



REPUBLIC OF KENYA



EC alias EJ v DK (Civil Suit E002 of 2022) [2024] KEHC 5365 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET**

CIVIL SUIT E002 OF 2022

JR KARANJA, J

MAY 16, 2024

BETWEEN

EC ALIAS EJ PLAINTIFF

AND

DK DEFENDANT

JUDGMENT

1. The amended originating summons dated 17th May 2023 by the Applicant/ Plaintiff, EJ alias EJ Seeks orders against the Respondent/Defendant, DK to the effect that: -
 1. A declaration be issued that the Applicant is entitled to whole share or such other share as the court may award of movable and immovable property acquired by the Applicant prior and/or during the substance of their marriage, and that the Respondent holds title, interest, ownership and/or the possession of the said property in trust for the Applicant in their respective shares as the legal owners and “cestui que trust” respectively: -
 - a. LR No. Nandi/Mutwot/1XX measuring 7.0acres currently registered in the name of the Respondent’s father, the Late AMR (deceased).
 - b. Household items and all other properties acquired during the subsistence of the marriage and personal effects full details whereof are well within the Respondent’s knowledge.
 2. The Respondent/ Defendant by himself, his servants, agents and/or employees be restrained by a temporary injunction from selling, transferring, cutting down trees, charging and/or in any other inconsistent manner dealing with the Applicant/ Plaintiff’s right of ownership of the aforementioned matrimonial property 1(a) and (b) pending the hearing and determination of these proceedings and/or further directions of the court.



3. The matrimonial property and/or home aforementioned being LR No. Nandi/Mutwot/1XX measuring 7.0 acres currently registered in the name of the deceased father of the Respondent Late AMR alias AM, be shared according to contribution made towards its development and/or improvement or in any other ratio as the court may deem just and expedient.
 4. The household items be released to the Applicant and/or that they be shared in any ratio as the court may deem just and expedient.
 5. Alternatively, that an order be issued to the effect that the Respondent is not entitled to any share of the property LR. Nandi/Mutwot/1XX measuring 7.0 acres currently registered in the name of his late father, nor is he entitled to the household items.
 6. Alternatively, that an order be issued directing that a valuation of the entire matrimonial property or properties be carried out by a mutually acceptable valuer and a report be filed in court for the court to apportion the monetary entitlement of each party and direct the Respondent to effect payment to the Applicant in that regard and/or such other entailment or share as the court may order in the best interests of justice.
 7. Upon grant of any and/ or all of the foregoing orders a permanent injunction be issued to restrain the Respondent/ Defendant by himself, his servants agents and/or employees from interfering with the Plaintiff's lawful enjoyment and quiet possession of the matrimonial property.
 8. Such other and/or further orders as the court may deem, fit, fair and expedient to grant in the circumstance.
4. The summons is supported by the Plaintiff/ Applicant's averments and annexures contained in the supporting affidavit deposed by herself on the 19th May 2023. These are opposed by the Defendant/ Respondent vide his replying affidavit dated 6th June 2023 and filed herein on 9th June 2023. On the 9th October 2023, the court directed that the originating summons as amended be heard by oral or "viva-voce" evidence with the Applicant being the Plaintiff and the Respondent being the Defendant.
 5. At the hearing, the Plaintiff was represented by the Learned Counsel, Ms. Isiaho, while the Defendant was represented by Ms. Aketch, Learned Counsel.
In her evidence the Plaintiff, EJ (PW1), stated that she was a resident of Mosoriot-Nandi County and a teacher by profession currently employed by the TSC (Teachers Service Commission) and deployed at [Particulars Withheld] Primary School. She indicated that her marital relationship with the Defendant commenced in the year 1996 when they were married, but it collapsed and was formally dissolved in the year 2023.
 6. The Plaintiff produced the relevant marriage certificate (P. Exhibit 1) issued by the then DC's Office - Nandi District of the Rift Valley Province dated 14th June 1996. It showed that the Plaintiff was aged twenty six (26) years old at the time while the Defendant was thirty four (34) years old.
The Plaintiff also produced the relevant divorce documents i.e. decree nisi and decree absolute (P. Exhibit 2a – b) which showed that the marriage was lawfully dissolved in the year 2023.
 7. It was also indicated by the Plaintiff that her marriage with the Defendant was not blessed with any issue (child) and this was the major reason which led to its breakdown. That, the present case was instituted for the purposes of distribution of property acquired during the subsistence of the marriage i.e. matrimonial property which according to her comprised of the material home/house erected on



a parcel of land registered in the name of the Defendant's late father (P. Exhibit 6) and some rental houses.

8. The Plaintiff contended and implied that the claim is for a share of the entire matrimonial property equal to her contribution in the acquisition and/or improvement/ development of the same. The Plaintiff contended further she was already in employment at the time she married the Respondent and over the years during the subsistence of the marriage she solely made financial contributions towards acquisition and/or improvement/development of the matrimonial property as the Defendant was unemployed and literally depended on her.
9. The Plaintiff thus implied that the Defendant was a "nobody" when they married and that he is who he is today because of her. She produced copies of her payslips and other documents (P. Exhibit 3) to confirm her capability in financially contributing towards the material property and the sacrifice she made in that regard and more, as indicated in the relevant documents (P. Exhibit 4, 5, and 7).
10. The Plaintiff's evidence was essentially a rendition or re-edition of her witness statement in support of the summons dated 16th August 2022 and filed herein on 22nd August 2022. She adopted the statement as part of or in addition to her oral evidence in chief. She did not call or avail any other person as her witness. As it were, she was her own witness.
11. The Defendant, DK (DW1), was also his own witness when he testified in opposition to the Plaintiff's claim that he was a resident of Mosoriot Nandi County and a farmer cum businessman by occupation. That, after his marriage to the Plaintiff they lived together in his own permanent house which he fully constructed and furnished prior to their nuptial union. He produced a photograph of the house (D. Exhibit 1) and indicated that it was erected on a parcel of land registered in the name of his late father and was treatable as ancestral land.
12. The Defendant also indicated that he was a farmer as well as a businessman dealing in maize and could therefore afford to construct and/or improve/develop the said house which he considered to be his matrimonial home. He produced several documents (D Exhibits 2, 4, 5, 6, 7, 8 and 9) to confirm as much and contended that he never lived in abject poverty as alleged by the Plaintiff.

He further contended and maintained that the matrimonial home/ house was wholly constructed and developed by himself without any contribution from the Plaintiff. He adopted his witness statement dated 6th June 2022 and filed herein on 9th June 2023 as part of or in addition to his oral evidence in chief.

13. The evidence foregoing clearly shows that the centre of focus in this dispute is the matrimonial property said to have been acquired or otherwise improved and/or developed during the subsistence of the marriage between the Plaintiff and the Defendant which apparently started going south in the year 2013 and culminated in the year 2023 with a legal dissolution.

In particular, the matrimonial property standing on the parcel of land described as LR. No. Nandi/ Mutwot/1XX is the jewel of the dispute. Indeed, prayers (1) (aa), (3) and (5) of the summons are focused on the property and do form the substratum of the dispute.

The rest of the prayers are peripheral and focused more on the household property (See, prayers (1) (b) and (4)).

The *Matrimonial Property Act* (Cap 152 Laws of Kenya) is the substantive law governing disputes relating to matrimonial property such as the present dispute. The Act provides for the rights and responsibilities of spouses in relation to matrimonial property and connected purposes.



14. Together with the *constitution*, more specifically, Article 45 (3) of the *Constitution*; the Act provides for the legal framework in the resolution of matrimonial property disputes.

Indeed, this suit is anchored on the provisions of the Act and the aforementioned provisions of the *Constitution* which provides that: -

“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.”

It was thus presupposed that “equal rights” meant equal distribution of matrimonial property upon dissolution of a marriage i.e. the 50:50 or “Nusu mkate” concept.

15. However, the recent decision of the Supreme Court in *JOO v MBO* (2023) KESC 4(KLR), did put to rest and settled the confusion and uncertainty surrounding the 50:50 concept when it held with regard to Article 45(3) of the the *Constitution* that: -

“While Article 45(3) dealt with equality of the fundamental rights of spouses during and after dissolution of marriage, equality did not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither did the reading of that provision lead to the assumption that spouses were automatically entitled to a 50% share by fact of being married.”

16. The court went to hold that: -

“The stated equality order article 45(3) meant that the court were to ensure that at the dissolution of a marriage, each party to a marriage got a fair share of the matrimonial property based on their contribution.

That was best done by considering the respective contribution of each party to ensure no party was unfairly denied what they deserved as well as ensuring that no party was unfairly given more than what he or she contributed.”

17. The same court found and stated that: -

“Article 45(3) acts on a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more.

Nowhere in the *constitution* do we find any suggestion that a marriage between parties automatically results in common, ownership or co-ownership of property (hence vesting of property rights). And Article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.”

The *Matrimonial Property Act*, may safely be regarded as a derivative of Article 45(3) of the *Constitution*. The Act, Under Section 6(1), defines matrimonial property to mean: -

- 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.



18. And Section 2 of the *Act*, defines matrimonial home to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouse as their family home, and includes any other attached property.

The Plaintiffs evidence to the effect that the property or house standing on the Land Parcel No. Nandi/Mutwot/1XX was their matrimonial home/ house was not disputed by the Defendant. He actually stated as much when he indicated that soon after they married he took the Plaintiff to that house and that's where they lived and cohabited until the breakage of the marriage and formal divorce twenty-seven (27) or so years later.

19. However, the marriage was not blessed with any issues (child) but the couple remained husband and wife for all those years although the Defendant indicated that the Plaintiff deserted the matrimonial home in the year 2013 or thereabout, allegedly to live with another man as her new suitor.

Both the Plaintiff and Defendant confirmed that the matrimonial home stands on a parcel of land belonging and/ or registered in the name of the Defendant's late father as the owner. The Defendant indicated that the land is regarded as his family's ancestral land.

20. In the circumstances, although the Plaintiff suggested that the land was also part of the matrimonial home it was evidently clear that it was not and cannot be regarded as being part of the matrimonial house/ home as it did not belong to the Plaintiff nor the Defendant nor both. However, the house erected thereon or any other property erected thereon by the Plaintiff or the Defendant or both formed part of the entire matrimonial property for which either party had a proprietary right or interest equal to his/her contribution towards acquisition, improvement or development thereof.

21. The evidence from both sides implied that some rental units were constructed on the same land on which the matrimonial house is constructed. If that be the actual case, then the rental units were also part of the matrimonial property and remained as such even if they were not constructed on the land.

Section 7 of the *Matrimonial Property Act*; provides for ownership of matrimonial property in the following terms: -

“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.”

22. So, what is herein to be divide a between the Plaintiff and the Defendant is their matrimonial property comprising of the matrimonial house/ home, the rental units and of course, household items which were not herein specified by the Plaintiff, but would of course not include items or personal effects which are so peculiar to either party.

Section 9 of the *Matrimonial Property Act*: provides that: -

“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.”

23. The evidence from both sides indicated that the matrimonial house was in existent and in possession of the Defendant even before his marriage to the Plaintiff, but the evidence also indicated that the house was improved and/or developed and/or renovated during the subsistence of the marriage at the behest of either party or both. The improvement, development or renovation of the house invariably extended



to the rental units which formed part of the matrimonial property. this meant that the original house which may have been set up by the Defendant on his own prior to the arrival of the Plaintiff acquired a new face and brand and became what it is today during the subsistence of their marriage. This could not have been possible without their joint efforts, industry and commitment given that both earned an income through business ventures for the Defendant and through employment for the Plaintiff. Their respective degree of contribution would be the determinant factor of their respective share of the property.

24. Section 14 of the *Matrimonial Property Act* provides that: -

“Where matrimonial property is acquired during marriage: -

- a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- b. In the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interest in the matrimonial property are equal.”

Basically, all the foregoing constitutional and statutory provision of the law sets the guiding principle in the apportionment or division of matrimonial property to the extent that the parties ought to fulfill or discharge their obligation of proving what they are entitled to as their respective share of the matrimonial property on the basis of their joint and/or individual contribution to the acquisition, renovations, improvement, development or in any other manner adding value to the property.

25. “Contribution” Under Section 2 of the *Matrimonial Property Act* means monetary and non-monetary contribution and includes: -

- a. Domestic work and the management of the matrimonial home.
- b. Child care
- c. Companionship
- d. Management of family business or property, and
- e. Farm work.

With regard to non-monetary contribution it was undisputed that the matrimonial bliss between the Plaintiff and the Defendant lasted for about twenty-seven(27) years before it was lawfully dissolved. Such was a long period of time even if, as alleged by the Defendant, the Plaintiff deserted the matrimonial home in the year 2013.

26. There can be no doubt that throughout the years whether they be twenty seven (27) years or seventeen (17) years, the Plaintiff being wife to the Defendant and as a matter of course took care of the domestic affairs and management of the matrimonial home and provided companionship to the Defendant even if they were not blessed with any issue. Whatever the Plaintiff did in her role as the wife of the Defendant, for that matter, “African wife,” amounted to her non-monetary contribution to their marriage whether for good or bad until divorce did them apart.

27. The Defendant could not therefore be heard to say that the Plaintiff made no contribution whatsoever in adding value to their marriage and enable them to upgrade their social status and economical standards to the position they were in at the time of the dissolution of the marriage. The Defendant’s evidence implied or suggested that the Plaintiff despite being a school teacher by occupation was nothing more than a “deadbeat” and “selfish’ wife who did nothing or contributed nothing to their marriage but diverted all her financial resource for the benefit of herself and her own family. That,



she was a “layabout” or a “bum” or “shirker” during the entire period of that matrimonial “seventh heaven” or “cloud-nine” or “walk in the air.”

28. However, the Plaintiff’s evidence indicated otherwise and disproved the Defendants contemptuous suggestion. Apart from the non-monetary contribution to the success of the marriage as it lasted she provided copies of her pay-slip and loan application forms to establish and prove on a balance of probabilities that the income from her employment and Sacco loans was capable of and did in fact provide financial or monetary contribution towards the improvement and/or development of the material home/house and contribution of the rental units.
29. As may be deduced from the Plaintiff’s evidence which was clearly not substantially disputed by that of the Defendant, the development or renovation or improvement of the couple’s matrimonial property inclusive of the matrimonial home/house and the rental units was as indicated herein above, a joint effort between them powered by their respective financial contributions made possible by income derived from the Plaintiff’s employment and the Defendant’s business activities.
30. The question of either party’s contribution in terms of estimate or degree or worth was really the bone of contention.

In that regard, the matrimonial house which was in existent prior to the marriage but renovated, improved or developed during the subsistence of the marriage ought to be shared between the parties at a ratio of thirty per centum (30%) in favour of the Plaintiff and the Seventy per centum (70%) in favour of the Defendant. This does not include the land LR. No. Nandi/Mutwot/1XX on which the property is erected and which belongs to the Defendant’s late father usable as ancestral land.

31. With regard to the rental units, these ought to be shared equally between the parties at the ratio of fifty per centum (50%) each.

The amended originating summons is therefore allowed to the extent that the matrimonial property comprising of the matrimonial house and rental units shall be shared between the parties in the ratios indicated hereinabove. It is accordingly ordered with liberty to the Defendant to buy off the Plaintiff’s share of the matrimonial house and keep the entire property for himself and with liberty to each one of them to buy off the other’s share of the rental units, and keep the entire units for himself/ herself.

32. As for the household items, these were not specified, but is hereby ordered that sharing of the same be on equal basis regard being given to the peculiar nature of any item vis-à-vis either party. Short of that, the parties may share the household property in the manner that they deem proper and necessary. Each of them shall bear their own costs of the originating summons.

DELIVERED AND DATED THIS 16TH DAY OF MAY, 2024.

**J. R. KARANJAH,
JUDGE**

