



MGN v SN (Civil Suit E012 of 2024) [2025] KEHC 9650 (KLR) (Family) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT E012 OF 2024
H NAMISI, J
JULY 4, 2025**

BETWEEN

MGN PLAINTIFF

AND

SN DEFENDANT

JUDGMENT

1. The Plaintiff instituted these proceedings by way of Originating Summons dated 22 July 2024 seeking the following orders:
 - i. That a declaration do issue ordering the sale and disposal of the Land Title Nairobi/Block XXX/XXX and the proceeds to be shared equally between the Applicant and the Respondent;
 - ii. That the cost of this suit be awarded to the Applicant.
2. The Originating Summons which are brought under section 17 of the *Matrimonial Property Act* and Rule 7 of the Matrimonial Proceedings Rules is premised on the following grounds:
 - i. That the Applicant and Respondent have been married under the African Marriage and Divorce Act (now repealed) since 1 November 1986;
 - ii. That during the pendency of the said marriage, the couple acquired the property Land Title Nairobi/Block XXX/XXX now registered in their joint names as evidenced by the search and the title;
 - iii. That the Applicant is a co-owner of the property and she is entitled to have the same shared equally between the Applicant and the Respondent;
 - iv. That it is in the interest of justice that the Application be allowed by this Honourable Court.



3. The Applicant has filed a Supporting Affidavit with annexures. She also filed a Supplementary Affidavit. The Respondent filed his Replying Affidavit, opposing the Application. Parties consented to dispose of the matter by way of written submissions.

Plaintiff's Case

4. The Plaintiff avers that she was lawfully married to the Defendant on 1 November 1986. Attached to her Supporting Affidavit is a copy of the Certificate of Marriage. It is the Plaintiff's case that during the subsistence of their marriage, the Plaintiff and Defendant jointly acquired the suit property, which is registered in their names as joint proprietors.
5. In refuting the Defendant's claim that he acquired the suit property solely, the Plaintiff avers that she contributed both directly and indirectly to the acquisition and improvement of the suit property. She particularised her non-monetary contribution to include domestic responsibilities, which, she asserts, enabled the Defendant to commit his income towards servicing the mortgage in respect of the suit property. The Plaintiff stated that she was responsible for raising and providing for their children, including managing their education and welfare, often in the absence of the Defendant.
6. The Plaintiff relied on the provisions of Section 91 of the *Land Registration Act*, 2012, which stipulates that property jointly registered is held in equal and undivided shares, and such registration is binding unless evidence to the contrary is adduced. In her Supplementary Affidavit, the Plaintiff categorically denies the Defendant's allegations of deceit and fraud, as well as her purported desertion of their matrimonial home. She maintains that she is the registered as a co-owner and that the registration was lawful and consistent with their marital arrangement and mutual contributions towards the property's acquisition and use.

Defendant's Case

7. The Defendant opposes the Application, asserting that he is the sole legal and registered owner of the suit property. In his Replying Affidavit, the Defendant depones that he solely purchased the suit property in 1990 via a mortgage facility from HFCK, which was subsequently taken over by his employer, Industrial Development Bank, in 1993. A Further Charge was registered in 1995 over the suit property. It is the Defendant's case that he solely remitted all related charges, including payment of water bills, land rent and land rates. The Defendant was emphatic that the Plaintiff never made any contribution whatsoever to the purchase or development of the suit property.
8. The Defendant provided a detailed account of their marital history. He avers that although they got married in 1986, the Plaintiff deserted their home in 1987, accompanied by the children, without any notice or just cause. He claims that he secured the mortgage in 1990, long after the Plaintiff had deserted their home. The Defendant avers that the Plaintiff only became aware of the suit property in 1992, when she suddenly reappeared, sick, and resided temporarily at the residence. However, upon regaining her health, the Plaintiff took off again with the children in tow. It is after this incident that the Defendant married a third wife and they cohabited on the suit property.
9. The Defendant's core contention is that the Plaintiff's inclusion in the title over the suit property was marred with deceit, misrepresentation, fraud and emotional manipulation. He alleges that in 2009, following a disagreement with his third wife, he reached out to the Plaintiff, who then imposed preconditions for him to move in with her. These preconditions allegedly entailed including her name on the title for the suit property in exchange for the Defendant's name being included on the Plaintiff's property in Kayole, which the Defendant claims he developed by constructing a two-room house and a wall. The Defendant asserts that once the suit property was registered in both names, the Plaintiff



chased him from her house, denying the Kayole agreement and that she intentionally retained the title over the suit property in order to claim ownership.

Preliminary Objection

10. The Defendant raised a preliminary objection on the following grounds:
 - i. That the Plaintiff herein lack the locus standi to sue the Defendant as there was no relationship, contractual or otherwise, as between the Plaintiff and the Defendant at any time whatsoever with respect to the suit property.
 - ii. That the Plaintiff's suit herein is fatally defective for the reasons stated at paragraph *para_1 1* hereinabove.
 - iii. That consequently this suit is an abuse of this Honorable court process and should be struck out with costs to the Defendant.

Analysis and Determination

11. Having keenly read the pleadings and submissions herein, the following are the issues for determination:
 - i. Whether the Defendant's preliminary objection is merited?
 - ii. Whether the suit property, land Title Number Nairobi/Block XXX/XXX, constitutes matrimonial property?
 - iii. The share of the Plaintiff's interest in the said property?
 - iv. Who bears the costs?
12. The Defendant's Preliminary Objection asserts that the Applicant lacks locus standi because there is no contractual relationship between the parties concerning the suit property.
13. What constitutes a Preliminary Objection is set out in the case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696, where it was held that:

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”
14. In John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR the court elaborated the foregone legal position whereby Mwita J. stated that: -

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”



15. Also in the case of *Oraro v Mbaja* [2005] 1 KLR 141 the court held as follows:

“...A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....”

16. It follows, therefore, that a Preliminary Objection ought to be raised on pure points of law and when argued it is likely to dispose of the suit. In the instant suit, the Preliminary Objection raised by the Defendant is based on the issue of locus standi. A claim that one lacks locus standi contests a party's right to a trial by a Court, and if a decision is rendered in favour of the said argument, the suit may be dismissed. A claim that a party lacks locus standi is a purely legal matter that must be brought up and resolved as soon as possible. In the circumstances, the Preliminary Objection as filed is proper as it raises pure points of law. Therefore, as a preliminary issue, this Court must determine the issue whether the Plaintiff has the locus standi to institute this suit.

17. It is undisputed that the Plaintiff and Defendant were married, as evidenced by the Certificate of Marriage. The Plaintiff is, therefore, the lawful spouse to the Defendant. The [*Matrimonial Property Act*](#) and its accompanying Rules create a specific statutory avenue for spouses to seek declaration of rights to contested property, irrespective of whether a formal contractual relationship existed between them concerning the acquisition of the property.

18. Section 17 of the [*Matrimonial Property Act*](#) provides as follows:

- (1) 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.
- (2) An application under subsection (1)—
 - (a) shall be made in accordance with such procedure as may be prescribed;
 - (b) may be made as part of a petition in a matrimonial cause; and
 - (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

19. The Defendant's contention that locus standi is dependent on a contractual relationship in this context demonstrates a fundamental misunderstanding of the legal framework governing matrimonial property. The Plaintiff's right to bring suit is expressly provided for in statute. Therefore, the Preliminary Objection lacks any legal foundation and the same is overruled.

20. On the second issue, from the evidence and assertions, it is clear that the suit property is registered in the names of the Plaintiff and Defendant. The registration date being 21 July 2010, falls squarely within the subsistence of their marriage. Section 6 (1)(c) of the [*Matrimonial Property Act*](#) defines matrimonial property to include any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. Needless to say, pursuant to the provisions of the Act, the suit property is matrimonial property.



21. Turning to the issue of the Plaintiff's interest in the suit property, the legal framework for the division of matrimonial property is primarily governed by the [Matrimonial Property Act](#), read in conjunction with Article 45 (3) of [The Constitution](#).
22. In its landmark decision of JOO -vs MBO KESC 4 (KLR), the Supreme Court clarified the interpretation of Article 45(3). The Court definitely ruled that while Article 45 (3) espouses the principle of equality of spouses, it does not automatically translate to an equal division of matrimonial property upon dissolution of the marriage without regard to contribution. Instead, the division must be based on the proven respective contribution of each party, whether direct or indirect, guided by the principles of fairness and conscience.
23. That notwithstanding, the present case differs significantly from instances where the property is registered in the name of one spouse. In this instance, the suit property is registered jointly, whether or not the same was done by deception or misrepresentation as alleged by the Defendant.
24. Section 93 of the [Land Registration Act](#) provides as follows:

Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the [Matrimonial Property Act](#) (Cap. 152).
25. Section 14(b) of the [Matrimonial Property Act](#) reinforces this by stating that where property is in the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests are equal.
26. This means that for property that is jointly registered between spouses, the starting point for this Court is the presumption of equal beneficial interest. The burden then shifts to a party seeking an unequal division to rebut his presumption by demonstrating a significantly disproportionate contribution.
27. The Defendant claims sole financial contribution to the acquisition and development of the suit property, citing mortgage payments and other incidental costs. While the mortgage documents and initial title indicate his name solely, the property was ultimately registered jointly in 2010. This joint registration itself implies a mutual understanding and intention of co-ownership.
28. On her part, the Plaintiff claims both direct and indirect contribution. While no evidence of the direct contribution has been provided, the Plaintiff has articulated her non-monetary contribution clearly. The same includes domestic responsibilities that enabled the Defendant to service the mortgage, raising and providing for the children, managing their education and welfare in the Defendant's absence.
29. The Courts have progressively recognised and valued non-monetary contributions. In N W M v K N M [2014] eKLR, the Court stated thus:

“It therefore follows that this court must endeavour to give effect to both monetary and none monetary contributions, that both the Applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.”
30. Similarly, in AWM v JGK [2021] eKLR, the Court held that

“in respect of non-monetary contribution, I take the view that the Applicant made her contribution in the manner defined under section 2 or the [Matrimonial Property Act](#). I have considered the argument by the Respondent that the Applicant had domestic workers



and did not do household chores. However, a mother's contribution to a home cannot be quantified in monetary terms. Even where there is domestic help in most cases it is the duty of the mother to ensure that the home runs smoothly and that all the needs of the children and the husband are catered for. Even where she is gainfully employed as claimed in this matter, her duties once she gets home do not end until all is well at home. This is what the Applicant is claiming. She also provided companionship to the Respondent. The Respondent argues that companionship does not constitute a contribution towards matrimonial property. Section 2 of the *Matrimonial Property Act* defines the contribution to include companionship”

31. The above position directly supports the Plaintiff's claims regarding child-rearing and domestic management. Though unquantifiable, non-monetary contributions can be substantial and, in some instances, even higher than monetary contributions.
32. In this instance, it is not in dispute that the Plaintiff bore children and cared for them while the Defendant worked. The Plaintiff's role in domestic management and child-rearing, particularly during the periods when the Defendant was allegedly absent, directly facilitated the Defendant's ability to service the mortgage and develop the property. While the Defendant's narrative includes alleged desertions by the Plaintiff and his subsequent marriage, these do not negate the legal effect of the joint registration in 2010, nor do they diminish the value of the Plaintiff's contributions over a marriage that span almost four decades. The fact that the Plaintiff was involved in the process of registration of the title jointly, as admitted by the Defendant, further supports the Plaintiff's claim of legitimate involvement and entitlement.
33. Finally, the Plaintiff seeks an order that the property be sold and the proceeds shared equally between the Plaintiff and Defendant.
34. Section 7 of the *Matrimonial Property Act* provides that:

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 added)
35. There has been no evidence of dissolution of the marriage between the Plaintiff and Defendant. By dint of section 7, this Court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. By seeking an order for sale of the property, the Plaintiff is inviting this Court, essentially, to divide the property between the parties. I decline such invitation.
36. The position was set out in *AKK vs PKW* [2020] eKLR where the Court of Appeal stated as follows;

“A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act. In *PNN vs. ZWN* [2017] eKLR, Waki, JA stated that:

An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in *Petit vs. Petit* [1970] AC 777:



“One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?”

The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant’s prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.”

37. In the upshot in regard to the Plaintiff’s Originating Summons, I make a finding that the Plaintiff is entitled to 50% of the property known as Land Title No Nairobi/Block XXX/XXX. All other prayers are not granted. Each party to bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 4 DAY OF JULY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Plaintiff: Ms Wangui

For Defendant: Mr. Simiyu

Libertine Achieng..... Court Assistant

