

cause to claim her interest in the suit property but was unable to do so due to ill health. The Applicant's case is that after the deceased died on 10.3.21, the Respondent has threatened to dispose of the suit property and gift it to unknown third parties, without regard to the deceased's interest which had by law crystalised upon the divorce in 2015. The Applicant urged that it is in the interests of justice that the orders sought be granted to secure the assets belonging to the estate of the deceased and for the benefit of her children.

3. The Respondent though served did not file a response and the matter proceeded as undefended.

4. I have considered the OS and the submissions filed the Applicant. The issues that fall for determination are:

    i. Whether the suit property is matrimonial property.

    ii. Whether the estate of the deceased is entitled to half share interest of the property.

Whether the suit property is matrimonial property

5. The Applicant seeks a declaration that the suit property is matrimonial property. He submitted that the suit property was bought during marriage and was the Kenyan home of the deceased and her children for over 20 years.

6. Section 6 of the *Matrimonial Property Act* (the Act) defines matrimonial property as follows:

    1. For the purposes of this Act, matrimonial property means—

        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

7. For a property to be declared to be matrimonial property, it must constitute the matrimonial home or homes of spouses and household goods and effects in such home or homes. Other property jointly owned and acquired during the subsistence of marriage also constitutes matrimonial property.

8. It is not possible to tell from the available evidence whether the Respondent and the deceased did in fact make the suit property their matrimonial home. The claim by the Applicant that the suit property was the home of the deceased and her children for over 20 years is not supported by evidence nor does that make the same the matrimonial home of the Respondent and the deceased. The documents exhibited however do show that the suit property is jointly owned by the Respondent and the deceased. Accordingly, the same is matrimonial property by definition.

Whether the estate of the deceased is entitled to half share interest of the property

9. The Applicant, seeks that his name be entered in the Title to the suit property in place of that of the deceased. He also seeks a declaration that the estate is entitled to half share of the suit property or that in the alternative, the same be sold and proceeds shared equally between the Respondent and the estate of the deceased.

10. It is well settled that the basis upon which property, matrimonial or otherwise, is divided between spouses, is contribution. Section 7 of the Act makes provision relating to ownership of matrimonial property as follows:

> 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. (emphasis)

11. In JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment), the Supreme Court reaffirmed this principle of contribution and stated:

> The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution.

12. A party seeking a share in matrimonial property must thus demonstrate that they have contributed to the acquisition or development of the said property. This is observed in the P N N v Z W N case (supra), where Waki, JA citing the case of Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR stated:

> The Court also examined local decisions and came to the following conclusion:-
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> "In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see Essa vs. Essa (supra); Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported), Kamore vs. Kamore (supra); Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court 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. The court considered the peculiar circumstances of each case and independently assessed the wife?s (sic) contribution as equal to that of the husband."

13. In the case of jointly acquired properties during the marriage, Section 14(b) of the Act provides that there shall be a rebuttable presumption that the parties' beneficial interest in the matrimonial property is equal:

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.

14. The exhibited Conveyance dated 12.5.97 conveying the suit property to the Respondent and the deceased on purchase, shows that the suit property was acquired by them both, jointly. The Conveyance clearly states "TO HOLD the same unto and to the use of the Purchasers as Joint Proprietors for an estate in fee simple free from encumbrances.

15. A reading of Section 14 of the Act reveals that the Court will make a presumption that joint property that is acquired during coverture, is held by spouses equally. This presumption may however be

rebutted by evidence to the contrary. In this regard, I am duly guided by the decision in O K N v M P N [2017] eKLR, where the Court of Appeal had this to say about this presumption:

> Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See Kivuitu -v- Kivuitu, [1991] KLR 248. The presumption is however, rebuttable by either party showing that their contributions were not equal.

16. Article 45(3) of *the Constitution* provides:

> 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

17. Whereas the equality principle set out in Article 45(3) of *the Constitution* extends to matrimonial property, it by no means suggests that such property is to be shared 50-50 between the parties upon the dissolution of their marriage. The Court must treat each spouse equally by taking into account their respective contribution, whether monetary or non-monetary, to the acquisition or development of matrimonial property.

18. In the case of P N N v Z W N [2017] eKLR, Kiage, JA while considering the equality principle in Article 45(3) of *the Constitution* stated:

> 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."

19. And in JOO v MBO case (supra), the Supreme court stated:

> While therefore reiterating the finding in Echaria, we also find that article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in *the Constitution* do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.

20. It is quite evident from the law and case law that contribution is the basis for division of matrimonial property between spouses.

21. In his submissions, the Applicant contended that there are 4 requirements for division of matrimonial property. He relied on the case of ENN v SNK [2021] eKLR where Kemei, J. stated:

> On whether the petition is fatally defective and ought to be struck out, this Court finds that it is trite law that a matter regarding division of matrimonial property ought/shall have the following facets proved by either party:
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> a) The fact of a valid, legal, regular marriage in law;

b) Dissolution of such marriage by/through an order of the Court;

c) That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage;

d) Contribution by each party to the acquisition/development.

22. In support of his claim, the Applicant exhibited a summary extract of marriage deed which shows that there was a valid marriage between the Respondent and the deceased solemnized on 13.12.61. The documents further shows that the marriage was subsequently dissolved on 31.8.15. The exhibited conveyance dated 12.5.97 and the official search dated 30.8.22 support the claim that during the subsistence of the marriage, the Respondent and the deceased purchased the suit property jointly. The first 3 requirements set out by Kemei, J. have been satisfied.

23. As regards the 4th requirement, namely contribution, the Applicant stated that during the subsistence of the marriage the deceased purchased the suit property using her own money and had it registered in her name and that of the Respondent, her then husband. No evidence was however produced to support this claim. The Applicant was obligated to place before this Court, cogent evidence to support his claim. A bank statement or copies or counterfoils of cheques drawn by the deceased towards the purchase price would have assisted the Applicant to prove his allegation.

24. The Applicant further stated that following the dissolution of marriage, the deceased was keen to file a matrimonial property cause to claim her interest in the suit property but was prevented from doing so by ill health. Again, the Applicant has not placed any evidence to show the intention of the deceased to file such matrimonial property cause. He has not even told the Court when the deceased began to ail or indeed what she was suffering from. Hospital records would have been helpful in supporting his claim.

25. As regards the alleged threat by the Respondent to dispose of the suit property or gift the same to unknown third parties, the Applicant has not supported the same with evidence. Indeed, the exhibited official search shows that the suit property is still in the name of the Respondent and the deceased. Had there been any such intention, one would have expected that the Respondent would have had the deceased's death certificate registered against the title to the suit property pursuant to Section 60 of the *Land Registration Act*, whereupon her name would have been deleted from the register. Without any evidence to support the Applicant's claim, the same rings hollow.

26. The Applicant has further stated that the deceased's interest crystallised upon the divorce in 2015. It bears repeating that the basis of a spouse's entitlement to matrimonial property is contribution. Such contribution must be proved to the satisfaction of the Court. The fact of marriage and subsequent dissolution thereof alone, does not entitle a spouse to a share in property, notwithstanding that the same is matrimonial property. The claim by the Applicant in this regard is clearly unsupported by *the Constitution* or statute.

27. It is trite law that he who asserts must prove. Even in an undefended case such as the one before me, an applicant must prove his claim to the required standard if he is to obtain the remedy that he seeks. The *Evidence Act* is very clear in this regard. Section 107 stipulates:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108 provides:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 provides:

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

28. In Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, the Court of Appeal had this to say on the burden of proof in undefended cases:

> On perusing the judgment and hearing Mr. Mwangi, what comes through clearly and was repeated several times over, was the position that since the appellant did not deny the facts stated in the affidavits of the 1st respondent then he was deemed to have admitted those facts. With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1st respondent that:
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> "The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."
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> That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed.
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> It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

29. Duly guided by the holding of the Court of Appeal in the cited case, I find that notwithstanding the absence of a rebuttal by the Respondent, the Applicant has not proved his case to the required standard.

30. In the end and in view of the foregoing, the Court finds and holds that the Originating Summons dated 29.9.22 lacks merit and the same is hereby dismissed. As the Respondent did not participate in the matter, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 17TH DAY OF JANUARY, 2025

M. THANDE

JUDGE