



Mariano v Hijarat (Sued as the Administrator of the Estate of Anthony Timothy Mariano) & 3 others (Environment & Land Case 151 of 2013) [2024] KEELC 1165 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 151 OF 2013
OA ANGOTE, J
FEBRUARY 29, 2024**

BETWEEN

MARIA SZABANOWICZ MARIANO PLAINTIFF

AND

MORSEL HIJARAT (SUED AS THE ADMINISTRATOR OF THE ESTATE OF ANTHONY TIMOTHY MARIANO) 1ST DEFENDANT

WALI HIJARAT 2ND DEFENDANT

HOMER HIJARAT 3RD DEFENDANT

REGISTRAR OF TITLES 4TH DEFENDANT

JUDGMENT

1. By way of a Further Amended Plaint dated 10th June, 2016, the Plaintiff prays for judgment against the Defendants jointly and/or severally for:
 - a. An injunction barring the 1st, 2nd and 3rd Defendants either by themselves their tenants, agents, servants or in any manner howsoever from evicting, trespassing, entering, remaining on, creating a nuisance on or in any way dealing with the flat or interfering with the Plaintiff's enjoyment of her spousal interest and/or trust interests on Flat No. 10 erected on L.R. No. 1870/V/241; I.R. 75309 Maruti Apartments Nairobi ("the Flat").
 - b. An order of eviction from the said Premises I.R. 75309 Maruti Apartments Nairobi ("the Flat") of the 1st, 2nd and 3rd Defendants, their tenants, agents and/or servants.
 - c. The 4th Defendant to bar any further transactions, conveyance, transfer, mortgage, charge, lease over Flat No. 10 erected on L.R. No. 1870/V/241; I.R. 75309 Maruti Apartments Nairobi ("the Flat") and to rectify the Register to reflect the Plaintiff's rights and interest thereon.



- d. Declaration that the Plaintiff has spousal interests in Flat No. 10 erected on L.R. No. 1870/V/241; I.R. 75309 Maruti Apartments Nairobi (“the Flat”) and/or the 1st Defendant is Trustee for her interests in the Flat.
 - e. Damages.
 - f. Order for presumption of marriage order (sic) that the 1st Defendant is trustee for the Plaintiff’s spousal interest on.
 - g. Order for the principal immigration officer to produce the file.
 - h. Damages.
 - i. Interest thereon.
 - j. Costs of this suit.
 - k. Any other relief the court deems fit to grant.
2. In her Amended Complaint, the Plaintiff averred that on 9th September, 2000, she solemnised her marriage to the 1st Defendant, Anthony Timothy Mariano, who is now deceased; that at the time of filing of the suit, he was seriously ill resulting in his mental faculties being affected; that the 2nd Defendant is the deceased’s nephew and that the 3rd Defendant is his wife.
 3. The Plaintiff averred that she met the deceased in October, 1999 and they later commenced a romantic relationship; that after getting engaged and obtaining her father’s blessings, they moved in together in May 2000 living as man and wife and that on 9th September, 2000, their union was blessed in church at the YWCA Hall in a ceremony organised by the deceased.
 4. It is the Plaintiff’s case that after the said marriage, they decided to purchase a home which they did on cash basis; that they purchased Flat No. 10 erected on L.R. No. 1870/V/241; I.R. 75309 Maruti Apartments Nairobi (“the suit property”) and that in the year 2002, they moved into the suit property.
 5. The Plaintiff averred that she contributed to the purchase of the suit property and as per Polish and Indian customs, had it registered in the name of her husband, even though she managed the home as the wife and that the 1st Defendant is her trustee in the interest in the suit property. It is the Plaintiff’s case that she paid all domestic bills including service charge, the apportionment for land rent, car insurance, taxi, food and other household expenses.
 6. It was averred by the Plaintiff that having worked for Air France since 1996, she paid for their air tickets to the USA for the deceased to undergo a heart operation and accompanied him for the said treatment; that she eventually changed her last name to that of her husband and he swore an affidavit confirming that they were man and wife and that the Kenyan immigration office ought to produce her file to confirm this.
 7. It was the deposition of the Plaintiff that the deceased enjoyed all perks as her spouse from her place of employment, including a medical cover which catered for treatment for various ailments including diabetes, Parkinson’s and prostate cancer, which conditions prevented them from having children.
 8. It is the Plaintiff’s case that she took early retirement on the advice of the deceased; that they sold most of their properties so they could migrate to his home in the USA; that they left the suit property in their neighbour’s management and the proceeds used go to a joint account she held with the deceased and that eventually they moved to Turkey with the 2nd and 3rd Defendants in pursuit of a warmer climate,



- where the 2nd and 3rd Defendants used the deceased's and her funds to buy a house and moved the money to their son's account, Idiris Hijrat without their knowledge, consent or approval.
9. The Plaintiff averred that when the deceased was admitted to hospital, the 1st and 2nd Defendants informed the hospital that he had no wife and denied her access to visit him in hospital; that due to mistreatment by the 2nd and 3rd defendants in Turkey and loss of her matrimonial funds to them, she opted to return to Kenya.
 10. The Plaintiff further averred that the 2nd and 3rd Defendants made a Power of Attorney which was not signed by the deceased as he was in ICU and not capable of making conscious decisions; that the Power of Attorney is invalid and the deceased is a trustee of her interests in the suit property and that she has spousal interest in the suit property because she married the 1st Defendant and the presumption of marriage has been established.
 11. The 4th Defendant entered appearance and filed its Defence on 30th August, 2013 where it denied knowledge of the averments in the Plaint and undertook to seek better particulars of the same. The averments in the Plaint were denied and the Plaintiff was put to strict proof.
 12. The 1st, 2nd and 3rd Defendants applied to have the name of the 1st Defendant substituted with that of Morsel Hijrat, the daughter of the 2nd and 3rd Defendants, the Administrator of the Estate of the deceased. By the said application, the Court was informed that the 1st Defendant passed away on 3rd December, 2015. The said application was allowed. The 1st, 2nd and 3rd Defendants did not any file any Defence.

Hearing and Evidence

13. The Plaintiff testified as PW1. She relied on her Witness Statement and the Supporting Affidavit to the application dated 5th February, 2014 which reiterates the contents of the Amended Plaint as set out above, as her evidence-in-chief. In addition, she testified that the deceased was her husband; that there are witnesses who saw them get married and that the ceremony was presided over by a pastor.
14. It was the testimony of PW1 that after marriage, her and the deceased bought a house along Rhafta Road, Maruti Flats; that she is the one who paid the deposit for the house and that it is the deceased who proposed that the suit property be registered in his name and she had no objection to the suggestion.
15. She testified that she never worked for the deceased as she had a fulltime job at Air France; that they travelled a lot together as she would get free tickets from her place of work, Air France; that due to the 1st Defendant's health, they relocated to Turkey where they decided to purchase a house, but the 3rd Defendant registered the house in her son's name and that the 3rd Defendant and her husband would threaten her and refused to allow her visit the deceased who at the time had been admitted in hospital.
16. PW1 testified that no Power of Attorney can extinguish her rights over the suit property; that she has not consented to it being sold; that the deceased fell sick while in Holland and that she had to apply for residence status so that she could take care of her husband.
17. The Plaintiff produced in evidence a copy of her Marriage Certificate as exhibit 1, a letter from the Ministry of Foreign Affairs as exhibit 2, a copy of the caveat as exhibit 3 and copies of her passport and that of her late husband as exhibits 4(a) and (b) respectively.
18. In cross examination, she testified that she is the owner of the suit property even though she had no documents to confirm it because the documents were with the 1st, 2nd and 3rd Defendants and that her name does not appear anywhere on the title documents because she trusted her husband.



19. She further testified that she had not challenged the Power of Attorney in the Defendants' bundle of documents; that she did not know whether the Will of Anthony Timothy Mariano was genuine and that she was aware that a Certificate of Inheritance was issued in respect of the Will, which she has never challenged in court.
20. PW1 testified that she had also not challenged the unconditional acceptance of inheritance and that she has never challenged the Application for Resealing of Grant in Kenya and the Notice for Resealing of the Grant, both of which were in respect of Anthony Timothy Mariano.
21. With regard to the suit property, the Plaintiff testified that the property was purchased for about KShs. 413,500,000 and the deposit thereto was KShs. 144,350,000 which she paid from the Air France sacco; that she did not have any document to show that she contributed to the purchase price and that she destroyed all the documents when they were migrating from Kenya.
22. On further cross-examination, PW1 testified that as per the title produced in court, the current owner of the suit property is her late husband who died in 2015 while the suit was pending; that there is filed HCCC no. 707 of 2017 as well as 527 of 2017; that the suit property was their matrimonial home and is part of the estate and that the succession cause is ongoing.
23. The Plaintiff called Robinson Das, PW2 as her witness. PW2 testified that he was a mutual friend of the deceased and the Plaintiff and knew that they were married; that the two travelled around the world together courtesy of the Plaintiff's tickets as a staff member; that the Plaintiff later quit employment to travel abroad with the deceased and that to his shock, the 2nd and 3rd Defendants manipulated the deceased due to his deteriorating health.
24. PW3, Tessie Almeida also gave a sworn testimony, and adopted her witness statement dated 2nd March, 2017, where she stated that she was a mutual friend of the deceased and the Plaintiff and that she knew that they were married.
25. The last witness was Jan Szabanowicz, who testified as PW4. It was his evidence that the Plaintiff was his sister; that he attended the engagement party of the deceased and the Plaintiff where the deceased gave the Plaintiff a diamond engagement ring; that they travelled around the world together courtesy of the Plaintiff's tickets as a staff member of Air France and that the Plaintiff quit employment to travel with the deceased abroad.
26. PW4 testified that to his shock, the 2nd and 3rd Defendants manipulated the deceased due to his deteriorating health; that the deceased never divorced the Plaintiff and neither was he living with her under duress and that he was further shocked to learn that the 2nd and 3rd Defendants were alleging that the Plaintiff was a house girl yet she is a professional, skilled and educated and always worked with Air France.
27. None of the Defendants testified.

Submissions

28. The Plaintiff submitted that ownership of the suit property being matrimonial property vested in her and her late husband; that she contributed to the acquisition of the suit property and development thereof; that they lived on the suit property as tenants and when it was put on the market, she paid the legal fees and the deposit and that as a wife, she also contributed by paying medical fees for the deceased as well as air tickets from Air France, where she she worked.
29. It was submitted that the 2nd and 3rd Defendants took advantage of the deceased's failing health to hijack their plans; that they took advantage of the illness of the deceased to create a Power of Attorney



which they tried to use to sell the house and that the 2nd and 3rd Defendants refused to participate in the hearing and did not call any witnesses.

30. According to the Plaintiff, her case was unassailable and has proved her case to the requisite standard; that under Article 45 (3) of *the Constitution*, parties to a marriage are entitled to equal rights during and after the dissolution thereof and that the Defendants did not provide any evidence to challenge the Plaintiff's contribution to the acquisition and ownership of the suit property.
31. The Plaintiff went on to submit that under Section 7 of the *Matrimonial Property Act*, ownership of matrimonial property vests in the spouses according to their contribution towards acquisition; that Section 2 of the Act, recognises that contribution can either be in monetary or non-monetary form; that it does not discriminate against remunerative employment; that non-monetary contribution includes domestic work, management of the home and companionship and that the court should allow her claim which is uncontroverted.

Analysis and Determination

32. This court has considered the parties' pleadings, the testimony and evidence tendered herein, submissions filed and the applicable law. The issues which arise for determination are as follows:
 - i. Whether the suit property forms part of the Plaintiff and 1st Defendant's matrimonial property?
 - ii. Whether the Plaintiff is entitled to the prayers sought in the Plaintiff?
33. From the Court record and the facts presented before the Court, there is no dispute that the 1st, 2nd and 3rd Defendants were represented by learned Counsel in the proceedings. The firm of Iseme, Kamau and Maema filed a Notice of Appointment of Advocates on 29th October, 2013 to act for the 1st, 2nd and 3rd Defendants.
34. The said firm of Advocates however failed to file a Defence. On the date the matter was set down for defence hearing, the Defendants and their Advocates were absent in court.
35. The court in its ruling delivered on 27th May, 2016 observed that the issues raised on the legality of the marriage between the deceased and the Plaintiff as well as contribution and interests in the suit property were matters for evidence during trial.
36. In *Trust Bank Limited vs Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No. 1243 of 2001*, the court held that it is trite that where a party fails to call evidence in support of its case, the party's pleadings remain mere statements of fact because in so doing, the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the Plaintiff against the Defendant is uncontroverted and therefore unchallenged.
37. However, this does not take away the Plaintiff's burden to prove the allegations put forward in her case. The Court of Appeal in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another [2014] eKLR* espoused that as follows:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted, the claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of



proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

38. The legal burden of proof is on the Plaintiff to prove her case as alleged. Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

39. There is also the evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:

“Section 109: The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”

40. Section 112 provides as follows:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”

41. The two provisions were dealt with in *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the [Evidence Act](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

42. It follows that the general rule is that the initial burden of proof lies on the Plaintiff, but upon it being discharged, the same may shift to the Defendant, to put forward her case in Defence depending on the circumstances of each case. In *Evans Nyakwana vs Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the [Evidence Act](#), Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the [Evidence Act](#) provides the burden lies in that person who would fail if no evidence at all were given as either side.”

43. Section 2 of the [Land Act](#) defines a “matrimonial home” as any property that is owned or leased by one or both spouses and occupied by the spouses as their family home. Section 6 of the [Matrimonial Property Act](#) defines matrimonial property as:

“(1) For the purposes of this Act, matrimonial property means—
(a) the matrimonial home or homes;



- (b) household goods and effects in the matrimonial home or homes;
or
- (c) any other immovable and movable property jointly owned and
acquired during the subsistence of the marriage.”

44. Therefore, before determining whether the suit property is matrimonial property, this court must first determine whether there was a marriage between the 1st Defendant and the Plaintiff at the time the property was purchased.
45. The Plaintiff has averred that she was married to the 1st Defendant on 9th September, 2000 at a ceremony conducted at the YWCA Hall. She has produced a marriage certificate as proof of this fact, and a letter from the Ministry of Foreign affairs Reference No. MFA.168/275/001 confirming that the Marriage Certificate No. 069508 does bear the seal of the Registrar General, Sheria House, Nairobi.
46. Although the said letter was said to be fake, no proof has been produced to dispel the presumption that the letter indeed emanated from the Ministry of Foreign Affairs.
47. The Plaintiff’s witnesses corroborated the Plaintiff’s testimony. PW2 went further and stated that he attended the marriage ceremony. There are however glaring irregularities evident on the face of the Marriage Certificate produced herein. For starters, the marriage between the deceased and the Plaintiff having been celebrated in 2000, the Certificate could not have been issued under the current Marriage Act of 2014, but instead the under the Marriage Act, 2012 CAP 150 Laws of Kenya, which was repealed by the current Act. Section 28 of the repealed Act provides that:-

“ 28. Signature of marriage certificate

- (1) The certificate shall then be signed in duplicate by the officiating minister, by the parties and by two or more witnesses to the marriage.
- (2) The minister, having also signed his name to the counterfoil, shall sever the duplicate certificate therefrom, and he shall deliver one certificate to the parties, and shall within seven days thereafter transmit the other to the registrar of marriages for the district in which the marriage takes place, who shall file the same in his office.”

48. A perusal of the Certificate of Marriage produced in court shows that while the names of the minister, the parties contracting the marriage and the witnesses thereto are typed thereon, the said Certificate does not bear their signatures. This is contrary to the repealed law under which it was issued.
49. That aside, the Plaintiff has testified that her marriage was celebrated at the YWCA Hall on 9th September, 2000, which information appears on the said marriage certificate. However, this court notes that the marriage certificate indicates that it was issued on 30th day of November, 2012. There is a period of 12 years from the date the marriage was celebrated to the date of issuance of the Certificate. Section 27 of the repealed Act provides as follows:

“

“ 27. Entries to be made in marriage certificate



Immediately after the celebration of any marriage by a minister, the officiating minister shall fill up in duplicate a marriage certificate with the particulars required, and shall state also and enter in the counterfoil the number of the certificate, the date of the marriage, the names of the parties and the names of the witnesses.”

50. No reason has been given as to why the said marriage certificate was not issued on the same date that the marriage ceremony was conducted. If another ceremony was conducted on 30th November, 2012 that gave rise to the said Certificate, the Plaintiff has not informed this court. It also raises eyebrows that this certificate was issued on 30th November, 2012 while this suit was instituted on 30th January, 2013, just two months after the Certificate was issued.
51. The timing of all these events is questionable. Therefore, the court must register its doubts over the validity of the said marriage certificate. This is because the lack of the signatures of the officiant, the parties to the marriage and the witnesses thereto contrary to the laws under which it was purportedly issued, raises serious questions as to whether the marriage as claimed is valid.
52. As to the prayer for an order of presumption of marriage, the repealed CAP 150 provided under Section 59 that a marriage could be proven by:-
 - a. a certificate of marriage issued under this Act or any other written law;
 - b. a certified copy of a certificate of marriage issued under this Act or any other written law;
 - c. an entry in a register of marriages maintained under this Act or any other written law;
 - d. a certified copy of an entry in a register of marriages maintained under this Act or any other written law; or
 - e. an entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith'nasheri, Shia imam, Ismaili or Bohra communities, or a certified copy of such an entry.”
53. Seeing as the Plaintiff has produced a marriage certificate that she alleges is valid, this court does not understand why she would not base her suit on the said certificate and instead wants to rely on the common law doctrine of presumption of marriage.
54. This court having already declared the marriage certificate suspect and thus invalid, and having declined to bring into play the doctrine of presumption of marriage, it is the finding of this court that the suit property herein is not matrimonial property.
55. Regardless of this finding, the court has investigated the claims that the Plaintiff contributed towards the purchase of the suit property. The Plaintiff claims that she paid for the deposit of the purchase price towards acquiring the house. The Plaintiff alleged that the money she paid as deposit was obtained from the Air France sacco.
56. However, the Plaintiff has produced no documentary evidence to prove this allegation. Her allegation that the Defendants took all documents from her does not hold. As a former employee of Air France and a member of the sacco, she could have approached them to provide copies of the documents evidencing the release of money to her or withdrawal thereto as the case may be.
57. The alleged payment of car insurance is also not backed by evidence. If for any reason she lost all these documents, she could have approached the issuing authority for provision of copies to submit to this court.
58. The only evidence produced as proof of contribution are seven receipts being payment of service charge. These are receipts issued by Maruti Apartments in respect of service charge. The receipts



- produced are receipt no. 597 for payment of KShs. 3,375; 623 receipt no. 821 for payment of KShs. 3,375/-; receipt no. 832 for payment of KShs. 3,375; receipt no. 850 for payment of KShs. 6,750/-; receipt no. 908 for payment of KShs. 6,750 and receipt no. 920 for payment of KShs. 6,750. In the same bundle, there is one receipt paid by the deceased being receipt no. 445 for payment of KShs. 3,375 /-.
59. In total, the Plaintiff has only proved contribution of KShs. 33,750, whereas the property was, by the Plaintiff's own testimony, allegedly purchased for KShs. 413,500,000. Considering that the issue of marriage was not proved, I do not see how such a paltry sum as compared to the entire purchase price could entitle the Plaintiff to an interest in the suit property.
 60. Consequently, the claim of contribution towards purchase, maintenance and development of the suit property also fails. The prayer for declaration of a trust on the part of the deceased to the Plaintiff by virtue of her being a spouse and contribution towards purchase of the property must as a consequence also fail.
 61. In conclusion, the prayers in the Plaint all flow from the allegation that the suit property is matrimonial property. This court has already stated that it is not convinced that there existed a marriage between the Plaintiff and the 1st Defendant, and has consequently made a finding that the suit property is not in fact matrimonial property. Consequently, any prayer based on the alleged marriage must fail.
 62. The Plaintiff has also not led any evidence to show her entitlement for damages, or the purpose for which the damages are to be paid. It did not come out in evidence that the Defendants have trespassed onto the property. It is in fact her testimony that the Defendants do not reside in the country.
 63. In any event, if the Plaintiff is claiming that the Defendants are threatening to evict her, then she must be the one in occupation of the suit property and thus they cannot be in trespass unless otherwise proven. There seems to be no violation herein which would warrant the court to issue an order for payment of damages or at all.
 64. Even if the Defendants were in occupation of the house, it goes without saying that in the instant suit, the Plaintiff does not hold title to the suit property, neither has she proved that she has any legal interest in the said house. Consequently, she would not have been entitled to any damages.
 65. For those reasons, the Plaintiff's suit is dismissed. The Defendants having not defended the suit, I shall not award any costs.

DATE, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance of the Plaintiff

No appearance for the Defendant

Court Assistant - Tracy

