



U M M v I M M (Civil Suit 39 of 2012) [2014] KEHC 7534 (KLR) (12 February 2014) (Judgment)

U M M v I M M [2014] eKLR

Neutral citation: [2014] KEHC 7534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL SUIT 39 OF 2012
F TUIYOTT, J
FEBRUARY 12, 2014**

BETWEEN

U M M PLAINTIFF

AND

I M M DEFENDANT

Division of Matrimonial Property as provided for under the Matrimonial Property Act Vis-à-vis Article 45(3) of the Constitution of Kenya, 2010

Reported by Njeri Githang’a Kamau

***Constitutional Law** - fundamental rights and freedoms - right to equality - equality in distribution of matrimonial property - whether the equality contemplated by the Constitution was an automatic 50:50 sharing of matrimonial property upon dissolution of the marriage - whether the Court could apply the Constitution in resolving a dispute where the disputed properties were all acquired before the promulgation of the Constitution of Kenya - Constitution of Kenya, 2010, article 45(3).*

***Family Law** - matrimonial property - distribution of matrimonial property - mode of distribution of matrimonial property between the spouses - distribution subject to contribution of the spouse towards acquisition - what amounts to contribution - whether non-monetary contribution would amount to contribution within the meaning of the Act - Matrimonial Property Act, 2013, sections 2,6 and 7.*

Brief facts

The Plaintiff (U) sought orders for the sharing and division of some property held in the names of her former husband the Defendant (I). U got married to I when she was 18 years old and did not bring any money into the marriage. She joined her husband in an Auto Spares business and helped with the management of the shops. Before having difficulties in their marriage U was a good and hardworking wife. It was the former husband’s testimony that some properties were acquired in the course of his marriage to U while one was acquired prior to the marriage but was subdivided in the course of the union.



Issues

- i. Whether the equality contemplated by article 45(3) of the Constitution of Kenya 2010 was an automatic 50:50 sharing of matrimonial property upon dissolution of marriage.
- ii. Whether the Court could apply article 45(3) of the Constitution in resolving the dispute where the disputed properties were all acquired before the promulgation of the Constitution of Kenya, 2010.
- iii. Whether non-monetary contribution in acquisition of property recognized under the Matrimonial Property Act was considered as equal contribution recognized under article 45(3) of the Constitution.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 45(3) provides as follows:-

“45(3) 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.”

Matrimonial Property Act, 2013 which received assent on 24th December 2013 and commenced on 16th January 2014.

“7. 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. Contribution is defined by section 2 to mean monetary and nonmonetary contribution. And non-monetary contribution 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; “

Family business” means any business which-

- a) is run for the benefit of the family by both spouses or either spouse; and
- b) generates income or other resources wholly or part of which are for the benefit of the family;”

Held

1. The provisions of the Matrimonial Property Act, 2013 ameliorated the harshness that was associated with the decision in *Echaria v Echaria*. The Statute recognized the non-monetary contribution of a spouse but did not go as far as what the Court of Appeal had suggested in *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*, where it argued that article 45(3) was perhaps “a Constitutional Statement of the principle that marital property is shared 50-50 in the event that a marriage ends.”
2. Sections 2, 6 and 7 of the Matrimonial Property Act, 2013 fleshed out the right provided by article 45(3) of the Constitution. By recognizing that both monetary and non-monetary contributions had to be taken into account, it was congruent with the Constitutional provisions of article 45(3) of the Constitution that parties to a marriage were entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
3. At the dissolution of a marriage each partner should walk away with what he/she deserved. What one deserved had to 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 was evidence that a non-monetary contribution entitled a spouse to half of the marital property then, the Courts ought to give it effect. To hold that article 45(3) of the Constitution decreed 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 would be oppressive to the spouse who makes the bigger contribution and that could not be the sense of equality contemplated by article 45(3).

4. Although the suit was filed post the Constitution of Kenya 2010, it related to a dispute over property acquired before the coming into force of the Constitution. If the Courts were to apply the provisions of the Constitution then it would be doing so retroactively. However, since the right to equality was inherent and indefeasible to all human beings, it mattered not that the cause of action accrued before the current constitutional dispensation.

5. Article 45(3) of the Constitution required that parties to a marriage were entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. In division of matrimonial property that right was safeguarded by vesting in each spouse ownership according to their respective contributions be it monetary or non-monetary. For that reason the court would strive to give effect to any monetary or non-monetary contribution that U proved in the acquisition or improvement of the properties in dispute.

6. The statements by I was that U made some non-monetary contribution towards the developments on the subdivided plots. The contribution made towards the improvement of the property would entitle her to a beneficial interest therein equal to the contribution she made.

7. The Plaintiff did not give evidence of any financial contribution towards purchase of property bought about 14 days into the marriage. Although acquired during the coverture, it was acquired in the very nascent days of the union and in the absence of proof of monetary contribution by U, it would be inequitable to hold otherwise than that the property was acquired wholly by I.

8. There was evidence that Dr W who was an uncle to I gave him one of the plots as a gift. U was unable to prove an allegation that she contributed to the whole of the purchase price of Kshs 350,000. There was no evidence as to whether there had been any improvements made to the plot. The property being a gift solely to I did not form part of the matrimonial property.

9. After weighing all the evidence, U made a non-monetary contribution to the development of some of the suit plots. Of significance was that one of them housed the matrimonial home in which she resided. U's contribution towards the improvement of some of the plots deserved acknowledgement.

Orders

To enable the Court make an informed decision, separate valuations were to be conducted of each of the plots. The costs of valuation was to be shared equally by the parties. The Court, after receiving the valuation Reports was to give its final orders.

Citations

East Africa

1. *Echaria v Echaria* [2007] 1 KLR 469 - (Applied)
2. *MCN v AWM* E&L Case No 208 of 2012 - (Followed)
3. *William, Agnes Nanjala v Jacob Petrus Nicolas Vander Goes* Civil Appeal No 127 of 2011 - (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 article 45(3)
2. Constitution of Kenya (Repealed), section 66(5)
3. Kadhis' Court Act (cap 11), section 5 - (Interpreted)
4. Married Women's Property Act, 1882 [INDIA] section 7 - (Interpreted)
5. Matrimonial Property Act, 2013 (Act No 49 of 2013) sections 2, 6 and



JUDGMENT

1. The proceedings before Court are brought under the now inapplicable the *Married Women's Property Act*, 1882 in which the Plaintiff (hereinafter U) seeks the sharing and division of some property now held or in the names of her former husband IMM(I).
2. I and U solemnized an Islamic marriage at Bungoma on 21st November 1990. That marriage lasted for 17 years or so. In a divorce cause (Divorce Case No 12 of 2007) taken out before the Kadhis Court, the said marriage was dissolved on 21st February 2008 In subsequent proceedings before that Court in which the Kadhi was asked to settle the issue of matrimonial property, The Kadhi ruled,

“In regards to the above mentioned verses, this court grants Mrs UM plot at [particulars withheld] No [particulars withheld] undeveloped for her send off and thereof the petitioner shall immediately transfer the said plot to her in documentation.”
3. It is however doubtful that at that time the Kadhi's Court had the jurisdiction to determine a dispute in respect to division and sharing of property on divorce given the provisions of section 5 of the *Kadhis Courts Act* (Chapter 11) as read with section 66(5) of the old *Constitution*.
4. Perhaps recognizing that the Khadhis Court had overstepped its powers, U has included the property [particulars withheld] purportedly granted to her by that Court as one of those whose fate this Court must decide. The others are:
 - a. [particulars withheld]
 - b. [particulars withheld]
 - c. [particulars withheld]
 - d. [particulars withheld]
 - e. [particulars withheld]
5. I received viva voce evidence from both sides. The evidence of U was that she got married to I when she was 18 years old and, not surprisingly, did not bring any money into the marriage. She joined her husband in an ongoing business. That business was a well stocked Auto spares shop. It was also her testimony that at the time of marriage I already owned property known as [particulars withheld]. That property has since been subdivided to plot numbers [particulars withheld] - [particulars withheld].
6. During her coverture to I, she says that they jointly bought property known as Bungoma Municipality [particulars withheld] (herein plot No [particulars withheld]). This, she testified, was in 1994 - 1995 and bought from the proceeds of their joint business. She conceded that she was not party to the sale agreement. She gave not a dissimilar story of how [particulars withheld] (hereinafter plot No [particulars withheld]) and [particulars withheld] (hereinafter plot No [particulars withheld]) were bought. In respect to plot No [particulars withheld] she alleged that she contributed Ksh 400,000 out of the total purchase price of Ksh 600,000.
7. Then there is Mumias Township Block [particulars withheld] (hereinafter plot No [particulars withheld]). Her position is that it was purchased and not gifted to I by the former owner Hon EWW. That it was her who paid the entire purchase price of Ksh 50,000.



8. I stated that before having difficulties in their marriage U was a good and hardworking wife. She managed some of his business. He had two spare shops, one at Mumias and another at Bungoma. They interchanged in the management of the shops. It was his testimony that properties [particulars withheld], [particulars withheld], [particulars withheld], [particulars withheld] were all acquired in the course of his marriage to the U. While plot No [particulars withheld] which he acquired prior to the marriage was subdivided in the course of the union.
9. I gave detailed evidence of how he acquired each property. He bought plot No [particulars withheld] from one JWT and transfer effected in his favour on 12th August 1988. This was two years before he married U. This was then subdivided into 6 sub plots ([particulars withheld] - [particulars withheld]) which are all registered in his name.
10. As for plot No [particulars withheld], he bought it from one MW. This was, partly, in settlement of a debt owed to him by the seller. The sale agreement in respect of the transaction is dated 4th November 1979. The purchaser is I. U does not feature and it was the evidence of I that she did not make any financial contribution towards the purchase.
11. Within Bungoma Municipality, I owns plot No [particulars withheld]. He bought this from JJMW on 13/11/1991 at a consideration of Ksh 66,000. He produced a sale agreement in proof hereof. The property is registered in his name. Again he asserts that the U did not contribute a cent.
12. The late Dr W is an uncle to I. In the course of his lifetime Dr W gave him plot No [particulars withheld] as a gift. Dr W wrote to the Town Clerk Mumias Municipal Council (Exhibit [particulars withheld]) requesting the Council to transfer that property to I.
13. Then there is plot No [particulars withheld]. It was acquired by I on 14/11/1990. His marriage to U was just two weeks old. It is registered in the name of I but he is willing to abide by the decision of the Kadhi and is ready to transfer this property to U.
14. I also made the point that he already gifted U with motor vehicle Isuzu [particulars withheld]. In addition, he left her the Bungoma Shop which is now registered as [particulars withheld] in the names of U and her sister. Lastly, that he gave her [particulars withheld] which is registered in her names. These evidence was not controverted.
15. At the close of the taking of evidence parties herein filed written submissions. For the Plaintiff the Court was urged that article 45(3) of the Constitution required that the principle of equality be applied to the division of Matrimonial Property. Article 45(3) provides as follows:-

“ 45

- (3) 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.”

16. Counsel further submitted that I be persuaded by the decision of my sister Mary M Gitumbi J in Exh No 208 of 2012 *MCN v AWM* [2013] eKLR where she observed that:-

“Essentially, the foregoing legal provisions seek to change the position previously prevailing in which the Court considered the level of financial contribution made by each spouse in deciding what percentage to apportion to them. The legal provision in force now requires



this court to apply the principle of equality instead. This court is duty bound to share the Suit Property equally between the Plaintiff and the Defendant.”

17. In the Defendants view the law governing division of matrimonial property was settled in the famous decision of Nairobi Civil Appeal No 75 of 2001 *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR. The significant holding in that decision is that for a wife to prove entitlement to property acquired in the course of coverture she needs to prove her contribution towards the acquisition of the property. That contribution being of a monetary nature.
18. Counsel for the Defendant submitted that the provisions of article 45(3) did not debunk the force of the holding in *Echaria* (*supra*). Arguing that it would be to overstretch the provisions of that article to define equality in terms of property ownership rights.
19. In resolving the rival views taken by parties my work is made somewhat lighter by two recent developments. First, the Court of Appeal has recently given its views as to the place of *Echaria* (*supra*) in the context of article 45(3) of the *Constitution*. In Civil Appeal No 127 of 2011 *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes*, the Court observed that *Echaria* (*supra*) may no longer be good law, and then held,

“Article 45(3) of the *Constitution* 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. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to article 68 parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of rights in our Constitution can be invoked to meet the exigencies of the day.”

20. The Legislation hoped for by the Court of Appeal is the *Matrimonial Property Act*, 2013 which received assent on 24th December 2013 and commenced on 16th January 2014. That is an important development in the law of Matrimonial Property for this country. Section 7 is of paramount significance. It provides:-

“7. 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.”

Contribution is defined by section 2 to mean monetary and nonmonetary contribution. And non-monetary contribution 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;

“Family business” means any business which-

- a) is run for the benefit of the family by both spouses or either spouse; and
- b) generates income or other resources wholly or part of which are for the benefit of the family;”

21. The provisions of that Statute ameliorates the harshness that was associated with Echaria (supra). Statute now recognizes the nonmonetary contribution of a spouse. It however does not go as far as what the Court of Appeal had suggested in Nanjala William where it argued that article 45(3) was perhaps “a Constitutional Statement of the principle that marital property is shared 50-50 in the event that a marriage ends.” 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).
22. So should this Court apply the provisions of article 45(3) in resolving this dispute” the disputed properties were all acquired before the promulgation of the Constitution, 2010. The marriage between the Plaintiff and the Defendant was contracted on 21st November 1990 and dissolved on 21st February 2002. [Although this suit was filed post the Constitution 2010, it relates to a dispute over property acquired before the coming into force of the new Constitution. If this Court were to apply the provisions Constitution 2010 then it would be doing so retroactively]. Is this the way to go” On this I again turn to the decision of Agnes NatJala William (supra) where the Court of Appeal applied the provisions of article 45(3) of the current Constitution to a cause of action accruing before the promulgation of the Constitution 2010. The Court of Appeal observed;
- “Having found that the right to equality as inherent and inalienable to all human beings, it matters not that the cause of action accrued before the current constitutional dispensation. We therefore do not find favour with the respondent’s submissions to the contrary.”
23. Asi turn to resolve the dispute before me, I recap the principle that will guide my hand. [Article 45(3) of the Constitution 2010 requires 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. In Division of matrimonial property that right is safeguarded by vesting in each spouse ownership according to their respective contributions be it monetary or non-monetary]. For this reason I shall strive to give effect to any monetary or nonmonetary contribution that U will have proved in the acquisition or improvement of the properties in dispute.



24. I acquired [particulars withheld] on 10/02/1988. This was before he contracted the marriage with U. That property was subsequently subdivided into 6 subplots, numbers [particulars withheld] - [particulars withheld]. Subdivision was formalized on 21/1/94. This was in the course of coverture. U stakes a claim on the subdivided portions because she made contribution towards the improvement of the subdivided portions. That the subdivisions enabled them take loans to finance their spare parts shop. On one of the subdivided portions being plot [particulars withheld] lies a residential house in which U and the issues of marriage reside.

25. In the course of his testimony Defendant said this about the developments to the subplots.

“The Plaintiff was my supervisor at the time of development but all the funding was from me.”

Elsewhere he testified,

“Before my divorce the Plaintiff was a good wife and hardworking. She was like a manager for my business.”

The statements by I is that U made some non-monetary contribution towards the developments on the subdivided plots. The contribution made towards the improvement of the property would entitle her to a beneficial interest therein equal to the contribution she made.

26. There is then plot No [particulars withheld]. This property is not developed. It is registered in the name of I. It was bought on 14/11/1990. This would be about 14 days into the marriage. The Plaintiff did not give evidence of any financial contribution towards its purchase. It seems to me that, although acquired during the coverture, it was acquired in the very nascent days of the union and in the absence of proof of monetary contribution by U, it would be inequitable to hold otherwise than that the property was acquired wholly by I. The paradox is that I is willing to give this property to U in deference to the holding of the Kadhi’s Court.

27. There was evidence that Dr W who was an uncle to I gave him plot [particulars withheld] as a gift. U was unable to prove an allegation that she contributed the whole of the purchase price of Ksh 350,000. There was no evidence as to whether there has been any improvements made to the plot. My view is that this property being a gift solely to I does not form part of matrimonial property.

28. I turn to the acquisition of plot No [particulars withheld]. This was purchased on 4th November 1999 by I from one MWW. It was the testimony of I that he got it for a song as the seller was his cousin. In the sale agreement the purchase price is Ksh 562,500. There was no evidence of the prevailing market prices then. There is no basis for me to believe that the purchase price was a bargain. On her side U was very categorical about her contribution. She says that she made a financial contribution of Ksh 400,000. This is her testimony.

“The purchase price was Ksh 600,000 (six hundred thousand) I contributed Ksh 400,000 (four hundred thousand) at the time we bought the property in 2002. There is in the bank statement but I do not have it here.” (my emphasis) But she failed to avail that critical bank document. On a balance, I do not find that she made a monetary contribution towards the acquisition of this property. As the basis of her claim in the property was solely on account of monetary contribution, then I am unable to hold that she made any contribution whatsoever in its acquisition.



29. Another property acquired during the subsistence of the marriage was plot No [particulars withheld]. This was purchased in the name of I from JJM W on 13th November 1991. It was the evidence of U that the property was bought and developed from the proceeds of the family business. But she did not prove any proof of this. She was in charge of one of the family businesses and she should have been able to prove payment made out of that business.
30. There was evidence that after the dissolution of the marriage I surrendered ownership of m/v [particulars withheld] and [particulars withheld] to U. In addition she took over the ownership of Bungoma Spares Shop which she now runs as [particulars withheld]. I thought that this, in addition to Plot No [particulars withheld], was all the Plaintiff deserved.
31. This Court after weighing all evidence reaches a decision that U made a non-monetary contribution to the development of plots [particulars withheld]-[particulars withheld]. Of significance is that one of them (Plot [particulars withheld]) houses the matrimonial home in which she resides. The offer made by I is that Plot No [particulars withheld] would be sufficient to settle this matter. On my part, I have no doubt that U's contribution towards the improvement of plots [particulars withheld]-[particulars withheld] deserves acknowledgement. I cannot be sure that an offer of plot No [particulars withheld] is good enough. To enable this Court make an informed decision herein I now order that separate valuations be conducted of each of the plots (plot No [particulars withheld] - particulars withheld) and plot No [particulars withheld] within 14 days hereof. The costs of valuation shall be shared equally by the parties. The Court shall after receiving the valuation Reports give its final orders.

F. TUIYOTT

JUDGE

DATED, DELIVERED AND SIGNED AT BUSIA THIS 12TH DAY OF FEBRUARY 2014.

In the presence of:

KadenyiCourt Clerk

.....For Plaintiff

.....For Defendant

