



REPUBLIC OF KENYA



**CMK v RKN (Appeal E129 of 2023) [2025] KEHC 13434 (KLR)
(Family) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY
APPEAL E129 OF 2023
H NAMISI, J
SEPTEMBER 30, 2025**

BETWEEN

CMK APPELLANT

AND

RKN RESPONDENT

(Being an appeal against the Judgement of Hon. Emily Nyakundi, Principal Magistrate delivered on 16 October 2023 in MCCHCC No. E1148 of 2021- Milimani)

JUDGMENT

1. This is an appeal from a judgement in a Divorce Cause instituted by the Appellant. In her Petition to the trial court, the Appellant sought the following orders:
 - i. That the marriage between the Petitioner and the Respondent be dissolved by a decree of divorce;
 - ii. That the property Mavoko Park LR NO. XXXXX/XXXXX maisonette No. 30 be awarded to the Petitioner;
 - iii. That the Respondent be compelled to reimburse Kshs 2 million to the Petitioner;
 - iv. That costs of the Petition be awarded to the Petitioner
2. The Respondent filed an Answer to Petition and Cross Petition dated 4 October 2022. In it, the Respondent did not contest the dissolution of the marriage but disputed the other claims. He prayed for orders that the marriage be dissolved and that each party bears their own costs.



3. Upon hearing the parties, the trial court delivered its judgement in which it found that the grounds for divorce, specifically cruelty, had been established to the required standard by both parties. Consequently, the trial court made the following orders:
 - i. That the marriage solemnized between the Petitioner and Respondent be and is hereby dissolved;
 - ii. A Decree Nisi is hereby issued and a Decree Absolute shall issue thirty days from the date hereof;
 - iii. Each party to bear its own costs.
4. The learned Magistrate declined to grant the prayers relating to the matrimonial property and the reimbursement of Kshs 2 million, giving rise to the present appeal, which is based on the following grounds:
 - i. The learned Magistrate erred in law and in fact in finding that the court could not issue the order to compel the Respondent to refund the Appellant Kshs 2 million because the same was not a prayer sought in the Petition dated 25th October, 2021; yet the Petition on record at prayer (c) seeks the very prayer.
 - ii. The learned Magistrate erred in law and in fact in failing to award the Appellant the Property Mavoko LR NO XXXXXX/XXXXXX Maisonette No 30 on the grounds that:
 - a. the property was situated in Mavoko, and the court lacked local jurisdiction;
 - b. no valuation report had been made on the property to prove that the court had pecuniary jurisdiction over the property; despite the sublease on record indicating a purchase price of 11.5 million for the property.
 - iii. With regard to paragraphs 1 and 2 above, the decision and judgement of the lower court is insupportable in law and on the peculiar facts of this case; and the discretion of the court was exercised injudiciously in this case.
5. The appeal was canvassed by way of written submissions.
6. In her submissions, the Appellant contended that the trial court erred in law and in fact in finding that the court could not issue an order compelling the Respondent to refund the Appellant Kshs 2 million because the same was not a prayer sought in the Petition. The Appellant submitted that this was a plain error on the face of the record, as prayer (c) of the Petition explicitly sought that relief.
7. The Appellant faulted the trial court for erring in law and in fact by failing to award her the property known as Mavoko LR No. XXXXXX/XXXXXX Maisonette No. 30. She argued that the trial court was wrong to decline jurisdiction on the basis that the property was situated in Mavoko and, therefore, outside the court's local or territorial jurisdiction. The Appellant submitted that in a matrimonial cause, the court should, in the interest of judicial economy, determine all issues arising between the parties, including division of property, regardless of its location.
8. Further, the Appellant challenged the finding that the trial court lacked pecuniary jurisdiction over the property due to the absence of a valuation report. The Appellant's position is that the sublease agreement, which was on record and indicated the purchase price as Kshs 11.5 million, was sufficient prima facie evidence to establish that the property's value fell within the pecuniary jurisdiction of the Chief Magistrate's Court.



9. The Appellant submitted that the decision of the trial court is insupportable in law and that the discretion of the court was exercised injudiciously.
10. On his part, the Respondent argued that the learned Magistrate was correct in her approach, albeit for different reasons. The Respondent's position is that this claim constitutes a civil debt and is not a matter for determination within a divorce cases. He submitted that such a claim ought to be pursued in a separate civil suit, where the Appellant would be required to meet the requisite burden of proof. He maintained his denial of owing any such sums to the Appellant.
11. Regarding the property, the Respondent supported the trial court's decision to decline jurisdiction. He contended that the division of matrimonial property is a consequential matter that should only be entertained after the issuance of a decree absolute, through an independent suit, He argued that this allows for a proper inquiry anchored on the principles of equity, where each party can fully defend their respective contributions.
12. The Respondent further submitted that the purchase price of Kshs 11.5 million indicated in the 2018 sublease agreement could not be taken as the current value of the property, which must have appreciated.

Analysis & Determination

13. This being a first appeal, the duty of this Court is well settled. It is to reconsider the evidence adduced before the trial court, evaluate it and draw its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. This principle was authoritatively laid down in the locus classicus case of *Selle & Anor -vs- Associated Motor Boat Co Ltd & Others EA 123*.
14. From the grounds of appeal and the submissions of the respective parties, the following issues lend themselves for determination by this Court:
 - i. Whether the trial Court erred in fact and in law in finding that the prayer for a refund of Kshs 2 million was not pleaded and in failing to determine it;
 - ii. Whether the trial court erred in law by declining jurisdiction over the immoveable property on grounds of territorial and pecuniary jurisdiction
 - iii. What are the appropriate orders in the circumstances.
15. On the first issue, a keen examination of the Record of Appeal reveals that the Appellant's contention is well founded. Prayer (c) of the Petition dated 25 October 2021 specifically addressed the issue of reimbursement of Kshs 2 million to the Petitioner. It is, therefore, plain and incontrovertible that the learned Magistrate made a manifest error on the face of the record. The prayer was clearly and unequivocally pleaded. The finding by the trial Court was factually incorrect and cannot be sustained.
16. While the learned Magistrate was factually incorrect that the prayer was missing, the outcome – that the claim should not be determined within the confines of divorce proceedings – was legally sound and prudent. The trial court ultimately granted the parties liberty to file an appropriate suit in respect of that prayer. This ground of appeal partially succeeds in establishing the factual error, but fails on the substantive law governing the adjudication of disputed debts within a divorce petition. The correct forum for establishing liability in a disputed debt remains open via a separate suit.
17. Regarding the issue of the trial court's jurisdiction to entertain the claim on division of matrimonial property, the Appellant's prayer to the trial court was That the property MAVOKO PARK LR NO. XXXXX/XXXXX maisonette No. 30 be awarded to the her. In her submissions herein, the Appellant



- argued that she is deserving of the said property because she continues to service the mortgage thereon, though the lease is registered jointly between her and the Respondent.
18. As rightly submitted by the Respondent, for the trial court to determine this particular issue, it would call for evidence on and proper examination of the level of contribution by each party.
19. Section 7 of the *Matrimonial Property Act* provides 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.
20. Rule 5 (2)(a) of the Matrimonial Property Rules provides clarification on when such applications may be made:
- A spouse or former spouse may apply to a court for the determination or declaration of any right or claim over matrimonial property in accordance with rule 7—(a) at any time after the dissolution of the marriage by a decree of a court given in final determination of proceedings under the *Marriage Act* (Cap. 150);
21. In essence, a claim for matrimonial property, which is not a claim for declaration of rights under section 17 of the Act, must be made upon the dissolution of the marriage. In *EWG v WMM*; Civil Case NO. 1 of 2019 [2020] eKLR, Justice Muchelule stated thus:
- “The practice obtaining is that parties who seek to divorce will file a petition in the subordinate court. If they seek the declaration of their interest in any matrimonial property acquired during the marriage, and subject to the value of the property, they will bring the cause in the High Court. Such declaration is made under section 17 of the *Matrimonial Property Act*, 2013. It is only upon the dissolution of the marriage that, under section 7 of the *Matrimonial Property Act*, a cause can be brought for the division of the matrimonial property. In essence, the applicant would be looking at three different suits. One can imagine the time that would be lost, and the costs to be incurred! Parliament should look at sections 2 of the *Marriage Act* and Sections 7 and 17 of the *Matrimonial Property Act*, and see how to make it easy, effective and efficient for couples to deal with disputes relating to marriage and matrimonial property. Access to justice, in all its manifestations, is a right under Article 48 of *the Constitution*.”
22. Although the trial court cited lack of jurisdiction as the basis for not granting the orders, it is clear from the foregoing that the timing of that particular prayer also presented a problem. The trial court issued a decree nisi and not a decree absolute, meaning that a claim for division of matrimonial property at that juncture was premature. On this basis, this ground of appeal fails, too.
23. Having re-evaluated the evidence and considered the grounds of appeal, this Court finds that the learned Magistrate’s ultimate decision to grant liberty to the parties to file an appropriate suit regarding the claim on reimbursement and division of matrimonial property was sound, notwithstanding the minor factual error concerning the enumeration of the prayers in the Petition. For that reason, this appeal is substantially dismissed. Each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 30 DAY OF SEPTEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT



Delivered on virtual platform in the presence of:

For Appellant: Ms. Samba

For Respondent: Mr. Olando

Court Assistant: Lucy Mwangi

