



**LNK v EW (Civil Suit 45 of 2019) [2024] KEHC 2016 (KLR)
(Family) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT 45 OF 2019
SN RIECHI, J
FEBRUARY 27, 2024**

BETWEEN

LNK APPLICANT

AND

EW RESPONDENT

JUDGMENT

1. The Applicant filed an application via Originating Summons dated 3rd July 2019 under section 6, 7, 14 and 17 of the *Matrimonial Property Act*, 2013 and order 37 Rule 11 of Civil Procedure Act and all enabling provisions of the law. The Applicant is seeking orders that;
 - a. That a declaration be issued that the suit property Plot.No.7340/108/143-Nairobi jointly acquired by the parties is held in Trust for the benefit of the minor born out of the subsistence of the marriage between the parties herein.
 - b. Upon the attainment of 18 years of age by the minors herein, the suit property Plot No.7340/108/143 held in trust by the parties herein devolve to the minors borne during the subsistence of the marriage.
 - c. The parties herein hold no interest in the suit.
 - d. That the respondent be condemned to pay the costs of this application and incidentals thereto.
6. The application is premised on grounds on the face thereof and a supporting affidavit sworn by the Applicant on the even day. In it, she deposed that she got married to the Respondent in 2003 by cohabiting with him under come we stay for 15 years and they were blessed with two issues from the marriage.



7. The applicant deposed that their marriage irrevocably broke down and she filed a divorce petition in Nairobi Divorce Cause No.441 of 2018 and the parties divorced on 12th October,2018. She attached a copy of the Decree Nisi in support. The applicant deposed that during the subsistence of the marriage they acquired the following property; Plot No.7340/108/143-Nairobi. She attached a copy of the land share certificate in support. She deposed that the property was acquired through their joint efforts and contribution. The applicant deposed that the property is registered in their joint names and it is their matrimonial property which was jointly developed by the them.
8. The supplicant deposed further that it is her desire that her interest in the said property to be declared hers and be held in trust for the benefit of the minors born out of the their marriage and upon attainment of 18 years of age by the minors herein the said property be devolved to the minors namely MKW and CAW She attached a copies of the minor's birth certificate marked LNK3 and LNK4.
9. The applicant deponed that unless the court proceeds and grants the orders sought the respondent will continue to fully control and utilize the said property to her exclusion. She deposed that she is entitled in law and in equity to a share of the matrimonial property.
10. In response, the respondent swore an affidavit sworn 28th November 2019 in which he deposed that notwithstanding the dissolution of the marriage to the applicant, they have continued living together in the matrimonial home which is built on the suit property that is plot No.7340/108/43(Suit Property) whose title is yet to be issued.
11. The respondent stated that their harmonious living with the applicant was disrupted in July 2018 when she assaulted him causing him to move out of the matrimonial home to avoid further conflict with the applicant.
12. The respondent stated that he was able to purchase the suit property and construct the matrimonial home through a credit facility from Equity Bank facts which the applicant is aware.
13. The respondent stated that he took the credit facility and the applicant was unemployed and it was through his own effort that he was able to fully repay the credit facility from the Bank.
14. The respondent stated that when the share certificate was issued, he chose to indicate the name of the applicant and himself since it was his intention that it would be matrimonial home.
15. The respondent stated that he has never denied the applicant access to the matrimonial home and that he is currently unemployed and he struggled to find employment to date and the applicant is aware.
16. The respondent stated that since the suit property is jointly owned, the beneficial interests are equal and the applicant has choice of deciding how to dispose of her share of the suit property.
17. By consent of parties the application was canvassed by way of written submission. The applicant filed written submissions dated 14th July 2023 and respondent filed written submissions dated 22nd September 2023.
18. MR.S for the applicant his submissions, he reiterated the averments in applicant's affidavit and do not need to reproduce the same. Counsel further submitted on whether the interest of the applicant in the suit property can be held in trust of the minors. MR.S applicant submitted that joint tenancy creates a right of survivorship which means if one of the joint tenants dies, the remainder of the property is automatically transferred to surviving owner. He submitted that in this instant case applicant does not desire her interest in the suit property to automatically pass to respondent upon her demise but wishes for her interest to pass to the minor children.



19. MR.S submitted that the applicant also does not desire for the suit property to be sold given that she and the minor children currently reside in the said matrimonial property. He submitted applicant contributed through her savings and salary which catered for the purchase of construction material and payment of construction workers. He submitted that applicant has equal right to the matrimonial property and she is entitled to equal share of 50% of the property and she equally has a right to dispose her interest in favour of the minor children. The applicant relied on the following case authorities In *Re Estate of Johnson Gichobi(Deceased)*[2018]Eklr and Civil Appeal No.142 of 2018 in *CWM v. JPM*[2017]Eklr in support.
20. The respondent submitted through Ms.W who reiterated averment in respondent's affidavit and I do not need to reproduce the same. Ms.W submitted briefly that the suit property is matrimonial property. She submitted that the applicant has not sought for orders for division of the property pursuant to the dissolution of her marriage but she is asking court to make declaration that the suit property and matrimonial home devolve to the issues of the dissolved marriage upon attaining the age of 18 years.
21. Ms.W submitted that the prayers sought by the applicant are invoking court jurisdiction and discretion to apply principles of succession proceedings in a matter of matrimonial property which action is unknown in trust and not founded on any statutory provision. The respondent referred to Article 45 of the *Constitution* of Kenya,2010 and Section 14 of the *Matrimonial Property Act* on the presumptions as to property acquired during marriage.
22. The respondent's Advocate submitted that this court should find that both parties have equal beneficial interest in the suit property as the matrimonial property. Ms.W submitted that the respondent has the discretion to utilize his share of the property as he so wills as there was no agreement as to how the property would be put to use following dissolution of marriage.
23. I have carefully considered the application, rival affidavits and submissions by respective parties.The main issue for determination is;

Whether the court can declare the property Plot.No.7340/108/143 which jointly owned by the parties as a property held in trust for the minors.

24. ...
25. In the instant case certain facts are not in dispute in this case. It is not in dispute that the Applicant and the Respondent were married and that their marriage ended in a divorce in 2018, vide Milimani Divorce Cause No.441 of 2018. It is also not in dispute that suit property was acquired during subsistence of the marriage and therefore it is a matrimonial property. The only issue in dispute is whether this court should declare that the subject property is held in trust for the minors
26. I have given due consideration to the pleadings and the evidence It is evidence on court record that suit property Plot.No.7340/108/143 Nairobi is jointly registered in the names of Applicant and respondent.
27. The applicant submitted that she was married to the respondent and during the marriage the parties acquire suit property through joint efforts of the parties. The applicant submitted the parties have equal interest in the property. The applicant submitted that she wishes her interest in the property to be held in trust of the minors' children.
28. The respondent on his part confirmed that the property is matrimonial home and that property is jointly owned by the parties. The respondent submitted that the applicant is seeking for orders from this court in respect of the suit property whose ownership is not disputed. The respondent submitted



that the prayers sought are invoking the court's jurisdiction and discretion to apply principles of succession proceedings in a matter of matrimonial property.

29. In this instant the it is not contested that the suit property is matrimonial property. It is also not contested that both parties have equal rights over the suit property.
30. The applicant is seeking order that a declaration be issued that the suit property Plot.No.7340/108/143-Nairobi jointly acquired by the parties is held in Trust for the benefit of the minor during the subsistence of the marriage between the parties herein. That Upon the attainment of 18 years of age by the minors herein, the suit property Plot No.7340/108/143 held in trust by the parties herein devolve to the minors borne during the subsistence of the marriage. That The parties herein hold no interest in the suit.
31. I have analyzed the above orders sought by the applicant. I find that this court cannot issue such orders because parties have a right to decide on how to they wish to deal with their property. Both the applicant and respondent are registered jointly as proprietors of the property and this court cannot force a party to dispose of his or her share or hold the share in trust.
32. Having set the above the application dated 3rd July 2019 is dismissed in entirety.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF FEBRUARY 2024.

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S. N. RIECHI

JUDGE

