JKG v MGM (Civil Appeal E127 of 2022)
[2024] KEHC 13867 (KLR) (5 November 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E127 OF 2022

CJ KENDAGOR, J

NOVEMBER 5, 2024

BETWEEN

JKG ..... APPELLANT

AND

MGM ..... RESPONDENT

JUDGMENT

Background

1. This dispute is unique because the parties disagree almost entirely. I will, therefore, begin by highlighting the few issues that both parties seem to agree on. Afterwards, I will address the disputed facts.

2. The Appellant and the Respondent agree that they met and started a friendship in 1996. They had a child together in 2001. In 2007, the Appellant bought a parcel of land from Jane Karimi Gituma at the purchase price of Kshs.180,000/=. The sale agreement stated that the Appellant was the purchaser. The Respondent was a witness in the written sale agreement, and she appended her signature as a witness.

3. The land was subsequently registered jointly in their names. Thereafter, a house was constructed on the parcel of land, and its construction was finalized in 2011. The Respondent came to live in the house in 2011 against the will of the Appellant. The Appellant sought to evict the Respondent from the house. She obtained a court injunction preventing the Appellant from evicting her from the house.

4. The parties do not agree on how each contributed to the purchase of the parcel. The Appellant states that he solely paid the purchase price. He maintains that the Respondent did not contribute financially or in any other way to the purchase of the parcel. On the other hand, the Respondent disputes this. She states that she paid/contributed the whole amount and that the Appellant only processed the title deed.

5. The parties also dispute the circumstances under which the land was registered in their joint names. The Respondent states they agreed with the Appellant to have the suit property registered jointly so that they could build their matrimonial property thereon. On the other hand, the Appellant disputes the agreement to have the parcel registered jointly. Instead, he states that the Respondent fraudulently colluded with the surveyor to have the land registered jointly behind his back.

6. Parties also disagree on their contribution to the construction of the house. The Respondent stated that she contributed financially to the construction of the house, and her contribution was more than that of the Appellant. On the other hand, the Appellant stated that he solely financed the construction of the house and that the Respondent did not contribute financially or in any other way to the construction of the houses.

7. Parties do not also agree on the nature of their relationship, whether it was a marriage or a mere friendship. The Appellant stated that the Respondent was not his wife and that he had never married her under any law. He states that what they had was just a friendly relationship from which the child was born. On the other hand, the Respondent disputes this. Instead, she states that she was cohabiting with the Appellant as a married couple when purchasing the property in 2007 and that there was a valid marriage between the two by virtue of cohabitation.

8. The Parties also disagreed on whether they cohabited. The Respondent claimed that she cohabited with the Appellant as a husband and wife for 16 years, from 1996 to 2012. She stated that at the time of acquiring the property in 2007, they were still cohabiting as a married couple. On the other hand, the Appellant disputed this and stated that he has never cohabited with the Respondent. He stated that he has never cohabited with the Respondent for such a period that they could be construed as husband and wife at all.

9. The Respondent filed a suit, CM Civil Case No 144 of 2012, in which she sought the following orders;

    1. A declaration that Land Reg. No Kiirua/Kiirua/1XX0 was jointly acquired and/or purchased by both [the Respondent] and [the Appellant].

    2. That there be an equal division of land Reg. No Kiirua/Kiirua/1XX0 and all the developments thereof between [the Respondent] and [the Appellant].

    3. A permanent injunction restraining [the Appellant], his agents, assigns, servants or anybody else acting on his behest from entering, occupying, utilizing and/or interfering with the [Respondent's] occupation and utilization of the matrimonial home and all that matrimonial properties situate of L.P No Kiirua/Kiirua/1XX0.

10. The Appellant filed a Counter-Claim and sought the following order;

    1. Cancellation of the name of [the Respondent] as co-proprietor of land parcel No Kiirua/Kiirua/1XX0 and Registration of [the Appellant] as Sole Proprietor of land Parcel No Kiirua/Kiirua/1XX0.

11. The Court delivered a judgment on 17th August, 2022 where it held that the Respondent had proved her case on a balance of probabilities and entered judgment against the Appellant. The court found that the registration of the suit land was proper and could not be impeached. It held that the Appellant failed to demonstrate the Respondent was registered as a proprietor through fraud, misrepresentation, illegally, unprocedurally, and for that a corrupt scheme.

12. The Appellant was dissatisfied with the judgment and appealed to this Court by filing a Memorandum of Appeal dated 16th September, 2022. He listed the following grounds of Appeal:-

1. The Learned Chief Magistrate erred in law and in fact for holding and for reasons that held that Respondent contributed financially towards purchase or acquisition of land Parcel Number Kiirua/Kiirua/1XX0 whereas the Respondent did not prove on balance of probability that she contributed financially towards purchase or acquisition of land Parcel Number Kiirua/Kiirua/1XX0.

2. The Learned Chief Magistrate erred in law and in fact for holding and for reasons that he held that land Parcel Number Kiirua/Kiirua/1XX0 was jointly acquired or purchased by both the Appellant and the Respondent whereas the Respondent was not named as a purchaser in the sale agreement in respect of the aforesaid parcel of land.

3. The Learned Chief Magistrate erred in law and in fact for holding and for reason that he held that land Parcel Number Kiirua/Kiirua/1XX0 was jointly acquired/purchased by both the Appellant and the Respondent whereas the Respondent did not produce any document to prove that she contributed financially towards purchase of the aforesaid parcel of land and or development of the same.

4. The learned Chief Magistrate erred in law and in fact for holding and for reasons that held there was a presumption of marriage between the Appellant and the Respondent whereas the Respondent did not prove on balance of probability that a marriage existed between herself and Appellant.

5. The learned Chief Magistrate erred in law and in fact for holding and for reasons that he held that land Parcel Number Kiirua/Kiirua/1XX0 was jointly acquired by both the Appellant and the Respondent whereas the Respondent did not prove on balance of probability that she was employed and/or earning any income as at the time of acquisition of the aforesaid parcel of land.

6. The learned Chief Magistrate erred in law and in fact for holding and for reasons that he held that land Parcel Number Kiirua/Kiirua/1XX0 was jointly acquired by both the Appellant and the Respondent whereas the Respondent did not prove on balance of probability that a marriage existed between herself and the Appellant.

7. The learned Chief Magistrate erred in law and in fact for failing to find that the Respondent was registered as co-proprietor of land parcel No Kiirua/Kiirua/1XX0 fraudulently, illegally, and/or procedure whereas the Appellant had proved to the required standard that the Respondent fraudulently, illegally, and unprocedurally inserted her name in transfer form and application for consent of control board in respect of the aforesaid parcel of land.

8. The Learned Chief Magistrate erred in law and in fact for holdings and for reasons that held that there should be equal sub-division of the suit land and all development thereon between the Appellant and the Respondent where the Respondents did not prove on balance of probability that she contributed financially towards acquisition or purchase of the aforesaid parcel and whereas the Respondent did prove on balance of probability that a marriage existed between herself and the Appellant.

9. The learned Chief Magistrate erred in law and in fact for issuing injunctive reliefs against the Appellant in respect of the suit land and development thereon whereas the Appellant had proved on balance of probability that he solely purchased and/or acquired the suit land and solely financed development hereon.

10. That the Judgment was against the weight of evidence.

13. He asked the Court to set aside the Judgment of the learned Chief Magistrate and dismiss the Respondent's suit in the [lower] Court. He also asked the Court to allow his counter-claim as prayed in the [lower] court. The appeal was canvassed by way of written submissions.

The Appellant's Written Submissions

14. The Appellant submitted that the trial Court was wrong in holding that the Respondent contributed financially towards the purchase or acquisition of L.R. No Kiirua/Kiirua/1XX0. He argued that the Respondent did not prove that she contributed financially towards the purchase because she did not produce any document to prove that she contributed financially towards the purchase. He also submitted that the Respondent did not prove that she was employed and/or earning any income as at the time of the acquisition of the property. He also submitted that the Court was wrong in holding that the property was jointly acquired because he was the purchaser as per the same agreement, and he is the one who paid the purchase money.

15. In addition, he faults the lower Court for holding that there was a presumption of marriage between the appellant and the Respondent because the Respondent did not provide any evidence that a marriage existed between the Respondent and the Appellant. He argued that there was no marriage between them because he did not pay any dowry to the parents of the Respondent, and they did not cohabit for such a period as members of the public would presume them as husband and wife, respectively. If anything, he argued that the Respondent had abandoned the prayer for dissolution of the marriage in the amended plaint dated 21st March, 2018.

16. Lastly, he argued that the lower Court was wrong in directing that the land be subdivided equally between the Appellant and the Respondent when the Respondent had not contributed to the purchase and development of the parcel. He maintained that he solely financed the development of the parcel and that the Respondent's registration as a co-owner was acquired illegally and fraudulently. Lastly, he submitted that the Court has jurisdiction to hear and determine this appeal because the predominant issue is whether the suit property was a matrimonial property jointly owned by the parties herein.

The Respondent's Written Submissions

17. The Respondent submitted that this being a Civil Court, it has no jurisdiction to deal with the appeal. She submitted that the issues in this appeal lie squarely on the ELC Court and urged this Court to dismiss this appeal for want of jurisdiction. She stated that the dispute herein, both in the plaint and in the counterclaim, relates to the ownership of a parcel of land No. Kiirua/Kiirua/1XX0.

18. In addition, the Respondent argued that the trial court was right in holding a presumption of marriage between the parties because she had proved that she cohabited with the Appellant for over 16 years. She also argued that her family members, friends, and relatives all knew that she, Appellant and the Respondent were a husband and a wife. In addition, she argued that they cost shared to purchase the suit land and build a dwelling house. She defends her alleged marriage to the Appellant by arguing that if indeed they had not married as alleged by the Appellant, the Appellant would not have sat in his comfort zone and allowed her to be included in the title.

19. Lastly, the Respondent submitted that the Appellant had not proved fraud against her as alleged in the Counter Claim. She argued that the trial Court did not make any single mistake in its decision. She relied on the following cases: Estate of M'Murianki M' Mugwika (Deceased) (2019) eKLR, MNK v POM*; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021*) [2023] KESC 2 (KLR); Denis Noel Mukhulo Ochwada & Another v Elizabeth Murungari Njoroge &

Another [2018] eKLR, and Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR.

Issues for Determination

20. Each party identified several issues for determination and made considerable arguments around those issues. However, I have looked at their respective submissions and I find that these are the issues for determination;

    a. Whether the Parties were married or if there was a presumption of marriage at the time of acquiring the property;

    b. Whether a resulting trust can be imposed and in whose favour, given the circumstances.

    c. Whether either party has acquired any interests in the property.

The Duty of the Court

21. Being a first appeal, the duty of this Court is to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. This principle was set out in Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123 where the Court held:

> "...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

Whether the Parties were married or if there was a presumption of marriage at the time of acquiring the property;

22. I find it prudent first to determine whether the parties were married or could be regarded as cohabitees at the time of acquiring the property. The marriage issue is important because it determines whether the subject suit property can be regarded as matrimonial property. The High Court in the case of N L S v B R P [2016] eKLR, underscored this point where is held that;

> "It would be an academic exercise to elaborate on this point in that matrimonial property arises where there is a marriage. It is clear that no presumption of marriage arose and therefore no matrimonial property can be considered. To clear the matter Section 6 of the *Matrimonial Property Act*, No. 49 of 2013 defines matrimonial property as:
>
> (1) For the purposes of this Act, matrimonial property means—
>
> (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.
>
> (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

Section 2 of the *Matrimonial Property Act* defines a matrimonial home as: -

> " 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."
>
> It would also be flogging a dead horse if the alleged issue of contribution is considered. Firstly, because no presumption of marriage arises therefore there is no matrimonial property."

23. A finding on whether a certain property is a matrimonial property or not determines how Courts are to distribute the property in dispute. In the case of the Court of Appeal in OKN v. MPN [2017] eKLR hold that:

> " Not even the presumption of marriage as understood in law could save the situation because the union was in limine nonexistent, contracted without capacity. Such unions present many challenges to those involved and are fraught with legal uncertainties. There being no marriage between the parties, the two properties cannot be shared in accordance with family law." (emphasis added)

24. The parties hotly disputed the issue of marriage and cohabitation. The Respondent claimed that she cohabited with the Appellant as a husband and wife for 16 years, from 1996 to 2012. In her statement, she stated that they would visit each other's houses and spend time there. She also stated that by the time their son was born in 2000, they were cohabiting. She also stated that the Appellant would live in her house in the staff quarters of the Kiriaine Mission Hospital while on leave from his job as a police officer. She stated that at the time of acquiring the property in 2007, they were still cohabiting as a married couple.

25. On his part, the Appellant denies that they ever cohabited with the Respondent. He also stated that he had never married the Respondent under any law. Although he admits that they had a friendly relationship with the Respondent as a result of which the child was born, he insisted that he has never cohabited with the Respondent for such a period that they could be construed as husband and wife at all.

26. The lower Court presumed the existence of a marriage between the two on account of long cohabitation. It held that the parties were cohabitees and had held themselves out as a husband and wife. It pronounced itself as follows;

> In consideration of the several factors, existing in the said relationship including the period of stay, their level of interaction, and close prostrating during the said period, the court concludes that the parties cohabited, while holding out, of other right thinking members of the society who must have presumed that the two were in a marriage. During the transaction the court concludes that the 2 must therefore have gone through the whole transaction as a couple."

27. I have reexamined the evidence placed before the lower Court and the applicable law to ascertain whether the lower Court arrived at the correct position.

28. Under Section 2 of the *Marriage Act*, "cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage. I will follow this definition.

29. The Court of Appeal in Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held as follows:

> " Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.

30. In the case of MNK v POM; *Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021*) [2023] KESC 2 (KLR), the Supreme Court held as follows;

> " 64. We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:
>
> 1. The parties must have lived together for a long period of time.
> 2. The parties must have the legal right or capacity to marry.
> 3. The parties must have intended to marry.
> 4. There must be consent by both parties.
> 5. The parties must have held themselves out to the outside world as being a married couple.
> 6. The onus of proving the presumption is on the party who alleges it.
> 7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
> 8. The standard of proof is on a balance of probabilities."

31. The Respondent alleges that there was cohabitation for the purposes of a presumption of marriage. Based on the above principles, she had the onus of proving the presumption.

32. How do we prove cohabitation? The Court in Mary Njoki v John Kinyanjui Mutheru [1985]eKLR observed as follows;

> " In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently.....To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to are all too apparent in the Yawe and in Mbiti (supra)."

33. In the case of SWK v RNK [2019] eKLR, the court held as follows;

> " 22. The Respondent's evidence on alleged cohabitation, and strenuously denied by the Appellant, was not corroborated by any other witness. Not a single independent witness was called, or probative documentary material produced by the Respondent to confirm such cohabitation. Not even a single photograph was placed before the Court to support the alleged cohabitation."

34. The Court went on to state that;

> " Had she cohabited with the Appellant in Nakuru since 2006....., she would surely have been able to call witnesses such as parents, siblings, friends or neighbours or to tender documentary evidence in proof, beyond the four MPesa transactions.
>
> 26. Reviewing the evidence tendered in the lower Court, I am of the view that there was neither credible proof of cohabitation between the parties."

35. Similarly, in the case of Vincent Aliero Ayumba v Livingstone Eshikuri Liakayi & 2 others [2017] eKLR, the High Court at Kakamega held as follows;

> " 35. In my analysis of the evidence, the Appellant was only an intimate boyfriend to the deceased. There was no basis for the witnesses who testified to hold that the two were husband and wife. The fact of two people, a man and woman visiting each other and keeping each other company does not necessarily lead to the conclusion that the two are married. Such parties must expressly make their intentions known to the public, their friends and family members."

36. In the case of In re Estate of Kihara Thatu Gatu (Deceased) [2019] eKLR, the court observed as follows;

> " 40. The burden of proof again lay on her to show this long cohabitation. Evidence of children between a man and a woman is not necessarily evidence of long cohabitation.
>
> 41. The petitioner needed to call evidence to show that she had a long cohabitation with the deceased and that they held each other out as man and wife.
>
> 42. As stated in the case of MWK vs AMW (supra), there has to be evidence that the long cohabitation is not a close friendship between a man and a woman, that she is not a concubine but that the cohabitation has crystalized into a marriage and that it is safe to presume that there is a marriage.
>
> 43. The Judge in the MWK VS AMW case went ahead to state;
>
> > " "Since then, our case law has been consistent in following the English Common Law in requiring that a presumption of marriage arises only when a person proves two factual predicates:
> >
> > a. Quantitative element – namely the length of time the two people have cohabited with each other; and
> >
> > b. Qualitative element – namely acts showing general repute that the two parties held themselves out as

husband and wife. Factors tending to demonstrate these qualitative elements include whether the parties had children together; whether the community considered the two as husband and wife; whether the two carried on business jointly or whether they took a loan jointly; whether the two held a joint bank account – and so forth."

37. The court went further to state as follows;

> " 44. These factors in my view must be applied conjunctively and not disjunctively. I am fortified in this holding by the realization that for example a man and a woman may have children over a long period of time yet they continue living separate lives hence no presumption of marriage can be made. At other times a man and woman may be engaged in business together for long yet that alone does not lead to a presumption of marriage. It is the sum total of the factors that leads to the presumption of a marriage. Whether the community considered the two as husband and wife is central.
>
> 45. The person asserting the presumption must of necessity put in evidence which, on a balance of probabilities, demonstrates the quantitative and qualitative elements alluded to above (see MWK vs AMW case).
>
> 46. In our instant case, other than stating that she cohabited with the deceased from 1988 and they bore two (2) children, the petitioner provided no evidence of such cohabitation and repute that the two (2) held out as husband and wife. She did not call any member of the community in which they lived or even a family member to prove the cohabitation and general repute of a husband and wife."

38. In addition, in the case of In re Estate of Jackson Nduva Kathula (Deceased) [2018] eKLR, the court held as follows;

> " The 1st Petitioner stated that the Deceased used to visit her mostly over the weekends. That she visited his home and he also visited her home. In the case of NUFR vs. MSC HCCC No. 57 of 2011. It was stated that; the Applicant had the burden of marshalling evidence from which the Court could decide to declare existence of a marriage from prolonged cohabitation or not. Further, that she did her best in adducing such evidence but unfortunately the element of reputation of what may be referred to as the community view of cohabitation fell short. That evidence of community element can only be adduced by members of the community themselves.
>
> 18. None of the relatives of the Deceased were called as witnesses to confirm if indeed there had been long cohabitation between the 1st Petitioner and the Deceased. Such evidence was crucial. The alleged witnesses should have been available to be cross examined."

39. The question that comes to the fore is whether the Respondent adduced enough evidence to prove her alleged long cohabitation with the Appellant. Upon reviewing the evidence produced at the lower Court and the typed proceedings, it occurs to me that the Respondent did not call other independent witnesses to prove the fact of long cohabitation with the Appellant. She did not call other members of

the society to testify that the parties had held themselves out to the outside world as being a married couple. She was the only witness and she did not produce any documentary evidence.

40. I have reviewed the evidence presented before the lower Court and the application of the above legal principles to the circumstances of this case. I find that the lower Court misinterpreted the facts and arrived at a wrong conclusion on the issue of the presumption of marriage. There was no basis for the lower Court to presume a marriage between the two parties on account of long cohabitation. The Respondent did not provide enough evidence to show that they had lived together for a long period of time. She also did not show that they had held themselves out to the outside world as being a married couple.

41. For the above reasons, I find that the presumption of marriage cannot apply to the parties in the circumstances and conclude that they were not married.

42. In my view, the relationship between the Appellant and the Respondent was an interdependent relationship outside of marriage. An interdependent relationship was described by the Supreme Court of Kenya in the case of MNK v POM*; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021*) [2023] KESC 2 (KLR) where the Court held as follows:

> "Marriage was an institution that had traditional, religious, economic, social, and cultural meanings for many Kenyans. However, it was becoming increasingly common for two consenting adults to live together for long durations where these two adults had neither the desire, wish nor intention to be within the confines of matrimony. There existed relationships where couples cohabit with no intention whatsoever of contracting a marriage. In such contexts, such couples may choose to have an interdependent relationship outside of marriage. While some may find that amoral or incredible, it was a reality of the times we live in today.
>
> A person could have been in a marriage before and the marriage was no more due to the death of a spouse or divorce. Due to their prior experiences, such persons may choose to have an interdependent relationship outside of marriage. For others, it could just be their desire never to marry but to have a partner without the confines of marriage. Where such a situation was evident and there was no intention whatsoever of contracting a marriage, the presumption of marriage must never be made where this intention did not exist. Marriage was a voluntary union. Courts should shy away from imposing marriage on unwilling persons.
>
> Statistics revealed that a man and a woman could choose to cohabit with the express intention that their cohabitation did not constitute a marriage. The pervasiveness of having interdependent relationships outside marriage over the past few decades meant that no inferences about marital status could be drawn from living under the same roof. nter-dependent relationships outside marriage were not a new concept."

43. The rule established by the Supreme Court in the case of MNK v POM (Above) has subsequently been applied by the High Court in several cases. It was followed by the High Court in the case of In re Estate of Alloys Obunga Aboge (Deceased) (Succession Cause E001 of 2022) [2023] KEHC 18520 (KLR) (30 May 2023), where the court said as follows:

> "Accordingly, I am satisfied that a presumption of marriage did not arise between the appellant and the deceased. In my view what existed is what the Supreme Court referred to as an 'Adult Interdependent Relationship outside marriage'[AIR] which though not recognized in Kenya by statute yet, but that it exists and the apex Court even proposed for

enactment of a statute to provide for such relationships and the rights and duties of the 'cohabitees' in such relationships. The Supreme Court was also clear that presumption of marriage should be the exception and not the rule. Having so found, I find that the appellant herein not being a wife or presumptive wife of the deceased as no such evidence was adduced to the required standard of on a balance of probabilities, I find and hold that the Appellant herein was not a dependant of the deceased Alloys Obunga Aboge."

44. How, then, should the Court deal with the distribution of property between parties in an Adult Interdependent Relationship? The Supreme Court in MNK v POM (Above ownership deliberated the same issue and observed as follows;

> " 82. Kenya, just like many other countries, does not have laws to protect parties to cohabitation in case of a dispute relating to property acquired during the subsistence of such cohabitation. However, the issue of cohabiting couples' property has increasingly become a social problem due to the high number of people resorting to cohabitation and in the process of acquiring properties, upon separation there is no legislation governing the division of property.
>
> 83. While we acknowledge the difficulties of resolving such disputes, a laissez fair approach can result in injustice for parties to a relationship who might be more vulnerable or who contribute less in financial terms than their partners. Conversely, we do note that the interventionist approach risks creating uncertainty, and attaching a monetary value to the party's actions within this type of relationship is often highly complex as is in the present case."

45. Courts have held that the distribution of property held by persons in Interdependent Relationships should be guided or governed by the law of Trusts. In Walker v Hall [1984] FLR 126, Lord Lawton observed as follows:

> " During the past two decades the Courts have had to consider on a number of occasions the division of property between men and women living together without being married..... Courts have been able to make an equitable division of property between spouses when a marriage breaks down and a decree of divorce is pronounced. No such jurisdiction exists when the cohabitees are unmarried. When such a relationship comes to an end, just as with many divorced couples, there are likely to be disputes about the distribution of shared property. How are such disputes to be decided? They cannot be decided in the same way as similar disputes are decided when there has been a divorce. The courts have no jurisdiction to do so. They have to be decided in accordance with the law relating to property... There is no special law relating to property shared by cohabitees any more than there is any special law relating to property used in common by partners or members of a club. The principles of law to be applied are clear, though sometimes their application to particular facts are difficult. In circumstances such as arose in this case the appropriate law is that of resulting trusts. If there is a resulting trust (and there was one in this case) the beneficiaries acquire by operation of law interests in the trust property."...(emphasis mine)

46. Resulting Trust was defined by the Court of Appeal, in the case of Charles K. Kandie v Mary Kimoi Sang [2017] eKLR, where the Court held that;

> "A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention.
>
> Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra). (emphasis added)

47. The Court of Appeal also applied the doctrine of Resulting Trust in Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, where it held as follows;

> "Applying the emphasized principles to the case before us, all indications are that a resulting trust arose as between the respondent and the 1st appellant. As stated in the authority above, a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial. It is common ground that all the purchase money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1st appellant."

Whether a resulting trust can be imposed and, based on the circumstances at hand, identifying the appropriate beneficiary;

48. The above authorities hold that a resulting trust will automatically arise in favour of the person who advances the purchase money. It now becomes important for this Court to ascertain the issue of financial contribution to the acquisition of the suit property.

49. The parties do not agree on how each contributed to the purchase of the parcel. The Appellant states that he solely paid the purchase price. He maintains that the Respondent did not contribute financially or in any other way to the purchase of the parcel. On the other hand, the Respondent disputes this. She states that she paid/contributed the whole amount and that the Appellant only processed the title deed.

50. The Respondent gave contradicting accounts on whether she contributed to purchasing the suit property. Throughout the trial, she took different and contradicting positions on this issue. In her statement dated 22nd May, 2012, the Respondent stated as follows: 'I later bought the parcel [Suit Property], but during registration, his name was inserted.' In her supporting affidavit dated 22nd May, 2012, she deponed that: 'I had worked and bought land parcel [Suit Property].'

51. She took a different position in 2018 when she amended her pleadings. In her Amended Plaint dated 26th March, 2018, the Respondent stated that she contributed the largest share of the purchase price. She did not specify how much she had contributed. In her written witness statement, the Respondent claimed she pooled her savings to buy the land. In the statement, she did not state how much she contributed.

52. However, the glaring contradictions about her contribution played out during the hearing of the case when she took the witness stand on 6th June, 2018. In her testimony in Court, she stated that she paid the whole amount of the land purchase, Kshs.180,000/=. At the hearing, she neither produced the pay slips for 2007 nor the letter of appointment to show she was employed at the time in question. She also did not provide documentary evidence, especially on the financing of the entire Kshs.180,000/=. In addition, although she stated that she pooled her savings, she did not produce evidence of taking out a loan or withdrawing such amounts from a financial institution.

53. On the other hand, the Appellant gave a consistent account of his contribution to the purchase of the suit property. In his Statement of Defence, dated 4th June, 2012 the Appellant stated that he solely purchased the suit property and solely financed construction of the house. In his witness statement, he maintained the same. When he testified in Court on 28th February, 2018, he told the Court that the Respondent did not give him any cash towards the purchase of the suit property. He testified that he took a loan of Kshs.224,423/= in December, 2005 from his SACCO to fund the purchase and produced his payslip as an exhibit. He also produced a copy of a service contract between him and the contractor who built the house.

54. Based on the above analysis, I am inclined to hold that the Appellant solely advanced or paid the purchase price for the Suit Property. I am persuaded by the Appellant's version of evidence and hold that he has, on a balance of probabilities established that he single-handedly funded the purchase. Ultimately, I find that there is a resulting trust in favour of the Appellant with respect to the Suit Property.

Whether the Respondent has acquired any interests in the Property

55. I hold the view that the Respondent's occupation and stay in the suit property has been acrimonious from inception. It appears to me that she entered the house against the will of the Appellant. She has also not proved that she has contributed financially to the construction of the house. She has also not proved that she has developed the suit property since she came in in 2011. She did not prove that she has since contributed to maintaining and improving such properties. In my view, the Court cannot confer any interest on her where she has proved none.

56. In the Supreme Court decision in MNK v POM, the Court held that both parties had a beneficial interest in the property and shared the property 70%: 30%. I, however, hold that the current case is distinguishable from the Supreme Court Case. The facts of the two cases differ significantly. In the Supreme Court Case, both parties had contributed to the purchase. The Supreme Court held:

> " 94. In assessing the beneficial interests due to the parties, we cannot only be primarily focused on the direct financial contribution to the acquisition of the property but also interrogate other forms of contribution such as actions of the parties in maintaining and improving such properties.
>
> 95. The record shows that the Appellant and the Respondent jointly contributed to the acquisition and the construction of the suit property and the two jointly invested in the property for more than 20 years. Therefore, we are of the view that the Respondent did prove his case on a balance of probabilities that the suit property was acquired and developed through joint efforts and/or contribution of the parties. We therefore make a finding that the share of the parties is apportioned as 70% for the Appellant and 30% for the Respondent based on their respective contributions."

Disposition

57. Ultimately, I hold as follows;

    i. The Appeal succeeds. The lower Court's judgment dated 17th August, 2022 is hereby set aside.

    ii. A presumption of marriage between the appellant and the respondent does not exist. The relationship between the Appellant and the Respondent was an interdependent relationship outside of marriage,

    iii. The Appellant solely paid the purchase price for the suit property land Parcel No. Kiirua/Kiirua/1XX0 and the developments thereof. The Respondent does not hold any beneficial interests in the property.

    iv. I also hold that there is a resulting trust in favour of the Appellant in the circumstances, and therefore, I allow the Appellant's Counter-claim.

    v. No order as to costs.

58. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 5TH DAY OF NOVEMBER, 2024.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Ms. Beryl

Mr. Gitonga Advocate for the Appellant

No attendance by the Respondent