



**King'oo v Mutuku (Matrimonial Cause E010 of 2023)
[2024] KEHC 10383 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MATRIMONIAL CAUSE E010 OF 2023**

MW MUIGAI, J

JULY 29, 2024

BETWEEN

PENINAH NDINDA KING'OO APPLICANT

AND

GEDION KATHILA MUTUKU RESPONDENT

RULING

Notice of Motion

1. Vide an Application dated 19th September 2023 brought under Order 40 Rules 1,2 and 3 of the Civil Procedure Rules, 2010 and section 3A and 63 of the *Civil Procedure Act* seeks the following orders from this court;
 - a. Spent
 - b. Spent
 - c. The rental income from the four matrimonial properties, phase 1/block 4405 at Mlolongo-Pioneer Co-operative Society Plot no 44 B/7 at Mlolongo – Ngwata Society Plot number 589-Sambati near London Distillers in Mlolongo be deposited in a joint account between the two parties herein or their representative Counsel pending the hearing and determination of this suit and the Respondent be ordered to account for all the income received since January 2020 to date.
2. The Application is supported by the affidavit of Peninah Ndinda Kingoo deponed on 19th September 2023 in which she stated that the marriage was dissolved on 5th September 2023 and although the properties are registered in the name of the Respondent, they were acquired through joint effort, direct and indirect contribution as they both income. She stated that she works with Kenya School of



Revenue administration as a junior officer while the Respondent is a business man. She stated that she contributed she participated as follows;

- a. Contributing hard funds towards the acquisition and development of the properties in the form of securing a loan from her employer and handing over a substantial portion to the Respondent for development, handing out her ATM card for withdrawal purposes, withdrawing funds from her ATM card and handing over the funds to the Respondent and sending the Respondent money through Mpesa, sourcing for funds from other quarters, purchasing furnishing, paying handymen, funds and hardware shops and covering the Respondents medical needs.
- b. Being part of the supervision team as the works progressed
- c. Physically or manually being involved in working on the properties
- d. Financing domestic budget to enable the respondent direct his income towards the acquisition and development of the properties
- e. Meeting the educational budget of the child so that the the Respondent direct his income towards the acquisition and development of the properties
- f. Meeting the salary of the gardener and/or househelp to the respondent direct his income towards the acquisition and development of the properties
- g. Sacrificing her lifestyle to create a saving pool from the Respondent and her side upon which the properties were acquired and developed
- h. Providing necessary support and enabling environment to the Respondent to invest and develop the properties.

Replying Affidavit Dated 11.10.2023

3. The Respondent stated that the orders sought should not be granted as there is no evidence that the properties are registered in his name or are part of matrimonial properties and if such orders were granted, they would be against third parties who are not involved in these proceedings.
4. Further, that the only property available was Katheka Kai plot where his matrimonial home sits and he lives. He stated that the Applicant had no source of income at the time of acquisition of the Katheka Kai plots as she was a student at St. Joseph College Mlolongo and Daystar University.
5. The Respondent deposed that he obtained a loan from National Bank on 6.05.2009 of Kshs 400,000 and used Kshs 275,000 to buy land and the balance to fence the property, develop it for farming and construct a servant quarters. That the construction of the house started in 2016 and ended in 2018 and on 26.7.2016, he was paid his salary dues amounting to Kshs 2,161,000 which he used to commence construction, on 8.11.2016 and on 4.08.2018 he obtained a loan of Kshs 1,540,000 and Kshs 1,900,000 respectively from co-operative bank which he used to continue with the construction. He contended that he continued to use his salary and other income to finance the house project.
6. The Respondent stated that the Applicant moved out of the house in 2019 when they started having issues and she was working for KESRA. At this time, he contends that the house was completed and the loan she took was not for the construction of the house. He stated that all the other properties were sold during the subsistence of the marriage and the proceeds of sale used to pay the Applicant's school fees. He stated that plot 589 at Sabati was sold via sale agreement of 13.08.2019, plot 44E/7 via sale



agreement of 16.01.2018, plot 44/07 via sale agreement of 10.04.2014. he stated that plot 4405 does not exist and the sale agreement attached was strange to him.

7. He denied motor vehicle registration number KAQ 078T being registered in his names and the other vehicles being associated with him. As such, there was no income to account for.

Further Affidavit Dated 15.11.2023

8. The Applicant stated that in 2009 she was running a small business selling ladies clothes and shoes and used the income to support her family, that the respondent was dismissed from employment in 2011 and was not earning and as such they survived on her small monies. She stated that she was taking part time classes for accounting and became an accountant for Amon driving school, Kitengela, a business they registered and ran with the respondent. That they purchased vehicles for the driving school including motor vehicle registration number KAQ 078T and KAM 082X. Further, that they acquired several properties including the Katheka Kai property and Mlolongo properties.
9. The Applicant contended that she was duped into believing that although the properties were registered in the name of the Respondent, it was for their joint benefit. She stated that she has been employed from 2016 to date and the construction started in 2016. She stated that she bought materials, paid fundis and actively engaged in the construction of their home. She took a loan of Kshs 1 Million and handed a substantial amount to her husband. When she was transferred to Machakos, they moved to the Mlolongo home and when she was posted to Mlolongo and due to the strain of commuting daily on her health status, they agreed as a family that she put in a formal request for housing at the staff quarters in Langata.
10. The Applicant stated that the Respondent is still the owners of plot number 589, 44B/7 and 44E/7 which they acquired from Franklin Makola. She also stated that she still supports him as he uses his medical cover and further that she is paying their child's school fees.

Further Replying Affidavit

11. The Respondent filed an affidavit on 3.12.2023 and contended that from the marriage certificate, the Applicant was not schooled and further that the driving school business was purely his sole venture. He stated that the Kai Katheka Property was acquired in 2009 and could not be from the proceeds of 2015 or 2019 when the Applicant allegedly took a loan. He denied using the Applicant's ATM card.

Submissions

12. The Applicant filed submissions dated 19.03.2024 in which she relied on the case of Giella Vs Cassman Brown (1973) EA 358 and Mrao vs First American Bank of Kenya Limited & 2 others (2003) KLR 125 submitted that there was no doubt that the suit properties were in danger of being alienated and wasted to the detriment of the Applicant.
13. That the Applicant and her child have been forced to seek accommodation elsewhere as the Respondent resides with another woman in the matrimonial home, a fact he has not denied. The Applicant contends that she had established a prima facie case with a probability of success and the orders sought should be granted as the balance of convenience tilts in her favour. Further reliance was placed on the case of Paul Gitonga Wanjau vs Gathuthis Tea Factory Company Ltd & 2 others (2016) eklr and Kenleb Cons Ltd vs New Gatitu Service Station Lts & Another (1990) e KLR
14. The Respondent did not file submissions.



Determination

15. I have considered the Application, the affidavits on record and the submissions. I note that on 21.09.2023 this court issued an order preserving all matrimonial properties pending the hearing and determination of the matrimonial division proceedings.
16. The issues raised in the rival affidavits are issues that can only be determined at the hearing stage. It is not is dispute that the parties got married in 2006 and divorced on 5.09.2023.
17. Section 6(1) of the *Matrimonial Property Act*,2013 provides the meaning of matrimonial property, that:-
 - (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
18. In the case of P.O.M vs. M.N.K(2017) eKLR, the court stated that:

“This is a suit for division of matrimonial property...The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made...”
19. The *Matrimonial property Act* provides for division of matrimonial properties on the basis of contribution acquisition development and/or possession occupation and/or registration of matrimonial properties. In the instant parties have deposed that they married and divorced and have each deposed their contribution to acquisition and development of the properties. However as outlined above the facts deposed and challenged by each party there are contentions and counter contentions that can only be resolved through oral/viva voce evidence.
20. The Court is required under Sections 107- 112 of *Evidence Act* to ensure that he who alleges proves. The deposed evidence ought to be tested on its veracity through cross examination and credibility of the witness which shall be through hearing interpartes.
21. To avoid putting the horse before the cart, the status quo shall continue to be maintained as per the orders of 21.09.2023 and the issue of what is available, what is or was matrimonial property shall be determined at the hearing of this cause.

Disposition

1. The status quo shall be maintained of ALL matrimonial properties in terms of Section 14 & 17 of *Matrimonial Property Act*.
2. The parties Counsel to obtain early hearing date for interpartes hearing.
3. It is so ordered.

RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 29/7/2024. (VIRTUAL/PHYSICAL CONFERENCE)



M.W. MUIGAI
JUDGE

