



**NMG v EG (Matrimonial Cause 20 of 2004)  
[2024] KEHC 15509 (KLR) (Family) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 15509 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MATRIMONIAL CAUSE 20 OF 2004  
EKO OGOLA, J  
OCTOBER 9, 2024**

**BETWEEN**

**NETTA MWIHAKI GEENEN ..... APPLICANT**

**AND**

**ERIK GEENEN ..... RESPONDENT**

**JUDGMENT**

1. This suit was instituted vide an Originating Summons dated 30<sup>th</sup> July 2004. An Amended Originating Summons dated 12<sup>th</sup> August 2021 was later filed. The applicant prays for the following orders:-
  - a. That it be declared that the following property together with the buildings and improvements thereon acquired with the joint efforts or funds of the applicant herein Netta Mwhihaki Geenen and registered in the name of the Respondent, that the Respondent hold half share of the said property in trust for the applicant. LR NO. Nairobi/Block/ xx/xxx with a permanent Matrimonial House in Loresho Estate.
  - b. That the respondent be restrained from selling and disposing of, charging, transferring, or in any other way howsoever interfering with the said property.
  - c. That there be an Order that the property registered in the name of the respondent be sold and the proceeds of such sale be shared equally between the plaintiff and the respondent.
  - d. That in the alternative to paragraph 3 above the respondent be ordered to transfer his half share to the Applicant.
  - e. That the rental proceeds collected from LR NO. Nairobi/Block/ xx/xxx from 17<sup>th</sup> August, 2004 to the date of judgment be accounted for by the Respondent and the same be shared



equally between the applicant and the Respondent and pending such determination, the monthly rent be paid into a joint account of Advocates for the parties.

- f. That costs of this application be provided for.
2. The applicant in her affidavit dated 30<sup>th</sup> July 2004 deposed that she was married to the respondent under Kikuyu Customary Law on 8<sup>th</sup> June 2002. She deposed that the respondent met with three of her uncles among other family members. The respondent gave the applicant's parents Kshs. 200,000 as ngurario, that is, dowry. In addition to the money, the respondent gave the applicant's parents two goats, that is, mwati and harika, to formalize the marriage.
  3. The applicant deposed that after the Kikuyu traditional marriage, they relocated to LR No. xxxx/xxx (Original No. xxxx/xx/xxx) and gave instructions to D.S. Kitaa & Company Advocates to commence the process of sale. Annexed to the affidavit are payment receipts from the said advocate stating that he received payment from both the applicant and the respondent. The payments included the legal costs, the purchase price and stamp duty costs. The property was thereafter on 2<sup>nd</sup> October 2002 registered in the name of the respondent.
  4. The applicant deposed that she lived with the respondent in the said property and later on moved to Belgium where they solemnized their union on 25<sup>th</sup> July 2003. The marriage went through a strain and the parties divorced on 6<sup>th</sup> March 2008.
  5. The respondent's case is that he met the applicant sometime in March 2002 while she was working in the Netherlands. The applicant worked as a licenced commercial sex worker and the respondent was a paying customer. According to the respondent, commercial sex work in the Netherlands is a lucrative trade and the applicant thrived in this business to the extent that she purchased a home in Embakasi Nairobi, where her mother lived. The respondent deposed that his relationship with the applicant moved from being a client to a 'boyfriend-girlfriend' relationship. He added that he took care of the applicant by paying her monthly bills and sometime in May/June 2002, they took a trip to Kenya for a holiday. The respondent admitted to meeting the applicant's parents but denied that the meeting was a wedding.
  6. During their trip to Kenya, the respondent learnt that the Embakasi house was at risk of repossession since the applicant had failed to pay the mortgage. Therefore, as a good and naive boyfriend, he cleared the applicant's mortgage of 38000 Euros.
  7. The respondent further deposed that on 27<sup>th</sup> June 2002, he sought the services of D.S. Kitaa & Company Advocates intending to purchase property known as LR No. xxxx/xxx (Original No. xxxx/xx/xxx). He deposed that he purchased the property without any monetary assistance from the applicant. He further deposed that the applicant did not assist financially in purchasing the furniture in the said property.
  8. Furthermore, the respondent deposed that on 23<sup>rd</sup> July 2003, the parties entered into a prenuptial agreement in Belgium stating that there shall be no joint ownership of property, or assets and that properties entirely belong to the party that acquired it. After the agreement, the parties solemnized their union on 25<sup>th</sup> July 2003. However, due to strain in the marriage, the respondent on 12<sup>th</sup> June 2004 moved out of the home. A Divorce Cause was filed on 26<sup>th</sup> July 2004. The parties engaged in legal battles. The applicant was allowed to continue living in the house until 31<sup>st</sup> December 2004. Their divorce was declared official on 3<sup>rd</sup> April 2008.
  9. The matter was canvassed by way of viva voce evidence in court.



10. PW1 was the applicant. She testified that the marriage broke down due to the respondent's infidelity and upon their divorce, the Belgium Court ordered the respondent to pay her 2500 euros but the respondent has failed to do so. On record are emails from the applicant to the respondent where the applicant states that she was unfaithful and that was the main cause of their marriage breaking down. The applicant testified that some of the contents of the emails might not be correct.
11. PW2 was one Bernard Njoroge Wachai who testified that he was the applicant's cousin and he did attend the Kikuyu Customary wedding on 8<sup>th</sup> June 2002 and he participated in the negotiations by way of being the interpreter to provide translation from English to Kikuyu and vice versa. According to him, the respondent had fulfilled the requirements to satisfy a traditional wedding as per the Kikuyu customs, and dowry was indeed paid during the 'ngurario' and even the applicant's mother's so as to follow strict Kikuyu custom had to complete her own traditional obligations to permit her daughter's ceremony to go ahead were met. He stated that he has been a close friend of the two parties herein and even attended their civil wedding ceremony in Belgium in 2003 where he stayed in their house for nearly one week.
12. DW1 was the respondent. He reiterated the contents of his case aforementioned. The respondent testified that according to their prenuptial agreement, assets acquired before or after marriage would remain the property of the one who purchased them. He testified that the suit house belongs to him fully. He added that the house does not bring any income as it was rented for a short while. The respondent deposed that the introduction party was just a party and not a wedding.
13. On cross-examination, DW1 testified that the party shown by the applicant's bundle in the photos was merely an introduction party and not a dowry ceremony. Also, the party that they attended in Murang'a was just a visitation of friends and it had nothing to do with a wedding. According to him, he was not aware that the visit was an occasion for the applicant's mother's dowry so that her dowry would be paid. In his view, it was not a traditional wedding and he had no clue of what was going on.

### **Determination**

14. I have considered the Originating Summons, the rival affidavits and submissions, and the entire record of the court. Since the suit was instituted in 2004, the preliminary issue for determination is the law to use in determining this suit. Should it be the Married Women Property Act of 1882 or the *Matrimonial Property Act* of 2013?
15. The Married Women Property Act of 1882 ceased to apply in Kenya on the 16<sup>th</sup> January 2014 when the *Matrimonial Property Act* No. 49 of 2013 came into force. The issue of retrospective legislation was discussed at length in the matter of distribution of matrimonial properties by the Court of Appeal in RMM -VS- BAM - Nairobi Civil Appeal No 267 of 2011. The Learned Judges referred to the Supreme Court decision in Samuel Kamau Macharia -vs- KCB & 2 Others (2012) KLR where quoting from Blacks Law (6<sup>th</sup> Edition), defined retrospective law as :-

“ A law which looked backwards or contemplates the past, one which is made to affect acts or facts occurring or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches anew disability in respect of transactions or considerations already past. One that relates to previous transactions and gives it different legal effect from that which it had under the new law when it occurred.”



16. The suit was instituted before the coming into force of the *Matrimonial Property Act*. In line with the Supreme Court decision, the vested rights of the parties which accrued before the *Matrimonial Property Act* ought to be determined under the repealed Married Women's Property Act of 1882.
17. The second issue for determination is whether LR No. xxxx/xxx (Original No. xxxx/xx/xxx) was acquired during wedlock. The applicant prays that when the said property was purchased, they were married under Kikuyu Customary law. According to the respondent, the event was an introductory party and not a wedding. The respondent has not disputed that he gave the applicant's parents money and two goats.
18. The applicant stated two events to confirm the marriage: the ceremony at her family home in Murang'a where they participated in the dowry ceremony for her mother which had not been fulfilled and was a requisite under Customary Law to pave the way for them to receive and/ or conduct a similar ceremony for their daughter, the applicant; and the event that took place at Nyayo Embakasi Estate where the respondent paid Kshs. 200, 000/= as well as other symbolic gifts as part of the dowry bride price.
19. Eugene Cotran's "Casebook on Kenya Customary Law" at page 30 sets out the essentials of a Kikuyu Customary marriage. These are stipulated as;
- i. Capacity; the parties must have capacity to marry and also the capacity to marry each other.
  - ii. Consent; the parties to the marriage and their respective families must consent to the union
  - iii. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.
  - iv. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.
  - v. Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e. under the capture procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bride grooms home".
20. Consequently, in the case of *Gituanja vs Gituanja* [1983] KLR 575 the Court held inter-alia that;
- "The existence of a marriage is a matter of fact which is proved with evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario."
21. The respondent has been using ignorance as a defence. He bought goats. Which is the 'ngurario'. He gave the applicant's mother some money. Which is the 'ruracio'. The respondent attended these ceremonies. He had an opportunity to ask questions in the event that he did not understand. Ignorance has never been and will never be a defence. From the foregoing, it is plain to see that the elements necessary for a Kikuyu customary marriage were present and this marked the formalization of their marriage under Kikuyu Customs.
22. The third issue for consideration was whether the applicant had a share in the Loresho house.
23. Section 17 of the MWPA of 1882 provides that;
- "in any question between husband and wife as to the title to or possession of property, either party, may apply by summons or otherwise in a summary way to any judge of the High



Court of justice and the judge may make such order with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit.’

24. The parties got married under Kikuyu Customs on 8<sup>th</sup> June 2002 and the property was acquired on 6<sup>th</sup> August 2002 which would mean it was purchased during the subsistence of the marriage and as such would be within the realm of matrimonial property.
25. The principles set out by the Court in *Echaria V Echaria* [2007] eKLR are the applicable ones in guiding this court in its determination of the matter before it. Those principles were summarized in *Francis Njoroge V. Virginia Wanjiku Njoroge* [2013] eKLR as follows; -
  - “ a) A wife’s non-monetary contribution cannot be considered in determining the amount of contribution of the wife towards the acquisition of the property. The performance of domestic duties would also not be considered as contribution towards acquiring the property.
  - b) Where the property in dispute is not registered in the joint names of the parties, then they have no joint legal interest. It is erroneous to presume that they have an equal beneficial interest in the property.
  - c) Joint tenancy connotes equality for there is a rebuttable presumption that where two or more people contribute to the purchase price of property in equal shares, they are in equity joint tenants. Equal contribution results in a joint tenancy unless there is contrary evidence to show that irrespective of the registration there was no equal contribution.
  - d) Where the disputed property is not registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim ‘equality is equity’.
  - e) A court has jurisdiction to allocate a portion of the disputed property as it deems just. It may also order a transfer of the share to the rightful beneficial owner.”
26. It is against the background of the said principles that I turn to the issue of the parties’ contribution towards the acquisition of the matrimonial properties.
27. The applicant has tendered credible evidence to show that she had made some direct financial contribution towards the acquisition of the property in dispute so as to entitle her to some share of the same evidenced by the payment receipts in both their names to their then Advocates D.S. KITAA & CO ADVOCATES as filing fees and deposits towards the purchase price of the property. Similarly, she also managed to make payments to have the floors of the house repaired as well as providing non-monetary support to the respondent in terms of companionship, upkeep and maintenance of the matrimonial home.
28. In light of the foregoing, the Amended Originating Summons dated 12<sup>th</sup> August 2021 is not wholly merited. I make the following orders thereof: -



1. The Property L.R. NO. NAIROBI/BLOCK xx/xxx is hereby declared as matrimonial property and it be shared in the ratio of 80:20 in favour of the Respondent.
2. The Respondent do hereby transfer the requisite share to the applicant and/or sell the property and the proceeds of such sale be shared in the same ratio 80:20.
3. Each party to bear their own costs.

Orders accordingly,

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF OCTOBER 2024.**

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**E.K. OGOLA**

**JUDGE**

In the presence of:

Mr. Kinguri h/b for Mr. Akedi for the Applicant.

N/A for the Respondent.

M/s Gisiele M Court Assistant.

