



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE NO. 134 OF 2012 (OS)
IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT, 1882
AND
IN THE MATTER OF DECLARATION OF PROPERTY RIGHTS AND DIVISION OF MATRIMONIAL PROPERTY
BETWEEN
JNK.....PLAINTIFF
-VERSUS-
SPMK.....DEFENDANT
JUDGEMENT

Introduction

1. By an originating summons dated 13th February, 2019 supported by his affidavit sworn on 12th May, 2017, the Plaintiff seeks the following orders:-

1. **THAT this Honourable Court do declare that all that parcel of land known as LR xxxx/xx situated at Mlolongo area within Machakos County, and the matrimonial home constructed thereon by the Plaintiff between the years 2002 and 2007 are matrimonial properties.**
2. **THAT it be declared that the Respondent holds the said matrimonial properties in trust for the plaintiff.**
3. **THAT LR xxxx/xxbe divided between the Plaintiff and the Defendant, and the Plaintiff do retain the matrimonial home constructed by her on the said land between the years 2002 and 2007.**
4. **THAT in the alternative to prayer 3 hereinabove, the Respondent be compelled to pay to the Plaintiff such reasonable sum as this Honourable Court may deem fit and just**
5. **THAT the Respondent be compelled to share rental income from the rental developments (houses on LR xxxx/xxwith the Plaintiff.**
6. **THAT costs of this suit be paid by the Respondent.**

2. At the hearing of this suit, the Plaintiff did not pursue prayer 5 hereinabove.

Plaintiff's case

3. In her supporting affidavit, the Plaintiff averred that she married the Respondent in 1998, first under the Kamba Customary Law and then under the *African Christian Marriage and Divorce Act*. However, though the said union was not blessed with any child the Defendant has several grown up children from the previous marriages.

4. After the said marriage, it was pleaded that the Plaintiff and the Defendant lived as husband and wife on LR No. xxxx/xx measuring approximately 60 acres, situated at Mlolongo in Mavoko Municipality within Machakos County, which property is registered in the Defendant's name and whereon the Defendant had, and still has a home. According to the Plaintiff at the time of the said marriage, she was working as a secretary with Telkom Kenya Limited, earning Kshs 35,000/- per month. However, in January 2007 she was retrenched pursuant to the Government approved restructuring of the said Company, and she was paid benefits amounting to over Kshs 900,000/-.
5. According to the Plaintiff from the date of the marriage between her and the Defendant, she had problems with some of the Defendant's aforesaid grown up children, who alleged that she could not live and/or continue living in the Defendant's home/house on the said parcel of land on the basis that the said house had been built by the Defendant and their mother who died before the Plaintiff married the Defendant and demanded that the Plaintiff build her own separate house. The Plaintiff averred that one of the Defendant's sons even went to the extent of threatening to kill the Plaintiff if she continued living in the said house and the matter was reported to the police whereupon the said son was arrested and prosecuted.
6. It was further averred that in January, 2003 the Defendant showed the Plaintiff a portion of the said parcel and told her to build her home thereon and promised to assist her put up her said house. With her savings and development loans from her employer, she had a plan drawn and she started purchasing building stones and other construction material. She started the construction work in early 2004 which went on till December, 2007 by which time she had constructed one-storey matrimonial home and paid for and had water and electricity connected to the said house. It was her averment that she spent all her savings, earnings on constructing the said house and even took credit facilities, some of which she is still servicing.
7. However, she averred, on 4th December, 2007, just before she moved into her said matrimonial home, she was woken up very early in the morning by the Defendant's said grown-up children and ordered to get out of the house wherein both the Plaintiff and the Defendant were sleeping. The Plaintiff was roughed up by the Defendant's said children and ordered to stand outside as all her belongings were thrown out of the house and loaded into a waiting pick-up and subsequently driven to her parent's home at Kivutini in Machakos Municipality while she was forced to take most of her belongings which could not fit in the pick-up to friends' and neighbour's house in Mlolongo.
8. Apart from that she was physically searched by the Defendant's to ensure that she did not carry any documents from the house she lived in with the Defendant, hence most of her receipts on construction of the said matrimonial home, her original car log book, her car keys, the original marriage certificate and many other documents and personal effects were left in the house.
9. To the Plaintiff's dismay, the Respondent who had suffered a severe stroke in 1999, and whom she physically nursed, footing his medical bills at the time, did not in any way restrain his said children from brutally evicting the Plaintiff from the home, and instead drove the pick-up which took some of her belongings to her parents' home whereat he announced that he had taken her back notwithstanding the fact that the Plaintiff never travelled with him in the said pick up. The Defendant further denied her access to her said newly constructed matrimonial home.
10. After being sent away, the Plaintiff tried to reach the Defendant for discussion and even sought the assistance of FIDA in that regard but the Defendant ignored all the communication. Finally, the Plaintiff gave instructions for the institution of Milimani Chief Magistrate's Divorce Cause No. 17 of 2017. However, upon being served, the Defendant disclosed Decree Nisi and Decree Absolute issued in Machakos Chief Magistrate's Divorce Cause No. 16 of 2008 which had been filed by the Defendant against the Plaintiff and was heard and concluded without the Plaintiff's knowledge and participation. Accordingly, the marriage between the Plaintiff and the Defendant has been dissolved and what remains is the division of the matrimonial property. She reiterated that apart from spending all her savings in developing the said matrimonial home, she spent her fortune on the defendant's medicare. Having moved out of the said home, she was unsure whether the property was still registered in the name of the Defendant as the same was in occupation of third parties.
11. The Plaintiff insisted that she is entitled to a share of the said matrimonial property, in particular the portion on which her said new matrimonial home stands and she urged the Court to make a finding to that effect. In the alternative, she sought an order directing the Defendant to pay her alimony in the sum of Kshs 500,000.00 or such other reasonable amount as the Court may deem just.
12. In her evidence, the Plaintiff testified that **Sebastian Paul Muinde Muthuli**, the Defendant herein, was her husband having married her on 1st March, 1998 under Kamba Customary Law and had later at a church wedding on 5th May, 2001 under **African Christian Marriage and Divorce Act** after their marriage they lived in his matrimonial home at Mlolongo where the Defendant had land and a home. Her marriage to the defendant was however not blessed with any children. The Plaintiff was however not the Defendant's first wife since the Defendant's previous wives (2) who were deceased before he married her and with whom the Defendant had adult children at the time of his marriage to the Plaintiff. The Plaintiff however did not know the said wives but was informed by the Defendant that one of them was called Beatrice.
13. According to the Plaintiff, the home she lived in with the Defendant was the home he had shared with his earlier wives. It was her evidence that her stay in that home was not peaceful as she had problems with the Defendant's children against whose wishes the Defendant had married the Plaintiff and who were against the Plaintiff living or occupying their mother's house.
14. In order to solve the problem, the Defendant decided to build a separate matrimonial home for the couple in a subdivided land next to the matrimonial home with his earlier wife on LR No. 7149/25. The defendant had bought the land before they got married. The Plaintiff testified that the defendant called an architect called **Mr. A** based in Nairobi in August 2004 to the home where they were living in Mlolongo and the plaintiff told him to do building plans for their house, which the Plaintiff exhibited. After pointing out where the house was to be built, the Plaintiff told her to mark it with stones and the architect was shown the location and used it to draw his plan.
15. She testified that work on the home started in 2005 and was completed in 2007, and that only power was remaining to be connected though it had already been paid by December 2007. It was her evidence that she was retrenched from Telkom in February 2007 and she produced a letter of termination of services dated 19-1-2007 after which she was paid Kshs. 900,000/= as her final terminal dues, part of which she used to complete furnishing of the matrimonial home and part of it she put in a business of selling clothes. She however did not get to occupy the

said home since the defendant said he wanted to buy new furniture for the home and it had no electricity.

16. The Plaintiff testified that on 4th December, 2007 at 6am, she was thrown out of the home by the Defendant's 4 sons, **F, C, F** and **MK** from his earlier wives, threw her out of the home. It was her evidence that when she woke up at 6 am that day, the house help told her that the sons had come to see the defendant and that her seats and clothes were outside were outside the house. They then packed the things on a pick up and left some on the ground. She then called her father who was then alive and told him the things were on the way and that he should keep them for her as she looked for means to bring the other things.

17. The Plaintiff testified that the defendant did not try to stop the sons and her said properties were taken in the pick up to her father. According to the Plaintiff, they both contributed to the home as they were building their home. By then she was working at Telkom as a Secretary earning Kshs 35,000/- and contributed money. She annexed a pay slip and added that she had savings at the time and took development loan from her employer during construction and used it during the constructions. Further, it was her who was the one surveying the building materials, part of which was bought by the money given to her by the Defendant, and the workers since the Defendant who had suffered a stroke in 1999 was not able to buy the materials, as he could not drive or move around.

18. By the time she got married to the Defendant, he was well and when he became unwell she took care of him since he was discharged from the hospital with a catheter which the Plaintiff used to empty and was nursing the Defendant as a baby and during his physiotherapy as the Defendant did not employ a nurse. The Plaintiff exhibited a letter dated 27-10-2003 and a medical report by which she requested that the defendant be included in her medical scheme by her employer hence the Defendant benefited from her medical scheme.

19. It was further averred that the Defendant was driven by his sons in a saloon car he had bought her which together with the pickup took the things to her father's home at Mutituni in her absence. This, she testified was, according to the customary law, was that they were taking her back to her father. She disclosed that the sons physically searched her and everything and took her marriage certificate, her car keys and a duplicate of a logbook of the saloon car the defendant had bought for her, KAN xxx D, and of another car he had sold.

20. The Plaintiff averred that she called her cousin and went to his place as the house was locked and keys taken away and she was warned by one of the sons, **FK**, never to step in the house again while the defendant did not tell her anything. As a result, she did not live in the matrimonial home even for a minute and left from the old home where she lived as they constructed the matrimonial home. It was however her evidence that she was not counting what she was buying when they were building the home hence she did not know how much was spent. She however averred that it was her who financed a case that the Defendant had when he had nothing by paying Kshs. 310,000/= in order to secure the release of the Defendant who had been arrested for a civil jail. The said money was refunded to her through her advocate, **Mr Masika** long after she had left his home. She however denied that she had no money of her own and that she misused the money given to her in constructing the matrimonial home. She exhibited a bundle of receipts as evidence that she spent money in purchasing materials. She however did not have the home valued as she had no access to the House having been warned never to step in the compound. She however had the photos of the house which she took before she left the home and which she exhibited. She urged the Court to direct that the house be valued.

21. After the Defendant left the home, she went to FIDA to facilitate their reconciliation but this was not possible and it was after this that she instituted divorce proceedings. Upon being served with the petition the Defendant then produced a divorce decree nisi and absolute which the Plaintiff was unaware of. It was at that stage that the Plaintiff filed the present cause though her divorce cause at Makueni is still pending.

22. The Plaintiff however denied that she mistreated the defendant and asserted that she nursed him as her husband and did all that was necessary. She denied that she assaulted the Defendant or mistreated him and that it was his decision to do what he did. She stated that while she was staying with him there was never any case of domestic violence between them and that they stayed peacefully other than the problem with his children one of whom (**CK**) even threatened to kill her before they threw her out of the home. According to the Plaintiff, LR xxxx/xxis registered in the name of the defendant and it measures 6.475 hectares.

23. The Plaintiff maintained that being the Defendant's wife, she acquired spousal interest at the time of marrying him, during the marriage and even after he divorced her. During the substance of her marriage she contributed to the building of the home and by putting up a modern home in the portion of land he showed her though she did not know the size of land on which the home stood. Other than her properties which she had bought, she walked out of the marriage with nothing.

24. It was therefore her prayer that this Court declares the home matrimonial property and that the defendant holds it in trust for her. She also sought that it be divided between them as she constructed it and in the alternative if he had depended on it to pay alimony to her to share rental income from rental deposits on the land. She disclosed that by the time she left, there were rentals deposits on the land by the time I left but she did not know how many houses they were as she was not collecting the rent. She however was aware that the defendant no longer occupied in the matrimonial home and that there were third parties staying there but she was not sure if they were tenants or purchasers. Following their separation, the Defendant married another wife whose name she did not know but was a relative of her brother's wife.

25. In cross-examination, the Plaintiff maintained her evidence in examination in chief and added that she married the Defendant when she was 45 years old but did not know how old the Defendant was though she admitted that he could be 66 years old. By the time of their marriage the Plaintiff was working in Telkom Accounts section at Wilson Airport and was living in Rongai and earning Kshs 18,000/- less the house allowance. He met the Defendant when he used to go to Wilson Cafeteria for meetings with one **K**, a distant relative to the Plaintiff, now deceased. By then she was neither married nor had children.

26. According to her, the marriage was initially Kamba Customary Marriage which was later formalised. She stated that the Defendant visited her parents but was unaware if gifts were exchanged. However, there were relatives such as uncles and Aunties as well as her parents. Some of the Defendant's children were also present. After their marriage they started living together in the Defendant's house in Mlolongo in the same house that the Defendant occupied with his late wife Beatrice, the mother to Fred. She revealed that the Defendant told her that he had another wife in Kangundo but he never told her how many children he had with that wife and the Plaintiff never met her. Though he

heard of the names of the Defendant's children, she did not know all of them.

27. Because the house they were constructing was their house, the Plaintiff said that she never calculated the expenses. It was her evidence that at work they had access to loans and they used to be paid overtime hence she was getting more than Kshs 18,000/- and she had her own money even at the time she met the Defendant. During the 10 years they were together, she said that spent a lot. It was her evidence that as a result of the wrangles from the other house the clan told the Defendant to put up a house for her. Though she was of the idea that the Defendant should buy a land, the Defendant proposed to give her a portion to put up her house though all the documents were in the name of the Defendant. The Plaintiff stated that the land for construction was allocated by the Defendant in the presence of his children who saw her working on it.

28. According to the Plaintiff, by the time the Defendant got the stroke in 199, the relationship between her and the children was already bad. She reiterated that she assisted the Defendant by changing her name to his in order to enable him access medical cover from Telkom. She denied that she assaulted the Defendant. She stated that there was no mediation between her and the Defendant because the Defendant stated that since she had taken him to Court, he had nothing to give her.

29. In re-examination, she stated that by the time of their marriage both the Defendant's wives were deceased and he was living in the house of his wife with two of his sons, **M** and **F** together with F's wife and children since it was a bug house.

Defendant's Case

30. In response to the Plaintiff's case, the Defendant swore a replying affidavit on 15th May, 2012 in which he, while admitting that he got married to the Plaintiff on 5th May, 2001 under the said Act and that the marriage was not blessed with any issues, by then he was suffering poor health after getting a stroke in 1999 and he married the Plaintiff to take care of her after the death of his two wives in 1997 and 1998 respectively.

31. Though he initially lived with the Plaintiff in the matrimonial home which he shared with his late wife, **BNK**, he commissioned an architect to design another house for him so that he would comply with the Kamba Customs and leave the other house to the last son of B. In order to do that, he sold part of his land in 2006 and raised Kshs 4,000,000/- which he used to construct the said house and moved into the house with the Plaintiff in 2007. However, the Plaintiff left him in December of the same year when they had hardly stayed in the house for a year. He averred that the Plaintiff who was employed as a secretary at Telkom hardly earned Kshs 15,000/- per month which amount she spent on herself.

32. It was his case that the alleged Plaintiff's retrenchment of Kshs 900,000/- was not brought to her attention and that the same was never spent in construction of the house. To the contrary, he single-handedly financed the construction of the house while the Plaintiff took advantage of his immobility and ill health to embezzle the funds whenever he sent her to do purchases from the proceeds of the sale of his land. Further, the rental houses in the property known as Maxi Inn were constructed between 1084 and 1990 long before he knew the Plaintiff and that the rental income therein is for his personal use and that of his children.

33. The Defendant disclosed that he acquired LR No. xxxx/x in early 1960's probably before the Plaintiff was born and later in 1973, the property was registered in his name and that of his late wife as joint tenants and after her death, her interest devolved to him by virtue of the principle of *jus accrescendi*. Later he subdivided the land resulting into LR No. xxxx/xx whose title was issued in 1995.

34. The Defendant denied that the Plaintiff used any money to pay for his medical bills or connected water supply or electricity to the house as she did not have the financial capacity to do so and any money she had was used in her escapades overseas while leaving the Defendant unattended in the house. Further, the Plaintiff would insult him until it reached a point he had to inform his children of his suffering hence his decision to return her to her parents. The Defendant asserted that as LR No. xxxx/xx was not acquired and/or improved by the joint funds and efforts of the Plaintiff and the Defendant, the same does not qualify to be matrimonial property and therefore does not fall under the ambit of the **Married Women's Property Act, 1882**. According to him, where one alleges that the property is a matrimonial property, one is supposed to either take out Originating Summons during the substance of the marriage or file an application in court during the pendency of a Divorce Cause enumerating all the properties alleged to be matrimonial property. Therefore, it was averred that this cause is bad in law having been overtaken by events as the parties herein are neither married, nor are there any ongoing divorce proceedings. Further, it was contented the said Act applies to questions between husband and wife but here the Plaintiff and Defendant are no longer husband and wife the marriage having been dissolved.

35. In his evidence before the Court the Defendant reiterated the foregoing and added that the Plaintiff was not taking care of him and was away from him. It was his evidence that it was the Plaintiff who decided to go away since she could not stay with a sick person. He denied that he gave her 2 acres of his land otherwise he would have done the survey. He maintained that he built all the houses.

36. In cross examination, the Defendant stated that they stayed together with the Plaintiff from 1998 to 2002 and that the Plaintiff was working with Telkom but could not remember when she left her employment. Similarly, she could not remember when she went back to her parents but admitted that he sent her away but maintained that the Plaintiff used to disappear and leave her alone. He however denied that he was assisted by his sons. According to him the Plaintiff had boyfriends. In the Defendant's evidence, he did not build a house for the Plaintiff and that they lived together for a very long time. It was his evidence that he neither calculated how much money he spent nor the amount spent by the Plaintiff.

37. The Defendant testified that his current wife lives in the house he built for her according to Kamba Customs. The Plaintiff, he maintained ran away despite the fact that he built a shelter for her. he maintained that having divorced and remarried there is no reason why he should give her his house. Asked about the house, he stated that he neither knew its value nor the size of the land it stands on unless the same is determined by surveyors. Similarly, he could not tell how many bedrooms it had and how big the servant quarter was and denied knowledge of the existence of a garage. It was his evidence that he had many houses. He maintained that he would not give the Plaintiff any property at all.

Valuation

38. At the close of the case, this Court directed that the Machakos County Valuer, values the subject house and files his report. In the said report, the valuer placed the value of the property at Kshs 7,600,000.00.

Determination

39. I have given due consideration to the pleadings and the evidence on record. The case revolves around the application of Article 45(3) of the Constitution as read with section 7 of the *Matrimonial Property Act, 2013*. The former provides that:

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

40. What this provision provides, in my view, is that parties to a marriage do not lose their rights merely because they have entered into a matrimonial union but they continue to enjoy equal rights at the time of the marriage, during the marriage and at the termination of the marriage. What I understand by the said Article is that spouses may be in a union, each one with his or her rights which are not necessarily pegged on the said relationship. With respect to the present case, it is possible for the husband and wife to enter into a relationship with each one of them owning his or her separate property in his or her own rights without necessarily ceding the right merely because of the fact of their marriage.

41. The distribution of matrimonial property which is now governed by the provisions of the *Matrimonial Property Act, 2013*, which is an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. The said Act commenced on 16th January, 2014 and according to section 19 thereof:

The Married Women Property Act shall cease to extend to or apply in Kenya.

42. It follows that the provisions of *The Married Women Property Act* no longer apply to Kenya.

43. Section 7 of that Act, provides as follows:

Ownership of the matrimonial property vests in the spouses according to the contribution of other spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

44. What then is matrimonial property? Section 6 of the 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.

45. Based on section 7 aforesaid, it is my understanding that where the 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 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 understand 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 to the 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.”

46. It is however clear that contribution need not necessarily be in financial terms since according to section 2 of *Matrimonial Property Act, 2013* (hereinafter referred to as the said 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.

47. It therefore follows that the mere fact that one spouse is not engaged in any income generating venture does not necessarily mean that the said spouse is not contributing to the acquisition of the matrimonial property.

48. However, section 7 thereof 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.

49. On the other hand, section 14 of the Act provides 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) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

50. In determining this suit, this Court will therefore be guided by, *inter alia*, the above legal provisions.

51. In this case it is not in dispute that there was a legal marriage existing between the Plaintiff and Defendant and the same was dissolved and a decree absolute issued on 2nd November, 2010. By the time of the dissolution of the said marriage the parties herein had no children. In my view, the issues that fall for determination herein are as follows:

a. Whether LR No. xxxx/xx, Mlolongo was the Plaintiff and the Defendant's matrimonial property.

b. Whether the Plaintiff and Defendant contributed to the development of the said property.

c. If the answer to (b) is in the affirmative, what were their respective contributions?

d. What is the mode of distribution of the said properties?

e. What is the Plaintiff's entitlement in respect of the said property?

f. Who should bear the costs of the suit.

52. As regards the first issue, going by the pleadings, it is not in dispute that LR No. xxxx/xx, Mlolongo (the suit property) was acquired by and was registered in the name of the Defendant. However, it is the Plaintiff's case that subsequent to the marriage part of the said property was developed through the joint contributions of both parties. Section 9 of the said Act provides that:

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 the property equal to the contribution made.

53. In this case it is clear that the suit property does not fall under the definition of "matrimonial property".

54. However, if the Plaintiff's contention that she contributed towards its improvement in true the Plaintiff did acquire a beneficial interest therein equal to her contribution. In this case the Plaintiff testified that upon her retrenchment, she ploughed terminal dues amounting to Kshs 900,000.00 towards the construction of the house which they intended to occupy with the Defendant apart from giving nursing care to him after he suffered a stroke. She produced some receipts and testified that the other receipts were left in the house after she was forcefully evicted therefrom and was not allowed access back therein. The Defendant in cross-examination admitted that she sent the Plaintiff away though in his affidavit he alleged that the Plaintiff left the house. The Defendant further testified that he could not tell what contribution he made towards the construction of the house and the contribution that was made by the Plaintiff. In light of the documentary evidence produced by the Plaintiff, I find that both the Plaintiff and the Defendant contributed towards the development of the suit property.

55. It follows that whereas the first issue is in the negative, the second issue must be answered in the affirmative.

56. That bring me to the issue whether of the respective contributions of the parties to the development of the said property. I appreciate that whereas a person's source of income may be evidence of his or her capability to contribute towards the purchase and development of a property, it does not necessarily follow that the person did actually make the said contribution. As rightly held in **Federation of Women Lawyers Kenya (FIDA) vs. Attorney General & another [2018] eKLR**;

“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.”

57. That is also my understanding of the holding in the case of FMG vs. MNG [2019] eKLR, where it was held that;

“...no single party will enter into a marriage relationship with nothing and leave with more than he or she contributed during the subsistence of the marriage. In other words, courts must be vigilant in interrogating the actual role played by each spouse in a marriage relationship in terms of investment or property acquisition whether indirect or direct to discourage undue advantage, indolence or dependency on a co-spouse marital union.”

58. The same view was adopted in the case of, T M W v F M C [2018] eKLR, where the court held that:

“As regards ownership of matrimonial property, Section 7 of the Matrimonial Property Act, states as follows: -

“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.”

The above provision of law entails that ownership of matrimonial property vests with the husband and wife/wives according to what each party contributed towards the acquisition of the same. This section introduces yet another aspect as far as ownership of property by spouses is concerned, that is the aspect of contribution of each party towards the acquisition of such property. In my view, what this provision of law entails is that it is possible for spouses to own certain properties but not in equal shares. Thus in case of divorce, the court would look at what each party brought to the table for the purposes of the distribution of such properties if any dispute concerning distribution of matrimonial property arise...Registration of property in both spouses names is essentially regarded that the property is held by both spouses in equal right. However, this clause does not negate the fact that spouses receive from the marriage in accordance with their contribution whether monetary or in kind.”

59. I also agree with the view in the case of U M M vs. I M M [2014] eKLR, in which the court opined that:

“As far as I can see it is the provisions of Sections 2,6 and 7 of The Matrimonial Property Act, 2013 fleshes out the right provided by Article 45(3). By recognizing that both monetary and non-monetary contribution must be taken into account, it is congruent with the Constitutional provisions of Article 45 (3) of the Constitution that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by Article 45(3).”

60. It is therefore clear that it is necessary that the spouses prove their respective proportions of the financial contribution either directly or indirectly towards the acquisition of the property rather than merely waving the source of income. It is not unheard of for certain parties to spend all their income a marriage in their own personal gratification while the other spouse invests. Accordingly, financial muscle alone is not necessarily proof of contribution.

61. Again the mere fact that a party has access to financial facilities does not necessarily mean that the said facilities were spent towards the development of the properties in question though it would be evidence of his or her capability to do so. I agree with the position in the case of T M W vs. F M C [2018] eKLR, where the court held that:

“The Petitioner herein stated in her supporting affidavit that she sometimes ventured into small businesses for the purposes of helping her husband to take care of the family however no proof of the existence of such endeavours was produced before. I therefore find that the Petitioner’s contribution cannot be said to have been in the realm of monetary contribution since the same was not proved on a balance of probability.”

62. In this case however, the Plaintiff’s case was that her contributions were in both monetary and management forms. Since the Defendant got a stroke in 1999, it fell upon her to supervise the construction. It is not in doubt that the Defendant got a stroke that year. The Defendant has not stated who was supervising the construction and therefore the Plaintiff’s evidence on the issue of supervision has not been controverted. However, none of the parties could state with certainty the extent of their respective contributions. In F.S vs. E.Z [2016] eKLR it was held that:

“The parties herein have been married for about 10 years. The Plaintiff dedicated all this period to her marriage. Although she never made any financial payments towards the purchase of the properties, she also indirectly contributed to the

acquisition of the properties. The Defendant maintains that the companionship was quite intermittent. That is true as the Defendant is not a resident of Kenya. However, still there was companionship whenever the Defendant came to Kenya. The Plaintiff oversaw the purchase of the properties. She could have inflated the prices if she had any ill intention. She was honest enough and followed all the lawful procedures towards the acquisition of the properties. That amounts to indirect non-monetary contribution.”

63. Similar circumstances are to be found in DV vs. PB [2019] eKLR, where the Court held that the Plaintiff’s supervision of the development and management of matrimonial property whilst the Defendant was abroad also amounted to non-monetary contribution.

64. Having considered the evidence on record, I am unable to find with certainty the actual contributions made by each of the parties herein. As provided in section 14 of the Act, where matrimonial property is acquired during in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal. In my view that legal presumption has not been rebutted by any of the parties herein.

65. It therefore necessarily follows that as regards the mode of distribution of the said properties, the same ought to be 50:50. In arriving at this decision I associate myself with the decision of the Court of Appeal in P N N vs. Z W N [2017] eKLR where it held expressed itself as follows;

“Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement. The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in FRANCIS NJOROGE vs. VIRGINIA WANJIKU NJOROGE, Nairobi Civil Appeal No. 179 of 2009; “...a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in Lock Yeng Fun v Chua Hock Chye [2007] SGCA 33;

‘It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – be precise mathematical exercise.’”

66. I also rely on the decisions in NWM vs. KNM (2014) eKLR and AKM vs. NNN [2019] eKLR.

67. That answers issues (c) and (d).

68. What then is the Plaintiff’s entitlement to the suit property? It is clear that the Plaintiff does not know the true status of the suit property as regards its ownership. However, a valuation of the development on the suit property was undertaken and its value was arrived at the sum of Kshs 7,600,000.00. From my findings above the Plaintiff is entitled to 50% of the value of the joint development on the suit property. Accordingly, I find that the Plaintiff is entitled to Kshs 3,800,000.00 which is the sum owed to her by the Defendant being her contribution towards the development of the suit property.

69. As regards the costs, the Plaintiff stated that attempts at mediation failed. Before this Court the Defendant was adamant that the Plaintiff is not entitled to even a single cent and in his own words, he did not care even if the Plaintiff left his home “naked”. The Defendant holds the disgusting and repugnant view that once the marriage is dissolved the wife is not entitled to any property acquired in the course of the marriage and ought to be sent away empty handed as he did to the Plaintiff. With due respect such callous attitude belongs to the age of the cavemen and have no place in the civilised society which we pride ourselves to be part of. It is obviously out of the constitutional reality and ought not to be countenanced by any person guided by the rule of law.

70. In those circumstances, I find that the contemptuous attitude of the Defendant denies him of favourable exercise of discretion when it comes to costs. As costs follow the event and as the Plaintiff has succeeded in this suit, the Plaintiff’s costs shall be borne by the Defendant.

Disposition

71. Based on the foregoing findings, I therefore make the following orders:

a. A declaration that the Plaintiff made contributions towards the development of LR No. xxxx/xx, Mlolongo.

b. A declaration that both the Plaintiff’s and the Defendant’s contribution towards the said development was in the ratio of 50:50 respectively.

c. That Judgement be and is hereby entered for the Plaintiff against the Defendant in the sum of Kshs 3,800,000.00 being half the value of the joint development on the suit property. That amount takes care of any interest since that is the current value.

d. That the costs of this suit be borne by the Defendant.

72. Those shall be the orders of the Court.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 9TH DAY OF NOVEMBER, 2021

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Susan