



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KILGORIS

MATRIMONIAL CAUSE NO. 01 OF 2021 (OS)

(FORMERLY NAROK HIGH COURT MATRIMONIAL CAUSE NO. 01 OF 2020)

(CORAM: F.M. GIKONYO J.)

HNM.....APPLICANT /PETITIONER

VERSUS

FTS.....RESPONDENT

JUDGMENT

1. By Originating Summons filed on 30th December 2020 expressed to be brought under section 1A, 1B and 3A of the Civil Procedure Act, and Order 37 of the Civil Procedure Rules 2010. The Applicant is seeking the following orders;

i. A declaration be issued that the properties listed herein with improvements and the buildings thereon were acquired by the joint funds and efforts of the parties herein during the subsistence of their marriage and registered in the name of or in the position of the defendant and or both parties and the same is jointly owned by the Plaintiff and the Defendant being;

a. Transmara/ Enoosaen/ [particulars withheld] located at Kilgoris within Narok county

b. 4 grazing bulls in Kilgoris.

ii. The properties be shared equally and if incapable of being shared that they be sold and the net proceeds be shared equally between them.

iii. An order restraining the respondent from evicting the Petitioner from the matrimonial home.

iv. The Respondent transfers at his own cost and expense proportions of the said properties to the Applicant.

v. A declaration that the Respondent is accountable to the Petitioner in respect of all the income and rental proceeds in respect of the matrimonial properties.

vi. The properties and the income aforesaid be settled in proportions aforesaid or as the court may order.

vii. An injunction to issue restraining the Respondent, his servants and / or agents from alienating, wasting, damaging and / or otherwise interfering with the above mentioned properties pending hearing and determination of the originating summons.

viii. The Respondent do bear the costs of this application.

2. The originating summons was supported by the Applicant's affidavit dated 30/12/2020.

3. The Respondent opposed the OS through his replying affidavit dated 26th January 2021 and filed in court on 28th January 2021.

4. Directions were given on 1/03/2021 that the OS be canvassed by way of written submissions.

Brief facts

5. The Applicant/ Petitioner was married to the Respondent herein and together they were blessed with two issues.

6. This matrimonial property cause follows after a divorce cause dated 17th August 2020 filed by the Respondent against the Applicant. The marriage between the Applicant and the Respondent was dissolved vide judgment delivered on 24th November 2020 in Kilgoris Principal Magistrate's Divorce Cause No. x of 2020.

Applicant's Submissions

7. In her written submissions dated 26th April 2021 and filed on 29th April 2021, the Applicant submitted that the Applicant and the Respondent got married in 2014-after the demise of the Respondent's 1st wife in 2012 who left 6 children behind. The Applicant has been living with the Respondent and the children until 2020. The Applicant played a big role helping the Respondent in raising the children since she was a house wife and also did some businesses to enable support her husband.

8. The Applicant gave birth to the 2 children with the respondent and they have been living together until the Respondent started being unfaithful and abusive. Consequently, he filed for divorce at Kilgoris law courts. The marriage was dissolved.

9. The act defines matrimonial home to mean 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.

10. On contribution towards the acquisition of the suit property, the applicant submitted that she has been living in the matrimonial home with the Respondent and in that home she has raised her children. In defining matrimonial property she has cited Section 6 of the Matrimonial Property Act

11. The Applicant was a house wife as per the directives of the respondent and she at times conducted small businesses for the purposes of assisting her husband to take care of the family. She also kept some farm animals at their matrimonial home. The petitioner at all times was living with the respondent and taking care of the children and household. She has cited Section 2 of the Matrimonial Property's Act on what constitutes contribution.

12. Contribution must be seen in the lens of monetary and non- monetary contribution and has relied on the case of **MVW VS KNM [2014] eKLR.**

13. 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 the matrimonial property.

14. The marriage between the parties herein commenced in 2014 and the Petitioner has not known any other home apart from her matrimonial home and secondly she has improved it way better than she found it. She has been living in their matrimonial home ever since.

15. The Respondent herein has built for his sister in law another house where he spends most of his time and he still threatening to evict the Petitioner from her matrimonial home.

16. The Petitioner stayed home giving child care and support since her marriage with the Respondent was blessed with two issues and 6 of the Respondent's other children. She kept farm animals and provided companionship to the Respondent.

17. For the division of matrimonial property due regard should be taken on non-financial contribution. The court should not consider proved contribution alone. She cited the case of **White Vs White [200]UKHL, Miller Vs Miller & Mcfarlane[2006]UKHL, Section 45 of the Constitution Of Kenya 2010, Agnes Najala William Vs Jacob Petrus Nicolas Vander Goes(Civil Appeal No. 127 Of 2011), PWK Vs JKG 2015 eKLR And Peter Mburu Echaria Vs Priscilla Njeri Echaria (2007) eKLR.**

18. She concluded that she has proved her case and therefore prays that this court allows her application and grant the orders sought therein.

Respondent's Submissions

19. The Respondent presented his written submissions dated 27th April 2021 and filed on 29th April 2021. In opposition of the application he submitted that he inherited the said land no. **Transmara/Enoosael** [particulars withheld] from his late father. The said parcel was transferred to him on 6th April 2010 at Kilgoris land registry before he met the Applicant. The Applicant found he had built a home on it and has been developing the said property alone and not with the Applicant.

20. The Respondent the circumstances of this cause do not support the definition of a matrimonial home under the Section 6(1) of the Matrimonial Property Act, 2013.

21. The said property is held under customary law trust having been passed down from the father to the respondent and therefore it does not form part of a matrimonial property he cited Section 6(2) of the Matrimonial Property Act, 2013.

22. The Applicant has demonstrated no developments, no improvements or any contribution made by the applicant on the said property. He cited Section 9 of the Matrimonial Property Act And **PAW-M V-CMAW-M [2016]eKLR.**

23. On the prayer by the Applicant for an order of injunction restraining the Respondent, his servants and/ or agents from alienating, wasting,

damaging and/ or otherwise interfering with his properties. He submitted that the prayer to restrain him to free use of his property cannot be maintained since the Applicant has not demonstrated any right of ownership or joint ownership towards the alleged property. He cited the case of PAW –M- V- CMAW-M [2016]eKLR.

24. The Applicant and Respondent were married under customary law in the year 2017, barely 4 years in a marriage and no properties have been acquired during this period of their marriage except his deceased wife whom he had built their matrimonial home with.

25. The Respondent maintained that the Applicant did not make any contributions towards the acquisition and improvements of the said property. The matrimonial home which the Respondent and the Applicant are living in was built by the Respondent and his late wife in 1996 and the house is not yet complete to date.

26. The Applicant was constantly on the move between her matrimonial home and her parental home since they got married without the Respondent's convenience. The Applicant had no time to make contributions directly or indirectly towards acquisition of any property with the respondent.

27. The Respondent submitted that the Applicant should have backed up her allegation with documentary proof and receipts in evidence as proof of direct contribution towards the acquisition of the said 4 bulls.

28. The Respondent employed a 'shamba boy' to take care of the said animals. Therefore, the Applicant cannot demonstrate how directly or indirectly she contributed towards acquisition and growth of the said bulls. Therefore, the same cannot be shared equally or sold.

29. The matrimonial property ought to be distributed according to the contribution of each party towards its acquisition, developments and improvements of the property. He cited Section 7 of the Matrimonial Property Act.

30. The Respondent submitted that in his response he raised a preliminary objection that this court lacks jurisdiction to hear children matters along with this application. In any case the Respondent has sired only one issue with the applicant aged 4 years whom he has been maintaining until the time he was taken away by the Applicant to the unknown place.

31. The Respondent is always willing to take care of his child who is yet to start school and the Applicant is a person of means having business at Enosaaen. She is therefore in a position to maintain herself and the child she came with. He cited the case of W.M.M. VSB.M.L [2012] eKLR . That the parties barely got married four years ago and the Applicant cannot claim for maintenance when she is earning a living through business and he is only dependent on small scale farming activities to take care of his family

32. The Respondent submitted on the issue of costs that cost follow events and the successful party in the litigation is entitled to the fruits of litigation beings costs.

33. The Respondent concluded that the originating summons did not state the specific law governing division of matrimonial property. However pursuant to the application of Section 1A, 1B and 3A and Order 37 which underpins expeditious delivery of justice without undue regard to technicalities and that the matrimonial cause shall be by way of originating summons. The applicable law governing division of matrimonial property is the Matrimonial Property Act, 2013.

34. In the instant case it is clear that the applicant wants to obtain unjust enrichment by demanding equal division of property which she has not contributed in its acquisition or towards its growth or development which is unacceptable to the Respondent.

ANALYSIS AND DETERMINATION

35. From the pleadings and submissions of the parties, the major issues for determination in this cause are: -

- i. Whether the suit property is matrimonial property;**
- ii. Whether the Petitioner /Applicant made any contribution in the acquisition of the matrimonial properties;**
- iii. Division of the matrimonial property?**
- iv. Potency or otherwise of the orders prayed for.**

Matrimonial property

36. According to section 6 of the Matrimonial Property Act, matrimonial property include; _

"(a) the matrimonial home or homes

(b) Household goods and effects in the matrimonial home or houses or

(c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."

37. The Applicant has listed the following properties as comprising matrimonial properties: -

a. Transmara/ Enoosaen/ [particulars withheld] located at Kilgoris within Narok County.

b. 4 grazing bulls in kilgoris

38. The Respondent has denied that any of the above properties comprises matrimonial properties insisting that either he single handedly contributed towards their acquisition or that he inherited it from his father.

39. Parties have taken quite opposite position on whether the properties listed in this cause constitute matrimonial property in the sense of the law. But, worth of note is that, under **Section 14 of Matrimonial Properties Act**, the law has created two rebuttable presumption of law in respect of property acquired during marriage as follows:

14. Presumptions as to property acquired during marriage

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

40. Subject to the foregoing presumptions of law, the rule of thumb is; Whoever alleges must prove. The Applicant alleges contribution towards acquisition or improvement or development of these properties. The Respondent alleges either that he single-handedly acquired the properties, or he inherited the land in question from his late father as their ancestral property, thus, he holds it under customary trust. According to the respondent, Section 6(2) of the Matrimonial Property Act, specifically excludes such properties from matrimonial property.

41. The claims by the respondent are founded on section 6(2) of the Matrimonial Property Act which states that: -

Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

42. The claims by the respondent look formidable; I expect a serious litigant to properly support such claims with cogent evidence. The respondent merely stated these claims but did not back them with any tangible evidence.

43. Has the presumption of trust in section 14 of the Act been rebutted?

44. The Applicant stated that the land as well as the matrimonial home on the land, and the bulls were acquired during their marriage and therefore, matrimonial property. It was not rebutted that the applicant and the respondent lives in the matrimonial home resting upon the land herein. These pieces of evidence were not controverted whatsoever by the respondent or by any evidence. Accordingly, I find that the presumption of trust in favour of the Applicant was not rebutted. Thus, the immovable property **Transmara/ Enoosaen/ [particulars withheld]** listed in this cause although registered in the name of the Respondent forms part of the matrimonial property and is held in trust for the applicant.

45. The respondent did not say much about the bulls. Evidence by the applicant that the bulls were acquired through their joint efforts was not controverted. I also find they are matrimonial property.

Division of the property

46. Matrimonial property rights are real property rights protected under article 40 of the Constitution. The broad constitutional principle that underpins rights at, during and upon dissolution of a marriage which includes matrimonial property rights article 45(3) of the Constitution of Kenya 2010 which states that;

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage.”

47. Judicial pronouncements posit that this constitutional provision is not a peremptory command of a 50/50 ownership of matrimonial property between the spouses. See the case of *PNN vs ZWN (2017) eKLR*, Kiage JA; expressed himself on this issue as follows:

“I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words “50 per cent.”

48. Ownership of matrimonial property vests in accordance with the contribution of the spouse towards the acquisition or development of the

property. On contribution towards acquisition of matrimonial property, see Matrimonial Property Act which provide in Section 7 that;

“Subject to [section 6\(3\)](#), ownership of 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.”

49. On beneficial ownership arising out of development or improvement of property by a spouse, see Section 9 of the Act which provides as follows: -

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in property equal to the contribution made.”

50. Accordingly, as contribution of the spouse towards the acquisition or development of the matrimonial property determines the extent of ownership, spouses may own matrimonial property in equal shares or in other proportions other than equal shares. *Mutatis mutandis*, division of the matrimonial property between the spouses is in accordance with the contribution made by each towards its acquisition or improvement or development.

51. Contribution by a spouse for purposes of sharing matrimonial property may be monetary or non-monetary or both. According to section 2 of the Matrimonial Property Act: -

“contribution” means 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;

52. The Applicant did state that their matrimonial home is domiciled at **Transmara/ Enoosaen/ [particulars withheld]**. That Matrimonial house is situated on this land and should be considered matrimonial property by virtue of Section 6(1) (a) of the Matrimonial Property Act ,2013. The applicant argued that she remained home as a house wife at the directive of the respondent taking care of all the children- hers and those of the first wife. She stated that she also engaged in small businesses for purposes of assisting her husband-the respondent. By taking care of the children and doing house chores, the Applicant created time for the respondent to go out and look for money. I do note that the respondent stated that he used his own money to build the matrimonial home which is still incomplete to date. He continued to build it during the course of the marriage with the Applicant. The Applicant stated that she lived there with the children and the respondent and kept on improving the home for better. It bears repeating that in law, "contribution" as monetary and non-monetary 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

53. In this case, the contribution by the Applicant earns her ownership of the matrimonial home to an extent I will determine later.

54. What is the extent of ownership of the matrimonial property does this contribution confer upon the Plaintiff/Applicant? In other words, how should the matrimonial property be shared between the two spouses?

55. I am instructed that the court must give effect to both monetary and non-monetary contributions made by the applicant and the Respondent during the currency of the marriage in the acquisition or improvement of the matrimonial property. See the case of **NWM v KNM (2014) eKLR** . The Applicant in her submission stated that she took care of the 4 bulls. This is recognized contribution in law. I have also found that she made improvements on the matrimonial house and created time for the husband to go out and look for money which he used to improve the house further. Furthermore, the Applicant in her submission stated that she took care of the children borne out of her marriage to the Respondent and 6 children of the late 1st wife for the duration of her marriage to the Respondent. She also stated that she kept farm animals and provided companionship to the Respondent. In addition, she stated that they lived in this house with the children and the respondent and that she made the house better. The court was not told that this is not true. This again is recognized contribution which entitles the applicant ownership of the property.

56. Such non-monetary contribution is not illusory or of little or no weight; it is real and tangible contribution and must be given due weight in division of matrimonial property. I must buttress the need for the greater awareness by the courts of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills. The law has taken this a position in providing for non-monetary contribution as a factor of ownership in matrimonial property. In Civil Appeal No. 142 of 2018 in CWM-VS- JPM [2017] eKLR, the Court of Appeal recognized this reality and held as follows:

“...Parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of Respondent at the time of such overture. In our view, that contribution, be it domestic work and management of the matrimonial home, child care or companionship falls within the definition of contribution under the Act”.

57. See also White vs White (200)UKHL 54 and Miller vs Miller & McFarlane {2006}UKHL 24. See also Maputo Protocol on division of matrimonial property.

58. In the foregoing, the Applicant non-monetary contribution has been proved on a balance of probability. So how the properties should be divided? Each case turns on its own peculiar facts and circumstances. See the case of AW -VS- MVCMAWM [2018] eKLR the Court of Appeal observed as follows:-

" This now takes us to the crux of appeal; that is whether the appellant was entitled, to a larger share being 50/50 ownership of the suit premises or as cross-appealed by the Respondent the award of Kshs.2 million was excessive. This suit was filed on 30th May, 2015 after the Matrimonial Property Act was in operation.....what proportion or share should the appellant be awarded? It is common ground that the suit premises was inherited by the Respondent and just as the learned trial Judge, we appreciate no case is like another and each must be considered on its own merit while bearing in mind the peculiarities, circumstances and the principles of fairness and human worth in each case. Just like the old saying goes, "no one should reap where they did not sow and none should reap more that they planted." That is the basic tenet of equity which follows the law."

59. But, it does not entitle her to half of the matrimonial property. I will therefore make specific orders in respect of the property.

60. In the upshot, I order that the applicant is entitled to 1/3 of the matrimonial house, and 2 of the bulls. I restrict her entitlement to the matrimonial house which will be valued and the valuation report be filed in 30 days of today in order to ascertain the quantifiable entitlement.

61. Given the nature of these proceedings, I direct each party to bear own costs.

62. Dated, signed and delivered at Kilgoris through Teams Application, this 7th day of July, 2021.

F. GIKONYO M.

JUDGE