



WM v BML (Family Originating Summons 33 of 2011 & Civil Suit 44 of 2011 (Consolidated)) [2024] KEHC 9143 (KLR) (Family) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

**FAMILY ORIGINATING SUMMONS 33 OF 2011
& CIVIL SUIT 44 OF 2011 (CONSOLIDATED)**

HK CHEMITEI, J

JULY 18, 2024

BETWEEN

DR WM PLAINTIFF

AND

PROF BML DEFENDANT

JUDGMENT

1. These Originating Summons were consolidated and heard together. For purposes of clarity and order DR WM shall remain the plaintiff and Prof. BML the defendant.
2. In Originating Summons dated 23rd June 2011 filed by the plaintiff he prayed for the following orders:-
 - (a) That he be declared as the sole and absolute owner of the property known as LR NO XXXX [particulars withheld] Apartments, apartment XX, [particulars withheld] Westland’s including all furniture and fittings therein or such other order as the ownership thereof as may be just in the circumstances.
 - (b) In the event that the court finds that the subject property mentioned in (a) above therein is owned by the Applicant and the Respondent an order do issue that the said property be valued and either party buy out the other.
 - (c) Costs of these proceedings be paid by the Respondent.
3. On the other hand, the defendants Originating summons dated 16th August 2011 prays for the following reliefs;



- (a) That the joint proprietorship in respect of LR NO. XXXX [particulars withheld] apartments, apartment XX, [particulars withheld], Westlands be severed and the same be apportioned between the parties as tenants in common.
 - (b) That an order do issue that the Applicant herein is accountable to the Respondent herein for USD 35537.37 of the Respondent's inheritance which funds were withdrawn by the Respondent from the parties Joint Savings Account held at Citibank US from account number XXXXX and the same be paid to Respondent by the Applicant.
 - (c) That an order do issue declaring that the Respondent is entitled to 50% of USD 11796 and USD 45000 respectively withdrawn by the Applicant herein from the Joint Checking Account held at Citibank US account number XXXXX and the same be payable to the Respondent by the Applicant.
 - (d) That an order do issue declaring that the Respondent is entitled to 50% or such other higher proportion as this court may deem fit of the Applicants retirement and pension package from the [particulars withheld] Foundation and T-C;
 - (e) That in the alternative, part of the Respondent's funds alluded to in prayers (b), (c) and (d) be debited from the Applicants share of the matrimonial home.
 - (f) That the court be pleased to make such expedient orders.
 - (g) Costs to the Applicant.
4. The matters as stated above were consolidated and it proceeded to full hearing. Each of the parties testified and did not call any witnesses but relied on the documentary evidence on record which were essentially produced by consent.
 5. The plaintiff Dr. WM testified that his marriage with the Defendant which lasted about 10 years had broken down and he had filed for divorce. A decree absolute had been issued although on her part the defendant told the court that the matter was pending in the Court of Appeal and they were awaiting some dates.
 6. It is instructive to note however that as at the time of hearing this matter there was no stay of the divorce proceedings or for that matter the setting aside of the decree absolute. This court shall therefore proceed under that premise.
 7. What runs across the evidence of the two parties herein are clear and easy to appreciate. At the subsistence of their marriage the plaintiff was working in New York for [particulars withheld] Foundation.
 8. They purchased apartment at [particulars withheld] Apartments which they registered under their joint names. Later when the two developed their differences the plaintiff moved out leaving the defendant therein. At the time of this suit the defendant was still living there.
 9. The other uncontested issue is that they both opened two joint accounts, at Citibank. The same were number XXXX and XXXX.
 10. From the oral evidence as well as the documentary evidence on board, it is the plaintiff who took up the mortgage at East Africa Building Society amounting to Kshs.6,500,000 to purchase the said house. The defendant contributed Kshs.450,000 while the rest came from the plaintiff.



11. The mortgage was paid through the plaintiff's salary and his final dues from Kenya Human Rights commission (KNHCR). That position was not contested by the defendant.
12. As regards the New York accounts it was the plaintiff's case that he opened the said accounts under their joint names as he did not have a Social Security Number as he was not a citizen of America as opposed to the defendant. His salary from the [particulars withheld] Foundation was channelled through that account. The other reason was the fact that the defendant stayed much in the USA and she therefore needed to access the said accounts.
13. The defendant on the other hand testified that part of her inheritance totalling USD. 156828.67 was wired into the said Joint Checking Account.
14. It was the plaintiff's case that the defendant later withdrew the said inheritance amount and deposited it in her personal account in California and some other amounts resulting from her consultancies totalling USD 8907.
15. This line of argument taken by the plaintiff was not controverted by the defendant.
16. As regards the plaintiffs Kitui/Nzaambani measuring 100 acres land it was the defendant's testimony that the same ought to be taken into consideration as the plaintiff had already willed to her in his Will. The plaintiff however testified that that land was purchased from his cousin way before he married the defendant and was not therefore subject to this cause.
17. The court thereafter directed the parties to file their written submissions which they obliged.

Plaintiffs written submissions.

18. The plaintiff identified three issues for determination, namely, whether the apartment should be apportioned between the parties based on each one's contribution; whether the Applicant is entitled to 50% of the plaintiff's pension and whether the plaintiff is accountable to the defendant of the funds at the Joint Checking and Savings Accounts.
19. On the first issue the plaintiff was of the view that based on the fact that they have both been joined tenants of the apartment, they ought to share it out based on each one's contribution. The same ought to be valued and either of them permitted to buy out the other.
20. The plaintiff relied among others on the case of *Echaria v Echaria* [2007] eKLR where the court held that each of the parties ought to prove their respective contribution.
21. It was his case that the only contribution made by the defendant was Kshs.450,000 towards the purchase of the apartment and nothing more. The plaintiff has continued to pay the service charge and contributed towards the purchase of furniture and fittings.
22. As regards pension he submitted that the same came from his employer, the [particulars withheld] Foundation and T-C and at no time did the defendant make any contribution. He submitted that pension did not form part of matrimonial property.
23. The plaintiff relied among others on the case of *JKO v CKO* [2023] KECA 115(KLR)
24. As regards the issue of Joint Checking and Savings Accounts he submitted that this court did not have jurisdiction over the same. In any case, he continued, the said accounts save for the defendant's inheritance was funded from his salary.



25. He submitted that the defendant withdrew her inheritance money to her personal account in California and that the plaintiff did not get to know how she invested it and neither was he privy of how the defendant dealt with income from her consultancies and teaching at USIU.
26. As regards the sum of USD 83717 .08 which the defendant alleged was transferred by the plaintiff to some unknown persons the plaintiff submitted that the same came from his salary and he could therefore deal with it as he deemed necessary.

Defendants Submissions

27. The defendant submitted that the entire properties ought to be subjected to a 50:50 sharing formula based on the evidence she had tendered. She relied among others on the case of *MMK v JON* [2021] eKLR.
28. That since the matter of divorce was pending at the Court of Appeal the only recourse this court had was to simply make a declaration as they await the outcome from the said appellate court. The pending case at the Court of Appeal was number 230 of 2015 and Review case number 353 of 2012.
29. It was also her submission that she was entitled to apartment NO LR 330/586 A3 Riara road which was purchased by the plaintiff in 2013 after the divorce. This was for the reason that the purchase consideration came from the [particulars withheld] Foundation and T-C retirement plan. That property despite being registered in the plaintiff's name ought to be part of the matrimonial assets and consequently she had a claim.
30. She also submitted that she was entitled to the Kitui property by virtue of the Plaintiff having Willed it in 7th March 1995 before their marriage and the second will dated 19th March 2001.
31. She submitted that other than monetary claim, she had contributed in many other non-monetary style including taking care of the plaintiff when he was unwell, hosting his visitors, supporting his legal practice among many others.
32. She went on and relied on *MGNK v AMG*. [2016] eKLR among others.

Analysis and Determination.

33. I have extensively perused the evidence as presented by the parties, their lengthy submissions as well as the cited authorities.
34. The main issue is whether in light of the evidence presented the properties so far in contention ought to be split into two. In other words, should this court take the view that there was equal contribution by each of them? If that is the case should the court apply the 50;50 percent formula advanced by the defendant?
35. The properties in question are the Apartment XX at Fine Diamond as well as the Riara apartment, the Kitui [particulars withheld] land and the plaintiff's pension.
36. The other issue is whether to order the plaintiff to refund the defendant the sum of USD 83717 transferred to third parties as well as the plaintiff's pension from Ford Foundation.
37. It is now well settled that although Article 45 of the *Constitution* envisages equality between spouses and when it comes to matrimonial properties each of the parties must establish their respective contributions. It is no longer enough to take the view that each one was entitled to 50% of the same regardless of the situation.



38. In its clear and almost poetic decision the Court of Appeal in *PNN v ZWN* [2017] eKLR on this view rendered itself as follows:-

“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. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in *Francis Njoroge v Virginia Wanjiku Njoroge*, Nairobi Civil Appeal No. 179 of 2009;

“... a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in *Lock Yeng Fun v Chua Hock Chye* [2007] SGCA 33;

‘It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – a precise mathematical exercise.’”

39. Taking the evidence at hand and beginning with the Fine Diamond apartment it is not disputed that the same was purchased out of a loan facility taken by the plaintiff from EABS Ltd. The principal amount was Kshs.6,500,000 and the only monetary contribution by the defendant was Kshs. 450,000. There is sufficient documentary evidence that other than paying the initial deposit of Kshs.1,625,000 the plaintiff paid monthly instalments of over Kshs.100,000.
40. It was not disputed that the defendant's name appeared in the contract because she wanted it to be in their joint names and besides the bank needed another strong statement so to speak.
41. The other significant contribution which I find germane by the defendant is of course being a wife to the plaintiff and she did all that a wife is generally though sometimes not obviously expected to do. She testified that she took care of the home and in fact was involved in the purchase of the furniture and other fittings. The plaintiff has disputed this line of evidence as he testified that he contributed close to Kshs.2 million towards the furnishing of the same.
42. Taking the totality of the evidence before this court I think it will be fair to state that the plaintiff essentially purchased the said house and without deductions from his employer he would not have bought the same. Other than the initial Kshs.450,000 the defendant did not make any other monetary contribution.
43. She said that she paid utilities and rates of the said apartment but there was no significant evidence adduced before court. She nonetheless continued till today to pay those outgoings as she lives therein.
44. Taking cue from the aforesaid Court of Appeal decision, it is not easy to mathematically apportion each one's contribution in matrimonial property. Although the defendant herein may not have contributed monetarily much, the act of being a home maker and therefore making the plaintiff enjoy his home cannot be wished away.
45. For all intent and purposes the said apartment is a matrimonial home and consequently both have a share. Taking the totality of evidence before me I think it will be fair to apportion the defendant's contribution at 5%. The other 95% goes to the plaintiff.
46. Since the same is under lease it shall be difficult to split the same in the manner and as per percentages stated above. The best way therefore is to have the same valued and either of the parties be at liberty to buy out each other.



47. Turning now to the Riara apartment, it was acknowledged by the defendant that it was purchased after the divorce and the amount of money used came from the plaintiff's employer Ford Foundation. To this extent and by virtue of the fact that the divorce cause was finalised this property does not in my view form part of the matrimonial property and is therefore not part of the properties obtained while the marriage was subsisting.
48. At any rate there was no sufficient evidence adduced by the defendant to entitle her claim the same.
49. The same goes to the Kitui parcel of land. This was bought way before they married and the defendant did not establish by evidence her contribution towards its purchase or development. The fact that the plaintiff had indicated in his two Wills that he had bequeathed to the defendant would have been relevant after the plaintiff's demise. Otherwise this was a wishful thinking to say the least and in any case the Plaintiff was still alive.
50. Turning now to the issue of the pension, it is evident that the same came from the [particulars withheld] Foundation and T-C which the plaintiff worked for. There is respectfully no evidence of how she contributed to it or at all.
51. Section 6 of the *Matrimonial Property* defines what is matrimonial property it states thus:-
- “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.”
52. The same does not include pension as one of the properties. One's pension is jealously guarded in law and it is so personal that in the usual scheme of things for example it is not possible to attach. Needless to state that it does not form part of the matrimonial assets as defined above and therefore that prayer by the defendant is not meritorious.
53. On the issue of the two accounts, namely Joint Checking and Saving Accounts it is evident that the amount came from two primary sources, namely, the plaintiff's salary and the defendant's inheritance from her father.
54. In the cause of time and because both had access to the account, the defendant withdrew her inheritance amount and transferred it to a personal account in California. This was not disputed.
55. The other amount it appears to me came primarily from the plaintiff's salary. This was long and continuous.
56. The claim on the part of the defendant was on some interest which the saving account earned. That amount in light of the transactions that took place cannot be ascertained and be considered as matrimonial property. In essence the plaintiff's salary cannot be considered as matrimonial property as well as the defendant's inheritance from her father.



57. The two respectfully are distinct and does not permit this court to delve into. Whatever the defendant did with her inheritance was within her purview and the Plaintiff has no capacity to demand unless of course he contributed to whatever the sum did. As such the court declines that invitation.
58. It would have been different had the defendant invested in the said sum in a venture in which the plaintiff contributed towards its improvement. There is no evidence in any case of how the inherited amount benefited the plaintiff so that it can form part of the matrimonial property.
59. So to the extent that the defendant's inheritance cannot be divided, the plaintiff's salary at the said New York accounts cannot be divided.
60. It is worthy also to note that this court cannot act as a debt collection agency for either of the parties. There was some allegation from the defendant in particular that she was entitled to some amount including some interest from the joint account which was allegedly withdrawn by the plaintiff. I think if one was to venture into that then the court will be dealing with minute transactions which in my view apart from being insignificant is akin to the court turning into a debt collection agent.
61. In view of the above findings this court finds that the defendant's contribution to the purchase of the Fine Diamond apartment was not much to warrant her get 50% shares in it. In their union her significant contribution was minimal, that is, the Kshs.450,000. The other contribution was basically none monetary. It is worth noting as well that the two were not blessed with any child or children during their about 10 years' marriage and this in my view would have had a significant contribution by the defendant.
62. The other issues concerning the Riara and Kitui properties mentioned above shall remain the sole properties of the plaintiff and not subject to any division. The same goes to his pension.

Determination

63. In view of the above findings this court directs that:-
 - (a) Apartment Number XX At [particulars withheld] Apartments is a matrimonial property and the same shall be valued and the plaintiff or the defendant be at liberty to buy out each other in the ratio of 95% in favour of the plaintiff and 5% for the defendant.
 - (b) The above (a) exercise shall be done within 90 days from the date herein.
 - (c) Apartment Number LR XXXX Riara Road does not form part of the matrimonial property.
 - (d) Kitui/[particulars withheld], measuring 100 acres does not form part of matrimonial property and not subject to any division.
 - (e) The plaintiff's pension at Ford Foundation and Tiaa-Cref does not form part of matrimonial property and not subject to any division
 - (f) Each party shall bear their respective costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 18TH DAY OF JULY 2024.

H K CHEMITEI

JUDGE

