



**EW v PO (Civil Suit E056 of 2022)  
[2024] KEHC 11724 (KLR) (Family) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 11724 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL SUIT E056 OF 2022  
PM NYAUNDI, J  
JULY 26, 2024**

**BETWEEN**

**EW ..... APPLICANT**

**AND**

**PO ..... RESPONDENT**

**JUDGMENT**

1. The Applicant herein, took out Originating Summons dated 8<sup>th</sup> August 2022 against the Respondent seeking declaration of the following;
  1. That there be an order that the Respondent releases all the Applicant’s personal effects in the Respondent’s possession forthwith.
  2. That a declaration do issue that properties known as:
    - i. The [Particulars Withheld] Apartment.
    - ii. The Juja Plot No. 6X1

With all the buildings, improvements and developments thereto acquired by the joint funds and efforts of the Applicant and the Respondent, and being registered jointly as such , be declared as matrimonial property and be divided equally between the Applicant and the Respondent.
  3. That there be an order that the Motor Vehicle Registration No. KBV 7XXV, registered in the Applicant’s name be released to the Applicant forthwith.
  4. That costs of this suit be awarded to the Applicant.



5. the costs of this Originating Summons?
2. The Summons was supported by the grounds on the face of the same and by the Affidavit of even date sworn by the Applicant.
3. The Respondent entered appearance in the matter and filed a Replying Affidavit sworn on 23<sup>rd</sup> November 2022. He also filed a counter claim dated 31<sup>st</sup> October 2023. He sought the following orders in the counterclaim:
  - a. A declaration that the Respondent is the absolute owner of the following properties;
    - i. Apartment Number 5X3 on the 5<sup>th</sup> floor of Block A situate on Land Reference Number 209/21XXX6(original 209/7XX6) , Nairobi (hereinafter “the apartment”).
    - ii. The Motor Vehicle Registration Number KBV 7XXV (hereinafter “the motor vehicle”).
    - iii. The Plot known as JUJ 6X1 located in Juja (hereinafter “the Juja Plot”).
  - b. That in the alternative to (a) above, an order that valuation of the apartment and the Juja Plot be conducted within 30 days by a mutually agreed registered valuer and if the parties shall not agree on one within 7 days, the court shall appoint one.
  - c. That the Applicant and the Respondent shall equally share the cost of the valuation exercise valuation.
  - d. That the Apartment and the Juja Plot shall be distributed between the Applicant and the Respondent on the basis of their respective contribution in the following proportions;
    - i. Juja Plot - Applicant’s contribution- 5.57%;Respondent’s contribution 94.43%.
    - ii. Motor Vehicle - Applicant’s contribution-0%; Respondent’s contribution-100%.
    - iii. Apartment - Applicant’s contribution -0.84%; Respondent’s contribution as at 22<sup>nd</sup> November 2022 99.166%
  - e. That on the basis of the valuation report, the Respondent shall reimburse the Applicant the sums equivalent to the Applicant’s contribution for the Juja Plot and the Apartment within 60 days.
  - f. That the Applicant be ordered to transfer the Apartment and the Juja Plot to the Respondent within 45 days failure to which ,Lands Registrar, Ministry of Lands is hereby ordered to effect the transfers to the Respondent.
  - g. That Housing Finance (HF), the chargee with custody of the Original Lease to the apartment to release the original lease to the Respondent for purposes of effecting the transfer aforesaid.
  - h. That the Applicant/[Particulars Withheld] Ltd do release original title of the Juja Plot to the Respondent within 45 days failure to which ,Lands Registrar, Ministry of Lands is hereby ordered to effect the transfer to the Respondent without the need to produce original document and transfer.
  - i. The Applicant be ordered to transfer the Motor Vehicle to the Respondent within 45 days failure to which the Director General NTSA is hereby ordered to transfer the said Motor Vehicle to the Respondent.



- j. A permanent injunction restraining the Applicant or any other person claiming under her from interfering with and/or alienating any other properties named in (a) above in any manner whatsoever.
  - k. That the Applicant to collect her personal belongings in the custody of the Respondent within 14 days failure to which the Respondent be at liberty to dispose of the same as he deems without notice.
  - l. That the following joint accounts in the name of the Applicant and the Respondent be closed;
    - i. Joint account at HF.
    - ii. Joint account at [Particulars Withheld] Microfinance.
4. The Applicant states briefly that she and the Respondent lived as husband and wife from 2012 to 2015. Their marriage was dissolved on 28<sup>th</sup> May 2021. During the subsistence of their marriage, they acquired properties known as The [Particulars Withheld] Apartment, The Juja Plot No. 6X1 and a Motor Vehicle Registration Number KBV 7XXV. She averred that the apartment and the Juja Plot were acquired by their joint funds and efforts. She acquired the motor vehicle solely and is registered in her name. She attached documents showing ownership of the properties. She asked the court to divide the assets owned jointly equally.
  5. The Respondent opposed the Originating Summons. In his Replying Affidavit dated 23<sup>rd</sup> November 2023, he deponed that the Applicant did not contribute towards the purchase of the motor vehicle. He singlehandedly purchased Motor Vehicle Registration Number KBV 7XXV for Kshs. 1,265,000 and had it registered in the name of the applicant. He attached email correspondences with Patros Agencies, bank statements and application remittance form in support.
  6. The Respondent deponed that in respect to property known as JUJA 6X1, he purchased it from [Particulars Withheld] Ltd for Kshs. 500,000 and had it registered in the Applicant's name as his trustee. That the applicant's direct contribution was Kshs, 35,000. He attached copies of bank statements in support.
  7. In respect to the purchase of the apartment, he stated that he identified the property and started making payments for the same. Although the apartment is in their joint names, the Applicant did not contribute towards the purchase pf the apartment. He took a loan from Safaricom Sacco of Kshs. 2,844,748 and used it as part payment of the apartment. He attached copies of bank statements and receipts in support. He argued that the apartment is charged to Housing Finance Bank under Employment Mortgage Scheme for Kshs. 9,920,000. He has been servicing the two loans and has a balance of Kshs. 2,368,235. According to him, the applicant's direct contribution to the purchase of the apartment was Kshs. 136,105.
  8. During the subsistence of their marriage, the Applicant was in employment and her salary was wired into a joint account he held with her from 1<sup>st</sup> April 2016 upto 3<sup>rd</sup> April 2017. He also put funds in the account. The money would be channelled to pay the loan at HF Bank. The Applicant would however make withdrawals from the account without informing the Respondent.
  9. When the matter came up for hearing on 4/4/2024, the Applicant failed to attend court. The Originating Summons was dismissed for non -attendance and the court proceeded for hearing of the Respondent's counter- claim.



## **Evidence.**

10. The Respondent relied on his Counterclaim dated Originating Summons dated 31/10/2023, his written statement sworn on 5/12/2023 and a list and bundle of documents dated 14/3/2024 as his evidence in chief. He urged the court to allow his counter claim.

## **Respondent's Submissions.**

11. The Respondent's submissions are dated 21<sup>st</sup> May 2024. The Respondent submitted that although the motor vehicle is registered in the name of the Applicant, he paid for the full purchase price without the applicant's input. He submitted that the fact that the apartment was registered in both their names, the same should not be divided in the ration of 50:50. According to him, he paid Kshs. 635,000 to [Particulars Withheld] Ltd for the purchase of the apartment he took a loan of Kshs. 2, 884,884 from Safaricom Sacco, to pay for the apartment and a further Kshs. 2,687,000 . Kshs. 635,000 was also paid to [Particulars Withheld] Ltd. He paid Kshs. 775,000 as legal fees to the firm of Kitony Maina Karanja Advocates and Kshs. 156,110 to the firm of Mohammed Muigai Advocates for duty stamp. The Applicant only paid Kshs. 136,105 towards the purchase of the apartment.
12. He submitted that this court should be guided by the respective contribution of each party on how the properties should be apportioned. He relied on the decision in PNN v ZWN[2017] eKLR ,Federation of Women Lawyers (FIDA) vs Attorney General & Another [2018] eKLR and JMO v CLO[2019]eKLR. According to him, the Applicant did not prove her contribution.

## **Analysis and Determination.**

13. The main issues arising for determination are;
  - i. Whether the properties herein amount to matrimonial property.
  - ii. Whether the applicant contributed towards the acquisition of matrimonial properties.
  - iii. What share if any is each party entitled to.

## **Whether the properties herein amount to matrimonial property.**

14. 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.
15. 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 Applicant and the Respondent solemnized their union on 14<sup>th</sup> July 2012 at Kileleshwa Covenant Community Church. Both parties agree that the properties were acquired after they solemnized their marriage. The Apartment which is [Particulars Withheld] Apartments, Apartment Number 5X3 is registered in the name of the Applicant and the Respondent. The Respondent argues that he made immense contribution towards the purchase of the property whereas the Applicant only made a contribution of Kshs. 136,105. The Respondent argues that he took a loan to purchase the property and he is servicing the loan.



16. In regards to the Juja Property, both parties agree that it was acquired during the subsistence of the marriage. The property is registered in the name of the Applicant. The Respondent argues that he paid Kshs. 593,000 towards the purchase while the Applicant only paid Kshs. 35,000. He argued that he agreed the property to be registered under the Applicant's name under trust.
17. For the motor vehicle, the Respondent argued that he paid for the purchase price but the vehicle is registered in the name of the applicant. Both agree that it was bought during the subsistence of the marriage.
18. It is therefore clear that the parties are in agreement that all the properties listed here is matrimonial property as defined and the same having been acquired during subsistence of their marriage.
19. In my considered view therefore, after considering all the evidence by both parties, the properties listed in this matter are matrimonial property in the meaning of Section 6 of the *Matrimonial Property Act* and I so find.

**Whether the applicant contributed towards the acquisition and development of the matrimonial properties**

20. I have considered the Respondent's arguments on the issue of contribution towards acquisition of matrimonial property. I have read the authorities cited by the Respondent. I am alive to the fact that each case must be determined based on its own peculiar circumstances. Indeed, the Court of Appeal had this in mind in *TKM v SMW* [2020] eKLR where it is stated as follows:

“We bear in mind the edict in *Muthembwa v. Muthembwa* (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.”

21. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the *Matrimonial Property Act*, 2013 in the following terms:

In this Act, unless the context otherwise requires—

“contribution” means monetary and non-monetary contribution and includes—

- a. domestic work and management of the matrimonial home;
  - b. child care;
  - c. companionship;
  - d. management of family business or property; and
  - e. farm work.
22. The Respondent admitted partial monetary contribution by the Applicant. From the evidence on record, the apartment is registered in the name of the applicant and the Respondent. The respondent argues that he made immense contribution towards the purchase of the apartment. He took a loan of Kshs. 2,844,784 and used personal resources to purchase the property. He told the court that the house is charged to HB bank and he has been servicing the loan alone. He attached copies of bank statements, loan statement from Safaricon Sacco Payment and receipts for legal fees. He argued that the applicant only contributed Kshs. 136,105 toward the purchase.



23. On the issue of the Juja Plot and the Motor vehicle, the same are registered in the Applicant's name. The respondent told the court that he made payments for these properties. He attached bank statements and email correspondences in support.
24. The Respondent argued that the Applicant's monetary contribution was very little. She did not contribute non-monetary contribution because she was in full time employment. Most of the times, he did house chores and monthly shopping. The Applicant did not provide him with love, affection, companionship and peace of mind. They did not have any children, so there was no child to take care of. It is my finding that the Respondent made a higher financial contribution towards the properties as compared to the Applicant.

**What share if any is each party entitled to.**

25. 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.”
26. 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”
27. 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 taken by the Court of Appeal (Kiage, JA) in PNN v ZWN [2017] eKLR where the good judge has 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.”
28. 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.
29. 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.
30. Parties seeking division of the matrimonial property are under an obligation to prove their contribution towards acquisition and development of the matrimonial property. In this context, either party is required under section 107 of the *Evidence Act* required to prove his/her contribution to the acquisition and development of the matrimonial property.



31. Under Section 2 of the Act, 'Contribution' has been defined to mean both monetary and non-monetary contribution. It will be noted that monetary contribution has not been defined under the Act but under the Black's Law Dictionary Free Online 2<sup>nd</sup> Edition, monetary is that which relates to money. Regarding, non-monetary contribution, the Act has defined it to include: Domestic work and management of the matrimonial home; Child care; Management of family business or property; and Farm work.
32. Section 7 of the Act provides 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.”
33. 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.”
34. In determining the percentage of the contribution made by each party, I have carefully scrutinized the evidence. The Respondent has produced bank statements and correspondences with the agent that sold them the car. He further submitted that through his employment he acquired loans and monies that he contributed towards the acquisition of matrimonial properties.
35. The totality of my analysis of the evidence presented before me is that the Applicant made substantial monetary contribution towards acquiring, the matrimonial properties especially the matrimonial home. I am therefore satisfied that, basing my decision on the peculiar circumstances of this case, I am satisfied on a balance of probabilities that the Respondent has proved his case to the required standard. I will therefore assess the combined monetary and non-monetary contribution of the applicant to the suit properties at 35%. The Respondent will have 65% of the suit properties.
36. Consequently, I find for the Respondent and allow the Counterclaim. I grant the following specific orders:
- i. That a declaration is hereby issued that the Respondent is entitled to 65% of the properties listed below and held jointly by the Applicant and the Respondent, or held by the Applicant solely in trust for the Respondent.
    - a. [Particulars Withheld] Apartments, Apartment Number 5X3 situated on Land Reference Number 209/21XXX6.
    - b. Motor Vehicle Registration Number KBV 7XX V.
    - c. Plot No. Juja 6X1.
  - ii. That the properties be valued by a valuer to be nominated by the Counsels for the parties within 14 days.



- iii. In the event the Counsel are unable to agree the Respondents Counsel will identify a valuer.
- iv. The valuer so appointed to furnish report within 21 days. The Respondent will have the 1<sup>st</sup> Option to buy out the Applicant of her share in all the properties, within 60 days of the offer being made.
- v. That the Applicant shall execute all the documents to facilitate the transfer within 21 days of delivery to her, in default the Deputy Registrar Family Division will execute the same.
- vi. The Applicant to collect her personal effects from the house of the Respondent within 7 days, in default the Respondent at liberty to dispose of them.
- vii. That each party shall bear own costs in respect to this Originating Summons.

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 26<sup>TH</sup> DAY OF JULY, 2024.

M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Fardosa Court Assistant

