



REPUBLIC OF KENYA



**KENYA LAW**  
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**JWN v JGM (Civil Suit 46 of 2014) [2025] KEHC 4803 (KLR)  
(Family) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4803 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL SUIT 46 OF 2014  
PM NYAUNDI, J  
MARCH 28, 2025**

**BETWEEN**

**JWN ..... PLAINTIFF**

**AND**

**JGM ..... DEFENDANT**

**JUDGMENT**

1. The Originating Summons dated 14<sup>th</sup> July 2014 is brought by the Plaintiff JWN, against the Respondent, JGM seeking the following orders;
  1. That it be declared that property (moveable and immovable) acquired by joint funds and efforts of the Plaintiff and the Defendant (being the following) is owned jointly by the Plaintiff and the Defendant; Land Parcel measuring 0.05 Hectares excised from Land Parcel No. Dagoretti/Riruta/XXXX.
  2. That this Honourable Court be pleased to order the division of the said property;
  3. That the Defendant be restrained from alienating in any form, whether by way of sale, gift, lease, mortgage or otherwise and/or in any manner disposing of the said property;
  4. That this Honourable Court be pleased to grant further or other relief as may be just in the circumstances;
  5. That costs of the application be in the cause.
2. The Summons was supported by an Affidavit of even date sworn by the Plaintiff.
3. The Defendant filed a Replying Affidavit sworn on 26<sup>th</sup> September 2014 and further replying affidavit sworn on 28<sup>th</sup> October (year not indicated)



4. The Plaintiff states briefly that she and the Defendant cohabited as husband and wife from 1999. They formalised their union under Kikuyu Customary Law in May 2006. Their union was blessed by two issues: MNG who was born on 5/12/1996 and was adopted by the Defendant and PNG who was born on 15/5/2000. During the subsistence of their marriage, the Defendant purchased property known as Land Parcel No. Dagoretti/Riruta/XXXX situated in Kawangware. They developed the property jointly and constructed a 4 bedroomed house (family home).
5. They also constructed 12 residential units where the Defendant earns Kshs. 45,000/= per month. The Defendant deserted their matrimonial home in December 2013 forcing her to fend for her children singlehandedly. The Defendant has continuously threatened her and the children to move out of the matrimonial home. She sells ice cream while the Defendant operates a video shop in Kawangware. She argued that she made both monetary and non-monetary to the acquisition and development of the property and is therefore entitled to the same.
6. The Defendant denied marrying the Plaintiff under Kikuyu Customary marriage. He argued that he solely purchased Land Parcel No. Dagoretti/Riruta/XXXX on 23/6/2009 from proceeds obtained from selling Plot No. 39 on L.R 11379/3/R which he inherited from his father. He attached sale agreements dated 23/6/2009 and 16/3/2009 marked as JGM-2 and JGM-3. He sold the land for Kshs. 1,200,000. For the rentals, he constructed them without any financial or moral help from the Plaintiff. He took a loan from his Sacco and merry go round to develop these properties. He attached loan forms and merry go round marked as JGM-5 JGM-6. He denied threatening to evict the Plaintiff.
7. He argued that he uses the rental proceeds to meet the basic needs of the Plaintiff and the children. He set up an ice cream depot for the Plaintiff and purchased some ice cream cooler boxes/deep freezers. The Plaintiff makes around Kshs. 45,000/= per day. He built the Plaintiff's mother a house and paid school fees for her brothers. He denied paternity of the second child. He argued that the Plaintiff is not entitled to any proceeds from his property. That she has not shown evidence that she contributed towards the purchase and improvement of the properties in question.
8. The summons was disposed of by way of viva voce evidence.

#### **Evidence.**

9. The Plaintiff testified as PW1. Her evidence was that she started living with the Defendant in Kawangware in 1999. She had a child from a previous relationship and the Defendant accepted the child. She got a child with the Defendant in 2019. They shared family responsibility. She was operating a kiosk then while the Defendant operated a video shop. She operated a hotel during the day. School fees for the children were paid from proceeds from the hotel. She was paying rent for the hotel.
10. They built a house in 2019 then later on, they put up 12 single rooms for rent. She and the Defendant supervised construction of the house. She cooked for the workers. The Defendant collects Kshs. 4500 from each unit. The Defendant rented out the family home. She pays school fees for the children. The Defendant introduced her to his parents. He purchased land and built a house for her mother. He paid school fees for her brother and participated in the circumcision process. During cross examination, she stated that she did not have receipts showing her contribution. They do not have a title deed for the property
11. PW2, PMM stated that he is the father of the Plaintiff. He adopted his written statement dated 20<sup>th</sup> March 2017 as his evidence in chief.



12. During cross examination, he stated that the Defendant paid Kshs. 45,000 as dowry for the Plaintiff. According to Kikuyu Customary Law, the Defendant was required to pay goats. In present time, cash is accepted. He did not have minutes or photographs to prove that there was a ceremony.
13. DW1, JGM is the Defendant. He told the court that his relationship with the Plaintiff was a come-we stay. The Plaintiff deserted their matrimonial bed and moved to the children's room. He bought LR No. Dagoretti /XXXX from proceeds acquired when he sold Plot No. XX/Kiambu/Dandora to Francis Mwaura for a consideration of Kshs. 1.2 million. He does not have the title deed for the property in issue. The registered owner died and the succession cause is still pending. He built rentals on that property from his personal savings and money from merry go round. The Plaintiff did not help him to develop the property.
14. The Plaintiff did not file written submissions. The Defendant's submissions are dated 12<sup>th</sup> November 2024.

### **Respondent's Submissions.**

15. The Defendant framed the following as issues to be determined by this court;
  - i. Whether there was a marriage between the parties.
  - ii. Whether the suit property is matrimonial property.
  - iii. Whether the suit property should be divided between the parties.
16. On the first issue, it was the Respondent's submission that the Plaintiff had failed to prove existence of a marriage between them. She had failed to prove the requisites for Agikuyu Customary Marriage where the essentials include Capacity, consent, Ngurario, Ruracio and commencement of cohabitation. He sought to rely on the decisions of In the Matter of the Estate of the Late Ephantus Githatu Waithaka (Deceased) and Mary Njoki v John Kinyanjui Mutheru [1985] eKLR where the courts in both cases held that the plaintiff had failed to prove the existence of customary law marriage.
17. On the second issue, he relied on section 6 of the *Matrimonial Property Act* which defines what comprises matrimonial property. He submitted that the Plaintiff needed to prove contribution towards the acquisition of that property. He sought to rely on the decision of P A W-M v C M A W M [2018] eKLR which defined contribution to mean "monetary and non-monetary contributions and include Domestic work and management of the matrimonial home, Child care, Companionship, Management of family business or property and Farm work. According to him, he single-handedly purchased the suit property after selling his ancestral land. He further submitted that he had proved that he solely developed the property whereas the Plaintiff did not prove her financial contribution towards the development of that property.
18. On the third issue, the Defendant submitted that the Plaintiff has failed to prove the existence of a marriage or any contribution made towards the purchase and acquisition of the property the property should not be divided between him and the Plaintiff.

### **Analysis And Determination.**

19. I have considered grounds of the application, the affidavit in response, the evidence of both parties and the respondent's submissions and find issues for determination as follows:
  - a. Whether there exists/existed a marriage between the Plaintiff and the defendant or whether they cohabited as husband and wife



- b. Whether the property in question is matrimonial property.
- c. Whether the court should issue the orders sought.

Whether there exist/existed a marriage between the Plaintiff and the Respondent

20. The onus of proving the existence of a marriage between the Plaintiff and the defendant lies on the Plaintiff as per section 107 of the *Evidence Act* which provides:
- '(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.'
21. In *Gituanja v Gituanja* (1983) KLR 575, the Court of Appeal held that the existence of a customary marriage is a matter of fact which must be proved with evidence. In that case, the Court found that the evidence adduced had proved a valid marriage under Kikuyu customary law as was evidenced by the slaughter of the “ngurario”.
22. In *Hortensia Wanjiku Yawe v The Public Trustees, Civil Appeal 13 of August 6, 1976 (Wambuzi, P Mustafa V-P and Musoke, JA)* is to the same effect. In this case, Justice Kneller laid down three important and salutary principles regarding proof of customary marriages in Court. These are:
- i. The onus of proving customary law marriage is generally on the party who claims it;
  - ii. The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;
  - iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.
23. I am not persuaded by the evidence from the plaintiff and her witness that a customary marriage existed between herself and the Defendant. The witness does not speak on the formalities carried out. He told the court that money was paid in place of goats. However, I am guided by the decision *Eliud Maina Mwangi v Margaret Wanjiru Gachangi* [2013] eKLR where it was stated,
- “Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.”
24. The progressive tone by the Court of Appeal is well taken. As customs are surely organic, the exact procedures for a valid customary marriage cannot be said to be codified or static. Even then, there is no denying that certain pre-requisites must be present. So, although the absence of certain formalities would not per se invalidate a customary marriage the party alleging the existence of such a marriage must adduce evidence to demonstrate that a customary marriage was intended and certain substantive pre-requisites performed. In this case the Plaintiff has failed.
25. By law I am required to consider whether in the alternative we can presume that there was a marriage. The issue therefore is whether the Objectors cohabitation with the deceased can be presumed to be



a marriage. The Supreme Court in the decision of MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) has laid down the strict parameters within which a court will presume a marriage. At the heart of this is a demonstration of the common intention of a marriage between the parties. In MWK v A M W (Supra) Ngugi J as he then was summarised it thus; ‘To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage’.

26. In this case the Defendant does not deny cohabiting with the Plaintiff, he contends however that it was a come we stay. He admits supporting her children, setting up a business for her, building a house for her mother, he also paid school fees for her brothers and refers to them sharing a matrimonial bed. It is not denied that they shared a home and only separated when the defendant was apprehensive that the plaintiff had attempted to poison him. All these factors allow for a presumption that indeed the Couple conducted as man and wife.
27. From the year 2005 when cohabitation commenced the parties stayed together peacefully for a period of 8 years before the defendant left the home he was living in with the plaintiff and the children. In his evidence he even prayed that they leave the house. In the circumstances I am constrained to find that the plaintiff and the defendant were man and wife.

#### **Whether the property herein is matrimonial property.**

28. On what constitutes matrimonial property, I am guided by Section 6 of the [Matrimonial Property Act](#) that defines matrimonial property as:
  - (a) the matrimonial home or homes;
  - (b) household goods and effects in the matrimonial home or homes; or
  - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
29. Basically, for property to qualify as matrimonial property, it must meet the definition in Section 6 quoted above. From the evidence available in court, it is clear to me that the Plaintiff and the Defendant acquired the property and developed it in the pendency of the marriage.
30. Section 7 of the [Matrimonial Property Act](#) is clear in its terms 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.”
31. I have considered the provisions of [the Constitution](#) on Article 45(3) as well. This article provides that:

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage”
32. Although this provision grants equal rights to parties to a marriage as stipulated, this does not mean that a party to a marriage is entitled to equal share of the property acquired during marriage unless his or her contribution is ascertained to have been equal to that of the other spouse. However, the article guides the courts in determining the rights of parties to a marriage in respect to subdivision of matrimonial property. This view, that the provisions of Article 45(3) of [the Constitution](#) does not



entitle parties to equal distribution of matrimonial property, was well stated by the Court of Appeal (Kiage, JA) in PNN v ZWN [2017] eKLR where the Judge had this to say:

“ Thus it is that *the Constitution*, thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the *Matrimonial Property Act*, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.”

33. The share of each party to a marriage is pegged on the contribution made by each party. That is the law as it is and as applied in various decisions.

34. Section 14(b) of the *Matrimonial Property Act* provides that: -

Where matrimonial property is acquired during marriage—

(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

35. Parties seeking division of the matrimonial property are under an obligation to prove their contribution towards acquisition and development of the matrimonial property.

36. In *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* [2018] eKLR the court stated that: -

“The law recognizes equal worth and equal importance of the parties in marriage. Thus, the beneficial share of each spouse as the law on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. First, the Act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.”

37. It is not disputed that all the financial contribution towards the acquisition and development of the properties herein was made by the Respondent. The evidence also shows that the Plaintiff made non-monetary contribution by way of love, companionship and managing the home. She supervised the construction of the home and cooked for the workers when the property was under construction. The non-monetary contribution of the Plaintiff in the purchase and construction of the properties herein is recognized in law. As such, the Defendant cannot be entitled to the exclusive rights to the properties to the exclusion of the Plaintiff. The transaction relating to the sale of the land is yet to be completed.

38. Ascertaining contribution of spouses is always a challenging assignment. The difficult task of determining the rights of parties in a marriage in division of their property in the absence of concrete proof of contribution is left to judicial discretion. There is no formula and the Court has to make an unscientific estimate of each spouse’s contribution. In the case of *M, A, A v, A R* [2018] eKLR, Chitembwe, J. had this to say:

“There is no formula for distribution of Matrimonial Property. What the court should consider is the contribution by the parties towards the property which is the subject of distribution. Where the financial contribution of each party is known, it becomes easy for the court to distribute the property in line with Section 7 of the *Matrimonial Property Act*. However, where the contribution is non- monetary, the situation becomes difficult. The



court has to estimate the efforts by the spouse who did not make any financial contribution and give it a value, either as a percentage or as a lump sum. The current situation is that the defendant equally did not make any financial contribution.

39. After considering all the evidence, I draw the conclusion that the suit property was acquired and developed through the financial contribution of the Defendant and the non-financial contribution by the Plaintiff. The properties should therefore be divided according to each party's contribution. I estimate the Plaintiff's contribution to be 20% while that of the Defendant is 80%.
40. Consequently, I find for the Plaintiff and allow the Originating Summons in the following terms;
- i. That a declaration is hereby issued that the Plaintiff is entitled to 20% value of developments on land parcel Dagoretti/Riruta/XXXX comprising the matrimonial home.
  - ii. That the property be valued by a valuer to be nominated by the Plaintiff and the Defendant within 14 days. Failing of which the Plaintiff shall nominate the valuer.
  - iii. The valuer so appointed to furnish report within 21 days. The Defendant to pay out to the Plaintiff a sum equivalent of 20% of the Value of the matrimonial home within 60 days of presentation of the Report.
  - iv. Mention on 24<sup>TH</sup> June 2025 to confirm compliance
  - v. That each party shall bear own costs in respect to this Originating Summons.

**SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 28<sup>th</sup> DAY OF MARCH, 2025.**

**P M NYAUNDI**

**HIGH COURT JUDGE**

In the presence of:

Kanja Court Assistant

