



Juma v Brozzi; General Accident Insurance Limited (Interested Party) (Civil Case 2 of 2019) [2024] KEHC 8629 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 2 OF 2019
SM GITHINJI, J
JULY 17, 2024**

BETWEEN

BERNICE MARGATHER JUMA PLAINTIFF

AND

ALESSANDRO BROZZI DEFENDANT

AND

GENERAL ACCIDENT INSURANCE LIMITED INTERESTED PARTY

JUDGMENT

1. By an amended originating summons dated 10/3/2023 the Plaintiff moved to this court seeking orders that: -
 1. That the Plaintiff is granted a declaration that the piece and parcel of land known as Land Portion No. 13950 (Original Number 1888/1) Malindi on which the 'Albachiara' House stands registered in the name of the 1st Defendant is matrimonial property.
 2. That the defendant be restrained from selling, transferring or otherwise disposing of the whole or any part of piece and parcel of land known as Land Portion No. 13950 (Original Number 1888/1) Malindi on which the 'Albachiara' House stands without the Plaintiff's consent or until the determination of the Divorce Cause 16 of 2019 as well as the subsequent Matrimonial Property Cause. (spent).
 3. That the piece and parcel of land known as Land Portion No. 13950 (Original Number 1888/1) Malindi on which the 'Albachiara' House stands be subdivided between the parties according to the contribution of each party towards its acquisition and development thereof.



4. That in the alternative if the suit property is incapable of being shared as it is, that the same be sold and the net proceeds be shared according to each party's contribution or either party be given the option of buying out the other party's share.
 5. That this honourable court cause a restriction be registered against piece and parcel of land known as Land Portion No. 13950 (Original Number 1888/1) Malindi.
 6. That the status quo be maintained where all service providers are maintained on the property at the cost of the Plaintiff pending the determination of the Divorce Cause 16 of 2019 as well as determination of the subsequent matrimonial cause. (spent).
 7. That general accident insurance limited be ordered not to pay out the insurance claim with regards to the property till the Divorce and Matrimonial Property Cause are heard and determined. (spent).
 8. That the court be pleased to make any further order as it deems fit and just in the circumstances.
2. The application is supported by the affidavit of the Plaintiff dated 10/3/2023, further supporting affidavit dated 24/7/2020 and another dated 6/10/2023. The reasons advanced by the Plaintiff in support of the application are that she divorced the Defendant following a decree issued in Malindi Divorce Cause No. 16 of 2019. That sometime in 2013, the Defendant purchased the Land Portion No. 13950 (Original Number 1888/1) Malindi. Thereafter, she contributed the sum of Kshs. 2,500,000 towards the completion and renovations of the villa constructed on the said land (the suit property). She averred that the said monies were expended through different management companies and that the renovations included swimming pool and terrazzo renovations, and interior design all to make the property a holiday home. The Plaintiff added that she managed the property and business on its day to day operations and that she engaged the services of Earthland Property Management and Global Services and Management companies until sometime in April 2019 when the property was destroyed by fire. She stated that she also opened an Airbnb account and collected all rents paid thereon.
 3. She further deposed that prior to the defendant taking out an insurance cover, she paid for the property's insurance for three consecutive years with Trident through Chase Banc Assurance.
 4. The 1st Defendant filed a replying affidavit dated 17/12/2019, and further supplementary affidavits dated 23/7/2020, 26/8/2020 and 23/9/2020. His case is that when he bought the property, it was partially complete and that he solely engaged the services of one Fabrizio Vitalis to complete the construction. He narrated that once the same was complete in July 2014, he moved in with his ex-wife as their matrimonial home long before he met the Plaintiff.
 5. The 1st Defendant further deposed that he paid the management companies himself through his account, cash or otherwise. He added that the Plaintiff is a director with majority shares at Inspire Luxe Limited, which she held in trust for him as he invested in buying the assets of the said company, all amounting to Kshs. 9,000,000/-. He admitted that the Plaintiff opened an air BnB business for purposes of marketing the property and that payments done thereon were done to his pay pal account linked to his credit cards which were in the possession of the Plaintiff.

Evidence

6. The Plaintiff produced copies of the decree nisi and absolute as PEXH 1A and 1B respectively. She also produced a copy of trial bundle as PEXH 2. She told the court that by the time of their marriage, the 1st Defendant owned the house and that she moved into the said house in the year 2016 where she



- lived consecutively for a whole year. She narrated that when they agreed to start the air BnB business, she took over the management of the property and that she was not getting paid for that.
7. The Plaintiff asserted on cross-examination by Ms Metto, that while living with the 1st Defendant in the year 2013 at a different place, she was working and managed to pay the interior design fees. She added that the company referred to by the Defendant was indeed set up jointly but the 1st Defendant opted to sell his own shares to one Wamuyu who in turn transferred the same to the Plaintiff's father. It is her testimony that the 1st Defendant contributed 2 million in the company.
 8. On his part, the 1st Defendant adopted his affidavits as part of his evidence in chief. He testified that he married the Plaintiff in 2016 when she was living in Nairobi. That when he met her, she was not working and he took her to school in Italy. He added that the Plaintiff used the property as business premises but never gave him any income out of it. He told the court that the business was on for 3 years even before they got married. He asserted that they made a contract over the property whereby he met the maintenance costs while the Plaintiff advertised the property in various forums.
 9. On cross-examination by Mr. Kibunja, the 1st Defendant told the court that the Plaintiff incorporated the company with other shareholders and not the 1st Defendant as alleged. He added that he would be called by the administrator of the property to pay maintenance fee for the property.
 10. The 1st Defendant testified on re-examination that he paid the premiums for the insurance cover and was ultimately compensated by the Insurance when the property got destroyed.
 11. The Defendant's testimony marked the close of the hearing. Parties agreed to file closing written submission which they did.

The Plaintiff's Submissions

12. In her submissions dated 10/5/2024, the Plaintiff identified four issues for determination. Firstly, whether the suit property amounts to matrimonial property. Quoting the definition of matrimonial property under section 6 (1) and 9 of the *Matrimonial Property Act* (the Act), counsel submitted that the suit property amounts to matrimonial property by dint of the Plaintiff's contribution towards the property's renovation and management.
13. Secondly, whether the Plaintiff is entitled to a share of the suit property. In addressing this issue, counsel argued that having established that the suit property consists of matrimonial property, section 7 of the Act and Article 45 (3) of the *Constitution* come into play in determining the extent of the share entitled to the Plaintiff. To dissect the import of Article 45 (3) counsel referred the court to the case of *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* [2023] KESC 4 (KLR).
14. Further relying on the case of *AKM v NNN* [2019] eKLR to determine the extent of the share to be given to the Plaintiff, counsel argued that despite the courts having interpreted article 45 (3) not to automatically mean 50:50 divisions, there was nothing within the law prohibiting the same bearing in mind that each case must be considered on its own merit.
15. Thirdly, whether the Mercedes benz motor vehicle amounts to matrimonial property. In relation to this issue, counsel submitted that the said motor vehicle was a gift and that this could be deduced from the Defendant's conduct during the subsistence of the marriage. Counsel relied on the definition of a gift quoted in the case of *BIA v JMA & another* [2019] eKLR. To counsel, the said vehicle thus enjoyed the protection provided under section 15 of the Act.



16. Lastly, on whether the court has jurisdiction to preside over the shareholding of Inspire Luxe Limited, counsel argued that this court lacks jurisdiction to determine issues relating to the sale, transfer or disposing of company property in so far as it relates to matrimonial property as was held in *MJK v FML* [2019] eKLR and *S.N.K v M.S.K & 5 Others* [2015] eKLR.

The 1st Defendant's Submissions

17. Similarly, the 1st Defendant identified four issues for determination. The first being whether the suit property amounts to matrimonial property. In addressing this issue, counsel also quoted section 6 of the Act. To him, the suit property could not be matrimonial property since it was solely acquired by the 1st Defendant way before the parties solemnized their marriage. To this end, counsel relied on the case of *TMV v FMC* [2018] eKLR.
18. The second issue was whether the Plaintiff contributed towards the acquisition and development of the suit property. It was counsel's submission that the Plaintiff failed to prove both monetary and non-monetary contribution as defined under section 2 of the Act. Counsel proceeded to give an analysis and interpretation of Article 45 (3) on fair and equitable division of matrimonial property. Like the Plaintiff's counsel, he relied on the case of *JOO v MBO* [*supra*].
19. The next issue is whether the Plaintiff is entitled to any share of the property. In relation to this, it is counsel's argument that having failed to prove contribution towards acquisition and improvement of the suit property, the Plaintiff is not entitled to a share of it. To this end, counsel relied on section 7 of the Act and the cases of *PNN v ZWN* [2017] eKLR; and *UMM v IMM* [2014] eKLR.
20. From the material placed before me, it is clear to me that the parties herein were married having solemnized their marriage before the Registrar on 5/7/2016; that their marriage broke down and their divorce has since been finalized and a decree absolute issued on 8/9/2021. The issue between them is simply identification and distribution of matrimonial property. From the Originating Summons, I note that the property sought to be shared is 'Albachiara' House standing on Land Portion No. 13950 (Original Number 1888/1) Malindi.
21. The issues that arise for determination therefore are: -
- i. Whether the suit property identified as Land Portion No. 13950 (Original Number 1888/1) Malindi on which the 'Albachiara' House stands registered in the name of the 1st Defendant is matrimonial property.
 - ii. Whether the Plaintiff contributed towards the development of the suit property.
 - iii. Whether the Plaintiff is entitled to an equal share of the suit property.

Analysis and Determination

22. Section 6 of the Act defines Matrimonial property as follows: -
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.



23. Further, Section 2 defines a matrimonial home to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.
24. From the evidence available in court, it is clear to me that the Plaintiff and the 1st Defendant solemnized their union before the Registrar in 2016. This brings their dispute within the framework of the Matrimonial Property Act, 2013 which commenced on 16/1/2014. Both parties agree that the 1st Defendant purchased the land on 30/9/2013 as per a copy of indenture exhibited by the Plaintiff. There is also a copy of agreement for sale dated 2/3/2012 which reveals that the 1st Defendant contracted one Fabrizio Piantanida to construct a house thereon. This is also not disputed. It is evident therefore that the suit property was not acquired during the subsistence of the marriage.
25. However, the Plaintiff who struck me as an honest witness averred that their marriage subsisted for a period of 3 years. She lived in the said house from 2016 to 2019 as a wife, and before then lived at the said house from 2013. She had therefore lived in the said house for a period of six years. She used her own money to renovate it to the tune of Kshs. 2,500,000/= . She as well offered her services in its administration and maintenance without pay, as a wife to the respondent.
26. Considering the evidence, I do find that the said property is a matrimonial property within the definition of section 6, and a matrimonial home under section 2 of the Marriage Act.
27. The Plaintiff on cross-examination agreed that she was bought a Mercedes Benz vehicle C-200 by the Defendant. It was a matrimonial property. She sold it and bought another of which given the divorce is solely for her use.
28. The Defendant was paid by Insurance for the destruction of the property by fire. Considering the foregoing facts, I do find that the Plaintiff herein is entitled to 20% of monetary value of the said matrimonial home (property). She is also entitled to 20% of what defendant was paid by Insurance Company. The amounts should be recovered on her part from what remains of the said property. It should therefore be sold to enable her realize her entitlement in the said property which is Land Portion No.13950 (Original) Number 1888/1) Malindi, on which “Albachiara” House stood.
29. Each party to bear own costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17TH DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Lilian Mwaura holding brief for Mr Kibunja for the Plaintiff
2. Ms Ruttoh for the Defendant

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S.M. GITHINJI

JUDGE

