SAM v WOG (Matrimonial Cause E025 of 2022)
[2024] KEHC 9590 (KLR) (Family) (7 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9590 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

MATRIMONIAL CAUSE E025 OF 2022

SN RIECHI, J

AUGUST 7, 2024

IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT

BETWEEN

SAM ..... APPLICANT

AND

WOG ..... RESPONDENT

JUDGMENT

1. The applicant SAM and the Respondent WOG married in Dec 1983 traditionally and formalized it in a church wedding in 1999. They have 3 children – 2 sons and one daughter who are all adults. Their marriage was dissolved in 2022 in Divorce cause E317/2022. The applicant in her evidence testified that they founded a business named [Particulars Withheld] Ltd through whose proceeds they acquired a number of properties stated in paragraph 1 of the originating summons. She now prays for her share of the acquired properties.

2. On being cross examined by Mr. Osiemo for Respondent the applicant stated she initially joined the Respondent in the business probably in 1997 and he laer got her a job as a secretary in the Ministry of [Agriculture]. She confirmed that they opened a branch of [Particulars Withheld] in Kisumu where she is. She denied carting away furniture and electronica from the Karen home but admits keeping the generator.

3. In respect of [Particulars Withheld] West Property she stated the owner is posta but they have leased it. She confirmed that the Karen home is owned jointly but all other properties are in the name of the Respondent. WOG adopted his Replying Affidavit sworn on 20.5.2022 as his evidence in chief. He depones that all the properties were acquired during the subsistence of the marriage except the ancestral land in [Particulars Withheld] Uyoma. In 2016 when he suffered a near fatal gun attack the

applicant left their Matrimonial Home and moved to Kisumu where she runs a branch of the business. He deponed in paragraph 24 that:

> That we met through our respective advocates to discuss the properties where we agreed as follows;-
>
> i. I.R 16xx5(Karen) to be shared 50/50;
>
> ii. L.R Number 2x9/ 14xxx0(South C Apartment) the rent thereof be shared in the ratio of 60/40 in my favour;
>
> iii. The rest of the properties were to be divided later.
>
> Paragraph 26:
>
> i. That L.R Number 2x9/14xxx0 the South C apartments has since been sold through auction by the bank to offset a loan we took to build a hotel in Kisumu and the same is now no longer available for division.

4. From the evidence of the applicant and respondent, I find that the following facts are not disputed:

    1. That the Applicant and Respondent married in December 1993.
    2. That the marriage was dissolved in Divorce Cause No. E 317 of 2022 and decree absolute issued.

5. The issue for determination is the applicants prayer that this court issue an order declaring that 50% or such other higher proportions of the property listed is for beneficial interest of the applicant.

6. It is the applicant who seeks this court to make the declaration. She therefore bears the burden to prove the facts necessary for the Court to grant those orders.

7. Sections 107 and 108 of the *Evidence Act* provide as follows:

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

8. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

9. We rely on the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] 0o eKLR where the court held as follows with regard to the burden of proof:

> "....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed,' i.e. into the account provided. .... The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant. .... The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.. In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking the shifting of burden of proof would have arisen had

the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/ = the debt being claimed herein. "

10. We also refer to The Halsbury's Laws of England, 4th Edition, Volume 17: at paras 13 and 14: describes it thus:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
>
> The legal burden o proof normally rests upon the patty desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."
>
> (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.
>
> Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift ill the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?"

11. Justice Mativo in Hellen Wangechi vs Carumera Muthini Gathua [2005] eKLR quoted with approval Lord Brandon in Rheir Shaping Co. SA. v Edmunds [19551 TWLR 948 at 955 as follows:

> " No Judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take. "

12. Justice Mativo, in the above decision, went on to state as follows:

> " Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the.....test applied when coming to a decision in any particular case. The fact was succinctly put forth by Rajah JA in Britestone PTE Ltd v Smith & Associates Far East Ltd [2007] 4SL (R) (PO 855 at 59: 'The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

13. Justice Mativo went further to state in Hellen Wangechi (supra) as follows;

> "It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. As observed above, the Appellant made allegation in the plaint, hence she {was under an obligation to support the allegation. For example, since there was a denial in the defence, it was necessary to adduce evidence to show how the amount of Kshs.316, 000/- was arrived at. "

14. From the evidence and submissions I find that the Respondent does not dispute that the applicant was his wife and some of the properties were acquired during the subsistence of marriage. What he objects to is the claim that the applicant's contribution entitles her to a 50:50 share of the property by virtue of being a wife.

15. Section 7 and 9 *Matrimonial Property Act*

7. 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.

9. Acquisition of interest in property by contribution Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made..

Ogetonto Vs Ogetonto paragraph 97, 98, 101, 104

97. In this regard our view is that, while article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married. Kiage JA in his concurring opinion in PN*N v ZWN, Civil Appeal No 128 of 2014*; [2017] eKLR discussed the concept of marital equality and whether it is translated to mean that matrimonial property should be divided equally at dissolution of marriage. He succinctly penned his thoughts as follows:"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. 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 think that it would be surreal to suppose that *the Constitution* somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say *the Constitution* gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."Thus it is that *the Constitution*, thankfully, does not say equal rights "including half of the property."

98. Kiage JA's poetic and graphic finding had earlier found its way into Tuiyott J's mind when, while still at the High Court, in the case of UMM v IMM [2014] eKLR he

discussed the right to equality as provided for under article 45(3) and whether it decrees an automatic 50:50 sharing. He stated thus:"I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the courts should give it effect. But to hold that article 45(3 decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non- monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by article 45(3)."

99. We find the above opinions and findings persuasive and it is our finding that the stated equality under article 45(3) means that the courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed.

100. In making that finding, we are further persuaded by the Supreme Court of Zambia's decision in Mathews Chishimba Nkata v Ester Dolly Mwenda Nkata [SCZ Appeal No 60/2015] where the court held that sharing of matrimonial property should not be done on a fixed formula in law but on the basis of fairness and conscience. The court held:"If the basis of sharing family property is that both spouses contributed to its purchase or creation, it should follow that where it can be demonstrated that one spouse invested nothing (financially or in-kind) in the acquisition of the property, they should technically not be entitled to a share of what was in fact an investment by the one spouse on the basis only that they had entered into a marriage. Our view is that property should be undertaken on the basis of fairness and conscience, not on an unjustified reference to 50:50 dogma. In our opinion, the sharing of matrimonial property should not reside in a fixed formula in law. It should not be a matter of mathematics as simply splitting a piece of land into two equal portions. Equal rights between husbands and wives do not necessarily translate, in every case, into equal portions of family property." [Emphasis added]

101. Further, in the Canadian case of MacLean v MacLean, [2005] NSSC 284, the court found that, while the law recognizes equality in the division of property, the same should also not be unfair or unconscionable. The court held thus on that point:"[10] The philosophy or underlying principle of the *Matrimonial Property Act* is that property acquired for the mutual benefit of a couple during marriage is to be divided equally. This principle may be departed from only where one of the parties is able to establish under section 13 of the act that an equal division would be unfair or unconscionable."

102. Furthermore, in Hardwood v Thomas [1981] 4167 (NS CA), the Canadian Court also acknowledged that equality is encouraged in division of property by stating:"Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the act and prescribed by section 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances

equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair - not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be made."

103. 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.

104. 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.

1. IR No 16xx5 – Karen

This property is registered in the join names of the applicant and the Respondent. The parties in a settlement agreed that the same be distributed at ration of 50:50. The Respondent in his Replying affidavit and evidence admitted that the properly is registered in the joint names. Neither the applicant nor the Respondent testified as to how it was acquired for how and the contribution of each to acquisition. Section of the Matrimonial Property provides:

(where the property is registered in joint names).....

On this property I find that the property was acquired jointly and there being no evidence to the contrary, the contribution of each is assessed at 50% for applicant and 50% for the Respondent.

2. LR 2x9/14xxx0 South C Property

The applicant both in her supporting affidavit and evidence did not and state the current ownership and status of this property. The Respondent stated in his evidence that the same was sold by way of Public Auction by the Financial Institution. This information is not challenged by the applicant. I therefore find that this property is not available for distribution.

3. [Particulars Withheld] Hotel:

This is a business in venture in Kisumu jointly owned by the applicant, respondent and their children. The same was changed to a financial institution. This property was put up for Public auction. No evidence of title was tendered by the applicant to confirm if the same was sold by the financial institution or not. In any case the property did not exclusively belong to respondent but to a company where the applicant, respondent and their children held shares. As the staus of the property was not established, I find that application for apportionment is not proved and is thereby rejected.

4. [Particulars Withheld] West Property:

The property is registered in the name of Postal Corporation of Kenya, it is leased by Ronald foods. It is admitted by the rd party Postal Corporation of Kenya. I therefore find that it is not Matrimonial Property and is not available for distribution.

Applicant and Respondent that the property is not registered in the name of a 3rd party Postal Corporation of Kenya. I therefore find that it is not Matrimonial Property and is not available for distribution.

5. Properties in [Particulars Withheld] and South [Particulars Withheld] in Siaya:

All these properties are registered in the name of the Respondent. The applicant in her evidence confirmed that this is ancestral land acquired by the Respondent. It is registered in the name of Respondent. Being ancestral land inherited by the Respondent, Applicant can only acquire interest in it if she demonstrates that she has spent funds in development or improvement on the ancestral land.

16. Section 2 provides:

In this Act, unless the context otherwise requires— "contribution" means monetary and non-monetary contribution and includes— (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; "family business" means any business which— (a) is run for the benefit of the family by both spouses or either spouse; and (b) generates income or other resources wholly or part of which are for the benefit of the family; "matrimonial home" means 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; "matrimonial property" has the meaning assigned to it in section 6; "spouse" means a husband or a wife

17. The application did not tender any evidence of development or improvement on the ancestral land. In the absence of such evidence, I find that she has no interest in the property and her claim is rejected.

18. Upon considering the evidence I declare as follows:

1. IR No 16xx5 – Karen

   Applicant: 50%

   Respondent 50%

2. LR 2x9/14xx0 South C Property:

Not Available for distribution

3. [Particulars Withheld] Hotel:

   Not Available for distribution.

4. [Particulars Withheld] West Property:

   Not Available for distribution.

5. Properties in [Particulars Withheld] and South [Particulars Withheld] in Siaya:

   Respondent 100%

DATED AT NAIROBI THIS 7TH DAY OF AUGUST 2024.

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S. N. RIECHI

JUDGE