



**Jelagat v Sawe (Matrimonial Cause 7 of 2021)  
[2024] KEHC 12605 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12605 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
MATRIMONIAL CAUSE 7 OF 2021  
JR KARANJA, J  
OCTOBER 16, 2024**

**BETWEEN**

**JELANGAT ..... APPLICANT**

**AND**

**DANIEL KIPCHUMBA SAWE ..... RESPONDENT**

**RULING**

1. The Originating Summons dated 23<sup>RD</sup> July 2019 commenced this suit pitting the Applicant, Rodah Jelagat against the Respondent, Daniel Kipchumba Sawe.

The basic orders sought against the Respondent are that a declaration be issued to the effect that the Applicant is entitled to whole share or such other share as the court may award of movable and immovable property acquired by the Applicant prior or during the subsistence of their marriage and that the Respondent holds title, interest, ownership and/or possession of the property in trust for the Applicant in their respective shares as the legal owners, such property being Land Parcel No. Nandi/Kipkaren Settlement Scheme/254 jointly purchased by the Applicant and the Respondent and household items and all other property acquired during the subsistence of the marriage together with personal effects.

2. That, an order be issued directing that the household items be granted to the Applicant and/or the same be shared in any ratio as the court may deem fit and in the alternative to all the foregoing that an order be issued directing that the Respondent is not entitled to any share of the aforementioned property or that an order be issued directing that a valuation be carried out on all the aforementioned property by a mutually agreed valuer after which apportionment of what is payable to each party be undertaken by the court and that the Respondent be ordered to pay the Applicant her entitlement and/or such other share as the court may order in the best interest of justice.



3. The Applicant further seeks an order that a permanent injunction be issued restraining the Respondent by himself/ servants/ agents and/or employees from interfering with the Applicants lawful enjoyment and quiet possession of the property awarded to her.

In the supporting affidavit dated 23<sup>rd</sup> July, 2019, the Applicant averred that the Respondent and herself contracted a marriage under the African Christian Marriage & Divorce Act on the 28<sup>th</sup> December 2001 and were blessed with three (3) issues but due to marital disagreements and/or squabbles the marriage broke down and was ultimately formally dissolved with the issuance of a decree absolute by the Magistrate's Court at Milimani Commercial Court, Nairobi in Divorce Cause No. 573 of 2015, instituted by the Applicant against the Respondent.

4. The Applicant also averred that during the subsistence of the marriage she was in gainful employment as was the Respondent and that both of them jointly made contributions towards acquisition of the matrimonial property inclusive of the suit property measuring 11.5 acres which had not been registered or transferred to both their names as at the time of the dissolution of the marriage since the vendor thereof had already passed away.
5. The Applicant averred that due to the Respondent's attempts to prevent her from using the suit land property she sought necessary injunctive orders against the Respondent in Eldoret Environment & Land Case No. 18 of 2014, which was decided in her favour on 3<sup>rd</sup> July, 2018. A copy of the court's judgment is annexed to the supporting affidavit and marked exhibit "R.5". It shows that a declaratory order was issued to the effect that the suit property was matrimonial property and that the Applicant was at liberty to move the relevant court for distribution thereof.
6. Seemingly, it was pursuant to that judgment of the Environment & Land Court that the present originating summons was filed in this court on 29<sup>th</sup> July 2019, seeking the orders mentioned hereinabove "inter-alia".

The Respondent opposed the application and averred in his replying affidavit dated 15<sup>th</sup> November 2019 that the suit land was acquired by himself during the subsistence of the marriage while he resided in Tanzania and the Applicant was in Nairobi.

7. The Respondent also averred that the suit property was never transferred to him and has since been acquired by a third party thereby ceasing being a matrimonial property. That the Applicant resided in their matrimonial home at Nairobi and had never been to the suit property on which a matrimonial home had never been erected. The Respondent contended that the present application is an afterthought by the Applicant and a ploy to fraudulently gain from his hand work over the years with respect to the suit property. He therefore prayed that the suit property be registered in both his name and the name of the Applicant to hold in trust for their children should the application be allowed.
8. As per the directions given by this court on 7<sup>th</sup> December 2023, the hearing of the originating summons proceeded by way of affidavit evidence and written submissions.

In that regard, the Applicant relied on her supporting affidavit dated 23<sup>rd</sup> July 2019 and her submissions dated 8<sup>th</sup> January 2024, filed on her behalf by Isiaho Sawe & Company Advocates.

The Respondent fled the relying affidavit dated 15<sup>th</sup> November 2019 through Kimaru Kiplagat & Company Advocates, but did not file his submissions thereby implying that he was not substantially opposed to the application, a fact demonstrated by his averment that should the Applicant succeed in this application, then the property ought to be registered jointly in his name and that Applicant in trust for their children.



9. The property in question is essentially the suit property Land Parcel No. Nandi/Kipkaren Settlement Scheme/254 which the Respondent reluctantly conceded that it formed part of their matrimonial property.

In any event, a declaration that the property was indeed matrimonial property was made by a competent court of law in the judgment delivered on 3<sup>rd</sup> July, 2018 in Eldoret Environment & Land Court Case No. 18 of 2014. (Annexure marked “R5”) which had been commenced by the Applicant against the Respondent for a declaratory order that the suit property was matrimonial property.

10. The suit was effectively decided in favour of the Applicant in terms of the declaratory order and not in terms of the distribution of the suit property, a legal requirement reserved for the High Court and not the Environment and Land Court. This explains why the Applicant moved this court for a declaration on the ownership and distribution of the suit property and movable property acquired by the couple during the subsistence of their marriage which was lawfully terminated on the 9<sup>th</sup> January 2017 when the “Decree Nise” issued on the 9<sup>th</sup> December 2016 in Divorce Cause No. 573 of 2015 at the Chief Magistrate’s Court at Nairobi was made final and absolute with the issuance of a “Decree Absolute”.

11. Apparently, the suit land/property is the “hot cake” in this dispute. This is discernable from the Applicant’s supporting affidavit and her submissions in which great regard and emphasis has been placed on the suit property rather than movable household property which may have also been acquired during the existence of the impugned marriage. Be that as it may, the Applicant demonstrated without meaningful dispute from the Respondent that the suit property is indeed the major matrimonial property availed for distribution upon lawful dissolution of the marriage between the Applicant and the Respondent and in accordance with the Provisions of the [Matrimonial Property Act](#), 2013.

12. Before its collapse the marriage had subsisted for a period of approximately sixteen (16) or so years during which time the suit property was acquired.

The [Matrimonial Property Act](#) is the statutory law governing disputes relating to matrimonial property and alongside Article 45(3) of [the Constitution](#) provide the legal framework in the resolution of matrimonial property disputes.

Basically, in terms of Article 45(3), 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.

13. Equal rights in the distribution of matrimonial property does not necessarily mean distribution of the property on a ratio of 50:50 as was indicated by the Supreme Court in the Case of JOO Vs. MBO [2023] JISSC [4] [KLR], where it was held that: -

“While Article 45[3] dealt with equality of the fundamental rights of spouses during and after dissolution of marriage, equality did not mean the redistribution of proprietary rights at the dissolution of a marriage. Neither did the reading of that provision lead to the assumption that spouses were automatically entitled to a 50% fact by face of being married”

14. Further, the court observed that: -

“.....equality under Article 45[3] meant that the courts were to ensure that at the dissolution of a marriage, each party to a marriage got a fair share of the matrimonial property based on their contribution. That was best done by considering respective contribution of each party



to ensure no party was unfairly denied what they deserved as well as ensuring that no party was unfairly given more than what he or she contributed”.

Under Section 7 of the *Matrimonial Property Act*, 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.

15. According to Section 9 of the Act: -

“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 distribution made”.

If the matrimonial property is acquired during the marriage in the name of one spouse, a rebuttable presumption arises that the property is held in trust for the other spouse and if it is acquired in the joint names of the spouses there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal (see, Section 14 *Matrimonial Property Act*).

16. Regard being given to all the foregoing provisions of the law and considering the Applicant’s averment in paragraph 10 of the supporting affidavit, the suit property was acquired during the subsistence of the marriage jointly by the erstwhile couple. Each one of them made financial contributions towards the acquisition of the property as both were in gainful employment.

17. The bank receipts/slips exhibited herein by the Applicant do in the absence of contrary evidence from the Respondent indicate that the Applicant was the major financial contributor in the acquisition of the suit property and would in the circumstances be entitled to a 70% share of the suit property as opposed to the Respondent’s share of 30%.

The household property may be shared equally between the parties as there was no evidence to show either party’s [if at all] contribution towards their acquisition.

18. For all the reasons foregoing the application is allowed as follows: -

1. A declaration be and is hereby issued that the Applicant is entitled to a 70% share of the suit property, being land Parcel No. Nandi/ Kipkaren Settlement Scheme/254 jointly purchased by the Applicant and the Respondent.
2. An order be and is hereby issued that the household property be shared equally between the parties.
3. An order be and is hereby issued permanently restraining the Respondent by himself, servants/ agents and/or employees from interfering with the Applicant’s lawful employment and quiet possession of her share of the entire matrimonial property.
4. An order be and is hereby issued that each party be at liberty to buy off the other’s share in the suit land/property and keep the property wholly for himself/herself or that if they wish the property be sold as a whole and the proceeds be shared between them in accordance with their respective share of the property.
5. An order be and is hereby issued that the respondent do pay the costs of the suit to the Applicant.

**DELIVERED AND DATED THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024**



**J. R. KARANJAH,  
JUDGE**

