



**CWG v HGN & another (Civil Suit 15 of 2017)  
[2024] KEHC 11723 (KLR) (Family) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 11723 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL SUIT 15 OF 2017  
PM NYAUNDI, J  
JULY 19, 2024**

**BETWEEN**

**CWG ..... PLAINTIFF**

**AND**

**HGN ..... 1<sup>ST</sup> RESPONDENT**

**CEDAR WOODS PROPERTIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Plaintiff/ Applicant herein, by Originating Summons dated 7<sup>th</sup> March 2017 as amended on 7<sup>th</sup> June 2018 seeks the following orders;
  1. Whether it can be declared that the properties (movable and immovable) listed herein with buildings and developments thereon acquired and developed by the joint funds and efforts of the Plaintiff and the Defendant during their marriage and registered in the name of the defendant and in the name of the Plaintiff are owned jointly by the Plaintiff and the Defendant and/or are held beneficially and in trust for the Plaintiff: -
    - a. Motor vehicle registration number KAD 222 V.
    - b. L.R NO. 12715/4136
  2. Whether an order should issue declaring that 50% or such other or higher proportion of the properties aforesaid, is held by the defendant in trust and for the beneficial interest of the plaintiff?
  3. Whether an order should issue that the income aforesaid be settled in proportions aforesaid or as the court may order.



4. Whether the said properties aforesaid should be shared equally and/or be sold and the net proceeds be shared equally between the Plaintiff and the Defendant or settled in proportions aforesaid or as the court may order?
  5. Whether an order should issue declaring that any properties registered in the names of the defendant and sold by the defendant, were bought jointly by the Plaintiff and the Defendant and if so, whether the Plaintiff is entitled to the entire proceeds or half of the proceeds thereof or such proportions as the court may order?
  6. Whether an order should issue declaring that matrimonial home known as LR NO. 12715/4136 was fraudulently sold to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> defendant? If so, whether an order should issue cancelling the title in favour of the 2<sup>nd</sup> defendant back to its original state for purposes of distribution.
  7. Whether the Deputy Registrar ought to be empowered to sign any documents that the Defendants may refuse to sign?
  8. Whether the Defendants should be condemned to pay the costs of this Originating Summons?
2. The Summons was supported by the grounds on the face of the Application and by the Affidavit of even date sworn by the Applicant. In addition, the Petitioner relies on her further affidavits sworn on 28<sup>th</sup> March 2018 and 24<sup>th</sup> September 2019. Her list of documents dated 26<sup>th</sup> November 2019 and her witness statement dated 29<sup>th</sup> November 2019.
  3. The Respondent entered appearance in the matter and filed a Replying Affidavit sworn on 18<sup>th</sup> July 2017, list of documents and supplementary affidavit dated 15<sup>th</sup> August 2018
  4. The 2<sup>nd</sup> Respondent entered appearance on 28<sup>th</sup> May 2019 but did not respond to the Originating Summons.
  5. The Originating Summons was canvassed by way of viva voce evidence.

#### **Summary Of Petitioner's Evidence.**

6. She is the former wife of the Respondent. They formalised their marriage on 21<sup>st</sup> August 2001 under the *Marriage Act* (Cap 150 Laws of Kenya), now repealed. Their marriage was blessed with 2 children born on 14<sup>th</sup> December 2002 and 5<sup>th</sup> May 2005. She and the Respondent met in 1998, both were students at Jomo Kenyatta University. She was pursuing a certificate Course in Purchasing and Supplies while the Respondent was undertaking a degree course in Agricultural Engineering.
7. On completion of her studies she was employed at Transwide as a tea girl earning Kshs 8000 per month. They had their first home at Kariobangi South and she contributed to the running of the home. In consultation with the 1<sup>st</sup> Respondent she resigned her job so as to take care of their first-born child and manage the home.
8. She then run a second hand clothes business and subsequently, with the support of the 1<sup>st</sup> Defendant, a Kiosk adjacent to the matrimonial home at Kariobangi, the proceeds of which she applied to running the home. By 2005 she was pregnant with their 2<sup>nd</sup> Child and she took time off to take care of him.
9. Around this time, they agreed that since the 1<sup>st</sup> respondent had more steady income that he would take a loan for the purchase of a plot for construction of their matrimonial home, the identified plot was L.R. No. 1275/ 4136. It was further agreed that the 1<sup>st</sup> Respondent take a further loan to purchase a family car and they bought motor vehicle KAD 222V.



10. In 2006 she set up an electronic business from which she derived a net income of Kshs 30000 per month, with that income she continued to contribute to running the home. When the couple commenced the construction of their home she sold the business for Kshs 150,000 and contributed towards purchasing of some construction materials and installation of electricity, she also took up the role of overseeing its construction.
11. She also set up a poultry project within the matrimonial home and with that income supported the running of the home. At this time the 1<sup>st</sup> Defendant's job required that he travel a lot and so she was left to run the home front. The marriage between the two ran into headwinds resulting in divorce proceedings. The 1<sup>st</sup> Defendant abandoned the home in 2011. The divorce matter proceeded ex parte. It is her evidence that the 1<sup>st</sup> Defendant went behind her back and sold off the matrimonial home for Kshs 6m. She claimed that this was fraudulent as the value of the house is higher. Her convictions in this regard is confirmed by the fact that the buyers of the house Cedarwood has its directors, Solomon Njuguna Wachira and George David Onkundi Aika both of whom are friends of the 1<sup>st</sup> Defendant. It is her view that the transfer was engineered to deny her, her share in the matrimonial home.
12. She told the court that the motor vehicle was registered in the name of Ondari Bosire Gideon as at 18/7/2017. The house (LR No. 12715/4136) was registered in the name of Cedar Woods Properties Limited on 7/12/2016. She stated that she lives in the matrimonial home in Syokimau, LR No. 12715/4136 which has since been transferred to Cedar Woods Properties. She produced a search marked as P Exh 1. She has since been served with a Notice to vacate by the 2<sup>nd</sup> respondent (document 14).
13. On cross-examination, she stated that her contribution towards the construction of their matrimonial home was non-financial. The 1<sup>st</sup> Respondent bought the parcel of land and constructed the home. The 1<sup>st</sup> Respondent left the matrimonial home in 2011 and took the children with him She was not been given an opportunity to provide for her children. The 1<sup>st</sup> respondent remarried and has another family. He sold the house for Kshs. 6 million. The 1<sup>st</sup> respondent purchased the motor vehicle through a loan from his former employer. The structural calculations are not addressed to her. She pays electricity in the matrimonial home.
14. During cross examination, she stated that she doesn't pay rent to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> respondent would require spousal consent if he was to attach the house as security while taking a loan. She is not aware if the 1<sup>st</sup> Respondent took a loan from the 2<sup>nd</sup> Respondent. George Onkundi was the director of the company when the property was sold. That the 2<sup>nd</sup> Respondent did not conduct due diligence by visiting the property to see who was in occupation.

### **Summary Of Defendant's Evidence**

15. DW1, Hezron Geoffrey Nyaberi confirmed that he and the Petitioner were husband and wife. He denied however that she had made any contribution towards the acquisition of plot LR No. 12715/4136 and the construction of a house thereon. He further denied that the Applicant was in any gainful employment or ran any business that contributed towards running the home. It was his evidence that to the contrary she failed to support him and he bore the costs of running the home solely. That owing to her conduct he was compelled to file for divorce.
16. On cross examination, he stated that the properties listed in the Originating Summons were bought during the subsistence of their marriage. The applicant did not make any contribution towards the acquisition of the property. He supported the applicant to set up a business. He took a loan from the



- bank and Sacco to build a house on LR/12715/4136. He stated that the documents produced by the applicant concerning the construction of LR12715/4136 are not genuine.
17. When he took the loan for the house, she gave her consent. However, he did not need her consent when he sold the house because he had already divorced her. He did not inform her that he had sold the house to the 2<sup>nd</sup> Respondent. He informed the 2<sup>nd</sup> Respondent that this was a matrimonial home. George David Onkundi is a family friend and was a director of Cedar Woods Properties Limited when he sold the house. He sold the house for Kshs. 6 million. The 2<sup>nd</sup> Respondent took possession of the house in 2016. He sold the house to offset debts owed to a business partner, a bank and the 2<sup>nd</sup> Respondent. George Onkundi executed the documents. He did not have proof to show that he constructed the house; he left his personal effects in the house when he left. His brother and not the Plaintiff supervised the construction of the house.
  18. He further stated that he as the original registered owner of LR.12715/4136, he transferred it to the 2<sup>nd</sup> Respondent by deed of settlement dated 5<sup>th</sup> January 2015. He executed the transfer form dated 21<sup>st</sup> November 2016 in favour of the 2<sup>nd</sup> Respondent since he had the capacity to transfer it.
  19. In re-examination, he stated that he gave the applicant money to put up her businesses. He bought the subject property from Primeland Property at Kshs. 220,000. He got finances from his Sacco.
  20. DW2, Solomon Njuguna Wachira told the court that he is the sole director, Cedar Wood Properties Limited. as his evidence in chief. He stated that he was not aware of the dispute between the applicant and the 1<sup>st</sup> Respondent and therefore, the suit against the 2<sup>nd</sup> Respondent should be dismissed.
  21. During cross-examination, he stated that as at 12<sup>th</sup> June 2017, there were two directors; David Onkundi Atika was one of the directors. He resigned during the pendency of the case. He did not have knowledge that the property he purchased was matrimonial property. The 1<sup>st</sup> respondent informed him that he had separated with his spouse and there was no need of spousal consent.
  22. During cross-examination, he stated that the house was owned by the 1<sup>st</sup> Respondent at the time of execution. Both directors executed the deed of settlement.
  23. Upon conclusion of the hearing the Court directed that the parties file submissions.
  24. The Applicant filed written submissions dated 19<sup>th</sup> March 2024. The 1<sup>st</sup> Respondent's submissions are dated 7<sup>th</sup> June 2021 whereas the 2<sup>nd</sup> Respondent's submissions are dated 5<sup>th</sup> June 2024.

### **Summary Applicant's Submissions.**

25. The Applicant submitted that it was not in dispute that the marriage between her and the 1<sup>st</sup> Respondent had been dissolved and that the properties listed in the Originating Summons were acquired during the subsistence of the marriage. She submitted that the properties listed in the Originating Summons were within the definition of Matrimonial Property provided under Section 6(1) and Section 2 of the *Matrimonial Property Act*.
26. It was her submission that property vests in spouses according to the contribution of either spouse as provided by Section 7 of the *Matrimonial Property Act*. That contribution is both monetary and non-monetary as stipulated in Section 2 of the *Matrimonial Property Act*. She relied on the decisions of TMC v FMC [2018] eKLR and VI v JT [2021] eKLR. According to her, she ran businesses whose proceeds were used to meet the family's expenditure when the 1<sup>st</sup> Respondent was overwhelmed with loans. She also quit her job to take care of the children.



27. She further submitted that parties to a marriage have equal rights at the time of marriage, during the marriage and at the dissolution of the marriage according to Article 45 (3) of *the Constitution* of Kenya and Section 4 of the *Matrimonial Property Act*. By dint of Section 14 of the *Matrimonial Property Act*, the 1<sup>st</sup> Respondent held the properties in trust for her. She sought to rely on the decisions in *NNN v SNM* [2017] eKLR, *VI v JT*[2021] eKLR.
28. She submitted that she was entitled to an equal share of the properties as she had made significant contribution towards the acquisition and development of the same. She sought to rely on the decisions of *PNN v ZWN* [2017] eKLR and *SNM v DWM* [ 2021] eKLR.
29. The applicant submitted that spousal consent was required before the property was sold to the 2<sup>nd</sup> Respondent. She sought to rely on Section 12 (1) and (4) OF The *Matrimonial Property Act*, Section 79 (3) of the *Land Act* 2013 which state that consent of a spouse is required when disposing matrimonial property. Finally, she submitted that the Respondents should both pay for costs.

#### **Summary Of 1<sup>st</sup> Respondent's Submissions.**

30. The 1<sup>st</sup> Respondent submitted that he was the registered owner of property known as LR No. 12715/4136 and KAD 222V. That the applicant was required to prove her contribution whether monetary or non-monetary. Reliance was placed in the decision in *MNH v FHM* [2018] eKLR, *EKTM v ECC* [2021] eKLR. He argued that the applicant did not offer any significant contribution; she did not take care of the children and with regard to their companionship, their relationship was strained.
31. He submitted that during distribution of property, the contribution of each spouse should be taken into consideration. That it would be unfair for the applicant to claim 50% of the properties while she had contributed nothing towards the purchase. He sought to rely on the decision of *EKTM v ECC* [2021] eKLR, *Mambwe v Mambwe* (Appeal No. 22 of 2015); [2018] ZMSC 317. He further submitted that the sale to the 2<sup>nd</sup> Respondent was lawful and proper. That at the time of selling the property, their marriage had been dissolved and therefore, he did not require her consent to dispose the properties. The 2<sup>nd</sup> Respondent was therefore a bona fide purchaser for value without notice.

#### **Summary Of The 2<sup>nd</sup> Respondent's Submissions.**

32. Relying on the decision in *Weston Gitionga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR, on the definition of a bonafide purchaser without notice, the 2<sup>nd</sup> Respondent argued that it paid Kshs. 6 million for the purchase of L.R No.12715/4136. That at the time of the transfer, the applicant and the 1<sup>st</sup> Respondent were no longer husband and wife and therefore, spousal consent was not required. Counsel sought to rely on the decision of *Stella Nyakio Ngugi v Wilberforce Njenga Ndonga & 7 others* [2018] eKLR .
33. Citing the decision in *Falcon Global Logistics Co. Ltd v Management Committee of Eldam Ravine Boarding Primary School* [2018] eKLR, the, 2<sup>nd</sup> Respondent submitted that it conducted due diligence before purchasing the property by conducting a search which showed that the property was registered in the name of the 1<sup>st</sup> Respondent. There was no restriction on the property.
34. Lastly, it was counsel's submission that the 2<sup>nd</sup> Respondent's title was indefeasible. That the title was registered in the name of the 1<sup>st</sup> Respondent and the applicant failed to prove fraud in the sale of the property.



## Analysis And Determination

35. The following are the issues for determination
- i. Whether Motor vehicle registration number KAD 222 V and L.R NO. 12715/4136 comprise matrimonial property
  - ii. If the answer to (i) above is in the affirmative; Did the Applicant Contribute towards the acquisition of the matrimonial property
  - iii. What share, if at all, of the matrimonial property is the Applicant entitled to?
  - iv. Whether the transfer of LR No. 12715/4136 to the 2<sup>nd</sup> Respondent should be voided
  - v. Who should bear the costs of the Suit?
36. On the 1<sup>st</sup> issue whether the properties comprise matrimonial property?
- Section 6 of the [Matrimonial Property Act](#), 2013 provides the definition of Matrimonial property to include
- Meaning of matrimonial property
1. For the purposes of this Act, matrimonial property means—
    - 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.
37. There is an important distinction made by the law, with regards to identification of matrimonial property. In relation to the matrimonial home and the household goods and effects in the matrimonial home and homes, once a party establishes that the asset was a matrimonial home it is automatically designated as matrimonial property. With regards to other assets the party alleging has to establish that there was joint ownership, acquisition and a common intention that the asset be matrimonial property.
38. This distinction is important as it is now well established by judicial precedent that a marriage on its own does not have the effect of altering proprietary rights of a spouse. It is incumbent on the Spouse seeking a declaration of an asset as matrimonial property to demonstrate that common intention that the property ought to be deemed as such, and this will be done by establishing either joint ownership or joint acquisition.
39. I have no difficulty in finding that LR No. 12715/4136 comprises matrimonial property as it was where the parties established their matrimonial home.
40. The same cannot be said of the motor vehicle, the documentation on record shows that the Defendant obtained a loan from his employer to buy the car. The Petitioner has not demonstrated how she contributed towards its purchase and that the car was utilized as a family asset.
41. Having found that LR No.12715/ 4136 comprises matrimonial property the next question is whether the Petitioner contributed to its acquisition and what if any is her share of the matrimonial home.
42. The parties are agreed that the Defendant brought home a larger cheque. The Petitioner contends that she made both financial and non-financial contribution towards the acquisition of the matrimonial



asset and its development. An assertion that is vehemently denied by the defendant who portrays the Petitioner as one who seeks to reap from where she did not sow.

43. Section 7 of the *Matrimonial Property Act* states  
Ownership of matrimonial property  
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.
44. Section 14 of the *Matrimonial Property Act*, 2014 provides as follows  
Presumptions as to property acquired during marriage  
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;
45. The Couple moved into the house in 2008, the Defendant left the house in 2011 when the marriage was shipwrecked. Even after the divorce the Petitioner has continued to live in the house. With these facts the burden was upon the 1<sup>st</sup> Defendant to rebut the presumption that he held the property in trust for the Petitioner. I find that he has not discharged that burden.
46. The *Matrimonial Property Act* recognizes both financial and non-financial contribution. The Petitioner herein testified that she made both financial and non-financial contribution. The 1<sup>st</sup> Defendant urged that she did not make a contribution that would entitle her to a share of the property. I observe that the 1<sup>st</sup> Defendant brought a bigger cheque home and that the Petitioner moved from one venture to another in attempt to contribute to the family earnings. She coupled this with her responsibilities as the mother of the home.
47. In arriving at my decision, I am guided by the the dicta of the House of Lords decision in *White v White* [2001] 1 AC 596, which was cited with approval by the Supreme Court in *Petition No. 11 of 2020 Ogentoto v Ogentoto* on the weighting between financial and non-financial contribution-

“Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. As Butler-Sloss LJ said in *Dart v Dart* [1996] 2 FLR 286, 303, the statutory jurisdiction provides for all applications for ancillary financial relief, from the poverty stricken to the multi-millionaire. But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions. This is implicit in the very language of paragraph (f): '. . . the contribution which each has made or is likely . . . to make to the welfare of the family, including any contribution by looking after the home or



caring for the family.' If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.

48. All factors considered I think an apportionment of 40% share of the suit property to the Petitioner would be reasonable in the circumstances.
49. On the third issue whether the transfer to the 2<sup>nd</sup> Defendant should be voided? The 1<sup>st</sup> Defendant contends that he is no longer the owner of the property having transferred the same to the 2<sup>nd</sup> Defendant in 2016. He therefore suggests that there is no remedy for the Petitioner. In rejoinder the Petitioner contends that the sale was fraudulent as the asset was matrimonial property. The 2<sup>nd</sup> Defendant asserts that he was an innocent purchaser for value. I agree with the 2<sup>nd</sup> Defendant that his title to the land is unassailable.
50. The question then is how the Petitioner should retrieve her share of the matrimonial property as there cannot be a right without a remedy. The facts herein are almost similar to those in IC [v SS \(Matrimonial Cause 01 of 2021\)](#) [2024] KEHC 3316 (KLR) (9 April 2024) (Judgment) where the Court having observed that the defendant may have lawfully transferred the property to a third party directed that the Defendant pay to the Petitioner her share of the purchase price or the valuation. I think that would be an appropriate solution in the instant case.
51. The parties are agreed that the 1<sup>st</sup> Defendant sold the property for Kshs 6m. The Petitioner disputes this value but has not availed an alternative valuation of the property. In the circumstances, I find that she is entitled to 40% of the Kshs 6m sale price.
52. Based on the foregoing these are the final orders of the Court;
  - i. The Originating Summons partially succeeds.
  - ii. Motor vehicle KAD 222V does not comprise matrimonial property.
  - iii. The Property Known as L.R NO. 12715/4136 is matrimonial property and shall be apportioned in the ratio of 40:60 between the Petitioner and the 1<sup>st</sup> Defendant.
  - iv. The value of the property is assessed at Kshs 6m and the 1<sup>st</sup> Defendant shall pay to the Petitioner her 40 per cent share within 45 days.
  - v. Each party shall bear its own costs.

**DELIVERED ON THE VIRTUAL PLATFORM, DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JULY, 2024.**

**PATRICIA NYAUNDI**

**JUDGE**

In the presence of:

Fardosa Court Assistant

