EJ v JKN (Matrimonial Cause E004 of 2020) [2024] KEHC 9166 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9166 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MATRIMONIAL CAUSE E004 OF 2020

HM NYAGA, J

JULY 19, 2024

BETWEEN

EJ ..... APPLICANT

AND

JKN ..... RESPONDENT

JUDGMENT

1. The plaintiff and the defendant were once a happily married couple. Their union began in 1981 when they got married under Kipsigis customary law. They then solemnized their union in 1989. After close to forty (40) years of apparent marital bliss, their union met turbulent waters.

2. Subsequently, the plaintiff filed this cause, through an originating summons dated 3rd December 2020 said to brought under the *Matrimonial Property Act*, 2013 seeking the following orders;

    I. That this honourable court be pleased to declare that the following immovable property acquired during the subsistence of the marriage with the joint efforts of the applicant and the respondent and developed by their joint funds and efforts is jointly owned by the applicant and the respondent though registered in the respondent's name in trust for both;

        a. Plot 108 Nyota Farm

        b. Parcel No. Kericho/Kabianga/168

        c. Motor vehicle Reg. No. KPE xxx

        d. Motor vehicle Reg. No. KAH xxx

        e. Tractor KYK

    II. That this court be pleased to order the division of the property upon valuation to establish the value.

III. That the applicant be awarded plot 108 Nyota Farm where she lives and a half (½) of land parcel Kericho/Kabianga/168 where the respondent lives with his new wife.

IV. That this honourable court be pleased to grant such further or other reliefs as may be just in the circumstances.

V. That the costs of this application be in the cause.

3. Contemporaneously, the applicant filed the notice of motion of even date. The same has been dispensed with. The matter proceeded by way of viva voce evidence, and thereafter other applications which I have already made a determination on.

4. After the filing of this cause, the applicant also filed divorce cause in the Chief Magistrate's Court at Nakuru, being Divorce Cause Number 157 of 2022.

Applicant's Case

5. The applicant stated that at the time the parties got married, she was a teacher, while the respondent was a pilot. They settled in Nanyuki, then moved to Nairobi, and eventually in Mombasa. They had four issues who are all grownups now.

   The applicant states that while they were residing in Mombasa, the respondent operated his private airline and she left her teaching job and opened a restaurant at the airport in Mombasa. That when the respondent's business collapsed, he joined her in the restaurant and the same flourished for some time. She avers that due to the respondent's lack of financial discipline, the said business also collapsed. Their house in Mombasa was sold over a loan they had defaulted on. That later on they bought the land parcel known as plot number 108 Nyota Settlement Scheme where she put up a temporary house and engaged in farming.

   The applicant further stated that the respondent moved out of the house at Nyota and went to live in Kabianga, where his ancestral land is situated. That thereafter the respondent came and harvested mature trees that she had planted and failed to account for the proceeds.

6. The applicant states that they had also purchased a plot at Keringet. And a farm at Kimana, Loitoktok which the respondent sold and never accounted for the proceeds.

   She thus prayed that the two remaining properties be divided between them. She urged the court to consider that the defendant had already gained individually from the sale of the properties she described.

7. The applicant stated that although the documentation showed that it was the respondent who paid for the property at Nyota, she also contributed to its purchase as she was gainfully employed at the time. She proposed that the land at Nyota to be divided into 3, to take care of their children.

   The applicant admitted that she had sold plot known as Kapsambei Block 1/584 but stressed that she is the one who had bought the land, after parting ways with the respondent.

Respondent's Case

8. The respondent acknowledged having been married to the applicant as alleged, with the only difference being that he put the commencement of their union in 1980 and not 1981.

9. The respondent gave his employment history. He said that after he left employment with the Kenya Air Force, he engaged in an airline business and he bought two aircraft, through a loan. That from that

business, he was able to buy a house in Mombasa. That he also opened a restaurant at the airport and employed staff. That the applicant quit her teaching job and went to help run the business.

10. That due to issues in Mombasa he sold off some of his property there. He also got another job as a pilot and during that time he financed the farming at Nyota. The respondent stated that the and at Kabianga is his ancestral land and it is in his grandfather's name.

11. The respondent further stated that he was the one who paid for the land at Nyota and denied that the applicant contributed to its purchase as she alleges.

12. The respondent further stated that although the applicant was working as a teacher and later as a director at the restaurant he never saw her earnings.

13. On the issue of sale of trees previously, the respondent stated that even if this was the case, the applicant also did the same and had been benefitting from the farming on his land.

14. At the close of the trail the parties filed their respective submissions which I have considered and I will not rehash on them.

Analysis & Determination

15. I have considered the pleadings herein by both the Applicant and the respondent as well as the witness statements, necessary affidavits, viva voce evidence and submissions as filed. I have also considered the exhibits filed and produced in evidence and submissions and authorities cited.

16. It is my considered view that the following issues fall for determination;

    a. What property herein constitutes matrimonial property under the Act.

    b. Whether the matrimonial property can be divided between the parties.

    c. Whether the applicant is entitled to a share of the land at Nyota Farm and Kabianga.

    d. Whether provision can be made for the children while the parents are alive.

17. I will deal with these issues as hereunder.

18. The summons has been brought under Sections 6, 7 and 9 of the *Matrimonial Property Act*.

19. Section 6 of the Act describes matrimonial property as follows;

    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.

    (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

20. It is thus clear that matrimonial property is that property that is acquired during the subsistence of the marriage between the parties.

21. The only property that is in contention is the land at Nyota Farm and Kabianga. The applicant abandoned her claim to the rest of the property.

22. From the evidence, and this was conceded by the applicant, the land at Kabianga is the respondent's ancestral land which is said to have belonged to his grandfather and upon his death devolved to his sons, who include the respondent's father. No particulars of the said property were tendered to the court to show that the land in question was in the name of the respondent and if so when it became his. Thus, the averment by the respondent that the land is in the name of his father was not really rebutted by the applicant. Also, it is not clear whether the respondent inherited the land prior to his marriage to the applicant.

23. Therefore, the said property has not been shown to have devolved to the respondent and if it did the applicant has not shown that it is not a property excluded under Section 5 of the *Act*. The section provides that:

> " Rights and liabilities of a person
>
> Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property."

24. While interpreting Section 5 (supra) in *E N K vs. J N K* [2015) eKLR, Musyoka J. pronounced himself thus: -

> " From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property. Indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property (sic) where the inheritance was before the marriage..."

25. Mabeya J. on his part in *SN vs. FM* [2019] eKLR held that: -

> " The net effect of the foregoing is that any property acquired during the subsistence of the marriage, including that which is inherited forms part of matrimonial property. The only time that inherited property is excluded from matrimonial property is if it was acquired before marriage. Property that is inherited during the subsistence of the marriage is not excluded from matrimonial property except if it was acquired before marriage."

26. Since there is no evidence as to when the respondent came to own the said land, if at all, or that the parties actually lived there or that the applicant made any contribution to developments therein, I find that the land at Kabianga, which the applicant claimed half of, does not qualify to be termed as matrimonial property.

27. As for the land at Nyota Farm, there is no dispute that the same was acquired during the subsistence of the marriage between the parties. What is disputed by the parties is who contribution to its purchase.

28. There have been several decisions as to what constitutes matrimonial property. For instance, Musyoka J. in *P.O.M vs. M.N.K*(2017) eKLR stated that:

> " This is a suit for division of matrimonial property...The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made..."

29. Similarly, in the case of *T.M.V. vs F.M.C* (2018) eKLR, Nyakundi J. 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."

30. In the Ugandan High Court, Mwangusya J. in Paul Kagwa vs. Jackline Muteteri (Matrimonial Cause-2005/23) [2006] UGHC 17 (18 May 2006) while citing Bossa, J. in John Tom Kintu Mwanga vs. Myllious Gafafusa Kintu (Divorce Appeal No. 135 of 1997) (unreported) expressed himself as hereunder: -

> "On the last issue of whether the petitioner is entitled to matrimonial property, I clearly believe that she does and I so hold. Matrimonial property is understood differently by different people. There is always that property which the couple chose to call home. There may be property which may be acquired separately by each spouse before and after marriage. Then there is property which the husband may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse is entitled is that property which the parties choose to call home and which they jointly contribute to."

31. Going by these authorities I find that Nyota Farm was property acquired during the subsistence of the marriage and is thus to be considered as matrimonial property. It is important to note that this is also conceded by the respondent in his submissions.

32. The next question to be answered is whether the court can proceed to order a subdivision of the said property at Nyota Farm.

33. Section 7 of the Act then provides that;

> 7. 'Ownership of matrimonial property
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> 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.'

34. From the wording of the section, no subdivision of matrimonial property can be done until the marriage is dissolved. The Petitioner is seeking the division of the matrimonial property, which she has listed. If there is no evidence that the parties are divorced, then the prayer for subdivision is premature.

35. That said, the position in law is that when the parties are still married the court is still empowered under Section 17 of the Act to make a Declaration. The section provides that;

> 17. Action for declaration of rights to property
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> (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
>
> (2) An application under subsection (1)—
>
> (a) shall be made in accordance with such procedure as may be prescribed;
>
> (b) may be made as part of a petition in a matrimonial cause; and
>
> (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

36. Such a declaration is not necessarily pegged on the extinction of a marriage. The effect of this section is that the court can make a declaration with regard to the property in question even though the parties are still married or pending divorce.

37. The position in law was set out in *AKK v PKW* [2020] eKLR where the Court of Appeal stated as follows;

> " A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act. In *PNN vs. ZWN* [2017] eKLR, Waki, JA stated that:
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> An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in *Petit vs. Petit* [1970] AC 777:
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> "One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?"
>
> The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant's prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act."

38. There is no dispute that at the time the applicant moved this court, the parties were still legally married. It is also not disputed that at the time the parties concluded the hearing herein, the divorce cause was concluded. A copy of the judgment in the said cause has been availed to the court.

39. The court in *JNN v PMM & another* [2018] eKLR in regards to a divorce judgement held as follows:

> " The judgment in respect of that divorce cause is still subsisting. The same has not been varied nor set aside on appeal. For all purposes and intents, the Petitioner and Respondent are regarded as former husband and wife. Until the orders made by Milimani law courts being a court of competent jurisdiction on the dissolution of their marriage whether bad or not are set aside, the same are binding."

40. In view of the fact that the parties are now divorced, this court is now empowered to move beyond just making a declaration and can proceed to make a division of the property.

41. So how is the court to subdivide the said property at Nyota Farm?

42. The applicant had in her pleadings sought that it be apportioned to her wholly, but at the hearing she asked that the same be divided into three, presumably one third for each party and one third to be reserved for their children.

43. The applicant states that she contributed monetarily to its purchase, an averment vehemently denied by the respondent.

44. The respondent's position is that he was the one who solely paid for the property. In his submissions he points out that he had the original receipts of purchase. He avers that he is the sole proprietor of the said land. As such, he argues, the applicant is not entitled to the same.

45. it is not disputed that the property at Nyota Farm is registered in the sole name of the respondent.

46. There is need to dispel the notion that just because a property is registered in the name of one spouse then he is the absolute and only owner of the same. Section 14 of the 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 interests in the matrimonial property are equal."

49. From the above provision it is clear that even if the property is registered in the name of one spouse, there is a rebuttable presumption that the property acquired in the name of the said spouse is being held in trust for the other spouse.

50. The reasoning behind this provision is very simple. A marriage is built on a foundation of trust between the parties. It is not out of the ordinary to have a property registered in the name of one spouse but in their union it is taken to be that he/she is holding it in trust for the other.

51. In the case of *Njoroge -v- Ngari* [1985] KLR, 480, the court held that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property.

52. On these findings I find it difficult to accept the respondent's averment that he owned the land at Nyota Farm to the exclusion of the applicant.

53. So how is the said property to be divided? The law is that the court is to take account of the contribution by the parties. Section 2 of the Act defines contribution to include: -

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

49. It is thus not necessary that a party ought to have contributed monetarily to be awarded a portion of any matrimonial property. The court has to look any of the above contributions to come up with a fair apportionment of the property.

50. The above provisions of the Act have to read in line with Article 45(3) of *the Constitution* which provides:

> " 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."

49. In an increasing line of authorities, Courts have held that the equality of parties set out in the said in Article 45(3) does not translate to equal proprietary entitlement. In the oft cited case of *P N N v Z W N* [2017] eKLR, Kiage, JA succinctly stated:

> First, while I take cognizance of the marital equality ethos captured in Article 45 (3) of *the Constitution*, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough;

49. The learned Judge went on to state:

> " Does this marital equality recognized in *the Constitution* mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.
>
> The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra."

49. Similarly, in *EGM v BMM* [2020] eKLR the Court of Appeal faulted the trial court for finding that equality of parties in Article 45(3) means that the fact of marriage gives spouses an automatic 50% share of the matrimonial property. The Court opined:

> " 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."

49. The findings in these cited decisions of the Court of Appeal appear to be a departure from its previous holding in *Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes*, (Civil Appeal No. 127 of 2011) where it interpreted the equality of parties thus:

> Article 45 (3) of *the Constitution* 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. This article clearly gives both parties to a marriage equal rights before, during and after a

marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day.

49. Finally, this issue was settled by the Supreme Court in *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Petition 11 of 2020*) [2023] KESC 4 (KLR) (Family) (Judgment). The court held as follows;

> "In agreeing with the above decisions, we must note that, in a marriage, the general assumption is that both spouses share everything, and on the face of it, both parties contribute towards the home or family, in one way or another, to whichever extent, however big or small. Again, and further to this, both spouses may also work and earn income, which inevitably, at most instances, always ends up being spent on the family unit. It may be the whole income, or a substantial part of it, but ultimately, a percentage of it goes into the family. This is the essence of section 14 of the *Matrimonial Property Act*, 2013.
>
> Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of *the Constitution*. To hold that article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non- monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.
>
> We should only add that this position is not unique to our realm because the Supreme Court of Zambia in the case of *Penelope Chishimba Chipasha Mambwe v Mambwe* (Appeal 222 of 2015); [2018] ZMSC 317 also questioned the rationale of sharing property at the ratio of 50:50 where a spouse fails to offer any financial contribution with the court noting:"In this jurisdiction, as many others in the commonwealth, the prevailing position is that a spouse who contributes either financially or in-kind to the home earns an interest in the property of the family acquired during the subsistence of the marriage. In numerous authorities, the holding has been consistent that family property should be shared on a 50/50 basis... Although indeed many marriages are built on happiness and mutual support, there are still many others where one spouse may be perpetually wasteful, uncooperative, distant and providing absolutely no warmth of companionship let alone financial contribution. It is debatable whether such spouses should be taken to have earned the entitlement to 50% share of the property of the family at dissolution of the marriage."

In light of the above findings, we are of the view that the question of what amounts to a fair and equitable legal formula for the reallocation of matrimonial property rights at the dissolution of a marriage and whether the same can be achieved by a fixed means of apportionment at a 50:50 ratio or

whether such apportionment should be done in light of the circumstances of each individual case is one best answered again by the finding by the court in Echaria and we have explained why.'

49. Having stated the law as it exists then it is the duty of this court to determine how the Property at Nyota Farm is to be divided.

50. I have to admit that this is the most difficult task that the court has to perform in a matter like this. The task is even more onerous where one party is only able to prove non -monetary contribution. Even then that party is entitled to receive a fair share of the property.

51. The division of matrimonial property cannot be done to scientific accuracy. What the court does is basically to come up with a formula that takes account of all the factors that ought to be considered.

52. From the evidence, the respondent was able to show that he was the one who primarily financed the purchase. There is always a possibility that the applicant was left to attend to other responsibilities in the family as the respondent dealt with the purchase. Thus, she is also entitled to a share of the matrimonial property in question.

53. Looking at the matter, I find that a share of 50%-50% would not be fair. I would share the property at a ratio of 25:75 %. The land is said to be roughly 40 acres so the applicant will be entitled to around 10 acres of the same. I so order.

54. The applicant had asked that the land be divided into three, to the account of the couple's children. There is no law that grants a child of a person a right to the said person's property while he is still alive. That issue can only arise if the person is deceased and a succession cause is commenced.

55. On the issue of the harvesting of the trees, I have considered the same. It is to be noted that the reports tendered to court show that there was indeed such activity by the respondent. However, the applicant has also been deriving benefits from the said farm. She admitted that she has been farming on it over the years. In addition, there is evidence that these were second generation trees, meaning that previous harvests have taken place and it is not clear who did so. For these reasons I found that the issue is better buried and the parties move to get their shares of the property in question.

56. For the foregoing, and in conclusion, I make the following orders;

    a. As regards the land at Nyota Farm the applicant is entitled to 25% of the same with the respondent to retain 75%.

    b. A surveyor to be commissioned to survey the land and subdivide the same in the most economical manner.

    c. Upon the subdivision, the respondent shall proceed to transfer the 25% portion to the applicant within 120 days and in default the Deputy Registrar shall execute the relevant documents for such subdivision and transfer.

    d. The applicant shall bear the charges for the subdivision of her portion of the property.

    e. Each party to bear their own costs of this cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF JULY, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mrs. Njoroge for Applicant

Mr. Langat for Respondent