



**RWK v SKM & 2 others (Matrimonial Cause E006 of 2021)
[2024] KEHC 1621 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E006 OF 2021
SM MOHOCHI, J
FEBRUARY 22, 2024**

BETWEEN

RWK PLAINTIFF

AND

SKM 1ST DEFENDANT

JWW 2ND DEFENDANT

THE LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

1. The Plaintiff moved this Court vide Originating Summons dated 25th May, 2021 Under sections 8 (1) (a), 6, 12, 14 and 17 of the Matrimonial Property Act and Order 51 of the Civil procedure Rules seeking the following prayers;
 - a. That the Honourable Court be pleased to declare and do issue a declaration that the property being Land Parcel No. Bahati/Kabatini Block 1/11563 measuring zero decimal zero four three five (0.0435) Ha, currently registered in the name of the 2nd Defendant is a matrimonial property.
 - b. That the Honourable Court be pleased to declare and issue a declaration that the transfer and registration of suit property Land Parcel No. Bahati/Kabatini Block 1/11563, by the 1st Defendant was fraudulent and therefore null and void.
 - c. That the Honourable Court be pleased to issue an order compelling the 3rd Defendant to cancel the transfer and title of the suit property, Land Parcel No. Bahati/Kabatini Block 1/11563 registered in the name of the 2nd Defendant and for the same be registered in the name of the Plaintiff in trust for the children, or in the joint names of the Plaintiff and the 1st Defendant.



- d. That the Honourable Court be pleased to issue an order for permanent injunction restraining the 1st, 2nd and 3rd Defendants, their agents or servants from interfering with the suit property, Land Parcel No. Bahati/Kabatini Block 1/11563.
 - e. That the costs of this suit be borne by the 1st and 2nd Defendants who have occasioned this action.
2. The Originating Summons is supported by the affidavit of RWK sworn on 25th May, 2021. She stated that she got married to the 1st Defendant in the year 2000 under the Kikuyu Customary Laws. That on 11th February, 2010 together with the 1st Defendant purchased Land Parcel No. Bahati/Kabatini Block 1/11563 and the 1st Defendant registered it in his name to hold in trust for their children. She added that they established their matrimonial home there and further developed the place by constructing rental properties whereby the income which she stated to have been collecting since 2018 was utilized for maintenance of their children and the marriage.
 3. She stated that around 2020 the 1st Defendant moved out and has since kept from the home until on 3rd May, 2021 when she received a letter to vacate the premises as it had been sold to the 2nd Defendant who is a sister to the 1st Defendant. She avers that it was a ploy to meant to deprive her and her children of the property rights. That the property was not lawfully sold as it lacked the spousal consent. She further added that rental income from the property was being diverted elsewhere and the 1st Defendant is not providing financially and emotionally and has diverted rental income. She is apprehensive that any attempt to transfer the property will be watering down her interests and that of her children.
 4. In opposition the 1st Defendant filed a Replying Affidavit sworn on 11th September, 2023 on 18th September, 2023. He admitted to living together with the Plaintiff and having five children. He however stated that he has been the one taking care of the children singlehandedly after the Plaintiff deserted their home in 2020. He added that he purchased the property Land Parcel No. Bahati/Kabatini Block 1/11563 and since the Plaintiff abandoned the family he has been facing financial challenges hence forced to sell the property. He stated that he contacted his family members when the 2nd Defendant showed interest and on 7th January 2021 he sold the land to the 2nd Defendant.
 5. He further stated that having the legal title, he had the capacity to transfer ownership. He added that for a party to invoke the *Matrimonial Property Act*, they have to provide proof of marriage and that cohabiting partners have no right to claim property unless the marriage is registered. That the Plaintiff has not shown any proof of purchase by way of receipts and therefore cannot lay claim to the property. He added that ownership of matrimonial property vests in the spouses according to contribution and parties should prove their contribution especially when property is registered under the other party's name.
 6. The 2nd Defendant too in opposition filed a Replying Affidavit sworn on 25th July, 2023 on 12th September, 2023. She stated that the suit is based on falsehoods aimed at misleading Court. That she purchased Land Parcel No. Bahati/Kabatini Block 1/11563 from the 1st Defendant. That the 1st Defendant had capacity to transfer as the owner and this she is a bonafide purchaser. That the Plaintiff has not met the threshold for grant of the instinctive orders sought. That there has been no proof of marriage or acquisition of property. That if the orders sought are issued she stood to suffer irreparable loss and damage since she is already in possession of the suit property.
 7. The Originating Summons by Court's directions of 11th July, 2023 was disposed of by way of written submissions.



Plaintiff's Submissions.

8. The Plaintiff filed written submissions dated 2nd October, 2023 on 16th October, 2023. She submitted that spousal rights over matrimonial property are proprietary rights and any transaction done in violation of Section 12 of the Matrimonial Property Act is null and void. She relied on the case of Kisumu High Court Civil Case No. 14 of 2017 M.O. vs A.O.W. The Plaintiff further contended that she was and is still married to the 1st Defendant.
9. The Plaintiff urged the Court to find that that the transfer was fraudulent and illegal and make a declaration to the effect. She emphasized that the Court has the requisite jurisdiction and powers orders related to ownership of land respecting matrimonial property. Reliance was place in the case of MMK v JJM & Another (2022) eKLR.

1st Defendant's Submissions

10. In his submissions dated and filed on 23rd October, 2023 the 1st Defendant submitted that the property Land Parcel No. Bahati/Kabatini Block 1/11563 does not form part of matrimonial property and that the two were only cohabiting and sired children together. While placing reliance in the case of ENN vs SNK (2021) eKLR and P.O.M vs M.N.K (2017) eKLR he submitted that Section 7 of the Matrimonial Property Act provided that upon dissolution of a marriage, property vests according to contribution.
11. He also relied on the case of Echaria vs Echaria as well Joseph Ombongi Ongetoto vs Martha Bosibori Ongetoto to emphasize that division of matrimonial property should not be equal.

2nd Defendant's Submissions.

12. The 1st Defendant submitted through her submissions dated and filed on 23rd October, 2023. That the Plaintiff is not entitled to the reliefs sought. She added that having a good title, the 1st Defendant transferred the same to her, a bonafide purchaser. That the Plaintiff has not demonstrated evidence of such marriage in accordance with the Marriage Act for her to invoke the Matrimonial Property Act.
13. She further submitted that that a party to a marriage is not entitled to an equal share of the property unless contribution and that the Constitution under Article 45(3) does not entitle parties to equal distribution. He relied on the case of PNN v ZWW (2017) eKLR. He prayed for costs.

Analysis and Determination

14. According to the reliefs sought, the Plaintiff is seeking both declaratory orders and injunctive orders in respect Land Parcel No. Bahati/Kabatini Block 1/11563 (suit property). Therefore, having considered the application herein together with the respective Replying Affidavits thereto. As well as the submissions by counsel the issues that arise for determination are:
 - a. Whether the suit property constitutes matrimonial property and does the Plaintiff have matrimonial interests in the property;
 - b. Whether the Plaintiff has met the threshold for grant of injunction;
 - c. Whether the transfer and registration of the suit property from the 1st Defendant and the 2nd Defendant was legal and procedural;
 - d. Whether the title to the 2nd Defendant should be cancelled and the land registered in the name of the Plaintiff;



- e. Who bears costs of the suit.

Whether the suit property constitutes matrimonial property and does the Plaintiff have matrimonial interests?

15. Declaration of matrimonial property rights is enshrined under Section 17 of the [Matrimonial Property Act](#) which provides that:-

- “ 1) a person may apply to a Court for declaration of rights to any Property that is contested between that person and a spouse.
- 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.”

16. The Plaintiff submitted that the suit property qualifies as matrimonial property as it was acquired during the subsistence of the marriage. She submitted that together with the 1st Defendant, they got married under the Kikuyu Customary Law in 2000. She maintains that she is still married to the 1st Defendant. The 1st Defendant has insisted that he was only cohabiting with the Applicant and not actually married to her despite having 5 children together.

17. It is rather surprising that 1st Defendant is denying being married to the Plaintiff while in his Replying Affidavit sworn on 23rd July 2021 in opposing to the Plaintiff's Notice of Motion Application dated 25th May, 2021 confirmed that he was married to the Plaintiff to wit;

- “ 3. That it is true that the Plaintiff/Applicant and I lived as husband and wife and we were blessed with 5 issues.
4. That we lived happily until sometime in 2020 when the Plaintiff deserted our home”

18. The 1st Defendant cannot come again and say that since 2000 till 2020, when each party is accusing the other of desertion, the two were cohabiting. Matheka J in her Ruling dated 17th March, 2022 also noted that the 1st Defendant admitted to being married to the Plaintiff. Therefore, the argument for cohabitation at this stage is not plausible. The 2nd Defendant too cannot claim that the Plaintiff was married to the 1st Defendant who is her brother this making her sister-in-law. The 1st Defendant is employing trickery and mischief in order to avoid the accountability of matrimonial property.

19. Now therefore, is the suit property matrimonial property under the ambit of the [Matrimonial Property Act](#)? As to what constitutes matrimonial property is provided for under Section 6 (1) of the [Matrimonial Property Act](#) which defines matrimonial property as;

- 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.
20. Under Section 2 of the *Matrimonial Property Act*, defines ‘Matrimonial home’ 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.”
21. From the evidence tendered by parties, the marriage has not been dissolved or annulled in any Court of Law and neither are there pending proceedings of divorce. From the records provided, the property was acquired on 11th October, 2010. The Plaintiff has attached as proof of rental income collection bank statement as “Annex RWK4” which dates as late as 19th June, 2020. She states that the rental income was being utilized for maintenance of the issues and the marriage. The 1st Defendant has not challenged this allegation save for stating that he was the one who single handedly took care of the children which is farfetched. He has also admitted that they were cohabiting in the home.
22. In T.M.V. vs F.M.C (2018) eKLR, Nyakundi J. opined that:-
“...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”
23. As per the parties admission, the time of purchase of the suit property, the suit property was acquired during their union and there is no evidence in this Court to suggest that their union was dissolved. The 1st Defendant has submitted that the Plaintiff has no right over the land since she has not proven contribution. Further, Section 2 of the *Matrimonial Property Act* 2013 defines contribution towards the acquisition of matrimonial property as:
In this Act, unless the context otherwise requires—“contribution” means monetary and non-monetary contribution and includes—
a. domestic work and management of the matrimonial home;
b. child care;
c. companionship;
d. management of family business or property; and
e. farm work.
24. The Court is inclined to conclude that to accept that the Plaintiff contributed in domestic work and management of their matrimonial home, children, companionship, management of rental property or property and led evidence to confirm she collected rental income. Her contribution cannot be wished away. The parties have 5 children together, raising children alone single handedly or jointly is contribution. By virtue of her contribution as demonstrated through established her matrimonial entitlement.
25. It is not in dispute that the suit property was registered in the name of the 1st Defendant before it was transferred to the 2nd Defendant. It is also not in dispute that the Plaintiff and the 1st Defendant lived together on the suit property together with their children. The 1st and 2nd Defendants have faulted the Plaintiff for not producing evidence of contribution or evidence of purchase toward the suit property. Section 2 is very clear on what amounts to contribution. The Court is of the view that the Plaintiff has



proved contribution and her interests on the suit property. It therefore goes without saying that Land Parcel No. Bahati/Kabatini Block 1/11563 constitutes of matrimonial property as per the definition of Sections 6 and 2 of the [Matrimonial Property Act](#) and that the Plaintiff has established matrimonial interests.

Whether the transfer and registration of the suit property from the 1st Defendant and the 2nd Defendant was legal and procedural

26. The 2nd Defendant submitted that as a bonafide purchaser, the Court ought not to interfere with her right to ownership of property She has however belabored on the issue that that the Plaintiff was not married to the 1st Defendant and has no right to claim as a spouse under the Matrimonial Act. The 2nd Defendant submitted that she stood to suffer damage and prejudice as she was a bonafide purchaser for value and even attached a sale agreement dated 7th January, 2021. Is she however a bonafide purchaser?
27. The Supreme Court aptly expressed in *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) thus;
- “Where the registered proprietor’s root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”
28. The Court goes on further to state that;
- “.....If the process that was followed prior to issuance of the title did not comply with the law, then such a title could not be held as indefeasible.
29. What the Supreme Court has emphasize is that mere possession of a registered title document by an owner is not conclusive proof of ownership.
30. Section 26(1) of the [Land Registration Act](#), provides that that a title is prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. The section further provides that such title can be challenged on the ground of fraud misrepresentation or if it is sufficiently demonstrated that the allocation of such title was unprocedural or illegal or conducted through corrupt scheme.
31. The 2nd Defendant has submitted that she paid money for the title and that she is an innocent purchaser. The Court finds it hard to believe that she was an innocent purchaser bearing in mind she was buying the land from her brother. The 2nd Defendant besides the sale agreement availed has not in any way provided tangible evidence of being a bonafide purchaser in good faith. It was upon the 2nd Defendant to provide proof of payment of consideration of Kshs. 2,000,000 indicated in the sale agreement. The mandatory documents required for preferring a transfer i.e. Land Control Board, Consent, Transfer, Spousal Consent, Valuation Forms, Stamp Duty payment confirmation and so on were also not availed. It is not clear how she became a title holder. The Court finds that there was no valid or any sale of the suit property by the 1st Defendant to the 2nd Defendant.



32. The Plaintiff stated that she was not aware of the sale and she never consented to the sale. Section 12 (1) of the [Matrimonial Property Act](#) states that;

“An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.”

33. Further Section 93 of the [Land Registration Act](#) provides that:-

“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).”

34. The Plaintiff with regard to the suit property acquired matrimonial beneficial and overriding interest. The 2nd Defendant was aware that the Plaintiff was the wife of the 1st Defendant. She had a duty to ascertain whether the Plaintiff has given consent prior to. Spousal consent is a requirement under the law as demonstrated before a spouse can sell matrimonial property. In the absence of such a consent, the sale agreement, the transfer and subsequent registration of title therefore becomes null and void ab initio.

Whether the Plaintiff has met the threshold for grant of injunction?

35. The Plaintiff has also sought a permanent injunction, principles under which an injunction order can issue are well settled in the case of *Giella –vs- Cassman Brown* (1973) EA 358 where it was held that a party seeking an injunction must; establish a prima-facie case with a probability of success; Likelihood of suffering irreparable damage which cannot be compensated in monetary terms; and lastly, proof that on a balance of convenience justice tilts in his favour.

36. As to whether there is a prima-facie case, the Plaintiff states that she has been living in the said property since acquisition as a wife and deriving income from the developments erected as shown by the documentary evidence. The issue of her not living within the property or in any way benefiting as a spouse from the suit property due to the fact that she proved no contribution is not convincing at this stage. To this end, there is prima-facie case established by the Plaintiff.

37. The Plaintiff stated that she was served with an eviction notice from the 2nd Defendant addressed to the 1st Defendant dated 5th May, 2021. That the threatened eviction is likely to expose the Plaintiff to irreparable damage. To that extent and having found that the property constitutes matrimonial property and that the Plaintiff is living there is a likelihood to suffer irreparable damage being meted upon the Plaintiff by being rendered homeless together with her children which may be difficult to recover in monetary terms.

38. The 2nd Defendant claims to be in possession of the property but the question begs, why is there notice to evict in the first instance. There seems to be mischief which is aimed at locking out the Plaintiff from her matrimonial home. The 1st and 2nd Defendants have not taken into consideration that the Plaintiff has been living there with her children and with one who lives with a disability. Evicting the Plaintiff from the suit property would be unjust. The consequences would be grave.



39. Under Section 12 (3) and (4) of the *Matrimonial Property Act* states that;

“(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a Court.

(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except:-

- a. on the sale of any estate or interest in the matrimonial home in execution of a decree;
- b. by a trustee in bankruptcy; or
- c. by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.”

40. In order to protect the rights of the Plaintiff under the law and having found that the suit property constitutes matrimonial property and that the sale and transfer was unprocedural, null and void, on a balance of convenience justice tilts in favour of granting an injunction.

Whether the title to the 2nd Defendant should be cancelled and the land registered in the name of the Plaintiff.

41. The property was registered in the name of the 1st Defendant and as such was at the material time the registered owner of the suit property. Such proprietary rights are protected under Article 40 (3) of *the Constitution* and Section 26 of the *Land Registration Act*. Since the Court has found that the 2nd defendant did not possess a good title on due to illegality and procedural improprieties on the part of the 1st and 2nd Defendants, no title passed from the 1st Defendant to the 2nd Defendant.

42. This Court has the duty to preserve matrimonial property and protect the rights of a spouse and to ensure matrimonial property is not sold without the consent and knowledge of the other spouse. Clothed with authority under Section 80 of *Land Registration Act* to make an order of rectification by the registrar this Court hereby cancels the title issued to the 2nd Defendant and directs the 3rd Defendant to rectifies the register with the 1st Defendant as owner of the suit property. The cancellation is based on fraud, illegalities and procedural improprieties proved by the conduct of the 1st and 2nd Defendant.

On who bears the costs

43. The legal principle is that Costs follow the event.

44. Consequently, I find for the Plaintiff and allow this Originating Summons. I grant the following orders:

- a. A declaration is hereby made that Land Parcel No. Bahati/Kabatini Block 1/11563 is matrimonial property and that the matrimonial home belongs to both Plaintiff and the 1st Defendant as joint property.
- b. A declaration is hereby made that the transfer and registration of title of the suit property known as Land Parcel No. Bahati/Kabatini Block 1/11563 by the 1st Defendant to the 2nd Defendant is illegal, null and void.
- c. The 3th Defendant be and is hereby ordered to cancel the transfers and title of the suit property known as Land Parcel No. Bahati/Kabatini Block 1/11563 issued to the 2nd Defendant.



- d. An order for permanent injunction is hereby issued restraining the 1st 2nd and 3rd Defendants, their agents or servants from interfering with the property known as Land Parcel No. Bahati/Kabatini Block 1/11563.
- e. The Plaintiff shall have the costs of the suit.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 22ND DAY OF FEBRUARY 2024.

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MOHOCHI S. M.

JUDGE

