



**EIMW v GNC (Matrimonial Case E033 of 2020)
[2024] KEHC 4753 (KLR) (Family) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4753 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CASE E033 OF 2020**

MA ODERO, J

APRIL 18, 2024

BETWEEN

ELMW APPLICANT

AND

GNC RESPONDENT

JUDGMENT

1. Before this court for determination is the Amended Originating summons dated 16th November, 2021 by which the Applicant EMW seeks the following orders:-
 - a. That a declaration that plot 254 in Membley together with the building and improvements thereon be declared matrimonial property acquired by the efforts and/or joint funds of the applicant and the respondent.
 - b. That the respondent holds 50% share of the suit property in trust for the applicant despite the property being registered in his name.
 - c. Declaration do issue that the respondent holds the property in trust for the applicant and the property be settled for the benefit of the applicant in the manner the court deems fit.
 - d. That the property be shared equally between the parties and if incapable of being shared the same be sold and net proceeds/shared equally.
 - e. That the respondent be Encumbered from alienating, encumbering or disposing of the said property.
2. The Respondent GNC opposed the summons through the Replying Affidavit dated 22nd November, 2021. The summons was canvassed by way of vive voce evidence.



Background

3. The Applicant and the Respondent got married to each other in the year 2011 or 2015 (the actual date of the marriage is disputed). During the course of their union the couple bore one child together a daughter SGWC who was born on 25th March, 2012.
4. The marriage later experienced problems and the Applicant filed a Petition for Divorce being Divorce Cause No. EXX of 2021 filed in the Senior Principal Magistrates Court at Ruiru.
5. After hearing the parties a Decree Nisi was issued on 15th July, 2022 following which a Decree Absolute was issued on 19th July, 2022. As such the marriage between the Applicant and the Respondent now stands dissolved.
6. The Applicant claims that during the course of their marriage in the year 2013, the couple jointly acquired the Property known as Plot XXX in Memble Estate (hereinafter referred to as the 'Membley Property.' The Applicant avers that she contributed towards the acquisition of the said property and claims a fifty percent (50%) share of the properties.
7. The Respondent concedes that he was once married to the Applicant and confirms that they bore one child together. However the respondent vehemently denies the Applicants claim that she contributed financially and/or otherwise towards the acquisition of the 'Membley Property'
8. The Respondents position is that he single handedly acquired the said property before he got married to the Applicant. He therefore denies that the same constitutes matrimonial property.
9. The Respondent confirms that the marriage between himself and the Applicant was dissolved by way of a Decree Absolute issued by the Ruiru Senior Principal Magistrates Court on 19th July, 2022.

The Evidence

10. The Applicant told the court that she and the Respondent have been married for seven (7) years – since 2011 when they contracted a customary marriage. That their union was blessed with one daughter SWC who was born on 25th March, 2012. That the marriage was dissolved by the Ruiru Senior Principal Magistrates Court.
11. The Applicant alleges that during the course of the Marriage the couple jointly acquired the property known as Plot 254 Membley within Nairobi County where they constructed their matrimonial home. The Applicant asserts that she made both monetary and non-monetary contribution towards the acquisition of the 'Membley Property.' That however the property was registered in the sole name of the Respondent.
12. The Applicant states that they moved into the [particulars withheld] property in December, 2018 but she left the house in April 2019 due to acts of cruelty against her by the Respondent. She states that the Respondent is now enjoying the benefits of the 'Membley Property' to her exclusion and that he is making plans to sell off the same without including and / or consulting her.
13. The Applicant claims that she is entitled to a fifty percent (50%) share of the Membley Property and now seeks the relevant orders from this court.
14. On his part the Respondent states that he got married to the Applicant under Kikuyu customary law on 14th February, 2015 and NOT in the year 2011 as claimed by the Applicant. He claims that the Applicant has deliberately misrepresented the date of their marriage in order to unlawfully stake a claim to the Membley Property.



15. The Respondent states that he single handedly acquired this property in the year 2013 which was before he got married to the Applicant. Therefore the Respondent contends that the same cannot be deemed to be matrimonial property.
16. Further the Respondent vehemently denies that he paid a visit to the Applicants rural home in 2011 and denies that he gave the Applicants mother Kshs. 20,000 representing part of the dowry payment.
17. The Respondent maintains that he never visited the Applicants home before February, 2015 when he went to perform the Ruracio ceremony in accordance with Kikuyu Customary rites.
18. The Respondent explains that he purchased the Membley Property From one SKM at a consideration of Kshs. 1,250,000 which included the plot and all developments thereon. That he took loans from ABSA Bank, Standard Bank and two Saccos which he used to develop and construct a four bed-roomed house on the plot and that he and the Applicant moved into the said house together with their daughter in the year 2018.
19. The Respondent reiterates that he serviced the loans single handedly with no assistance at all from the Applicant. He maintains that the Applicant made no financial contribution at all towards the purchase, acquisition and or development of the Membley Property. The Respondent finally prays that the Applicants summons be dismissed in its entirety.
20. PW2 MWK and PW3 EN are friends of the now estranged couple. They both state that they were aware that the couple were developing a plot in Membley. PW3 who is a Quantity Surveyor told the court that he assisted in designing the house and supervised the construction upto the roof level.
21. At the close oral evidence the parties were invited to file their written submissions. The Applicant filed the written submissions dated 30th August, 2023 whilst the Respondent relied upon his written submissions dated 6th November, 2023.

Analysis And Determination

22. I have carefully considered the originating summons filed by the Applicant, the reply filed by the Respondent, the evidence on record thereto, as well as the written submissions filed by both parties. The issues which arise for determination are the following;-
 - I. Whether Plot No. 254 Membley Estate Constitutes Matrimonial Property.
 - II. If so - is the Applicant entitled to any share in the said property.

I. Whether Plot No. 254 Membley Estate constitutes Matrimonial Property

23. It is not in dispute that the Applicant and the Respondent were once married to each other – Neither is it disputed that their union was legally dissolved. A copy of the Decree Absolute dated 19th July, 2022 is in the court file.
24. Section 6 (1) of the *Matrimonial Property Act* 2013, defines Matrimonial Property in the following terms;-

“6 (1) For the purpose of this Act, Matrimonial property means

 - a. The matrimonial home or homes.
 - b. Household goods and effects in the matrimonial home or homes.



- c. Any other immovable and movable property jointly owned / and acquired during the Subsistence of the marriage.” [Own emphasis]
25. The Applicant insists that the Membley Property was acquired during the subsistence of her marriage to the Respondent. The Respondent vehemently denies this and asserts that he acquired the said property before he entered into a customary marriage with the Applicant.
26. The bone of contention then is this – when did the couple get married.
They both concede that they got married under Kikuyu customary law. The applicant’s position is that the marriage was contracted in the year 2011 when the Respondent visited her mother and paid a sum of Kshs. 20,000 as dowry.
27. The Respondent however denies that he ever visited the Respondents home in 2011 or that he even paid any money as dowry to her mother. The Respondent asserts that the couple contracted their marriage in 14th February, 2020 when he visited the Applicants home for the Ruracio ceremony.
28. It is noteworthy that though the Applicant asserts that dowry was paid in 2011, she has not called as a witness any person who was present when this dowry was paid. Marriages in Africa are not secret and / or clandestine affairs. They are usually a community affairs at which relatives, neighbours well wishers etc will be present. No witness was called to confirm having witnessed the Respondent pay dowry to the applicant’s family relatives e.g. a brother and/or a cousin or kinsmen.
29. DW3 who was a brother to the Deceased told the court that he has no knowledge of the Deceased going to pay dowry for the objector.
30. The obvious question that then arises is - what constitutes a Kikuyu customary marriage.
31. In the case of *Eva Naima Kaaka & Anotehr v Tabitha Waitibera Mararo* [2008] eKLR the Court of Appeal quoted Eugene Cotrans Casebook on customary law which at Page 30 set out the essential ingredients of a Kikuyu customary marriage as follows;-
- “(i) Capacity; the parties must have capacity to marry and also the Capacity to marry each other.
 - (ii) Consent;- the parties to the marriage and their respective families must consent to the union.
 - (iii) Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.
 - (iv) Ruracio; there can be no valid marriage under Kikuyu law unless part of the ruracio (dowry) has been paid.
 - (v) Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e under the capture procedure when marriage is consummated after the eight days seclusion, and nowadays when the bride comes to the bride grooms home.” [Own emphasis]
32. In this case although the Applicant states that dowry of Kshs. 20,000 was paid to her mother she made no mention of the Ngurario ceremony having been conducted in the year 2011.



33. In the *Eva Naima Kaaka* case [Supra] the court of Appeal in observing that no ngurario ceremony had taken place stated as follows:-

“From the above it becomes apparent that, no ram or goat was slaughtered to mark the courting into existence of a marriage. Without the presence of the central feature of the Ngurario Ceremony it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the Deceased” [Own emphasis]

34. The Respondents position is that he visited the home of the Applicants on 14th February, 2015 for the Ruracio ceremony. The Applicant does not contradict this evidence. The Respondent even remembers that the ceremony took place on Valentines Day.

35. I note that the question of the date when the Applicant and the Respondent entered into a valid marriage was considered by the learned trial magistrate in the Divorce Petition filed by the Applicant at Ruiru Court, being Divorce Cause No. 618 of 2021.

36. The learned trial magistrate addressed this inconsistency between the parties regarding the date when the customary marriage took place and in so doing stated as follows:-

“In this case is not disputed that the Petitioner and the Respondent got married. The bone of contention is when the marriage occurred with the petitioner indicating that the same occurred in 2011 when the parties sought the blessings of their parents which saw the Respondent pay Kshs. 20,000/=. On the other hand, the Respondent contends that the marriage took place on 14th February, 2015 when he paid the dowry.”

37. After analysing the evidence adduced before her the learned trial magistrate concluded as follows:-

“.....It is clear that the marriage between the Petitioner and the Respondent commenced on 14th February, 2015 when the essential elements of a Kikuyu customary marriage were complied with” [Own emphasis]

38. The trial court having made a definitive finding that the marriage between the couple occurred in February, 2015 that matter is now ‘Res Judicata’. The Applicant cannot invite this court to consider the matter afresh. If the Applicant disagrees with or is aggrieved by this finding by the trial court then she was at liberty to file an appeal to challenge said finding. The Applicant cannot use these matrimonial property proceedings as an avenue to appeal the decision of the trial court.

39. Accordingly I find that the Applicant and the Respondent got married to each other on 14th February, 2015.

40. It is quite possible that the Applicant and the Respondent were in a relationship and may have been cohabiting from 2011 prior to the marriage ceremony in February, 2015. However cohabitation (except under certain sets out parameters) does not constitute marriage.

41. If the couple involved themselves in identifying and/or purchasing any property prior to contracting a marriage then such property cannot be said to be matrimonial property.

42. In this case it is conceded by both parties that the Membley Property was purchased in the year 2013. Annexed to the Respondents Replying Affidavit dated 22nd November, 2021 is a copy of an Agreement for sale between the Respondent and one Steve Kangwana Muli in response of Plot No. 254 Membley. The Agreement is dated 1st March, 2013. The Applicant Elizabeth Mwangi signed the Agreement Not as a purchaser but as a witness.



- 43. Therefore the facts reveal that this Membley Property was purchased in March, 2013 a full two (2) years before the Applicant and the Respondent solemnized their union under Kikuyu customary law.
- 44. Section 6(1)(c) of the *Matrimonial Property Act* makes it clear that only property acquired ‘during the Subsistence of a marriage’ may be considered to be “Matrimonial Property”. I find that the Membley Property was Not acquired during the ‘subsistence of a marriage.’ Thus it cannot be the subject of a suit seeking division of matrimonial property.
- 45. In the event the Applicant wishes to claim a share of the said property then her remedy could be to sue under Civil claim in the Civil Division of the High Court. In order not to prejudice any Civil Claims the Applicant may be minded to pursue. I will not delve into the question of whether or Not the Applicant made direct financial contribution towards the acquisition and/or development of the property.
- 46. Finally I find that this summons suffers a ‘technical knockout’ so to speak. This court cannot consider division of property which is not Matrimonial Property. The applicant’s claim fails and the Amended Summons dated 6th November, 2020 is dismissed in its entirety.
- 47. This being a family matter I direct that each party shall bear its own costs. It is so ordered.

DATED IN NYERI THIS 18TH DAY OF APRIL, 2024.

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MAUREEN A. ODERO
JUDGE

