



EKK v JMM (Civil Suit 5 of 2016) [2024] KEHC 4970 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL SUIT 5 OF 2016**

**RK LIMO, J
MAY 9, 2024**

BETWEEN

EKK APPELLANT

AND

JMM RESPONDENT

JUDGMENT

1. This is a matrimonial dispute involving the plaintiff (E.M.K) and the defendant (J.M.M) who first got married under Kamba Customary law in 1984 and later solemnized the marriage on 15th November 1998.
2. The parties were blessed with 3 issues of marriage. Later they disagreed and the defendant filed for divorce vide Machakos High Court Divorce Cause No 332 of 1999 and the two were divorced under a judgment dated and delivered on 18th September 2009.
3. The plaintiff lodged this matrimonial cause seeking the following relief's against the defendant her ex-husband;
 - i. That the defendant be ordered to immediately effect transfer of land parcel Number Kisasi/Mbitini/332 part of the matrimonial property into the plaintiff's name.
 - ii. Costs of the suit
 - iii. Interests on (c) and (b) above at court rates.

The Plaintiffs case

4. In her evidence in chief, the Plaintiff averred that the Defendant deserted their matrimonial home in Kisasi/Mbitini/332 in 1994 where she averred she lived with her children. The Plaintiff also averred that she purchased the land through Sacco loans during the pendency of the marriage but the same



was registered in the Defendant's name who was holding it in trust for the family. She pleaded that the Defendant was a man of straw and did not contribute much. She proceeds that she has developed the land and constructed a three-bedroom permanent house where she lives with their children. She also pleaded that she constructed another house with two rooms, that the land is fenced with chain link and live fence and that she had also installed water tanks and solar panels and also has a shop within the land. She averred that upon deserting their home, the Defendant purchased another parcel of land at Miambani where he resides with his third wife Margaret and that he also has another home at Wamunyu where his first wife Alice resides.

5. She testified that she was employed in 1981 initially as an Untrained Teacher and later trained as a teacher and that she had been working as a teacher for 3 years prior to meeting the defendant and marrying him in 1984. She stated that the husband then worked as a wood carver.

In her oral evidence, the Plaintiff stated that she was employed as a teacher in 1981 and that she had been working as a teacher for three years prior to meeting and marrying the Defendant in 1984 who was then working as a wood carver. She stated that the two made the decision to acquire the suit property together and that they both identified the land and bought it from Andrew Kyambia at the purchase price of Kshs 30,000/- That the land was about 10 acres and the Defendant paid the initial instalment of Kshs 5000/- She stated that they continued paying for the land but the Defendant got into a car accident before the full purchase price was paid. She stated that she took a loan and paid the balance of the purchase price, constructed a semi-permanent house and moved in while the Defendant was away for work in Mombasa. She stated that she gave him the balance of Kshs 10,000/- to finalize the transaction in 1987. She stated that the people who were present on the final day of the transaction defendant's uncle Kamuti Kinoi, the brother to the seller Munyoki Musyoki and a friend Mwanzia Kitingo. She later retracted and stated that Munyoki Musyoki was not present. She also stated that the purchase price increased to Kshs 34,000/- because they had been penalized for taking too long before completing the transaction. The Plaintiff testified that she carried developments on the suit property as indicated in her witness statement and added that the Defendant did not contribute in any way. She however conceded that the Defendant contributed towards purchase of the property. She also stated that she had raised their children without assistance from the Defendant.

6. In cross examination, the Plaintiff she stated that the land was purchased between 1984 and 1987. She stated that she met the Defendant in February of 1984 and begun paying for the land in November of the same year and paid the last instalment in 1987. She also refuted the claim that the Defendant had commenced the process of purchasing the land before the two met but conceded that the Defendant had constructed the semi-permanent house that they found on the property. The Plaintiff testified insisted she had taken a loan in 1987 and given the Defendant Kshs 10,000/- to pay the final instalment. She testified that their children were now adults and that they had contributed in the development of the suit property.

The plaintiff acknowledged that she did not purchase the parcel alone but insisted that all the developments thereon were solely due to her own contribution.

The Defendants case

7. The Defendant filed an amended defense and counterclaim dated 20th December 2016 in which he denied allegations raised by the Plaintiff against him. He averred that he solely purchased the suit property during the subsistence of their marriage, established a matrimonial home which they lived in together before the Plaintiff evicted him. He averred that he was a successful businessman and that the Plaintiff did not contribute in the acquisition of the disputed property in any way.



8. In his counterclaim the Defendant reiterated his averments raised in the defence and added that he was willing to voluntarily cede the matrimonial home where the Plaintiff lives together with a ½ acre portion of the suit property. He also prays for judgement as follows;
 - i. A declaration that the Defendant's land parcel No Kisasi/Mbitini/331 is Not held by the Defendant in trust for either the Plaintiff or her Children.
 - ii. A declaration that the Defendant cannot under any known law be forced to transfer his land parcel No Kisasi/Mbitini/331 in which the Plaintiff now lives and a ½ acre of the Defendant's said land on which the said matrimonial home stands.
 - iii. A declaration that the Plaintiff has no legal claim over the Defendant's land parcel No Kisasi/Mbitini/331, save for the matrimonial home and ½ acre portion of land on which the home stands, both of which the defendant is willing to cede voluntarily to the Plaintiff.
 - iv. Costs of the suit and the Counterclaim be paid by the Plaintiff to the Defendant.
9. In his statement dated 28th September 2017, the Defendant avers that the Plaintiff was an untrained teacher when he marries her with a net salary of Kshs 750 per month. That she later joined Kericho Teachers College in 1988 then transferred to Machakos Teacher College where she completed training in 1990. He averred that he paid all her college fees and other expenses and took care of their children as she studied. He averred that he was a successful businessman then and did not have challenges with money. That he purchased land parcel No Kisasi/Mbitini/331 from Andrew Kyambia in 1984 and paid the full purchase price using proceeds from his business. He refuted the claim that the Plaintiff contributed to towards the purchase of the parcel in dispute.
10. In his oral testimony in court, the Defendant maintained that the suit property was his and exhibited a Sale Agreement which was produced as DEX 5 (a) and a translation DEX 5 (b). He also stated that he spent Kshs 125,000/- towards construction of the family home which he testified that the Plaintiff demolished and constructed another one. He stated that the suit property is about 9.9 acres and that he was willing to give the Plaintiff ½ acre.
11. In cross examination, the Defendant indicated that the sale agreement was done in 1987. He admitted that the Plaintiff assisted in raising their children but testified that he was the one who paid for her college tuition in 1988. He also admitted that he was given Kshs 6000/- by the Plaintiff and further admitted that she assisted him in constructing their matrimonial home between 1987 and 1990. He also conceded that he did not contribute towards construction of the new family home.
12. The defendant reiterated that he met the plaintiff in November 1984 and formalized the marriage in 1988. He stated that the land transaction was began in August 1984 and that he constructed a home on the property in 1988 adding that the plaintiff completed her studies in Kericho Teachers College in 1990. He however acknowledged that the plaintiff took up some loans between 1986 and 1987. He acknowledged receiving Kshs. 6000/= from the plaintiff but was cagey on what the amount was for or how he utilized the amount given to him. He maintained that the house he had constructed was pulled down before the new house was constructed. His view is that the plaintiff be given half acre of the disputed property including the house which he claims is occupied by the plaintiff with her current husband.
13. Musyoki Nzioka Kitonga (DW2) the defendant's brother and witness testified that he witnessed the sale transaction in respect to the disputed parcel between his brother and the seller one Andrew Mbai Kyambia on 4th April 1987. He stated that the agreed purchase price was Kshs. 34,000/= and he witnessed the signing of the agreement and that the defendant paid the total amount of consideration



in full. He stated that there were other witnesses to the transactions and named, Kamuti Kinai, Mwanzia Kitunga (deceased) and S. Mutunga Kyambia as the witnesses who were present when when shown the agreement tendered by the defendant (D EX 5(a) the witness doubted it saying the same appeared different from the one he signed.

14. The parties herein were both given a chance to put in their respective final written submissions but both opted not to file any and left the matter to be determined based on the evidence placed on record.
15. This matter is fairly straight forward. There is only one property in dispute here which is Kisasi/Mbitini/332 measuring around 4 hectares (10 acres)
16. There is no dispute that the property in dispute was acquired during the subsistence of marriage between the plaintiff and the defendant. The defendant in his oral testimony testified that he acquired the property in August 1984 before he formally married the plaintiff but that averment was a departure from his amended defence where he pleaded with para 6 as follows;

“ Further to paragraph 5 herein above and without prejudice thereof, the defendant avers that he solely acquired land parcel No Kisasi/Mbitini/332 during the subsistence of his marriage to the plaintiff.....” . It is therefore clear that there is no dispute that the matrimonial property or the disputed property herein was acquired during the subsistence of marriage between the parties herein. Both parties are in agreement that they got married in 1984 and the disputed property was acquired the same year. Of course, it is agreed that the marriage was solemnized later in 1988.

17. The only question for determination herein is the level of contribution of each party and how the property should be divided now the parties are divorced.
18. The case for the Plaintiff is that she should keep the whole parcel of land because she not only contributed to its purchase but also developed the property without the assistance of the Defendant and further, that she resides on the property with their children. Her testimony was to the effect that she gave the Defendant Kshs 10,000/- towards payment of the final instalment. In addition, she testified that she put up two permanent houses, that she fenced the suit property with chain link and k-apple live fence and that she also installed water tanks and solar panels and also constructed a shop.

The plaintiff further argues that the defendant purchased or has two other parcels which have been taken by the 1st and 3rd wives respectively. She therefore contends that she should be left with the disputed parcel for herself and her children.

19. On his part, the Defendant’s position is that he purchased the whole property by himself. He testified that the Plaintiff gave him Kshs 6000/- though he did not state whether the same was towards acquisition of the suit property. He also conceded that he did not contribute towards construction of the current matrimonial home but maintained that he constructed their initial home. His prayers are that the Plaintiff can be allowed to keep the matrimonial home and an addition ½ acre of the suit property while he keeps the rest of the property. From the search exhibited by the Defendant, the suit property is approximately 4.99 hectares.
20. In division of matrimonial property, the contribution of each spouse is an important factor. When it comes to assessment of a party’s contribution in acquisition of matrimonial property, the Court of Appeal in the case of *TKM v SMW* [2020] eKLR stated follows;

“ We bear in mind the edict in *Muthembwa v Muthembwa* (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition



of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.”

21. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the *Matrimonial Property Act*, 2013 as follows:

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.

22. Going by the above, it is certain and obvious that the disputed property to wit Kisasi/Mbitini/332 is a matrimonial property.

23. With regards to non-monetary contribution, it is evident that the Plaintiff played the bigger role.

24. Division of matrimonial property is provided for under section 7 of the *Matrimonial Property Act* which provides; that:

“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”.

25. The defendant’s position is that he purchased the property in August before he met the plaintiff but the same is not supported by the evidence tendered in this court. In his own pleadings, as I have observed above, the defendant is conflicted. He conceded that the plaintiff used to take some loans and conceded that at one time she gave him kshs. 6,000/= and though he did not say what the money was meant for. He also concedes the plaintiff’s contribution in his defence filed. But in his evidence in court, he denied that plaintiff made any contribution towards acquisition of the matrimonial property in this cause. The defendant says the plaintiff should be given ½ acre together with the matrimonial house but the plaintiff certainly deserves much more.

26. It is also evident that there is a non-monetary contribution component which the plaintiff played a part in. She took care of the children and the home when the defendant was away at work in Mombasa and the defendant conceded to this fact.

27. Article 45(3) of the *Constitution* also provides as follows as to division of the rights of parties to a marriage;

“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”.

28. The *Matrimonial Property Act* under Section 6 further provides that Matrimonial Property includes;

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



- c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage
29. In the case of *T.M.V. v F.M.C* (2018) eKLR, the court 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”.

The above provision however does not mean that upon dissolution of marriage the property or properties comprising matrimonial property should be necessarily be divided equally between the wife and the husband on 50:50 basis. There are parameters central to which contribution of each party is an important factor.

30. This was also the Court’s finding in *EGM v BMM* [2020] eKLR where the Court of Appeal and opined as hereunder;

“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... The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed”

31. The appellate court was of the view that;

The Learned Judge missed the mark on his interpretation of spousal equality as enshrined in that sub-Article. This Court espoused the meaning of that equality in *MEK v GLM* [2018] eKLR as follows;

“Equality in marriage is not a principle to be applied blindly nor is it intended to encourage dependency by one spouse. It is a situation where each party makes a contribution. In other words it is not shifting the burden, but the sharing of responsibilities and benefits taking into account the gender limitations.

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. The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed.

It is the duty of the courts to fairly and accurately determine such distribution and the learned judge but abducted that duty. His blanket of a 50:50 formular ostensibly on the basis of Article 45(3) of the *Constitution* effectively made the distributive scheme of the statute completely of no effect and orchestrated a failure of justice.

32. Similarly, on contribution, Nyakundi J. in *MNH v FHM* [2018] eKLR held as follows;

“The logical conclusion flowing from the judicial precedence quoted above is that in determining the distribution of matrimonial property at the dissolution of a marriage, the



Trial Court ought to dispassionately scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties”

33. From the foregoing it is quite clear that courts are guided by principle of fairness and monetary and non-monetary contribution of each party towards acquisition of the matrimonial properties.
34. In this instance what has come out from the evidence tendered shows that the defendant contributed towards acquisition of the matrimonial property in dispute herein. The plaintiff did her part and though she claims that she is entitled to the whole of it by virtue of the fact that the other wives have their own parcels, the law in this regard unlike a succession cause, does not look at what the other spouses if any have benefitted or likely to benefit. That is not a factor in matrimonial causes. I am however persuaded that she made significant contributions in light of the documents exhibited in this court showing that she took loans which was partly used to purchase the suit property and develop it. This part is cancelled by the defendant.
35. In the end balancing the scales of doctrine fairly this court finds that the matrimonial property known as *XXXXXX/332 should and is hereby dividend equally in two (2) equal parts with half (approx. 2 Ha) comprising where the matrimonial home is going to the plaintiff and the other half to the defendant.

I will not make any order as to costs so each party to bear own costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 9TH DAY OF MAY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

