



**VMM v KMM & another (Civil Case E006 of 2023)  
[2024] KEHC 17101 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 17101 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL CASE E006 OF 2023  
TM MATHEKA, J  
APRIL 15, 2024**

**BETWEEN**

**VMM ..... PLAINTIFF**

**AND**

**KMM ..... 1<sup>ST</sup> DEFENDANT**

**AMM ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. VMM Married KMM the 1<sup>st</sup> Defendant on 6<sup>th</sup> December, 2014.
2. Through a succession cause, Makueni Cause no. 21/2016 in the Estate of Late Mackenzie Musau - the 1<sup>st</sup> Defendant inherited parcel no. Makueni/Unoa/4XX9 which was created from Makueni/Unoa/2X4 which was part of the estate of the late Mackenzie who was his grandfather.
3. It is the Plaintiff's position that the fact that the said property was inherited during the subsistence of the marriage between her and KMM, the property became matrimonial property.
4. That thereafter she contributed to the development of the said property.
5. That the 1<sup>st</sup> Defendant, without her knowledge entered into a sale agreement for the sale of the said property, and as a result, the 1<sup>st</sup> defendant proceeded to fence off part of the land denying her access, and threatening to evict her from the same. On that basis she pleads and avers that the following Defendants actions are malicious and illegal.
6. Sale transaction entered by the Defendants with respect to matrimonial property without first obtaining spousal consent as mandated by law.
7. Illegal fencing of the sold portion within the matrimonial property by the 2<sup>nd</sup> Defendant with a view to hinder the Plaintiff's access to the farm.



8. Depriving the Plaintiff's rights, use and/or occupation over land parcel number MAKUENI/UNOA/4XX7.

In the circumstance she seeks orders: -

1. A declaration that land parcel number MAKUENI/UNOA/4XX7 is matrimonial property.
  2. A declaration land parcel number MAKUENI/UNOA/4XX7 which is registered in the names of the 1<sup>st</sup> Defendant who is to hold in trust for the Plaintiff.
  3. A declaration that the sale transaction entered between the Defendants is illegal/and/or null and void ab initio.
  4. An order of permanent injunction restraining the 1<sup>st</sup> Defendant either by himself, his servants, agents/or anyone claiming under him or through him from selling, leasing, mortgaging, changing or transferring land parcel number MAKUENI/UNOA/4XX7.
  5. An order of permanent injunction restraining the Defendants either by themselves, their servants, agents and/or anyone claiming under them or through them from interfering with, trespassing onto, evicting or in any other manner interfering with the Plaintiff's rights, occupation, use and/or interest over land parcel number MAKUENI/UNOA/4XX7.
  6. An order of permanent injunction restraining the Defendants either by themselves, their servants, agent and/or anyone claiming under them or through them from doing any of following acts that is to say, demolishing, removing, bringing down, wasting or damaging or in any other manner whatsoever destroying any of the houses, buildings, fences and/or structures erected on land parcel number Makueni /Unoa /4XX7.
  7. Any other relief(s) that this Honourable court will deem fit to grant.
9. Both Defendants were served with the plaint and the application seeking temporary injunction with respect to any action regarding the land. There was no response and the injunction was granted.
  10. At some point the Defendant/Respondent had counsel but counsel later withdrew for lack of instructions.
  11. The matter proceeded to formal proof.
  12. The Plaintiff testified and adopted her witness statement as evidence in chief. She told the court that since 1<sup>st</sup> Defendant were married and when they inherited the land - it was registered in her husband's name. They proceeded to occupy it. She demonstrated the expenditure incurred in fencing the land - in constructing the houses and in farming the land to grow fruit crops and trees - i.e. avocado, mango, passion, paw paw, bananas et al, expenditure valued at Kshs.1, 488,203 as at 28<sup>th</sup> April, 2023. She demonstrated with photographs the produce from the shamba, the houses, store and toilets - that the family had constructed and her contribution. She told the court that she had three young children and had nowhere to go - yet her husband had fenced off the land, including fruit trees she had planted to sell off the 2<sup>nd</sup> Defendant.
  13. Counsel for the Plaintiff submitted that according to Section 6(1) of the *Matrimonial Property Act* - property acquired during the subsistence of marriage is matrimonial property - the exception is set out at Section 5, which is the property acquired/inherited before marriage except where the other spouse contributes to its improvement. Counsel relies on ENK Vs FM [2019] eKLR, SN Vs FM [2019] eKLR, AMM V SMN [2022]eKLR where the golden thread is that property acquired during marriage, even through inheritance is matrimonial property.



14. I have carefully considered the facts before me. The only issue is whether Makueni/UNOA/4XX7 is matrimonial property. The evidence before me is that it was acquired through inheritance from the 1<sup>st</sup> Defendant's grandfather in Makueni PM Succession Cause 21/2016 - Estate of late Mackenzie Musau (Deceased) where the 1<sup>st</sup> Defendant and one JMM - inherited 7.625 acres from Makueni/Unoa/2X4 as per the Certificate of Confirmation of Grant dated 9<sup>th</sup> November 2016. The 1<sup>st</sup> Defendant was issued with a title deed on 2/10/2017 of 3.08 Acres - LR Makueni/UNOA/4XX7.
15. The Plaintiff produced marriage certificate showing that she and the 1<sup>st</sup> defendant were married on 6/12/ 2014 at St. Joseph the Worker Makueni Catholic Church. Evidently at the time of the inheritance - the two were married and this property became property acquired during the subsistence of their marriage as provided for under Section 6(1) of the Matrimonial Property Act.
15. The Plaintiff has demonstrated in addition that she has contributed to the improvement of the property - she has planted fruit trees, contributed to the construction of the building, the fencing, the preparation of the land, all facts that the 1<sup>st</sup> Defendant has not even attempted to controvert.
16. Even if the 1<sup>st</sup> Defendant was to argue that the property was his alone - which it is not - she has demonstrated her contribution to the improvement and hence her interest and the 1<sup>st</sup> Defendant could not deal with it without her consent.
17. This is provided for by s. 12 of the Matrimonial Property Act which provides for Special provisions relating to matrimonial property thus;
  1. 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.
  2. A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.
  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.
  5. The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.
    1. The 1<sup>st</sup> defendant is barred by law from acting in any way that diminishes the interest of the plaintiff in the said property without her consent.
    2. I therefore join the line of precedents set by Musyoka J, Mabeya J, Odunga J (as he then was) that property inherited during the subsistence of a marriage becomes matrimonial property.



3. In the upshot, the Plaintiff has established her case - and the claim succeeds. Judgement is entered for the Plaintiff against the Defendants:-
4. A declaration that the property LR Makueni/UNOA/4XX7 is matrimonial property.
5. A permanent injunction restraining the Defendants from doing anything that interferes with her interest in the matrimonial property without her knowledge and or consent as provided for in s. 12 of the [Matrimonial Property Act](#).
6. The plaintiff will have the costs of this suit.

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-04-05 11:52:02

The Judiciary of Kenya

