MIM v FMM; AAM (Interested Party) (Civil Appeal 633 of 2019) [2025] KECA 737 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KECA 737 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 633 OF 2019

DK MUSINGA, F SICHALE & FA OCHIENG, JJA

MAY 2, 2025

BETWEEN

MIM ..... APPELLANT

AND

FMM ..... RESPONDENT

AND

AAM ..... INTERESTED PARTY

(Being an appeal from the Judgement and Decree of the High Court at Nairobi (Ougo, J.) delivered on 28th November 2018 in Civil Suit No. 5 of 2015(O.S))

JUDGMENT

1. This is an appeal from the judgement and decree of the High Court at Nairobi (Ougo, J.) delivered on 28th November 2018, in Civil Suit No. 5 of 2015(O.S).

2. A brief background is necessary to contextualize this appeal. By an Originating Summons dated 18th February 2015 and filed on 28th February 2015, which was largely premised under the *Matrimonial Property Act* (the Act), MIM, the appellant, asserted that she married FMM, the respondent, under customary law around 1985, and subsequently formalized the union in 1996. Their marriage was blessed with four children. The union was eventually dissolved on 4th April 2014 by a decree nisi issued by the High Court at Nairobi in Divorce Cause No. 422 of 2013.

3. She averred that during the subsistence of the marriage, the couple jointly acquired various properties. These included LR No. S/Maragoli/Mahanga/X2; Kayole Plots C1-4X2 and C1- 4X1; LR No. Kajiado/Kitengela/3XX0; Kibera Plot NB 62/4X3; Kitale Plot No. 211/1X6; a 5.5-acre farm in Kitale; a plot in Ruai; and a motor vehicle, registration number KAL 1X1J (Peugeot). In addition, she asserted

that they had jointly acquired shares in Kenya Commercial Bank Ltd, Co-operative Bank of Kenya Ltd, National Bank of Kenya Ltd, Kenya Airways, and ICDC.

4. She provided a comprehensive account of her contributions to the acquisition and development of the matrimonial properties, encompassing both financial and non-financial efforts. These included childcare, companionship, oversight of property acquisitions, supervision of construction works, and management of family affair, contributions which, she argued, entitled her to a share of the properties. Her financial input involved securing multiple loans that were directly deducted from her salary, purchasing building materials, paying laborers from her personal funds, and actively overseeing the construction process. In support of these claims, she presented bank statements, salary deduction records, and receipts for construction materials. Despite these substantial contributions, she alleged that the respondent exclusively collected rental income from the properties viz, Kshs. 5,000 monthly from Kibera plot, Kshs. 204,000 from Kayole plots, and Kshs. 20,000 from Kitale plot, while she faced financial hardship in raising their children, as the respondent had allegedly abdicated his parental responsibilities.

5. The appellant further contended that she was living in dire conditions, while the respondent enjoyed the benefits of the properties, and expressed concern that he was about to dispose of one of the Kayole plots. She therefore sought court intervention to prevent wastage and protect her interests. She asked the court to declare that the properties were jointly acquired and held in trust by the respondent for her benefit. She also sought a declaration entitling her to 50% of the assets or their proceeds, a temporary injunction to restrain the respondent from disposing of the properties, and an order recognizing her right to rental income from the Kayole plots pending determination of the matter.

6. The respondent opposed the suit by way of a replying affidavit sworn on 2nd March 2015. He denied owning Kayole Plot C1-4X2, stating that it had been sold with the appellant's knowledge for Kshs.1,500,000 to AAM, (the Interested Party), through a sale agreement dated 15th April 2010. He claimed that the proceeds were used to pay school fees for their children and to cover his medical expenses. The respondent averred that he had suffered serious health issues, undergone two surgeries, and was preparing for further treatment abroad, having been officially certified as disabled. Contrary to the appellant's claims, he asserted that he had continued to pay school fees for his children despite his condition and attached receipts, including for a child pursuing a parallel university degree.

7. In response to the appellant's claim of financial hardship, the respondent contended that she remained employed at the Nairobi City Council, a position he claimed to have helped her secure. He further asserted that she resided in a rented house in Lavington, the rent for which he continued to pay, and that she owned a personal vehicle registration number KAJ 4X8B, along with other undisclosed assets. He denied that the loans she alluded to were used for the development of his properties, and alleged that she had unlawfully obtained the receipts submitted in her application.

8. Concerning the disputed properties, the respondent asserted that LR No. S/Maragoli/Mahanga/X2 was ancestral land gifted to him in 1984, prior to their marriage. He claimed to have purchased Kayole Plot C1-4X1 independently in 1998, although he acknowledged it was the subject of a legal dispute, to wit, Nairobi CMCC No. 7797 of 2006 arising from a double allocation. He further stated that LR No. Kajiado/Kitengela/3XX0 was a personal gift from a friend, Mr. Njau, and that the appellant made no contribution to its acquisition. As for the Kibera plot, he contended that it was acquired through an auction without any involvement from the appellant, and that the purchase occurred after they had already separated. He referred to Chief Magistrates' Court Milimani Matrimonial Cause No. 7 of 2006 filed by the appellant on grounds of desertion as evidence of their estrangement at the time of its acquisition.

9. The respondent further averred that Kitale Plot 211/1X6 had been allocated to him, but was subsequently sold to a third party due to his inability to develop it. He also stated that the 4.5-acre Kitale Farm served as a shared residence for both families and could not be subdivided without leaving dependants homeless. Regarding the Ruai plot, he explained that it was acquired through shares, although the relevant documents had been misplaced. Concerning the shares held in various companies, he denied joint ownership, presenting investment statements to demonstrate that some shares had been sold or acquired independently. He challenged the appellant's claims of contributing to the acquisition and development of the properties, arguing that her loans were used to purchase a separate property in Nyayo Estate. He also accused her of concealing her own assets, asserting that she should have disclosed the following as part of the matrimonial property: Plot No. 3XX2-Dandora Women Group share certificate dated 25th July 2014; Plot No. 0X8D-Wendani Enterprises share certificate dated 25th July 2014; two plots (50x100) each—Syokimau Bright House Ltd share certificate No. 4XX2 under Reg. No. 2XX1; and motor vehicle registration No. KAJ 4X8B, Toyota saloon.

10. Lastly, the respondent averred that he had taken loans to develop the properties, continued to support his children, and denied receiving the rental income as alleged. He dismissed the claims of cruelty, instead accusing the appellant of violence, citing Kibera Criminal Case No. 5162 of 2007 where she pleaded guilty to assaulting him. He urged the court to dismiss the application as speculative and unfounded.

11. During the hearing, the appellant reiterated her case, detailing how the properties were acquired and her contributions, both monetary and otherwise. She denied owning the assets listed in the respondent's affidavit, and confirmed that she knew the interested party, who was said to have purchased Kayole C1-4X2, but stated that the property had not been transferred.

12. The respondent narrated how he acquired each asset without the appellant's contribution, and claimed that some properties had been sold with the appellant's knowledge, and were no longer matrimonial property. He also alleged that the appellant owned secret properties, which he urged the court to consider as part of the matrimonial estate.

13. HKLM, the respondent's current wife, testified as DW2. She explained that she married the respondent in 2008 under Luhya Customary law, and they had one child together. She stated that their Kibera home was the only one she and their child had, and confirmed her contribution toward its development.

14. The interested party did not testify during the hearing but filed written submissions, in which she asserted that she had purchased Kayole C1-4X2 from the respondent. She further stated that the registration of the sale had not yet been completed due to an existing court order.

15. After the hearing, the trial court delivered its judgment on 28th November 2018. The court acknowledged that the date of the parties' customary marriage was contested, but based on the appellant's originating summons, supporting affidavit, and the proceedings in the Divorce Cause, it was generally agreed that the marriage took place in 1985. In that context, the court noted that LR No. S/Maragoli/Mahanga/X2, which the respondent claimed was ancestral land, passed down through generations, was transferred to him on 7th January 1985. The court referenced the decision in Muthembwa v. Muthembwa (2002) 1 EA 186, which held that a spouse cannot acquire an interest in property inherited by the other spouse unless the property had been improved with the financial contributions of the other spouse. However, the court concluded that the respondent had failed to provide sufficient evidence to prove that the property was ancestral land. Moreover, the appellant's

claim of having made monetary contributions toward its acquisition was not adequately refuted. As a result, the court held that the appellant had acquired a beneficial interest in the property.

16. The court addressed the disputed properties as follows: For Kayole Plot C1-4X1, the respondent argued it was not subject to distribution due to an ongoing court dispute over double allocation. However, the court noted the respondent had not provided the pleadings for the case, while the appellant presented a sale agreement between the respondent and the City Council of Nairobi. Since the plot was acquired during the marriage, the court ruled it qualified as matrimonial property. As regards Kayole Plot C1-4X2 which the respondent allegedly sold to the interested party, the court held that the issues concerning occupation and title were more appropriate for the Environment and Land Court, and thus, the plot was excluded from distribution. The same applied to Kitale Plot No. 211/1X6, which the respondent claimed to have sold to a third party.

17. As for LR No. Kajiado/Kitengela/3XX0, the 5.5-acre Kitale Farm, and the Ruai plot, the trial court determined that these properties, for which the respondent maintained title to, qualified as matrimonial property. Regarding Kibera Plot NB 62/4X3, where the respondent lived with his current partner and child, the court agreed with the appellant that the plot was purchased following the sale of another jointly acquired plot, thus granting the appellant an interest in it. Finally, concerning the respondent's shares in various institutions, the trial court found that the appellant did not provide evidence that the shares were acquired during the marriage, and therefore, they could not be considered matrimonial property.

18. While the court briefly made a mention of motor vehicle KAL 1X1J, which was in the possession of the respondent's son with the appellant, and KAJ 4X8B, allegedly owned by the appellant, it did not make definitive findings as to whether either or both vehicles constituted matrimonial property.

19. Regarding the respondent's claim that the appellant owned certain properties, as evidenced by various share certificates, the court ruled that the certificates lacked probative value and did not establish whether the appellant had actual or beneficial ownership of the properties. Therefore, the properties could not be classified as matrimonial property.

20. Ultimately, the court was satisfied that the appellant had largely demonstrated her contribution, both financial and non-financial, toward acquisition of the matrimonial properties listed above.

    Throughout the marriage, she had been employed gainfully while also diligently caring for the family. Therefore, her contributions, both in terms of money and personal effort, were integral to the acquisition of the matrimonial assets, the court held.

21. The Court rejected the Negative Contribution Doctrine raised by the respondent, referencing AQS v. AQR [2012] SGCA 3, where it was held that in cases where parties are in an acrimonious relationship and have accused each other of various forms of misconduct, the court should avoid hastily assigning blame when dividing matrimonial assets. The court further noted that the issues between the parties had already been thoroughly addressed in their divorce proceedings.

22. In the end, the court made the following orders regarding the distribution of property: LR No. S/ Maragoli/Mahanga/X2 was to be divided in the ratio of 80:20 in favor of the respondent; Kayole Plot C1-4X1 was allocated to the respondent; Kajiado/Kitengela/3XX0 and the 5.5-acre Kitale Farm were to be shared equally (50:50); Kibera Plot NB62/4X3 was allocated to the respondent; the plot in Ruai was allocated to the appellant; Motor Vehicle KAL1X1J was awarded to the respondent, while KAJ 4X8B was awarded to the appellant. Although the parties did not address the distribution of a property in Lavington, the court deemed it appropriate to allocate it to the appellant, as she had been residing there.

23. Being dissatisfied with that decision, the appellant preferred this appeal on the grounds, inter alia, that the learned judge erred in law and in fact by: failing to adequately consider the appellant's substantial contribution to the acquisition of all the matrimonial property; not giving proper weight to the appellant's evidence of her contributions; overlooking the appellant's rights under Article 45(3) of the *Constitution*; excluding Kayole Plot C1-4X2, which remained in the respondent's name; misjudging the Lavington quarters as matrimonial property, despite being a rental house owned by the appellant's employer; ruling that the respondent's shares in various institutions were not matrimonial property, despite evidence that they were acquired during the marriage; and failing to appropriately value the properties and developments in the distribution of matrimonial assets.

24. Despite all parties being duly served with the hearing notice, only the appellant attended the hearing, being represented by learned counsel, Mrs. Okune. In her written submissions, counsel had challenged the trial court's findings on the distribution of certain matrimonial properties, specifically LR No. S/Maragoli/Mahanga/X2; Kayole Plot C1-4X1; and Kibera Plot NB62/4X3. However, during the hearing, counsel formally abandoned the appeal concerning Kibera Plot NB62/4X3, which is presently occupied by the respondent, his current wife, and their child. She also abandoned the appeal in respect of LR No. S/Maragoli/Mahanga/X2. Accordingly, the only remaining issue for determination in this appeal is the distribution of Kayole Plot C1-4X1.

25. Counsel contended that the appellant had sufficiently demonstrated her contribution toward the acquisition of Kayole Plot C1-4X1. Nevertheless, despite the court having acknowledged the property as matrimonial, and notwithstanding the appellant's evidence of contribution, the court awarded the property solely to the respondent, who made no effort to establish any contribution, if at all, to its acquisition.

26. In response to a question from the Court regarding the extent of her client's contribution, counsel asserted that the appellant had contributed "substantially," though she was unable to clearly define what constituted that substantial contribution. She maintained that her client had produced various documents before the trial court, including electricity bills and receipts for construction materials related to the property, as evidence of her contribution. On that basis, counsel proposed that the property be distributed equally, on a 50:50 basis.

27. On his part, the respondent filed written submissions dated 18th March 2024 in opposition to the appeal. However, in light of the appellant having abandoned the majority of the grounds initially raised, leaving only the issue of the distribution of Kayole Plot C1-4X1 for our determination, we do not consider it necessary to reproduce the submissions in full. Nevertheless, we note that the submissions principally focus on the legal requirement for parties to prove their respective contributions toward acquisition of matrimonial property, rather than relying on a presumption of equal (50:50) distribution. The respondent acknowledges that contribution may be direct or indirect.

28. He contends that although Article 45(3) of the *Constitution* guarantees equal rights to parties upon the dissolution of a marriage, such equality does not equate to an automatic 50:50 division of matrimonial property. In support of that position, he relies on the Supreme Court decision in JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR), where the Court emphasized that distribution of matrimonial property should be guided by principles of fairness and conscience, rather than by an inflexible adherence to a 50:50 formula. According to the respondent, the sharing of matrimonial property should not reside in a fixed formula in law. In support of this argument, he cites the decision of this Court in PNN *v ZWN, Civil Appeal No. 128 of 2014*; [2017] eKLR, which held that the drafters of Article 45(3) did not envisage an automatic equal division

of matrimonial property upon dissolution of marriage, and that the phrase "equal rights" must be understood to mean that each party's entitlement is determined based on their respective contribution.

29. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in Selle -vs- Associated Motor Boat Co. [1968] EA 123, thus:

> An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

30. We have considered the record of appeal, the submissions filed, and the applicable law. The sole issue for our determination is the distribution of the property known as Kayole C1-4X1. The trial court found that the property constituted matrimonial property, notwithstanding the respondent's claim that its ownership was disputed in a separate suit concerning alleged double allocation. However, the trial court noted that the respondent failed to produce any pleadings from that suit to substantiate his claim. Conversely, the appellant provided a copy of the sale agreement entered into between the respondent and the defunct City Council of Nairobi in relation to the property. We find no basis to interfere with the trial court's conclusion that Kayole C1-4X1 was matrimonial property. In any event, the point of contention in this appeal is not that finding, but rather the trial court's decision to award the property solely to the respondent.

31. Section 7 of the Act is clear 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."

32. The concept of contribution toward acquisition of matrimonial property is defined under section 2 of the Act to include both monetary and non-monetary inputs. Specifically, contribution encompasses domestic work and the management of the matrimonial home, child care, companionship, management of family business or property, and farm work.

33. The appellant asserts that she contributed to the acquisition of Kayole C1-4X1 and that she had tendered in evidence copies of electricity bills and receipts for building materials. However, as noted earlier, she was unable to clearly articulate the extent of her contribution, merely stating that she had made a

> "substantial contribution." Notwithstanding this alleged contribution, the trial court awarded the property entirely to the respondent. The appellant now seeks an equal distribution of the property on a 50:50 basis.

34. In JOO v MBO (supra), the Supreme Court offered a clear interpretation of Article 45(3) of the *Constitution*, holding as follows:

> "In this regard our view is that, while article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married. Kiage JA in his concurring opinion in PNN v ZWN, Civil Appeal No 128 of 2014; [2017] eKLR discussed the concept of marital equality and whether it is translated to mean that matrimonial property should be divided equally at dissolution of marriage. He succinctly penned his thoughts 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 think that it would be surreal to suppose that the *Constitution* somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the *Constitution* gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."
> >
> > Thus, it is that the *Constitution*, thankfully, does not say equal rights "including half of the property."

35. At paragraph 99, of the said decision, it held thus:

> "...it is our finding that the stated equality under article 45(3) means that the courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed."

36. On the concept of equality, the Supreme Court in the same decision pronounced itself as follows:

> "Article 45(3) of the *Constitution* underscores the concept of equality as one that ensures that there is equality and fairness to both spouses. Equality and fairness are therefore one and intertwined. Equality also underscores the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, a finding we have already made and in stating so we recognize that each party's contribution to the acquisition of matrimonial property may not have been done in an equal basis as a party may have significantly contributed more in acquiring property financially as opposed to the other party.
>
> Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property."

37. We have no doubt in our minds that Kayole Plot C1-4X1 was matrimonial property. The appellant produced documentary evidence, as earlier noted, to support her claim of contribution toward its acquisition. In an attempt to discredit her claim, the respondent alleged that the appellant had stolen receipts for the purchase of building materials relating to this and other properties. However, in the absence of any evidence showing that a report was made to the police regarding the alleged theft, the respondent's assertion remains unsubstantiated and amounts to a mere allegation.

38. In our considered view, although the appellant and/or her advocate did not precisely articulate what constituted "substantial contribution", the documentary evidence on record sufficiently demonstrates that the appellant did, in fact, contribute to the acquisition of the subject property. Accordingly, and in full application of the principle of equality in the distribution of matrimonial property as enunciated in JOO v MBO (supra), we are persuaded that the appellant is entitled to a 50% share of Kayole Plot C1-4X1, or, in the alternative, to 50% of the proceeds from its disposal, and we so order.

39. In upshot, we find merit in the appeal with respect to Kayole Plot C1-4X1, which is hereby allowed. Consequently, the trial court's order on the distribution of this property is hereby set aside. We substitute therefor an order that it shall be apportioned equally between the appellant and the respondent as stated above. Given that the current market value of the property is unknown, we direct that the property be subjected to valuation, the costs of which shall be borne equally by both parties. Each party shall bear their own costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.