



Wesonga v Asman (Civil Case E002 of 2023) [2024] KEHC 9850 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA**

CIVIL CASE E002 OF 2023

REA OUGO, J

JULY 10, 2024

BETWEEN

WILKISTA MARY WESONGA PLAINTIFF

AND

IBRAHIM AHMED ASMAN DEFENDANT

JUDGMENT

1. The plaintiff filed this instant Originating Summons in which she seeks an order that the defendant transfer half share of each of the matrimonial properties which consists of Ndivisi/Muchi/5925 measuring 0.05 Ha, Bokoli Kituni/2453 measuring 0.1 Ha and Bokoli Kituni/ 2854 measuring 0.0325 Ha.
2. The application is on the grounds that the plaintiff and defendant were married under Islamic law and out of the marriage they had 3 children. Their marriage was dissolved in the Busia Divorce Cause No E001/2021 and they were issued with a Certificate of Divorce. During the pendency of their marriage, the properties were registered jointly in their names. She averred that she contributed almost 80% towards the purchase of Bokoli Kituni/2453. The plaintiff is apprehensive that the defendant may dispose of the properties after having them registered in his name in a manner that may be prejudicial to the plaintiff's interest. The title documents are in the custody of the Respondent and she fears that he might deal with them as he wishes at any time without her knowledge.
3. The defendant in his response conceded that Bokoli Kituni/2453 was purchased at Kshs 600,000/- with some contribution from the plaintiff. He avers that the plaintiff did not contribute towards acquiring the other properties parcel numbers 2854 and 5925. That the applicant is only entitled to a share in land parcel number 2453 and not any other property as she did not contribute to the same. He has no intention of disposing off any land.
4. The matter was canvassed by viva voce evidence. Wilkista Mary Wesonga (Pw1) testified that she purchased Bokoli/Kituni/2453 measuring 0.1 Ha using her money in 2017 and the land was registered



in her name. She later realized that the parcel was later transferred to the defendant without her consent. She testified that parcel No.Ndivisi/Muchi/5925 was jointly bought and registered in their joint names. They developed rental houses and are generating income of Kshs 60,000/-. Pw1 later noticed that the title was changed to the defendant's name without her consent. Parcel No Bokoli/Kituni/2854 was from the subdivision of parcel number Bokoli/Kituni/2454 where they were residing during the pendency of their marriage. They developed their matrimonial home on the said parcel of land now valued at Kshs 6,000,000/-. She is apprehensive that the defendant may sell the properties as the titles are in his custody. She testified that she has been in gainful employment working as a police officer with a stable income. She contributed towards the acquisition of the properties. She has been taking care of the children with little help from the defendant.

5. On cross-examination, she testified that she did not adduce evidence to show that she contributed to the acquisition of the properties. She denied that she did not take a loan to build for her parents a home.
6. Dw1 testified that he is employed by the National Police Service. He testified that Pw1 contributed Kshs 300,000 towards the acquisition of Ndivisi/Muchi/2453. During the pendency of the marriage, Pw1 found that he had saved some money and he bought the other two properties. He testified that Pw1 used her salary to support her parents. Pw1 built a home for her parents by taking a loan.
7. On cross-examination Dw1 when referred to the green card of parcel 2453, testified that Pw1 acquired the property in 2017, and in 2020 it was transferred to him. She also transferred to him parcel 5925 in the same year. Dw1 testified that they lived together in 2020 but stopped living together in 2021. He testified that the properties the plaintiff was claiming were in his name. He testified that he did not get the titles fraudulently.
8. The plaintiff filed her submissions dated 3/4/2024. According to the plaintiff, the issue for determination is whether the properties formed part of the matrimonial property within the meaning of section 6 of the [Matrimonial Property Act](#). The plaintiff submits that though there was no documentary evidence availed by both parties to establish the monetary contribution made by each party towards the acquisition of matrimonial property, the facts show that both parties were in gainful employment. Article 43 (3) of the [Constitution](#) provides for equal rights between parties to marriage during its subsistence and dissolution. She urged the court to find equal contribution at the ratio of 50:50 since the properties were bought while they were husband and wife.
9. The defendant in his submissions argues that registration of a person as proprietor vests absolute ownership of the land. He referred the court to sections 24, 26 and 28 of the [Land Act](#). It is not in dispute that the defendant is the registered owner and has the right to possession, occupation and use of land. He also submits that the [Matrimonial Property Act](#) provides that a person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property. The Quran precisely defines a wife's inheritance rights in Surah- An- Nisa verse 12 where the key principles include: If children exist, the wife receives 1/8 of the total estate after debts and bequests. If no children, the wife gets ¼ of the net estate. He submits that since Bokoli/Kituni/2453 was jointly acquired, then he proposes the 1/8 sharing.



Analysis And Determination

10. Before considering the issues raised in the substantive suit, the defendant in his submissions has challenged the jurisdiction of the court to entertain the suit. He cited section 3 of the [Matrimonial Property Act](#), 2013 ([Act No. 49 of 2013](#)) which states as follows: -

“A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.”

11. In this case, it is not in dispute that both parties profess the Islamic faith and were married under the Islamic Law in 2008. They filed a divorce cause at the Kadhi’s court and were issued with a certificate of divorce on 13/10/2022. The court in *AWA v HDD* [2018] eKLR on the application of section 3 of the [Matrimonial Property Act](#), 2013 ([Act No. 49 of 2013](#)) had this to say:

“Although Article 170 (5) of the [Constitution](#) gives the Kadhi’s jurisdiction to determine only four issues namely personal status, marriage, divorce and inheritance, section 3 of the [Matrimonial Property Act](#) add another jurisdiction to the Kadhi’s court to deal with matters relating to the matrimonial property where a person profess the Islamic faith. It is true that section 3 of the [Matrimonial Property Act](#) does not limit the power to determine matters relating to matrimonial property of a Muslim to the Kadhi’s court only, it is clear to me that the best court that can determine issues involving the Islamic faith is the Kadhi’s court. As held in the case of *MSR v NAB*, a dispute involving Matrimonial Property of a Muslim can be heard by either the subordinate court including the Kadhi’s Court or the High Court provided that the Islamic law is used as the determinant factor. In this case both parties profess the Islamic faith. There is a dispute relating to one house. Whether the dispute is heard by this court or by the Kadhi’s court it does not matter. I do find that both courts have the jurisdictions to determine the dispute.

...

The [Matrimonial Property Act](#) does not define the Court where such disputes are to be heard. Section 17 of the Act provides that a person may apply to a Court for a declaration of rights to any contested property. To say that section 3 of the Act does not confer jurisdiction to the Kadhi’s Court is tantamount to clawing back the underlying principle of applying Islamic Law to matrimonial property to the Muslim faithful.”

12. In my view this court has the jurisdiction to entertain this suit. Having settled the issue of jurisdiction, the next issue is whether the properties in question are matrimonial property and whether the plaintiff has proved contribution. The Court of Appeal in *Muthembwa v Muthembwa* [2002] 1EA 186, dealing with the issue of the distribution of matrimonial properties had this to say;

“The issue of whether the defendant made a contribution to the acquisition of the suit properties was a question of fact. As it was impracticable to take accounts for the purposes of determining the respective contribution of a couple to the management of a home, there arose a rebuttable presumption of an equal contribution”

13. The plaintiff in her submissions invoked the provisions of Article 45 (3) of the [Constitution](#) and submitted that contribution should be equal at the ratio of 50:50 since they were husband and wife. However, I am guided 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) (27 January



2023) (Judgment) that observed as follows on the interpretation of Article 45 (3) of the Constitution in relation to matrimonial property:

“...the equality provision in article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that article 40(1) and (2) of the Constitution which protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC’s language. While therefore reiterating the finding in Echaria, we also find that Article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in the Constitution do we find any suggestion that a marriage between parties automatically results in common ownership or co- ownership of property (hence vesting of property rights) and Article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only. The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution.”

14. Pw1 testified that she used her own money to acquire the property. According to the defendant the purchase of land parcel No. Bokoli/Kituni/2453 was purchased at Kshs 600,000/- with some contribution from the plaintiff. However, the green card shows that the plaintiff was issued with the title deed on 14/6/2017. According to the green card, the title was transferred to the defendant on 31/1/2020. Pw1 testified that the title change was done without her knowledge and consent. It is not clear how the transfers happened as Dw1 merely told the court that the appellant transferred the property to his name. However, because the property was acquired in the plaintiff’s name in 2017, she must have made financial contributions towards attaining the title. Dw1 testified that Pw1 contributed Kshs 300,000/- towards acquiring the land. The plaintiff is therefore entitled to half of the property.
15. The defendant denied that the plaintiff did not make any contribution towards the acquisition of Ndivisi/Muchi/5925. However, the entries on the green card show that the property was bought during the subsistence of the marriage and registered in the joint names of the plaintiff and defendant. In my view, the fact that the property was first registered in their joint names suggests that the plaintiff made substantial contributions towards its acquisition. Although the green card shows that the property is currently, in the defendant’s name, the evidence in the green card is sufficient for the court to find that the plaintiff proved contribution.
16. The last property, Parcel No Bokoli/Kituni/2854 is in the respondent’s name as the same was purchased in 2017. Pw1 testified that they resided in the home during their marriage having developed their matrimonial home therein. Pw1 testified that they have 3 children and urged the court to grant her a larger percentage of the matrimonial properties. The court in *EMK v SSS, MOMBASA OS NO 3 OF 2015 (Mombasa)*, [unreported], Thande J, held that:

‘The Qur’an recognizes that each spouse is entitled to their property. Surah An Nisa: 4:32 provides as follows ‘For men is a share of what they have earned, and for women is a share of what they have earned.’ It is clear from this provision of the Qur’an that earning is a key factor in determining each spouse’s entitlement to matrimonial property. Said differently, division of matrimonial property, must be based on each spouse’s contribution... from the forgoing, it is evident that non-monetary contribution by spouses must be taken into



account in the division of matrimonial property acquired or improved during coverture, notwithstanding that property is in the name of one spouse.’

17. Pw1 testified that she has always been with the children and the defendant only took custody in December 2023 when they visited him. Pw1 therefore made non-financial contributions towards the acquisition of Parcel No Bokoli/Kituni/2854.
18. In conclusion , I find that the matrimonial properties excluding Parcel No Bokoli/Kituni/2854 be shared on a 50:50 basis. The plaintiff’s contribution regarding Parcel No Bokoli/Kituni/2854 is assessed at 30%.
19. This being a family matter, there shall be no orders as to costs.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 10TH DAY OF JULY 2024

R.E. OUGO

JUDGE

In the presence of:

Plaintiff -Absent

Mr. Wanjala h/b Mr. Makokha -For the Respondent

Diana -C/A

