AIS v NM (Originating Summons E002 of 2022)
[2024] KEHC 13637 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13637 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

ORIGINATING SUMMONS E002 OF 2022

JN ONYIEGO, J

NOVEMBER 4, 2024

IN THE MATTER OF MATRIMONIAL PROPERTY ACT 2013

BETWEEN

AIS .... APPLICANT

AND

NM .... RESPONDENT

JUDGMENT

1. Through an originating summons dated 10th day of June 2022, brought pursuant to Sections 2,6,7,9 and 17 of the *matrimonial property Act*, the applicant herein sought the following orders;
    a. That this honourable court do make a declaration that the suit property belongs to the applicant herein.
    b. That this honourable court be pleased to grant a permanent injunction against the respondent whether by himself, his agents, and or his servants from wasting, damaging, alienating, selling, removing or disposing of property being plot registration number T.9X within Korondile Watiti Road pending hearing and determination of this application.
    c. That costs of this application be provided for
    d. That the honourable court be pleased to make such further orders as it may deem fair, just and expedient in the circumstances of this case.
2. The application herein is grounded on the particulars stated on the face of it and further amplified by the averments contained in the affidavit in support sworn by the applicant on 10-06-2022.
3. The applicant's case is to the effect that sometime the year 2001, she got married to the respondent herein. That their marriage was blessed with five children namely; F 16 years old, N 15 years, M 14

years, A 11yrs and D age 10 yrs. That their marriage hit a rock and irretrievably broke down leading to divorce on 05-07-2021.

4. The applicant's claim is that during the subsistence of their marriage, she acquired and therefore became the legal owner of plot registration number T.9X within korondile Waititi road. She averred that she solely acquired the said plot the year 2007 from her father in-law leading to her registration as the absolute owner on 19-09-2011. She further averred that on or about the year 2008, she single-handedly constructed a home thereon using a loan from the constituency women enterprise fund awarded to aftin korondile women group to which she was a member.

5. That following their divorce, the applicant demanded her to move out of the subject property claiming that as a woman and having divorced, she had no right to own property and therefore demanded her to vacate from the premises. Consequently, the responded resorted to violence and creating disturbance besides destruction of property thus evicting her around December 2020. Her attempt to put up a hay store worth 249,395 funded by CDDC for Hilal Korondile youth group was met by resistance and hostility which led to destruction of the said structure.

6. The applicant claimed that the respondent has since threatened to sell the said property hence the prayer for a permanent injunction and a declaration that the property was acquired through her own effort. She attached various receipts as proof of ownership being receipts for; registration of the subject plot (AIS-1), a copy of loan application from constituency women enterprise fund and certificate of registration of Korondile women group (AIS-2), rent payment receipts in respect of the plot (AIS-6), copy of judgment convicting the respondent for assaulting her (AIS-3), copy of Judgment in respect of their divorce(ALS-4).

7. In response, the respondent filed a notice of preliminary objection claiming that this court had no jurisdiction to hear the case this being a dispute over land ownership. However, the preliminary objection was dismissed on account that under section 17 of the *matrimonial property Act* 2013 the court had jurisdiction.

8. Besides, the respondent filed a replying affidavit sworn on the 26th April 2024 denying ownership claims by the applicant. He averred that the plot was ancestral land and all beneficiaries should get their share. He averred that there was no proof that the applicant had bought the subject land from her father. He further stated that he was in the process of petitioning for a grant of letters of administration in respect of the estate of his father. He denied being a trespasser on his father's land. He maintained that the plot in question is measuring 50 by 100 feet and that is where he has been living all through.

9. The respondent also filed a notice of motion dated 23-03-2023 seeking to injunct the applicant from disposing the property pending hearing and determination of the suit herein. However, parties agreed to proceed with the main suit thus compromising the application.

10. During the hearing, the applicant basically adopted her witness statement dated 10-06-22 which is a replica of what is contained in the particulars on the face of the application and the supporting affidavit. Principally, she reiterated the position that the land in question was hers having bought the same from one Osman her father in-law. On cross examination, she stated that the land was given to her in settlement of a debt her father in-law owed her. She further stated that the said land was given to three people.

11. On his part, the respondent reiterated his averments contained in the replying affidavit. Basically, he dismissed the appellant's claim. On cross examination, he stated that he is staying with his family on the said land and that it is ancestral land. He called three witnesses who reiterated his position. Dw2 Alasow Ibrahim adopted his witness statement dated 17-04-2024 stating that the land in question belonged

to the late Osman father to the respondent. Dw3 and dw4 corroborated the evidence of Dw1. They respectively adopted their witness statements dismissing the applicant's claim that she bought the plot from her father in-law.

12. Upon close of the hearing, the applicant filed her submissions through the firm of Odiya and company advocates dated 23-07-24. In submission, counsel submitted on three issues; whether the suit property is matrimonial property; whether the suit property should be shared equally and lastly who bears the costs.

13. With regard to the issue of ownership, counsel reiterated the testimony of the applicant and the production of land rent receipts as proof that she owned property. According to counsel, the applicant has discharged her burden of proof as laid out in the case of Samuel Ndegwa Waithaka v Agnes Wangui Mathenge & 2 others (2017)e KLR.

14. As to the question of equal distribution, counsel contended that the respondent never contributed anything towards the acquisition of the property and that Article 45(3) of *the constitution* on equality does not automatically mean 50 to 50 % equal sharing. To buttress that position, the court was referred to the SCOK holding in the case of Fedration of Kenya Women Lawyers(FIDA) Kenya) & another (Amicus Curiae)(*Petition11 of 2020*)(2020)(2023)KESC4(KLR)Family)(27 January 2023) (judgment).

15. On his part, the respondent did not file submissions. He basically relied on his evidence before court.

16. I have considered the pleadings herein, testimony by both parties and submissions by the applicant. Issues that germinate for determination are;

    a. Whether the applicant and respondent were married and now divorced

    b. Whether they ever acquired any assets or property during the subsistence of their marriage

    c. If the answer to (b) is in the affirmative, what was their individual contribution

    d. What is their individual share.

17. There is no dispute that the applicant and the respondent were married sometime the year 2001 and formally divorced in July 2021. In the case of ENN VSNK (2021)e KLR, it was observed that division of matrimonial property ought or shall have the following facets proved by either party;

    a. The fact of a valid, legal and regular marriage in-law

    b. Dissolution of such marriage by /through an order of the court

    c. That earmarked/listed property constitutes matrimonial property

    d. Contribution by each party to the acquisition/development.

18. Having established the existence of marriage and divorce thereof, issue number one is settled.

19. The next question is whether the plot in question was acquired during the subsistence of marriage and what was their individual contribution if any. There is no dispute that the plot in question is in existence. According to the applicant, she acquired the plot from her father inlaw sometime the year 2007 and had it registered in her name the year 2011. On the other hand, the respondent contended that the plot in question is ancestral land belonging to his late father and that that is where he is staying with his children.

20. What is matrimonial property? Section 6 of the *Matrimonial Property Act* defines 'matrimonial property' as:

    (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.

21. Under Section 2 of the Act, 'Matrimonial home' has been defined as: -

> " 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".

22. In the case of T.M.V. v F.M.C (2018) eKLR, Nyakundi J, expressed 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."

23. From the evidence of the applicant, she bought the property from her father in-law. She again stated that the same was given to her by the father in-law in settlement of a debt owed to her by him. There was no proof tendered that she bought the land as alleged or that it was given in full settlement of a debt owed to her by the father in-law. It is trite law that any sale transaction over land must be reduced into writing for it to be enforceable. See Section 3(3) of the law of contract.

24. The above notwithstanding, the applicant claimed that she had taken possession of the property by being registered as the owner culminating to her paying land rent. Mere payment of land rent and acquisition of receipts thereof is not sufficient proof of ownership of land. See James Muigai Thungu v county Government of Trans-nzoia &2 others (2022) eKLR where the court held that mere production of receipts on payment of rates is not sufficient proof of ownership of land.

25. The applicant did not call any witness to prove that she indeed bought the land from her father in-law. Other than land rent receipts, she did not produce any ownership documents to show that the property was transferred to her by the deceased father in-law. The only evidence available is that the property was gifted to the applicant and the respondent jointly by the respondent's father at no consideration hence matrimonial property.

26. However, both parties admitted that the plot in question is where they have put up their matrimonial home. The applicant claimed that she did develop their single handedly, using funds from a loan acquired from constituency enterprise fund. Besides producing a loan agreement, there was no proof that the same amount went into development of the plot or construction of the home. The respondent equally claimed that he was the one who put the home. None of them produced receipts for purchase of construction material or engagement of fundis or an approval of development plan.

27. It is trite law that he who alleges must prove. See Sections 107, 108 and 109 of the *Evidence Act*. In the circumstances of this case, parties were not able to prove their estimated or exact contribution towards the development of the property which they were gifted by the respondent's father. Ultimately, each party must have contributed towards the establishment of their home either directly or indirectly.

28. Section 2 of the *matrimonial property Act* states that contribution means; monetary and non-monetary contribution which includes;

a. Domestic work and management of the matrimonial house

b. Child care

c. Companionship

d. Management of family business or property; and

e. farm work

28. In the case of Esther Wanjiku Mwaura Vs Mwaura Ole Mashua Civil Appeal No. 261 of 2019 court of appeal at Nairobi the court emphasized on the point that matrimonial property is all about contribution be it monetary or non-monetary. See also R.M.M Vs T.S.M(2015) eKLR where the court held the position that each party's contribution ought to be assessed and the same ought to form the basis for Division.

28. The court in Echaria vs Echaria(2007) e KLR set out clear principles on what constitutes contribution in a matrimonial dispute by stating as follows;

> " Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately 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" while heeding the caution by lord Pearson in Gissing v Gissing…"

28. However, section 14 of the *matrimonial property Act* does recognize that a spouse can be registered as the sole owner of property but hold in trust of the other spouse. For avoidance of doubt, Section 14 does provide as follows;

Where matrimonial property is acquired during marriage;

a. In the name of the spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

b. In the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interest in the matrimonial property are equal.

28. In the case of PWK Vs JKG (Supra), the court had this to say;

> " We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50;50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five judge bench of this court in Echaria v Echaria(Supra)".
>
> "where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proved 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 maximum equality is equity while holding the caution of lord Pearson in Gissing Vs Gissing (19700 2 All ER 780 page 788". Despite the respondent submitting that the said properties

were acquired by him to the exclusion of the applicant, the applicant on the other hand painstakingly averred that the same were acquired through proceeds from family business.

28. Based on section 7 aforesaid, it is my understanding that where contribution towards the acquisition of matrimonial property can be identified, in the event of divorce or dissolution of the marriage, the said property will be divided between the spouses in accordance with their respective contribution towards the acquisition. In that event, there is no automatic presumption of 50:50 ownership of the said property. In my view, the 50:50 presumption is only to be invoked where there is evidence that both spouses contributed towards the acquisition of the property and there is no way of determining each spouse's contribution thereto. It is in that light that I concur with the position in Falconer vs Falconer [1970] 3 All ER where Justices of Appeal held that:

"And the principles applicable to whether a matrimonial home standing in the name of the husband belonged to them both jointly (in equal or unequal shares) were that the law imputed to the husband and the wife an intention to create a trust for each other by way of inference from their conduct and the surrounding circumstances; an inference of trust would be readily drawn when each had made a substantial financial contribution was stated to be such or indirectly as where both parties went out to work and one paid the housekeeping and the other paid the mortgage instruments; but whether the parties held in equal shares would depend on their respective contributions."

28. Outrightly, this court notes that there is no rule of the thumb that in the event of a divorce, the property must be shared in the ratio of 50:50. That each case must be decided on its own facts was appreciated by the Court of Appeal in TKM v SMW [2020] eKLR where it stated as follows:

> " We bear in mind the edict in Muthembwa v Muthembwa (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness."

28. In the case of Federation of Women Lawyers Kenya (FIDA) v Attorney General & Another [2018] eKLR it was 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 on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. First, the Act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage."

28. Guided by the above case law and the statutory provisions cited above, it is my finding, in the absence of any specific proof as to contribution by either party, that plot number T.9X be and is hereby owned jointly being a gift from one Osman father and father inlaw to the respondent and applicant respectively, and that the same having been developed during their marriage, equity demands that the property is held in trust for each other's' benefit in equal share that is to say 50:50%. In the event parties are not able to agree on the mode of sharing, the property can be sold after valuation by a mutually agreed valuer and the proceeds realized therefrom be share equally.

28. Regarding the costs, this is a family matter and each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 4TH DAY OF NOVEMBER 2024

J. N. ONYIEGO

JUDGE