



**ECK v JCK (Civil Suit E003 of 2023) [2025] KEHC 5046 (KLR) (Civ) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5046 (KLR)

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

**CIVIL**

**CIVIL SUIT E003 OF 2023**

**M THANDE, J**

**APRIL 25, 2025**

**BETWEEN**

**ECK ..... APPLICANT**

**AND**

**JCK ..... RESPONDENT**

**JUDGMENT**

1. By her Originating Summons dated 24.7.23 and amended on 19.2.24, the Applicant seeks the following orders:
  - a. Whether there has existed any matrimonial relationship of a husband and a wife between the Applicant and the Respondent.
  - b. Whether the Applicant and the Respondent cohabited together as husband and wife in one matrimonial home in love, affection and warmth at different places.
  - c. Whether during the said matrimonial relationship between the Applicant and the Respondent, they were able to garner, and acquire both moveable and immovable property together and that both are entitled to an 80:20 share accordingly.
  - d. Whether the aforesaid matrimonial relationship has become irrevocably broken and as a result, the marriage has been legally dissolved.
  - e. Whether specifically the Applicant is entitled to any alimony for the maintenance, care and custody of herself from the dissolution of the marriage.
2. In her affidavit sworn on even date, the Applicant deposed that she and the Respondent conducted a customary marriage in 2017 and later a civil marriage on 25.10.19. She averred that during the subsistence of the marriage, they purchased land measuring 105 by 70 meters in Misufini in 2018,



where they constructed their matrimonial home. They also purchased 63ha in Shomela and 12 ha beach plot in Kasangani the titles to which are yet to be issued. At the time of purchasing the latter 2 properties, the Applicant had relocated to Australia and hence her name does not appear in the agreements.

3. The Applicant further stated that their marriage was dissolved on 26.6.23 in Divorce Cause No. E4 of 2022. Additionally, that the Respondent has threatened to dispose of some of the properties as he is the only one in the sale agreements. She is further worried that the Respondent has brought a new partner to their matrimonial home. She urged the Court to protect her interests as she stands to suffer huge loss and be deprived of the opportunity to use and enjoy the suit properties.
4. The Respondent swore a replying affidavit on 18.6.24, in which he denied the Applicant's allegations. He asserted that he solely purchased the Misufini property from proceeds of sale of a piece of land to one RMK. He purchased the property from one AM in 2 phases. In the first phase, he purchased a portion of 70 by 70 meters. In the second phase, he purchased a portion of 35 by 70 meters and included the Applicant in the Agreement after she contributed Kshs. 62,000/=. The Respondent stated that they constructed their matrimonial house of this property but that the Applicant's contribution was minimal and limited to furnishings. He further stated that upon their separation, the Applicant removed all the furniture and took away some building materials. She also demolished part of the matrimonial home following which he renovated the same and continues to improve to date.
5. On construction of the matrimonial home, the Respondent stated that he purchased 900 coral blocks. Further that the Applicant intimidated him to send construction money to her account from which she would send money to her father for purchase of building and payment of labourers. He also paid the Applicant's father who was the foreman, Kshs. 25,000/= per month. He denied the Applicant's claim that his family chased her father away from the project.
6. The Respondent denied that they own land in Shomela and Katsangani. Further that while they paid as fee of Kshs. 48,000/= to the elders towards the purchase of the beach plot in Katsangani, they failed to meet the condition imposed by the elders of clearing the land as they had both moved to Australia.
7. In an affidavit sworn on 5.8.24, in rejoinder, the Applicant reiterated the averments in her supporting affidavit. She went on to state that she was the primary contributor towards the purchase of the Misufini property. Further that at the time of construction of the house, the Respondent was jobless and that he did not demonstrate how he was able to get funds for construction. The Applicant contends that she provided monetary contribution to the Respondent until the property was acquired. Further that she sent money directly to the hardware store and contractors through world remit. Additionally, that the money sent to her by the Respondent was to cater for food, car, chama, loan repayment given by the Applicant and rent. She further stated that some of the money sent to the Respondent was repayment of loans from her friends which was used to relocate the Respondent to Australia. As regards the land in Shomela and Kasangani, she stated that the Respondent took advantage of her absence from the country and denied knowledge of the same.
8. I have considered the Originating Summons, the response thereto, as well as the parties' respective submissions.
9. In the amended OS, the Applicant seeks a determination on whether there existed a matrimonial relationship between her and the Respondent and whether they cohabited in one matrimonial home in love affection and warmth at different places. She also seeks determination on whether matrimonial relationship has become irrevocably broken and as a result, the marriage has been legally dissolved.



10. The foregoing are rather curious prayers. The fact of marriage and divorce is not contested. The Applicant has demonstrated that she and the Respondent were married and that the marriage was dissolved. She exhibited a marriage certificate showing that the marriage was solemnised on 25.10.19 and a decree nisi indicating that the marriage was dissolved on 9.12.22. It is thus not clear why she seeks that this Court makes a determination on these uncontested facts.
11. The Applicant also seeks a determination as to whether she is entitled to any alimony for the maintenance, care and custody of herself from the dissolution of the marriage. This prayer ought to have been sought in the divorce proceedings and not in a suit for division of matrimonial property. The prayers sought cannot for the reasons stated be considered or granted.
12. I now turn to the prayer for division of property which is strangely worded. The Applicant seeks a determination whether during the said matrimonial relationship between the Applicant and the Respondent, they were able to garner, and acquire both moveable and immovable property together and that both are entitled to an 80:20 share accordingly. The prayer as framed is rather vague and incomprehensible. The Applicant has not listed in her prayer, the properties the division of which she seeks. Ordinarily, such a suit should be dismissed. The Court however notes that properties are set out in the grounds upon which the Application is premised and in her supporting affidavit. Being mindful of the constitutional imperative of administering justice without undue regard to procedural technicalities, this Court will proceed to decipher the intention of the Applicant and make appropriate orders.
13. For this Court to make any finding on the suit properties, the Court must first be satisfied of their existence. The first property is the plot in Misufini. The Applicant exhibited what she referred to as an agreement for sale dated 8.8.17. The agreement is however incomplete as only the first page describing the parties and the property was annexed. The pages containing the consideration and execution by the parties were not availed. The agreement as exhibited is not admissible as evidence.
14. The foregoing notwithstanding, the Respondent has admitted that this property was acquired and that the parties built their matrimonial home on the same.
15. As regards the Shomela and Kasangani properties, the Applicant claims that the Respondent was in charge of the purchase as she had already relocated to Australia. On his part, the Respondent denied that the parties have such properties. He stated that although he had paid the fee of Kshs. 48,000/= to elders, he did not meet the condition of clearing the land as he subsequently moved to Australia. They thus lost their rights to the land for failure to clear the same and maintain it for a period of 4 years.
16. It is trite law that he who asserts must prove. Section 107 of The *Evidence Act* stipulates:
  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 that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
17. The Applicant lays claim on pieces of land in Shomela and Kasangani. She was obligated to place before this Court, cogent evidence to support her claim. She did not however place any evidence to demonstrate the acquisition or existence of the said properties. She did not say when and from whom the properties were acquired or the purchase price paid for the same and by whom. I therefore find and hold that the Applicant failed to discharge the burden of proof placed upon her by law. It follows no orders can be given in respect of these 2 properties.
18. I now turn to the Misufini property. The parties are in agreement that this was their matrimonial home.



19. Section 6 of the *Matrimonial Property Act* defines matrimonial property as follows:
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

20. For a property to be declared to be matrimonial property, it must constitute the matrimonial home or homes of the parties and household goods and effects in such home or homes. Other property jointly owned and acquired during the subsistence of the marriage of the parties also constitutes matrimonial property. Matrimonial home is defined in Section 2 of the Act as “any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.” The Misufini property being the parties’ matrimonial home is thus matrimonial property.

21. How is this matrimonial property to be divided amongst the parties? It is well settled that the basis upon which property, matrimonial or otherwise, is divided between spouses, is contribution. Section 7 of the Act makes provision relating to ownership of matrimonial property 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. (emphasis)

22. In *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment)*, the Supreme Court reaffirmed this principle of contribution and stated:

The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution.

23. A party seeking a share in matrimonial property must thus demonstrate that they have contributed to the acquisition or development of the said property. This is observed in the *P N N v Z W N* case (supra), where Waki, JA citing the case of *PNE v. PNE*, (2007) eKLR stated:

The Court also examined local decisions and came to the following conclusion:-

“In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see *Essa vs. Essa* (supra); *Nderitu vs. Nderitu*, Civil Appeal No. 203 of 1997 (unreported), *Kamore vs. Kamore* (supra); *Muthembwa vs. Muthembwa*, Civil Appeal No. 74 of 2001 and *Mereka vs. Mereka*, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of



each case and independently assessed the wife's (sic) contribution as equal to that of the husband.”

24. The Court notes that the parties herein have been very economical with information. From the evidence on record, it is not known what the purchase price of the property was, or the cost of construction. It is not clear how much each party contributed towards the purchase of the property and construction of the matrimonial home thereon. Although the parties exhibited statements of transactions, they did not specify what payments were made. The Applicant attached statements as evidence that she sent funds directly to hardware stores and contractors involved in construction of the matrimonial home. She did not however indicate the names of the hardware stores or of the contractors nor the amounts sent and the exact purpose for which payment was made. Similarly, the Respondent exhibited statements for direct money transfers from his account to that of the Applicant. He did not however indicate the amounts and the purpose for the same. With this kind of vague evidence, it is not possible to determine the contribution of the parties towards the acquisition and development of the property.

25. In cases where contribution of parties cannot be ascertained from the evidence, as in the present case, our courts have divided matrimonial property equally. In the case of *PNE V PNE* [2007] eKLR the Court of Appeal stated:

However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “Equality is equity” while heeding the caution by Lord Pearson in *Gissing vs. Gissing* (supra) at page 788 paragraph c that:

“No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing”.

26. Duly guided, and given that the parties’ contribution is unascertainable, I find that this is a proper case where it is equitable to apply the maxim “equality is equity.”

27. Where property is acquired during the marriage, Section 14 of the Act provides certain rebuttable presumptions as follows:

Where matrimonial property is acquired during marriage—

- a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- b. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

28. In the circumstances herein, the presumption under Section 14(b) that the parties’ beneficial interest in the Misufini property which was acquired jointly is equal, remains unrebutted.

29. In the end and in view of the foregoing, I make the following orders:

- i. Plot in Misufini village measuring 105 by 70 meters is matrimonial property and shall be divided equally between the parties.



ii. The circumstances of this case do not call for an award of costs

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL 2025**

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**M. THANDE**

**JUDGE**

