



REPUBLIC OF KENYA



IIK v JKK (Family Appeal E019 of 2023) [2025] KEHC 3537 (KLR) (18 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E019 OF 2023
SM MOHOCHI, J
MARCH 18, 2025**

BETWEEN

IIK APPELLANT

AND

JKK RESPONDENT

(Being an Appeal from the judgment/order of Honourable E. N. Juma (CM) delivered on 24th October, 2023 in Nakuru Chief Magistrates Divorce Cause No. 47 of 2018)

JUDGMENT

1. The brief facts of this case is that the Appellant vide Petition dated 20th June, 2018 sought dissolution of their union with the Respondent and further prayed for mandatory injunctive orders in respect of the property known as Njoro/Ngata Block X/XX (New Kiambu) Kiamunyi Estate.
2. The Petition proceeded to trial and on 24th October, 2023 the Court dissolved the union but declined to issue orders in respect of the property known as Njoro/Ngata Block X/XX (New Kiambu) Kiamunyi Estate citing lack of jurisdiction in determination of issues matrimonial property.
3. The Appellant being dissatisfied with part of the judgment preferred the instant appeal vide the Memorandum of Appeal dated 30th October, 2023 on the following grounds: -
 - i. That the Learned Trial Magistrate erred in law and in fact in holding that, she has no jurisdiction to determine an issue of matrimonial property in Divorce Cause/Petition whereas Section 17 of the Matrimonial Property Act No. 49 of 2013 provides that an application for declaration of right to any matrimonial property can be made as party of a petition in a matrimonial cause
 - ii. That the Learned Trial Magistrate erred in law that, the issue of determination of rights of matrimonial property is reserved of the High Court citing the decision in EMW vs RMK [2022] eKLR whereas the decision confirms that a Court hearing a divorce petition



can determine an issue of matrimonial property within the province of Section 17 of the *Matrimonial Property Act* No. 49 of 2013 and Marriage Act of 2014 conferring Magistrate's Court with jurisdiction to determine Matrimonial Property dispute

- iii. That the Learned Trial Magistrate erred in law in failing to determine the prayers for orders respecting a property known as Njoro/Ngata Block X/XX (New Kiambu) Kiamunyi Estate which was one of the issues and prayers before her and which was within her jurisdiction to determine within the provisions of the *Matrimonial Property Act* No. 49 of 2013, *Marriage Act* 2014 and in line with the decision in Law Society of Kenya Nairobi Branch vs Malindi Law Society & 6 others [2017] eKLR.
 - iv. That the Learned Trial Magistrate's decision respecting the issue of matrimonial property specifically orders sought respecting the property known as Njoro/Ngata Block X/XX (New Kiambu) Kiamunyi Estate is a clear error of law.
4. The Appellant thus prays that, the judgement holding that the Court had no jurisdiction to determine an issue of Matrimonial property be set-aside, and that, the Court enters judgment in respect of the property known as Njoro/Ngata Block 1/2094 (New Kiambu) Kiamunyi Estate as prayed for in the Petition before the Trial Court and that the costs of the Appeal be met by the Respondent

Appellant's Submissions

5. The Appellant submitted that Section 17(2) (b) of the *Matrimonial Property Act* provides that the Court can make declarations of property rights as part of petition in a matrimonial cause and relied in the case of WMM v EWG [2023] KESC 36 (KLR) and quoted the Court where the states that: -
- “Under Section 17(2) (b) of the *Matrimonial Property Act*, an application or a declaration of rights to any property that is contested between spouses may be as a part of a Petition in a matrimonial cause.”
6. Further the Appellant relied on the following decisions to submit that the Trial Court's jurisdiction cannot be limited to Section 7 of the *Matrimonial Property Act* while ignoring the provision of Section 17 of the Act.
- a. In EMW v RMK [2022] eKLR it was held that the Court has jurisdiction to the twin issues of divorce and matrimonial property
 - b. AKK V PKW [2020] eKLR where the Court of Appeal overturned a ruling where it was held that divorce cause does not prevent a party from bringing an action for declaration of rights to property under Section 17 of the Matrimonial Act.
7. That subsistence of a marriage notwithstanding, a spouse can make an application for declaratory orders as part of a petition in a divorce cause. It was further submitted that the Petition did not allude to division of the property but to restrain the Respondent respecting the matrimonial property.

Respondent's Submissions

8. The Respondent submitted on three issues
- a. Whether the Appeal is merited
 - b. Whether the Respondent is entitled to a 50:50 share
 - c. Who shall bear the costs of the Appeal



9. Regarding the first issue, it was submitted that contrary to law the Appellant's Petition before the Trial Court sought to combine the division together with prayers for division of matrimonial property. Further that there were inconsistencies in the Appellant's grounds of appeal and the submissions.
10. The Respondent contended that, the decision of the Trial Court was based on concise and proper application of the law and judicial principles. He relied in POM v MNK [2019] eKLR and UMA v IID [2023] KEKEC 11 (KLR) to submit that, a Court of law lacks jurisdiction to handle and render decisions with respect to matrimonial property in the absence of concluded divorce proceedings.
11. As regards the second issue, the Respondent submitted in the unlikely event that the Court does find merit in the appeal, the Respondent submits that he is entitled to 50:50 share of the property as rooted in Section 7 of the *Matrimonial Property Act*. That the property qualifies as matrimonial property and was developed with the joint efforts of both parties.
12. On the third issue on costs, it was submitted that, costs follow the event as contemplated under Section 27 of the *Civil Procedure Act* and the Appellant having failed to prove merits in the appeal the costs be made to the Appellant.

Analysis and Determination.

13. I have carefully considered the Record of Appeal as well as the submissions filed by both parties.
 - a. Whether the trial Court had jurisdiction to determine a dispute on matrimonial property rights
 - b. Whether the Appeal has merit.
 - c. Who bears the costs of the Appeal
14. In the Petition dated 20th June, 2018, the prayers sought by the Appellant are reproduced as hereunder:
 - a. ...
 - b. That the respondent be restrained from emotionally and physically assaulting the Petitioners and towards the end the Respondent be restrained from entering into, residing on and in any other way interfering with the Petitioner in Property known as Njoro/Ngata Block XXX (New Kiambu) Kiamunyi Estate
 - c. The mandatory injunction issued directing the Respondent to forthwith vacate the Petitioner's house property known as Njoro/Ngata Block XXX (New Kiambu) Kiamunyi Estate
15. At paragraph 11 of the Petition, the Appellant pleaded declaration and distribution of matrimonial property pursuant to Section 6, 7 and 8 of the *Matrimonial Property Act*.
16. The Court declined to determine the issue of matrimonial property and stated it was a preserve of the High Court. The Appellant insists that the finding of the Court was flawed based on the fact that Section 17 of the *Matrimonial Property Act* provides that an application for declaration of right to any matrimonial property can be made as part of a petition in a matrimonial cause.
17. Section 17 of the *Matrimonial Property Act* provides the procedure to be followed where there is a dispute with respect to matrimonial property. It provides thus:-



- a. 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.
 - b. An application under Sub-section (1)—
 - i. shall be made in accordance with such procedure as may be prescribed;
 - ii. may be made as part of a petition in a matrimonial cause; and
 - iii. may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.
18. In *CGM v FMM* [2023] KEHC 122 (KLR) the Court opined that:
- “The above provision connotes that concurrent jurisdiction has been given to the various courts to hear disputes relating to matrimonial property. in this regard, this court has original and unlimited jurisdiction in civil matters by virtue of the provision of article 165(3) of *the Constitution*. The Court’s jurisdiction therefore includes jurisdiction over matters relating to matrimonial property.”
19. Section 17 of the Act does not define the “the Court” to mean either the Magistrates’ Court or the High Court, it is silent. Nonetheless Rule 6 (1) of the Matrimonial Property Rules provides that:-
1. Court to which application may be made
 1. An application to enforce a claim relating to matrimonial property may be made in any proceedings under the Act—
 - a. to the High Court in any case where the value of the matrimonial property which is the subject matter of the claim exceeds the pecuniary jurisdiction of a magistrate’s court; or
 - b. to a magistrate’s court having civil jurisdiction to adjudicate matters within the court’s pecuniary jurisdiction.
20. The above sheds light that a party seeking to enforce a claim on matrimonial property may file to either the High Court or the Magistrate’s Court based on the pecuniary value of the properties subject to the dispute. The only catch is the Court can only make declaratory orders and not distribution orders pursuant to Section 17.
21. Therefore, as regards findings 1 and 2 of the Memorandum of Appeal, a Magistrates’ Court does have jurisdiction. Section 17(2) (b) of the *Matrimonial Property Act* as absorbed in Rules 5 (1) (a) (b), 6 (1) and 7 (1) of the Matrimonial Property Rules and as read with Section 7 of the Magistrates Court Act grants the Magistrates Court jurisdiction to hear and determine matrimonial proceedings subject to pecuniary jurisdiction. The High Court’s jurisdiction is subject to the value of the properties exceeding the pecuniary jurisdiction of the Chief Magistrates’ Court.
22. In *PAO v PO* [2024] KEHC 230 (KLR) it was held that:
- I find and hold that the Rule gives jurisdiction to the magistrate’s court to hear and determine the dispute whose pecuniary value falls within the jurisdiction of the Magistrate’s Court, considering that the Act and Rules do not define what “court” is, and the wordings used throughout the other sections and Rules is “a court.”



For the above reasons, I find that the application dated December 14, 2023 is merited. I allow it and order that this suit shall forthwith be and is hereby transferred to the Chief Magistrate's Court at Kisumu for hearing and final determination.

23. The Court in *CGM v FMM* [2023] KEHC 122 (KLR) transferred a suit filed by way of Originating Summons to the Subordinate Court citing that the Magistrates Court equally had jurisdiction as follows:

“Equally, the Magistrate's Courts have jurisdiction to hear matrimonial causes arising under the *Marriage Act* of 2014...A magistrate who is seized of a matrimonial cause will have jurisdiction to determine a dispute under the *Matrimonial Property Act* based on his/her Monetary Civil Jurisdiction.

“The sub-ordinate courts have jurisdiction to handle Matrimonial Property Disputes...”

24. I find it contradictory that the Appellant in the Trial Court sought distribution and declaration of Matrimonial property yet in her submissions it was submitted that this was not a case of distribution of property but only declaration of matrimonial property rights.
25. Be that as it may, even if the Trial Court was clothed with jurisdiction, the value of the properties is not presented to ascertain whether the issue of determination of property rights or distribution of property is at the High Court level or of the Magistrate's Court level, based on the pecuniary value of the property. There is no valuation report or a defined figure of value of the properties in question.
26. Secondly, the claim lacked form for failing to conform to laid down procedure for the reason that Section 17 (2) of the *Matrimonial Property Act* provides that an application seeking a declaration of rights to contested property shall be made in accordance with prescribed procedure the subsistence of marriage notwithstanding.
27. A cursory look at the prescribed procedure, Rule 7 (3) of the Matrimonial Property Rules provides that, institution of a claim relating to matrimonial property made during the subsistence of a marriage shall be made, by way of Originating Summons supported by an affidavit. The claim could not be sustained in its form, since it was made during the subsistence of the marriage by way of Petition in divorce proceedings. One cannot bend the rules to accommodate their quest.
28. Thirdly, although the claim was not fatal, it was defective in nature curable by moving the Court appropriately. The prayers sought could not be granted from the manner in which the Appellant moved the Court. The same cannot be issued at this juncture. The Appellant equally sought in a Divorce Petition, dissolution of marriage, which correct in form, together with prayers for division of Matrimonial property which offended the rules of procedure.
29. On the issue of merit of the Appeal Grounds 1 and 2 cannot pass the test of time due to the foregoing. As regards Grounds 3 and 4, the Appellant has sought judgment in respect of the property known as Njoro/Ngata Block X/XX (New Kiambu) Kiamunyi Estate as prayed for in the Petition before the Trial Court.
30. First and foremost, the Appellant sought a prohibitory injunction restraining the Respondent from accessing the suit property secondly, she sought mandatory injunction compelling the Respondent to vacate the suit property.
31. The guiding principles on an application for any reliefs by way of injunctions was set in *Giella vs. Cassman Brown* [1973] EA 358 as follows:



- i. The applicant must show a prima facie case with a probability of success.
 - ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
 - iii. When the court is in doubt it will decide the application on a balance of convenience.
32. The Court of Appeal in the Case of Malier Unissa Karim v Edward Oluoch Odumbe [2015] eKLR discussed the circumstances under which a Mandatory Injunction would be granted as follows: -
- “The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-
- A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.
33. In her submissions, the Appellant failed to satisfactorily show why the Court should enter judgement as prayed in the Trial Court. The Appellant submitted extensively on the issue of jurisdiction and the fact that the Court could have granted declaratory orders but failed to address why she is entitled to injunctive orders before this Court as against the Respondent. It is simply not enough to seek orders; one has to convince the Court why the said orders are deserved.
34. In the upshot, I am unpersuaded that, the Appellant has failed to satisfy the Court that she is entitled to any of the prayers sought in the Appeal and the same is dismissed for lack of merit with costs to the Respondent.
35. The Judgment/Order of Honourable E. N. Juma (CM) delivered on 24th October, 2023 is hereby affirmed.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 18TH DAY OF MARCH, 2025

MOHOCHI S. M

JUDGE

