



**NJC v NOO (Civil Suit 15 of 2020) [2023] KEHC 21583 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21583 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL SUIT 15 OF 2020  
SN MUTUKU, J  
JULY 18, 2023**

**BETWEEN**

**NJC ..... PLAINTIFF**

**AND**

**NOO ..... DEFENDANT**

**JUDGMENT**

1. NJC, the Plaintiff, has brought this suit through a Complaint dated February 16, 2020 seeking the following reliefs:
  - a. A declaration that there exists marriage between the plaintiff and the Defendant by cohabitation and repute.
  - b. An order dissolving the marriage between the Plaintiff and the Defendant.
  - c. A declaration that Kajiado/Kitengela/94370 and Kajiado/Kitengela/XXXX are matrimonial properties.
  - d. A declaration that the Plaintiff is entitled to half a portion of Kajiado/Kitengela/XXXX & Kajiado/Kitengela/XXXX.
  - e. A declaration that the Plaintiff is entitled to all the household goods.
  - f. Cost of this suit.

**The Plaintiff’s case**

2. The Plaintiff’s case is simple. She claims in her Complaint that she is married to the Defendant through cohabitation and repute; that their courtship started in 2013 and they moved in and started living together in 2014. She has stated that the Defendant’s parents visited her parents in April 2015 for dowry negotiations during which Kshs. 170,000/, being part of the dowry, was paid.



3. She has stated that together with the Defendant, they jointly purchased Kajiado/Kitengela/37676 and Kajiado/Kitengela/XXXX and registered these properties in their joint names; that they jointly constructed their matrimonial home on Plot No Kajiado/Kitengela/XXXX and that she furnished the matrimonial home to a tune of Kshs 1,000,000/-. She has claimed that they lived peacefully until around July 2018 when problems started. She has accused the Defendant of physical and verbal assault and forcefully evicting her from their matrimonial home. She claims that efforts for reconciliation bore no fruits.
4. The Defendant did not enter appearance or file defence. The Plaintiff requested for default judgment but the court (Mwita, J) declined to grant the same. and directed that the Defendant be served with summons afresh for hearing of the matter. It seems that the Defendant did not enter appearance, file defence or attend court even after I directed that he be served through substituted service. The matter proceeded for hearing with the Plaintiff as the only witness.
5. In her evidence, the plaintiff adopted her witness statement dated 27/2/2022 produced her bundle of documents, being title deeds, bank transfer documents and copy of medical report to support her claim of assault, exhibits 1(a) (b) and (c).
6. The Plaintiff, through her counsel, also filed submissions dated June 27, 2022. She raised the following issues for determination:
  - i. Whether there exists a marriage between the Plaintiff and the Defendant?
  - ii. Whether the Marriage between the Plaintiff and the Defendant has irretrievably broken down.
  - iii. Whether Kajiado/Kitengela/XXXX and Kajiado/Kitengela/XXXX are matrimonial properties; and if so, what share is the Plaintiff entitled to?
  - iv. Who bears the cost.
7. On the first issue the Plaintiff argued that her marriage to the Defendant was a marriage that started out as cohabitation but that later dowry of Kshs. 170,000/- was paid. She relied on article 2(4) of the [Constitution](#) and section 3(2) of the [Judicature Act](#) and argued that the existence or non-existence of the marriage is based on satisfaction of section 43 of the [Marriage Act](#).
8. She also relied on [Hortensia Wanjiku Yawe v The public Trustees](#), Civil Appeal 13 of August 6, 1976 on the principles regarding proof of customary marriages in Court that:
  - i. The onus of proving customary law marriage is generally on the party who claims it;
  - ii. The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;
  - iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.



9. On the second issue the Plaintiff submitted that she has shown both in the Plaintiff and in her evidence that the Defendant was physically and verbally abusing her and that all efforts to reconcile them failed. She relied on *JSM v ENB* [2015] eKLR where the Court of Appeal held that:

“As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by section 66(2) (e) of the *Marriage Act*, 2014 and was not recognized in the repealed *Matrimonial Causes Act*. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties.

It is worth noting that although adultery, cruelty and desertion are distinct and separate grounds for divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage.

What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again; among others. These considerations would be, in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down.”

10. In addressing the third issue, the Plaintiff submitted that together with the Defendant they jointly acquired the properties, being Kajiado/Kitengela/94370 and Kajiado/Kitengela/XXXX and that she has shown the amounts each person contributed towards the acquisition of the properties.
11. It is her evidence that in respect of Kajiado/Kitengela/94370 she contributed Kshs. 200,000/- while the Defendant contributed kshs. 750,000/ and that they erected their matrimonial home on this property. With regards to Kajiado/Kitengela/37676 she stated that she paid the entire purchase price of Kshs.800,000 via bank transfer and a further Kshs 150,000/- in cash.
12. She cited section 6 of the *Matrimonial property Act* on what constitutes matrimonial property and the case of *T.M.V v F.M.C* (2018) eKLR where the court held that:
- “for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”
13. She submitted that upon finding that the properties are matrimonial property the same should be shared equally between the parties.
14. On the issue of cost, she relied on section 27 of the *Civil Procedure Act* and submitted that costs should be awarded to her.



## Analysis and Determination

15. I have considered the Plaintiff, the evidence adduced in court, the exhibits produced and the submissions. It is important to note that this matter is undefended as earlier explained herein. To my understanding, the following issues arise from this suit and require determination:
- i. Whether there exists a marriage between the Plaintiff and the Defendant?
  - ii. Whether the Marriage between the Plaintiff and the Defendant irretrievably broke down?
  - iii. Whether the suit properties are matrimonial properties and if so what share is each party entitled to?
16. The issue regarding the jurisdiction of this court to determine the issue of the marriage between the parties and dissolve that marriage, if the court finds that it exists, pops out for determination. It is trite that a court cannot proceed to determine a matter before it unless it is seized with the requisite jurisdiction to handle that matter. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, JA, stated as follows in respect to jurisdiction:
- “..... I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
17. The court handling a matter must possess the authority to decide the issues being canvassed before it. In the above cited authority, the court defined jurisdiction thus:
- “By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given” (See Words and Phrases Legally defined – Volume 3: I – N Page 113)
18. Section 7 (3) (b) of the *Magistrate's Court Act*, No. 26 of 2015, gives jurisdiction to hear and determine matters regarding marriage, divorce, maintenance, or dowry where such claims are based on African



customary law. The court in *ENN v SNK* [2021] eKLR was faced with similar issues like the one before me. It stated that:

“The *Constitution of Kenya* 2010 provides for the jurisdiction of this court in Article 165 (3) that Subject to clause (5), the High Court shall have;

(a) Unlimited original jurisdiction in criminal and civil matters.

That is to say that this court has jurisdiction to hear all civil matters including divorce petitions. However, with the giving of jurisdiction to the subordinate court, this Court has only been left with jurisdiction to handle matrimonial property issues and act as an appellate court in cases like the one before this court.”

19. It is clear to me that the jurisdiction to determine whether the Plaintiff and the Defendant were married lies not with this court but with the Magistrates’ court by dint of the above provision. That said, this court cannot grant prayers (a) and (b) of the Plaint for lack of jurisdiction.
20. In respect to declaration of the properties named in this suit as matrimonial property, I turn to sections 6 and 17 of the *Matrimonial Property Act*, No. 49 of 2013. Section 6 defines matrimonial property to include matrimonial home or homes, household good and effects in the matrimonial home or homes or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
21. Section 17 provides that:
  1. A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
  2. An application under subsection (1) –
    - a. shall be made in accordance with such procedure as may be prescribed;
    - b. may be made as part of a petition in a matrimonial cause; and
    - c. may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.
22. To my understanding, the effect of the above provision is that where divorce proceedings are pending, or the marriage between the parties is not sustainable but no divorce is sought, the parties may approach the court in an application contemplated under section 17. Declaratory orders, intended only to declare the nature of the interest that is claimed, may be sought by the parties or by any of them and the court may declare each party’s beneficial interest in the matrimonial property without distributing it.
23. What is of concern to me is whether, such a declaration, if it were to be made before the marriage is proved may be prejudicial to the Defendant. I have considered the exhibits produced by the Plaintiff. They include copies of title deeds in respect of Kajiado/Kitengela/XXXX and Kajiado/Kitengela/XXXX, the latter on which it is alleged that matrimonial home stands. Those title deeds show both names of the Plaintiff and the Defendant jointly registered as co-proprietors of both properties.
24. The effect of their joint ownership is that even before the existence of the marriage between the parties herein is proved and the marriage dissolved, the Plaintiff has a claim over the property as a joint registered owner. On that point alone, this court is enjoined by the law to protect the proprietary rights



of the Plaintiff pending proof of existence of marriage between the parties. In the interest of substantive justice and to protect the proprietary rights of the Plaintiff, this court will and does hereby allow prayers (c) and (d) of the Plaint. In my considered view, the grant of those prayers is not prejudicial to the Defendant. I decline to grant prayer (e) of the Plaint.

25. In conclusion, prayers (a) (b) and (e) are not granted. Prayer (c) and (d) are granted. The Defendant shall bear the costs of this suit.
26. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 18TH JULY, 2023.**

**S. N. MUTUKU**

**JUDGE**

