



BKB v EC (Civil Case 14 of 2021) [2023] KEHC 18806 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL CASE 14 OF 2021**

JR KARANJA, J

JUNE 21, 2023

BETWEEN

BKB PLAINTIFF

AND

EC DEFENDANT

JUDGMENT

1. This suit was commenced by the originating summons dated the 2nd of November, 2021 and filed herein by the applicant/plaintiff BKB, on the December 10, 2021, seeking against the Respondent/Defendant, EC, declaratory orders to the effect that the parcel of land registered as Chebarus/Taito Block x/xxx, herein referred to as the suit land solely belongs to the Plaintiff and that the defendant made no contribution whatsoever to its acquisition, neither as she made any contribution towards its improvement thereby acquiring no beneficial interest over it.

The plaintiff also seeks an order of eviction to eject the defendant from the suit land.

2. The suit is especially anchored on Sections 6 and 7 of the *Matrimonial Property Act* No 49 of 2013, Order 37 Rule 11 of the *Civil Procedure Rules*, 2010, Section 7D of the *Land Act* and Articles 40 and 66 of the *Constitution* of Kenya, 2010, have also been invoked.

The grounds and evidential facts in support of the summons are set out in the Plaintiff's supporting affidavit dated November 2, 2021 and are vehemently opposed by the defendant on the basis of the averments contained in her replying affidavit dated March 14, 2022.

3. The hearing of the suit was based on affidavit evidence and written submissions filed by both parties in support and opposition of the suit respectively. Having given due consideration to the claim in the light of the supporting grounds and rival submission, this court was of the view that the basic issue for determination was whether the Plaintiff enjoys sole proprietorship right over the suit property as against the Defendant and whether the Defendant is entitled to a beneficial interest over the property on account of her previous marriage to the Plaintiff.



4. The facts giving rise to the claim are briefly that in the year 2013, the Plaintiff and the Defendant conducted a customary marriage and established a matrimonial home on the suit property which had been purchased by the Plaintiff on the July 23, 2012, less than one year after the marriage which was never blessed with any issue and which was effectively and lawfully terminated by the decree absolute issued by a Magistrate's Court on the March 11, 2020, thereby bringing to an end a marriage relationship which lasted for a period of about eight (8) years.
5. More than one year thereafter, on the December 10, 2021, this suit was filed by the Plaintiff for sole ownership of the suit land on which the erstwhile matrimonial home stands with a view to excluding it from distribution of matrimonial property on account of the breakdown of his marriage to the Defendant, a scenario catered for under the *Matrimonial Property Act*, which came into operation in the year 2014.
6. Prior to that, the law governing the distribution of Matrimonial Property following a lawful dissolution of marriage was the English *Married Women Property Act* of 1882. The *Matrimonial Property Act* is the statutory law applying to the present dispute which was instituted vide the present originating summons dated 2nd November, 2021 and is certainly a derivative of Article 45 of the *Constitution* which provides for the family and states in sub-section (3) that;

“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”.

7. Such rights would invariably include ownership of matrimonial property on dissolution of a marriage. The present dispute is anchored on the distribution of the suit property following the dissolution of the marriage between the Plaintiff and the Defendant which subsisted from the year 2013 up-to the year 2020 with the issuance of a decree absolute on the March 11, 2020.

Whereas the Plaintiff contends that the suit property solely belongs to him on account of having acquired it prior to the impugned marriage, the Defendant contends that since the property was registered in the name of the Plaintiff during the subsistence of the marriage she was entitled to a beneficial share of the property held in trust by the Plaintiff.

8. It may be pre-supposed that on the basis of Article 45(3) of the *Constitution*, the suit Property having been acquired during the subsistence of the impugned marriage as per the title deed issued in the name of the Plaintiff, then it ought to be shared on equal basis or if you like, fifty fifty basis between the Plaintiff and the Defendant. However, since the *Matrimonial Property Act* No 49 of 2013, is more or less a derivative of Article 45 of the *Constitution*, the distribution of Matrimonial Property would be based on the guidelines provided and the principles set out in the Act.
9. In any event, the Court of Appeal in relation to the Constitutional Principle of equality of rights between married couples observed that the *constitution* does not give automatic half share of the Matrimonial Property to a spouse whether or not he or she earn it. That, getting married does not give a spouse a free to cash cheque bearing the words “50 per cent” (see *PNN Vs ZWN* 2017 ekLR).
10. Further, in the case of *Federation of Women Lawyers Kenya (Fida) Vs Attorney General and Another* (2018) ekLR, the Court of Appeal held that;

“The law recognizes equal worth and equal importance of the parties in marriage. Thus, the beneficial share of each spouse as the law of the division of the Matrimonial Property stands in Kenya ultimately depends on the parties proven respective proportion of financial contribution either direct or indirect towards the acquisition of the property”.



In the present case, it is not disputed that the disagreement between the parties is centered only on the suit property on which the Matrimonial home stood. Indeed, this is a dispute over the distribution of the Matrimonial home following the breakdown of the marriage between the parties.

11. Even though the transaction leading to the purchase of the property by the Plaintiff commenced in the year 2012, prior to his marriage to the Defendant, lawful ownership of the property was acquired during the subsistence of the marriage on the July 10, 2015 when the title deed was issued. In the circumstances, the presumption that the plaintiff held in trust the defendant's beneficial share in the property would readily arise and has not herein been rebutted by availability of necessary and relevant evidence from the Plaintiff. The disclosure that has arisen herein is that the defendant still occupies the matrimonial home and has done so for a period of time due to the Plaintiff's desertion therefrom on account of matrimonial squabbles and/or disagreements.
12. The formula to apply in distribution of matrimonial property has remained a big challenge even before the enactment of the *Matrimonial Property Act* which came into effect in the year 2014 to provide for the rights and responsibilities of spouses in relation to Matrimonial Property and for connected purposes and to that effect defines a Matrimonial home to mean any property that is owned or leased by one or both spouses and occupied or utilised by the spouses as their family home and includes any other attached property.
13. Under Section 6 (1) of the *Act*, Matrimonial Property means the matrimonial home or homes and the household goods and effect therein as well as other immovable and movable property jointly owned and acquired during the subsistence of the marriage. However, under Sub-Section (3), parties to an intended marriage may enter into an agreement before their marriage to determine their property rights. These are the so called prenuptial agreements. The parties herein entered no such agreement.
14. Ownership of Matrimonial Property is provided for under Section 7 of the *Act* to wit;

“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”.

This provision renders the Plaintiff's claim of sole ownership of the suit property untenable thereby making it impossible for a court's declaration to that effect. More so, considering the ever floating or gliding presumption provided for under Section 14 of the *Act* to the effect that where Matrimonial Property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse, and in the names of the spouses jointly, there shall be resultable presumption that their beneficial interests in the Matrimonial Property are equal.

15. So, the key to determining the scope of distribution of the suit property on which the Matrimonial home stands is the level of contribution made by the respective spouses in its acquisition, and or development and improvement.

Contribution under Section 2 of the *Matrimonial Property Act* (The Act) means monetary and non-monetary contribution and includes domestic work and management of the matrimonial home, child care, companionship, management of the family business or property and farm work.
16. The equality of rights principle articulated in Article 45 (3) of the *Constitution* seems to have been compromised by the contribution concept under the Act in relation to Matrimonial Property. This was affirmed in a recent decision of the Supreme Court delivered on the January 27, 2023 ie *JOO VS MBO & Federation of Women Lawyers (FIDA Kenya) Amicus Curiae, Law Society of Kenya Amicus*



Curiae Petition 11 of 2020, (2023) KESC 4 KLR (Family) where it was held that the equality provision in Article 45 (3) did 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 had contributed nothing to its acquisition merely because they were married to each other.

17. The Supreme Court also held that Article 45 (3) acted as a means of providing equality as at the time of dissolution of marriage but such equality could only mean that each party was entitled to their fair share of Matrimonial Property and no more. That the provision does not suggest that a marriage between parties automatically resulted in common ownership or co-ownership of the property and that, it was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.
18. The guiding principle in the distribution of matrimonial property as was held by the Supreme Court is that parties must fulfil their obligation of proving what they were entitled to by way of contribution. The evidence herein clearly shows that the suit property was effectively acquired during the subsistence of the marriage and was treated as the matrimonial home occupied by the couple with or without any issue.
19. The sale agreement dated July 23, 2012 (annexure noted BKB -3) was proof, on a balance of probabilities, that the Plaintiff solely contributed financially towards the purchase of the property. However, the Defendant acquired the beneficial interest in the property on account of her marriage to the Plaintiff as the property was ultimately transferred to the Plaintiff and registered in his name during the subsistence of their marriage. Her contribution towards the acquisition of the property was evidently non-monetary in the form of domestic work and management or maintenance of the property as well as companionship even though the marriage was short-lived as it lasted for about eight (8) years from the year 2013 to the year 2020.
20. It was indicated herein that the marriage became rocky at one point such that the Plaintiff deserted the Matrimonial home and has since kept off it. This action did not however, negate the defendant's substantial non-monetary contribution in related to the matrimonial home. In such circumstances it would be difficult to mathematically quantify the defendant's contribution, hitherto non-monetary towards the acquisition of the entire suit property.
21. In any event, the Plaintiff did not lead sufficient and credible evidence to disapprove the defendant's contention of having contributed immensely towards the development and/or improvement of the property and related matters. It would therefore be safe to infer that the defendant's non-monetary contribution towards the suit property in so far as it cannot be mathematically assessed is equal to the Plaintiff's financial or monetary contribution.
22. In that regard, it is the finding of this court that the Plaintiff does not enjoy sole proprietorship right over the suit property and that on account of his previous marriage to the Defendant, she (Defendant) is entitled to a beneficial interest in the property equal to his (Plaintiff).

Consequently, the present claim is devoid of merit and is hereby dismissed with orders that the suit property be sold and the proceeds be shared equally between the Plaintiff and the Defendant. Short of that, either party may purchase the other's share and keep the property for himself/herself. Each party to bear their own costs of the suit.

Ordered accordingly.

DELIVERED, DATED AND SIGNED AT KAPSABET THIS 21ST DAY OF JUNE, 2023.

J.R. KARANJAH



JUDGE

