ZJN v CNN (Matrimonial Cause 2 of 2020)
[2024] KEHC 1592 (KLR) (7 February 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

MATRIMONIAL CAUSE 2 OF 2020

AK NDUNG'U, J

FEBRUARY 7, 2024

BETWEEN

ZJN ..... APPLICANT

AND

CNN ..... RESPONDENT

JUDGMENT

1. The applicant instituted this suit by way of originating summons dated 05/06/2020 and filed on 08/06/2020 seeking for determination of the following;

    i. That all parcels of land known as Naromoru/Block1/Ragati/608 measuring 0.14609 and Nanyuki Municipality Block 12/140(New Grant) measuring 0.1468 are matrimonial properties;

    ii. That a declaration that the Applicant and Respondent have 50% stake in the suit properties herein;

    iii. That an order do issue declaring the suit properties as matrimonial properties and the Applicant be given 50% of the value of the suit properties or the same be sold and or subdivided and parties herein share the proceeds thereof on 50% basis or 50% of the divided portion thereof.

    iv. A determination on who should bear the cost of the suit.

2. The application is supported by a supporting affidavit of the Applicant herein. She deponed that she got married to the Respondent herein in the year 1997 and their marriage was dissolved in the year 2017 through Nanyuki Divorce Cause Number 1 of 2015. That the suit properties were acquired during the marriage and through her contribution. That the said properties were registered in the Respondent's

name but in trust for her. That her prayer is for the said two properties be declared as matrimonial properties and the same be dealt with in accordance with the law.

3. The respondent was served but he did not enter appearance and did not file any response to the Applicant's application. Upon being satisfied on service upon the Respondent, the court ordered this matter to proceed exparte. The Applicant was the only sole witness in her case.

4. The applicant testified that after four years into their marriage, the respondent acquired the parcel of land Known as Nanyuki Municipality Block 12/140 (New Grant) measuring 0.1468 Hectares. The property was registered in name of the Respondent and that she did not contribute any money towards the purchase of the said property. That they established their matrimonial home on the said property where they lived and she left after the dissolution of their marriage. That the Respondent was away most of time on duty as a military officer and she was left supervising the construction of their matrimonial home and raising their 3 children.

5. She further testified that the Respondent also acquired another parcel of land known as Naromoru/ Block 1/Ragati/608 measuring 0.1609 hectares. That the said property was acquired during subsistence of their marriage but it was registered in the name of the Respondent. That she did not contribute any money towards the purchase of the same but supervised the fencing work on the property which costed Kshs.50,000/-. That she did not contribute anything towards the fencing work. Further, upon their divorce, the Respondent was ordered to be paying Kshs.10,000/- as maintenance and that the Respondent was given custody of the youngest child who was still a minor. Her prayer is 50% share of the two properties.

6. From the foregoing, there are two issues for determination;Whether the suit properties are matrimonial properties; andHow the properties should be shared.

Whether the suit properties are matrimonial properties

7. There is no doubt that there was a legal marriage between the Applicant and the Respondent. There is also no doubt that their marriage was dissolved on 02/02/2017. The Applicant attached copies of decree nisi, decree absolute and a copy of judgment for Nanyuki Divorce Cause No. 1 of 2015 hence, the fact of the parties' marriage is proven.

8. The Applicant's claim is that the two suit properties that were acquired during the subsistence of their marriage are matrimonial properties and should be shared at the ratio of 50:50 basis between her and the Respondent.

9. On what constitutes matrimonial property, I am guided by section 6 of the *Matrimonial Property Act* (herein referred as the Act) that defines matrimonial property as:

> "(a) the matrimonial home or homes;
>
> (b) household goods and effects in the matrimonial home or homes; or
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> (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."

10. Basically, for property to qualify as matrimonial property, it must meet the definition in section 6 quoted above. In *T.M.W. v 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."

11. Do the suit properties constitute matrimonial property? Under section 2 of the Act, 'Matrimonial home' has been defined 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."

12. The applicant testified that they established their matrimonial home on parcel known as Nanyuki Municipality Block 12/140 (New Grant). That the matrimonial home comprises of a one-storey building with 4 bedrooms. She further gave further descriptions of their home where she lived until the dissolution of the marriage. Since her evidence was not controverted, I believe that their matrimonial home was constructed on this property and hence becomes a matrimonial property.

13. On the parcel known as Naromoru/Block 1/Ragati/608, the Applicant testified that the same was obtained during the subsistence of the marriage. The same was registered in the sole name of the Respondent herein and she did not contribute any money towards the purchase price. She testified that she however indirectly contributed towards the purchase of the property since the Respondent consulted her before purchase, that they visited the site and viewed the property together before the purchase and that the Respondent asked for her consent which she gave before the purchase and further that she supervised the fencing of the property.

14. The above property was acquired during the subsistence of the marriage. By dint of section 6(c) of the Act, it is not matrimonial property as it is not a property jointly owned and acquired during the subsistence of the marriage.

15. It is however not lost on this court that a party can acquire an interest in a property that is not matrimonial property as provided under section 9 of the Act which state as follows;

> " Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made."

16. The Applicant did not lay any evidence before the court of any contribution or improvement she made in respect of this property. Other than stating that she supervised the fencing of the said property, no evidence was forth coming to in support of that contention. I have no hesitation in making the finding that the Aopplicant is not entitled to any share of this property.

17. The law governing division of matrimonial property is contained in *Constitution of Kenya*, 2010 and the *Matrimonial Property Act*. 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."

18. In an increasing line of authorities, Courts have held that the equality of parties in article 45(3) does not translate to equal proprietary entitlement. In the often cited case of *P N N v Z W N* [2017] eKLR, Kiage, JA succinctly stated:

> "First, while I take cognizance of the marital equality ethos captured in article 45 (3) of the *Constitution*, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough"

19. And in *EGM v BMM* [2020] eKLR the Court of Appeal faulted Musyoka, J. for finding that equality of parties in article 45(3) means that the fact of marriage gives spouses an automatic 50% share of the matrimonial property. The Court opined:

> "We think it was erroneous for the learned judge to assume and hold that the *Constitution* gives spouses an automatic 50% share of the matrimonial property simply by being married."

20. The *Matrimonial Property Act* was enacted to give effect to the principle in article 45(3) of the *Constitution*. 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."

21. Under section 7 above, the Court may, on the basis of evidence before it, vest this property in the parties, according to their contribution and divide the same between them, upon dissolution of the marriage.

22. Section 2 of the Act defines the term contribution as;

> "contribution" means monetary and non-monetary contribution and includes—
>
> (a) domestic work and management of the matrimonial home;
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> (b) child care;
>
> (c) companionship;
>
> (d) management of family business or property; and
>
> (e) farm work"

23. In the instant case, the Applicant claims no monetary contribution to the acquisition of the matrimonial home. The Applicant testified that she did not contribute any money towards the purchase or building of the matrimonial home. She however testified that she contributed through supervising the construction of the matrimonial home and raising their three children. Her contribution was non-monetary.

24. It follows therefore that I have to determine whether the Applicant is entitled to any share due to her non-monetary contribution. While determining this, I have to pay regard to the contribution she made to the family and consider the evidence on record.

25. The uncontroverted evidence on record is that the Respondent was a military officer. The marriage was blessed with three issues who were left under the Applicant's care when the Respondent was away

on official duties. The Applicant's contention is that she was taking care of and was involved in the management of the matrimonial home.

26. I have had the advantage of reading the Divorce proceedings in Divorce Cause No. 1of 2015 between the parties and specifically the judgement of my sister judge (now retired) Hon Justice (Rtd) M. Kasango. The Applicant herein was labelled as a person who would desert her matrimonial home to the extent of failing to provide care to the children. In the said judgment, the Learned Judge observed inter alia that;

> 'On the other hand C N M came across as a truthful witness. He narrated how Z J N had shown scant interest in the marriage life and more importantly how she deserted the children when he was abroad on military duties. He testified that in the recent past when Z J N deserted the home. She went away with school fees for their youngest child which led to the child being sent back home for lack of school fees and more importantly how she went away with the car C N M had purchased to enable her take the youngest child to school. As a consequence that child was now uses motor cycle (popularly called Boda Boda) to go to school.
>
> Having considered the parties evidence I am satisfied that the petitioner has satisfied this court that the respondent has been cruel to him by frequently going away from the matrimonial home without reason and obtaining credit which involved a junior officer without informing him.
>
> In considering the prayer for custody this court can only be guided by one principle, that is the best interest of child. The child live in the matrimonial home, which Z J N deserted. He goes to school within Nanyuki area, where the home is. With the frequent incidents of unexplained desertion by Z J N, I am of the firm view that the best interest of the child would best be served by custody being awarded to C N M, which I hereby do. That would ensure continued stability of that child.'

27. It is clear from the above excerpt that the Applicant would frequently abandon the matrimonial home while the Respondent was away on official duties. It is also clear that this was detrimental to their children to the extent that she was denied custody of the minor child.

28. Non -monetary contribution entitles a party to a share of Matrimonial property. That contribution must be proved by way of evidence. The Applicant asserts contribution by way of care and management of the of the matrimonial home. Even though the Applicant's evidence was not controverted as no evidence was called by the Respondent, that by no means lessened the Applicant's duty to prove her case to the required degree.

29. The applicable law as to the burden of proof is found in section 107 (1) of the *Evidence Act* which states that:

30. "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."

Section 108 further provides that:

> "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."

31. Further, it has since been settled that the standard of proof in civil proceeding is on a balance of probabilities. The court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, held that:

> " Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

32. The duty of proving the averments contained in the Originating Summons lay squarely on the Applicant. In *Karugi & another v. Kabiya & 3 others* [1987] KLR 347 the Court of Appeal stated that:

33. "[T]he burdens on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant.... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

34. In our instant case the Applicants contention of non-monetary contribution by way of care and management of the matrimonial home pales in colour when juxtaposed with the evidence this court was advantaged to gather from the judgement of the divorce court, evidence which the applicant by craft or inadvertence provided in half measure (the judgement annexed to her affidavit is incomplete).Contrary to the Applicant's evidence, the Applicant is shorn of any claim to being a good minder to the children of the marriage and any pretence at having managed the matrimonial home is taken away by clear evidence of negative energy that the Applicant put to the marriage including documented neglect of the children and the home when the Respondent was away on official duties.

35. I think the above situation is what Kiage JA had in mind in *P N N v Z W N* [2017] eKLR, where he stated;

> '' In sum, I do think that it would be unrealistic to presume that marriage per se always engenders a blissful, convivial and idyllic existence of mutual support and synergistic exploits. I suppose it does in many marriages. It is true, however, that the marital state may sometimes be a trap where creativity is by slow degrees chilled out of existence and parties may feel entombed in sterility. A spouse may be so uncooperative, so wasteful, so distant, so all-over that he or she has hardly provided the warmth of companionship on the basis of which it might be said they made a non-monetary contribution to matrimonial property. In such instance it may well be that the one spouse achieved all they did and acquired not

because, but rather in spite of their lazy, selfish, wasteful, wayward, drunken or draining mate.

In such circumstances, an assessment of the inauspicious party's non-monetary contribution may well turn out to be in the negative, the account in debit. No fifty-fifty philosophy would grant such a party any right to property acquired without their contribution and notwithstanding their negation or diminution of the efforts towards its acquisition.

In the end it does work out justly and fairly enough in that assessment may turn out 50:50 or as in the case of Njoroge v. Njoroge (supra) 70:30 in favour of the man. There is no reason why the math may not be in favour of the wife if that is what the evidence turns up. In many cases in fact, percentages never feature as the Court only ascertains who between the spouses owns which property. It is always a process of determination, not redistribution of property. And each case must ultimately depend on its own peculiar circumstances, arriving at appropriate percentages."

36. On the material before me, it is clear that the Applicant was indeed an impediment to the well-being of the children of the marriage, the development of the matrimonial home and its management and any reward to her by way of a share of the matrimonial property would be inimical to fairness and justice and in the words of Kiage JA I reach the conclusion that the Applicant's non-monetary contribution turns out to be in the negative, the account in debit.

37. Having so found, and in light of the finding in respect of property known as Naromoru/Block 1/ Ragati/608, the applicant has failed to prove contribution to the acquisition of either of the properties. Her suit fails and is dismissed. In light of the history of the family ties between the parties, I direct that each party is to bear its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF FEBRUARY 2024

A.K. NDUNG'U

JUDGE