



REPUBLIC OF KENYA



FWM v PNK (Civil Suit 21 of 2019) [2022] KEHC 10636 (KLR) (2 February 2022) (Judgment)

Neutral citation: [2022] KEHC 10636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT 21 OF 2019
SN MUTUKU, J
FEBRUARY 2, 2022**

BETWEEN

FWM APPLICANT

AND

PNK RESPONDENT

JUDGMENT

Introduction

1 The parties herein got married on 7th December 2002 at [Particulars Withheld] Church Ongata Rongai as shown in the Marriage Certificate produced in court and marked “F.W.M1”. There are three issues out of that marriage, namely, PJN born in 2005, LLK born in 2007 and FAM born in 2014. The marriage developed problems leading to divorce proceedings. As the parties waited for the conclusion of the divorce proceedings, the Applicant filed this Originating Summons (OS) dated 22nd August 2019 and amended on 1st November 2019. She has anchored the pleadings on Section 3A of the *Civil procedure Act*, Order 37 Rules 1(a) (c) (g) of the *Civil Procedure Rules*, Section 2, 6(1), 7, 14(a) and 17 of the *Matrimonial Causes Act* 49 of 2013 and all other enabling provisions of the law. She is seeking the following orders:

1. The Honourable court be pleased to declare and issue a declaration that the property known as Plot No. xxxx Phase V, situated in Ongata Rongai measuring 1/16th of an acre, whose share certificate bears the name of the Respondent, is matrimonial property jointly owned by the Applicant and the Respondent.
2. That the Respondent, his agents and/or servants be restrained from alienating, encumbering, or in any other way disposing of property known as Plot No. xxxx Phase V, situated in Ongata Rongai measuring 1/16th of an acre.
3. That the Respondent, his agents and/or servants be restrained from evicting the applicant and/or in any other way interfering with the Applicant’s peaceful possession and living in the



matrimonial home comprise within the property known as Plot No. xxxx Phase V, situated in Ongata Rongai measuring 1/16th of an acre.

4. That the Honourable Court declares that the purported sale of the property to Onesmus Kioko Mbithi is null and void.
5. That the Respondent be ordered to pay costs of this suit.

The Applicant's Case

- 2 The grounds in support of the OS are found on the face of it and in the Amended Supporting Affidavit sworn by FWM on 1st November, 2019 to the effect that Plot No. xxxx Phase V, herein after referred to as "suit property," was acquired during the subsistence of the marriage between the parties and is therefore matrimonial property. That they got married to the Respondent on 7th December, 2002 at [Particulars Withheld] Church, Ongata Rongai and are blessed with three children PJN (14 years), LLK (12 years) and FAM (5 years). She claims that they acquired the suit property on 19th November 2003 and payment for the same was completed on 21st February 2004, during the subsistence of their marriage; that the suit property did not have an individual title deed since it was sub-divided from a large piece of land and the individual title deed has not yet been processed from the mother title; that the only proof of ownership is therefore the share certificate which bears the names of the Respondent; that their marriage still exists and has not been dissolved by a court of law.
- 3 She further states that upon advice by her advocate she believes that the suit property is held in the names of the Respondent in trust for herself as a joint owner by virtue of the same being acquired through their joint efforts during the subsistence of their marriage. She states that sometime in November, 2015 the Respondent took their two older children to live with him in a location unknown to her. She also claimed that in February, 2016 the Respondent made several attempts to evict her from their matrimonial home located in the suit property but she resisted the Respondent's attempts of eviction and sought assistance from the National Land Commission via a letter dated 9th February, 2016. Consequently, the National Land Commission wrote to the the New Roysambu Housing Company Limited, from whom they bought the matrimonial property. That on or about August 2017 the Respondent evicted and chased her away from their matrimonial home and in the process left behind most of her personal belongings and documents. She stated that it has come to her attention that the Respondent is attempting to sell the suit property to third parties and that her eviction was intended to assure potential buyers that the property was vacant. That she required the intervention of this Honourable Court to reinstate her to her matrimonial home and prevent its disposal against her interest. She claimed that since their marriage in the year 2002 she has supported the Respondent, provided companionship, raised their 3 children, managed the matrimonial home and undertaken domestic work to provide a conducive and healthy environment for the family. She also averred that the honourable court do issue a declaration that the suit property is matrimonial property and restrain the Respondent from disposing it and from interfering with her peaceful occupation.

The Respondent's Case

- 4 The OS is opposed. The Respondent, through his Replying Affidavit dated 29th October, 2019. He stated the suit property is not matrimonial property. It is his case that the suit property is personal property which he singlehandedly acquired and developed without any form of contribution or interest from the Applicant. That the Applicant was not interested in the property claiming that it was situated in a rural setting and that she wanted to stay in town. He stated that he acquired the property 3 weeks after completion of payment and not on 19th November, 2003 as stated. He claimed that the Applicant is merely in possession of the payment receipts because she broke into his room



and stole all his documents. Further that the share certificate is not in his possession as he sold the property to Onesmus Kioko Mbithi (the purchaser) on 3rd November, 2015 which fact is well known to the Applicant. That he and the Applicant have not been living under the same roof since the year 2015. That between 2013 and 2015 the applicant moved out of the master bedroom and they stayed in separate rooms. That given the bad state of their marriage over the years there was no companionship whatsoever and that the marriage only existed on paper.

- 5 The Respondent refuted the contents of paragraph 10 of the Applicant's Supporting Affidavit and stated that the presumption of property being held in trust for a spouse is subject to contribution towards acquisition of the property. He stated that there was no contribution from the Applicant. That there was no infidelity on his part and he left to live elsewhere following the threats by the Applicant which he reported at the police under OB number 94/14/12/15. He stated that his two older children chose to leave with him and that the Applicant knew where they went to stay and attend school.
- 6 He stated that he sold the property with vacant possession but the Applicant refused to leave the premise prompting the purchaser to institute proceedings against him at the Chief Magistrate's Court under Civil Case 619 of 2016. A court order was issued where he was given 2 weeks to vacate.
- 7 He challenged the validity of the letters to and from the National Land Commission as they had no signatures nor stamps on them.
- 8 He stated that the Applicant never provided companionship to him nor contributed towards furnishing of the house. He stated that he struggled by himself and would get help from the house help who he paid to do the domestic work. Further that he is the one who nurtured the children took them to school, paid their school fees, bought them clothes and that the Applicant was too busy to assist. That the suit property is already disposed of and the suit is futile and does not hold water. In that case the same lacks merit and should be dismissed with costs. He also stated that the Applicant be ordered to return all his documents including his original academic and baptism certificates.
- 9 The Respondent filed a further Affidavit dated 27th November, 2019 in which he deposed that the sale of the property Plot No. xxxx Roysambu to Onesmus Kioko Mbithi on 3rd November, 2015 was done legally and with knowledge and consent of the Applicant. That he donated irrevocable power of Attorney to Onesmus Kioko Mbithi and the same was attached. That the amended Originating Summons dated 1st November, 2019 is futile and lacks merit. That the suit is being filed 4 years later after the legitimate sale of the property and irretrievable breakdown of the marriage.

Evidence

- 10 This matter proceeded on trial in open court. The Applicant testified as the only witness. She adopted her witness statement and produced as exhibits the attachments to her Supporting Affidavit. She denied, in cross-examination, that she was aware that the suit property has been sold. She testified that she was not informed of the purported sale and that her consent was never sought. She told the court that she never left her matrimonial home and that all their three children were born on that property. She denied that she broke into the Respondent's bedroom to steal the receipts of sale and stated that the receipts were kept in the bedroom where each of them had access.
- 11 The Respondent was also the only witness for his case. He testified that when he started paying for the suit property the Applicant had left and was not present and only came back after he had paid for the first instalment; that the Applicant was present when the second instalment was paid but the Respondent did not tell her because of bad blood between them; that he later paid for the third instalment and got certificate of ownership in his name and that the Applicant was not aware that he was paying for the suit property. He stated that all the receipts are in his name.



12 The Respondent testified further that he constructed on the plot and told the Applicant to move in but she refused; that she did not contribute any money towards the construction and that she later moved into the house but kept on going away and returning. He testified that he informed her that he wanted to sell the suit property to which she said that she did not mind; that he sold the property; that the Applicant was aware of the sale and that the buy sued the Applicant who was still on the property.

Submissions

13 Parties were directed to file written submission. I have read the rival submissions whose contents, a reiteration of the facts as captured in the pleadings, are captured in this Judgment.

14 In her submissions, the Applicant relied on the provisions of Section 6 of the *Matrimonial Property Act* on the definition of matrimonial property and the case of *MNH- vs- FHM* [2018] eKLR where the court was of the view that:

where matrimonial property is acquired during marriage- (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.” It was further stated “Moreover, the union has been blessed with two issues, who from the evidence are now young adults with a bright future ahead of them. This is clear evidence of child care. As if this is not enough, it is uncontroverted that the Plaintiff engaged in farm work, in the form of growing vegetables in green houses. The gist of the foregoing is that, on the balance of probability, the plaintiff indeed made substantial non-monetary contributions in the course of the coverture. She would, in my opinion, be entitled to a portion of the matrimonial properties upon dissolution of the marriage.”

15 The Respondent raised the following issues for determination:

- i. Were the parties herein married before institution of this suit?
- ii. If, so has that marriage been dissolved customarily or legally?
- iii. Did the parties acquire any properties jointly?
- iv. Is there any contested property between the parties to warrant a declaratory order?
- v. Is the instant suit the proper process for the prayers sought?
- vi. Who will bear the cost of the suit?

16 He relied on *Matrimonial property Act* section 2 with regards to the definition of matrimonial home.

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.”

17 he also relied on Section 7 of the Act on Ownership of Matrimonial Property which provides that:

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.”

18 He cited Section 17 of the said Act to the effect that 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 and submitted that this court is being asked to make a declaration while the suit property has been disposed by way of sale.

- 19 In his submissions he relied on section 3(1) of the [Evidence Act](#) which requires that any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows. In his case the disposal of the suit property herein during the subsistence of the marriage is a fact in issue and ought to be/have been ventilated before this court is asked to make a declaratory order.
- 20 He further states that certain documents produced by the Applicant do not meet the threshold of Section 35 of the [Evidence Act](#) in that the copies of the payment receipts produced as “FWM 3” were never issued to the Applicant and recourse was for her to call for disclosure of documents, further that the Applicant was not the author of the alleged letter from National Land Commission produced as “FWM 5” and therefore he could not produce the same and author was not called as witness.

Analysis and Determination

- 21 I have considered the pleadings, the evidence adduced, the submissions and the authorities cited by the parties. The marriage of the parties was still subsisting at the time of these proceedings. There is mention that the Respondent filed Divorce Cause No. 122 of 2016. The outcome of that Cause is not within my knowledge. Be that as it may, the declaratory orders sought by the Applicant are not pegged on whether the parties are divorced or not. Section 17 of the [Matrimonial Property Act](#) provides as follows:
- (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 It is clear to me that Section 7 of the [Matrimonial Property Act](#) that provides that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition should not be read in isolation. Even when the parties have not dissolved their marriage, any party to such a marriage is at liberty to approach the court for declaration orders under Section 17 of the Act (see [AKK v PKW](#) [2018] eKLR).
- 23 The issue before me is clear that the Applicant seeks declaratory orders, among others, that the suit property is matrimonial property. She claimed to have contributed to its acquisition. The Respondent on the other hand denied that the Applicant made any contributions towards the acquisition of the property, whether monetary or any other kind of contribution. He claimed that he single-handedly purchased the property and developed it and that he has already sold it to a third party and further that the Applicant was aware of the said sale. She denied knowledge of the sale and stated that her consent was neither sought nor given.
- 24 It is clear from the proceedings that although the Respondent claimed that he had sold the property to one Onesmus Kioko Mbithi, this person was not called to testify.
- 25 The law defines matrimonial property under Section 6 of the Act to mean -



- (a) the matrimonial home or homes;
 - b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
- 26 I have no doubt in my mind that the property in issue herein was acquired during subsistence of the marriage between the parties to this suit. The Respondent admitted that their three children were born on the property. Although he claimed that the Applicant kept on going away and coming back to the matrimonial home and that he bought the property secretly without telling her, there is no evidence that the marriage between the two was not subsisting during the time he claimed to have secretly bought the property.
- 27 Contribution of the Applicant to the purchase of the suit property is contested. Contribution is defined under Section 2 of the Act to mean 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.
- 28 Having read, analysed and considered the issues raised in this matter and the supporting evidence of each party, I am persuaded to make a finding, which I hereby do, that the Applicant contributed to the acquisition of the suit property. Her contribution fell in any or in all of the above categories under Section 2. The law under Section 14 of the Act is clear that where matrimonial property is acquired during marriage:
- a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
 - b. (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.
- 29 This position of the law was followed by the Court in *Njoroge -V- Ngari* [1985] KLR, 480, where it was stated that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property.
- 20 Further, the issue of non- monetary contribution is under the law and in various decisions such as *NWM v KNM* (2014) eKLR where it was stated that the court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.
- 21 On the issue of sale of the property in issue to a third party, I have noted that there is a Sale Agreement to a third party dated 3rd November, 2015. The Respondent testified that the third party had sued him in Civil Case 619 of 2016 seeking orders to have him vacate the suit property within 2 weeks. The law is that spousal rights over matrimonial property are proprietary rights. Under Section 12 (1) of the *Matrimonial Property Act*: -



(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.”

22 Having established that the property in issue was acquired during the subsistence of marriage between the parties herein and was contributed to by both and further that spousal rights over matrimonial property are proprietary rights, it is my considered view that any transaction done in violation of section 12 of the *Matrimonial Property Act* cannot have the backing of the law. The Applicant has stated that her consent to sell the property was not sought and the Respondent has not made available evidence to the contrary, it is clear to me that the Respondent entered into an agreement with the third party on 3rd November, 2015 for the sale of the matrimonial property without the consent of the Applicant. This property being matrimonial property, spousal consent was necessary.

23 The OS filed herein is meritorious. The Property, Plot No. xxxx Phase V situated in Ongata Rongai is matrimonial property as defined under Section 6 of the *Matrimonial Property Act*. It cannot be alienated in any form without the consent of the Applicant. Any such alienation would amount to an illegality. I find that the Applicant has established her case and deserves the order of declaration as sought in terms of prayer 1 in the Amended Originating Summons dated 1st November 2019. I grant the following orders always bearing in mind that the issue of the percentage of shares of each spouse’s contribution is yet to be determined and can only be determined and shares assigned to each after dissolution of marriage and further that if this property is in the hands of a third party, then there are still outstanding issues:

1. Prayer 1 as sought is granted as prayed in the Amended Originating Summons.
2. Prayer 2 shall issue as prayed.
3. Prayer 3 shall issue as prayed.
4. I decline to issue Prayer 4 for the reason that it features a party who is not enjoined in these proceedings and who has not been heard.
5. This being a family matter, I order that each party shall bear own costs.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF FEBRUARY 2022.

S. N. MUTUKU

JUDGE

