



**NKC v EWK (Matrimonial Cause 2 of 2023)  
[2024] KEHC 10440 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10440 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MATRIMONIAL CAUSE 2 OF 2023  
FN MUCHEMI, J  
AUGUST 20, 2024**

**BETWEEN**

**NKC ..... PETITIONER**

**AND**

**EWK ..... RESPONDENT**

**JUDGMENT**

**Brief facts**

1. The petitioner has instituted the suit herein vide a Petition dated 10<sup>th</sup> August 2020 seeking determination on three issues namely:-
  - a. A declaration that Plot Nos. 3, 4, 5 and 6 Juja Gatwanyaga Road excised from LR Nos. 11407/xxx and 11407/79/xx are the matrimonial property of the petitioner and respondent;
  - b. A declaration that Plot Nos. 3, 4, 5 and 6 Juja Gatwanyaga Road excised from LR Nos. 11407/xxx and 11407/79/xx be subdivide and shared equally between the petitioner and the respondent;
  - c. In the alternative of (b) above, Plot Nos. 3, 4, 5 and 6 Juja Gatwanyaga Road excised from LR Nos. 11407/xxx and 11407/79/xx be sold and the proceeds be shared equally between the petitioner and the respondent.
2. In opposition to the petition, the respondent filed an Answer to Petition dated 17<sup>th</sup> June 2021 and Replying Affidavit dated 25<sup>th</sup> June 2024.



### **The Petitioner's Case**

3. The petitioner states that he cohabited with the respondent from 1993 with their union crystallizing into a marriage on 16<sup>th</sup> September 1995. The petitioner states that their union was blessed with two issues.
4. The petitioner states that he and the respondent are estranged although they live in the same matrimonial home. The petitioner further states that the respondent filed a divorce case in Thika CM Divorce Cause No. 55 of 2018 and a decree nisi was issued on 26<sup>th</sup> April 2024.
5. The petitioner further states that they acquired properties being Plot Nos. 3, 4, 5 and 6 Juja Gatuanyaga Road excised off LR. Nos. 11407/xxx and 11407/79/xx during the subsistence of their marriage as he contributed in cash and in kind towards the acquisition of the property. The said properties are in the name of the respondent as they were acquired from Maktaba Sacco Society Limited whose membership is limited to staff of Kenya National Library Services.
6. The petitioner avers that during the marriage he took several loans from Fundi Lima Services, Credit Co-operative Society Sacco and Equity Bank to finance the purchase of the suit properties. He Further states that he has attached receipts to show the money he contributed in constructing their matrimonial home which construction was undertaken in three phases. According to the petitioner he states that the house plan records have his name as the owner of the matrimonial home.
7. Although the properties are in the name of the respondent the petitioner states that she holds them in trust for him.
8. The petitioner states that he has taken care of his children's educational needs up to university level and further avers that it is not true that the respondent is a stranger to Plot Nos. 4, 5 and 6 of which certificates of ownership were issued in the name of the respondent.

### **The Respondent's Case**

9. The respondent admits to being married to the petitioner since 1992 until 24<sup>th</sup> January 2024. She further states that the marriage broke down and she petitioned for divorce in Thika CM Divorce Cause No. 55 of 2018. The respondent states that she made efforts to work on her marriage resulting in her withdrawing the divorce petition so as to facilitate alternative dispute resolution but the same fell through and the petitioner had the petition reinstated.
10. The respondent states that she has been an employee of the Kenya National Library Service since 13<sup>th</sup> July 1987 and joined Maktaba Sacco whose membership qualification at the time required that a prospective member must be an employee of the Kenya National Library Service. As a result of her membership, the respondent states that the sacco gave her an opportunity to acquire properties that were being sold by the sacco through loans and allotments.
11. The respondent states that she solely purchased four plots including Plot No. 3 from Maktaba Sacco through loans deducted through check off system by Kenya National Library Service. Further, she and the petitioner jointly contributed in the building of their matrimonial home where they reside until to date. The respondent states that their daughter does not have a job and their son is a third year student at the university. She adds that it was for that reason that she took loans specifically for the retirement home and eventual inheritance by the children and thus selling the property would leave all of them with no residence.



12. The respondent states that during the pendency of their marriage, she disposed off these properties and they are no longer registered in her name. Further, the petitioner is aware of the disposal of the said plots as the petitioner lodged a case in Thika Chief Magistrate's Court MCELC Case No. 35 of 2020 against herself and one of the current proprietors of the suit plots. Additionally, the petitioner had, in the pendency of their marriage obtained documents of the sale of Plot No. 5 confirming that indeed the said property was disposed hence the present matter has been filed by material non-disclosure.
13. The respondent states that the petitioner has not produced the documents of the said plots or provided the registration numbers of the said plots from the Lands Registrar office which the respondent states that this is a confirmation that the petitioner has no knowledge or information relating to the plots since they were acquired.
14. The respondent argues that she is a stranger to Plot Nos. 4, 5 and 6 Juja Gatwanyaga Road referred to by the petitioner and there has never been any conversation or understanding that she would hold any of the properties in trust for him.
15. The respondent states that the petitioner has not supported his claim with evidence as he has not provided any supporting documents to his petition, not even a copy of the titles he claims are part of the matrimonial property.
16. The respondent states that the petitioner began an affair with another woman who lives within their neighbourhood in December 2015. In October 2021, the petitioner moved in to stay with the said woman and continues to live with her to date. Despite their marriage having been dissolved and the petitioner having another family, the petitioner has refused to vacate the house causing her great pain and fear as she has no strength to evict the petitioner.
17. The respondent avers that the petitioner acquired other properties during the pendency of their marriage which he disposed of during their marriage in order to exclude her from gaining anything from those properties. The respondent further states that she is not interested in pursuing the properties which the petitioner acquired during their marriage and therefore he should not be allowed to claim ownership in the plots that she acquired with her personal finances and without his contribution.

### **The Petitioner's Submissions**

18. The petitioner relies on Section 6 of the *Matrimonial Property Act* and the case of *POM v MNK* (2017) eKLR and submits the respondent admitted to his contribution towards their matrimonial home. The petitioner further relies on Section 7, 14(b) & 17 of the *Matrimonial Property Act* and submits that the respondent sold some of the matrimonial properties which is aimed at dispossessing and defeating his claim and entitlement of the properties. The petitioner argues that he took various loans to finance the purchase of the suit properties and he produced a daily construction expenditure entry book for the entire project and house plan records which show that he is the owner of the matrimonial property. The respondent only attached receipts as evidence that she contributed to the building of the matrimonial home but the said receipts do not reflect the period of the construction. To support his contentions, the petitioner relies on the cases of *JMM v MM* [2019] eKLR; *FS v EZ* [2016] eKLR; *Falconer v Falconer* [1970] 3 All ER; *T.M.V v F.M.C.* (2018) eKLR ; *ENN v SNK* [2021] eKLR and *Paul Kagwa v Jackline Muteteri Matrimonial Cause No. 2005 of 2023* [2006] UGHC 17 (18 May 2006) and submits that the properties namely Plot No.s 3, 4, 5 and 6 Juja Gatwanyaga Road off LR No.s 11407/xxx and 11407/79/xx were acquired during the subsistence of marriage between the parties and form part of matrimonial property.



## The Respondent's Submissions

19. The respondent states that the suit properties were disposed of during the pendency of the marriage and that the petitioner did not contribute towards the acquisition of the properties. She further argues that the said properties were acquired between the year 2000 to 2008 which is approximately 16 years ago.
20. The respondent relies on Section 7, 12(1) and 14(a) of the *Matrimonial Property Act* and submits that none of the plots stated in the petition are matrimonial properties as the petitioner never contributed towards their acquisition. The respondent argues that the mere fact that the suit properties were acquired during the subsistence of the marriage does not make them matrimonial properties automatically, the petitioner has to show contribution towards the acquisition of the properties.
21. The respondent further relies on the case of Joseph Ombogi Ongetoto v Martha Bosibori Ongetoto [2023] eKLR and submits that the petitioner did not contribute directly or indirectly towards the acquisition of the suit properties. The respondent argues that the petitioner has only produced loan application forms and schedules of expenditure. There is not a single receipt of payment made towards construction of any house. There is not a single bank statement or loan account statement from the alleged sacco showing deductions of a loan obtained to finance the acquisition of the suit plots. The respondent on the other hand states that she has produced payslips running from early the year 2000 showing loan deductions. She has further produced loan application forms certified by Maktaba Sacco which shows she borrowed money to finance the purchase of the plots. The respondent submits that the petitioner does not even appear as a guarantor in the extensive list of the loan application form she has produced as exhibits.
22. The respondent argues that if the petitioner financed the suit properties with loans he obtained himself. She poses a question as to why the properties were registered exclusively in the respondent's name to the exclusion of the petitioner, yet they were spouses. She further states that the petitioner does not know the registration numbers of the properties as they currently appear in the relevant land register because he did not purchase them or even got involved with the transactions in any way.
23. The respondent further submits that the loan application form produced by the petitioner is not certified by Fundilima Sacco which makes it unreliable evidence. The evidence of ownership produced by both parties and confirmed by the respondent demonstrate that the properties were acquired through Maktaba Sacco.
24. The respondent submits that the statement of account from Equity Bank Kenya Limited shows that the loan was disbursed on 11<sup>th</sup> May 2014 which does not fit the trail of acquisition of the properties. The respondent stated in her affidavit that she acquired the last property in 2008 which was financed by Maktaba Sacco loan which she cleared in 2012.
25. Relying on the case of P.N.N v Z.W.N [2017] eKLR, the respondent submits that the petitioner has not pleaded that he indirectly contributed towards the acquisition of the properties or at all towards the welfare of the family. He further submits that she stated in her replying affidavit the cruelty that she endured during the marriage and towards the end of the marriage. Further, that the petitioner did not offer any form of companionship to the respondent. As such, the petitioner's indirect contribution was in fact negative. He caused great harm and the respondent lives in fear in her own house.
26. The respondent further submits that the petitioner personally acquired other properties in the pendency of the marriage which he disposed of with a view of excluding her from claiming any interest.



27. The respondent further submits that the present case is not one that is based on the *Matrimonial Property Act* but a normal suit based on trust. The respondent argues that there is no evidence to show that the petitioner and herself at all intended to create a trust before such a trust is implied by the court. In the absence of the intention to create a trust, no trust can be implied as the petitioner has also failed to prove contribution.
28. The respondent submits that all the listed properties by the petitioner were disposed of during the pendency of the marriage, a fact which is admitted by the petitioner in his pleadings and submissions. The petitioner admitted to having initiated an action in Thika MC ELC No. 35 of 2020 Nickson Chege v Eudias Wanjiku & Albert Mwangi. Contrary to the pleadings, the suit was initiated against the current registered owner of the properties and the herself. The case was dismissed after the petitioner failed to follow up with the matter. Thus, the respondent argues that if the court were to make any further orders for distribution, the said orders would be incapable of performance. To support her contentions, the respondent relies on the case of UKMA v IID Case No. E014 of 2022 [2023] KEHC 17 (KLR) (10 August 2023) (Judgment).

### Issues for determination

29. The two main issues for determination are:
- a. Whether Plot Nos. 3, 4, 5 and 6 Juja Gatuanayaga Road exists and whether they are matrimonial properties;
  - b. Whether the petitioner is entitled to a 50% share of the suit properties.

### The Law

#### Whether Plot No.s 3, 4, 5 and 6 Juja Gatuanayaga Road excised off LR. Nos. 11407/xxx and 11407/79/9 are matrimonial properties.

30. Section 6 of the *Matrimonial Property Act* 2013, defines matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage.
31. Basically, for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.
32. Furthermore Section 14 of the *Matrimonial Property Act* provides:-
- 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.
33. This principle was articulated in the case of H.C.C. No. 11 of 2007 E. N. K v J. N. K cited with authority in N. N. N v S. N. M. [2017] eKLR where the court held that:-

By dint of Section 14(a) of the *Matrimonial Property Act*, and by reason of the said assets having been acquired during matrimony and especially during cohabitation, the rebuttable presumption kicks in that the said assets were held in trust by the respondent for the



applicant. The presumption having arisen, the respondent was bound to provide evidence to displace the presumption. The only duty on my part is to determine whether such evidence has been provided that would displace the presumption.

34. In the present case, both parties have agreed that they acquired the suit properties during the subsistence of the marriage but the respondent argues that the said properties are not matrimonial properties and further that she has disposed off the said properties. From the record, it is evident that both parties agree that they jointly built the matrimonial home. On further perusal of the record, the petitioner produced certificates of ownership in respect of the suit properties from Maktaba Sacco society Ltd in the name of the respondent. He further stated that he filed a suit against the respondent being Thika MCL&E Case No. 35 of 2020 initiated against the respondent and Albert Kamau Mwangi an intended purchaser. In the said case, the respondent's advocate swore an affidavit disputing the jurisdiction of the lower court and she averred that the suit properties are matrimonial properties. The petitioner also produced a sale agreement in respect of Plot No. 5 between the respondent and Albert Kamau Mwangi dated 2<sup>nd</sup> May 2006.

35. The burden of proof was shifted to the respondent to rebut the presumption that she held the suit properties in trust for the petitioner as provided by section 14 of the Act. I have considered the petitioner's evidence in this regard. She said she sold out the properties listed in the petition to 3<sup>rd</sup> parties without the consent of the petitioner. The respondent further argues that property sold during the existence of the marriage is not matrimonial property and cannot be said to be matrimonial property. I am of the considered view that this argument is misconceived.

In the absence of the consent of the other party in the marriage, such sale would not exempt the property from being declared matrimonial. It was also expected that the respondent would produce evidence of sale of the properties but she failed to do so. The petitioner filed Thika CM MCL&E case No. 35 of 2020 against the respondent and the buyer but he did not pursue the case which resulted in the dismissal of the case for want of prosecution.

It was further argued that the petitioner did not produce documents to prove that such properties registered in the name of the respondent do not exist. The respondent did not deny that she owns such properties. In my view, she admitted the existence of the properties but she said she sold them for they all belonged to her since there was no contribution from the petitioner.

I come to a conclusion that the said properties exist and are matrimonial properties having been acquired during the existence of the marriage.

Whether the petitioner is entitled to a 50% share of the suit properties.

36. Having established that the suit properties are matrimonial property, the next issue for determination is in what proportion that the properties should be divided.

37. Article 45 (3) of *the Constitution* of Kenya is instructive on this. It provides:-

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

This principle is echoed by Section 3(2) of the *Marriage Act* and further recognized by the Court of Appeal in the case of Agnes Nanjala William v Jacob Petrus Vander Goes No. 127 of 2011 (UR) where the Court of Appeal observed that Article 45(3) of *the Constitution* gives parties to a marriage equal rights before, during and after a marriage.



38. However, the Supreme decision of *Joo v Mbo* (2023) KESC 4 (eKLR) explained the equivocability of Article 45(3) of *the Constitution* noting that the *Matrimonial Property Act*, 2013 was enacted after *the Constitution* and expounded on the right of parties on division of property. This case was an appeal from the Court of Appeal decision where the parties had been given equal shares of the matrimonial property based on the court's interpretation of Article 45 (3) of *the Constitution*. The court held that:-
- a. That the status of the marriage does not solely entitle a spouse to a beneficial interest in the property registered in the name of the other spouse and neither does the performance of domestic duties, or the fact that the wife was economical in spending housekeeping.
  - b. That a party must prove contribution to enable a court to determine the percentage available to it in the distribution.
  - c. That the principle of equality under Article 45 (3) cannot be applied in a blanket manner.
  - d. That despite the existence of two schools of thought derived from Article 45 (3) the court must ensure equality and fairness to both spouses.
39. In the present case, the petitioner stated that he contributed to the acquisition of the properties by taking his children to school up to university level, which was not denied by the respondent. He said he took several loans from Fundi Lima Services, Credit Cooperative Sacco and Equity Bank to finance the suit properties. The petitioner further stated that he contributed financially to the building of their matrimonial home which the respondent admitted. From the record, the petitioner borrowed two loans from Fundilima Sacco for the sum of Kshs. 500,000/- and 700,000/- in the years 2004 and 2007 but did not produce bank or payment receipts to show how the funds were spent. He produced a payslip for 2010 which did not show that he was paying back the loan but only shows his monthly contribution to the sacco as Kshs. 2,000/-. The statement of account from Equity Bank provided by the petitioner are for the year of 2014 long after the properties had been acquired.
40. On the other hand the respondent produced loan applications from Maktaba Sacco and payslip showing that the said sums were being deducted on monthly basis. She also produced receipts to show her contribution in building the matrimonial home.
41. This court is obligated to determine the percentage of contribution of each party. The petitioner did not produce any evidence to show that he contributed in the purchase of the properties. Section of the *Evidence Act* places the burden of proof on the petitioner to demonstrate extent of his contribution. However, he produced evidence that he partly contributed to the construction of the matrimonial home which sits on one of the plots listed in the petition. The construction cost of the home was not given to the court to enable this court determine the contribution of each party in the said project. In this case, the court hold that both parties contributed in the construction.
42. The Parties solemnised their marriage in 1995 and divorced in April 2025. The marriage was peaceful till 2018 when the parties became irreconcilable. The petitioner said he educated his children up to University level which in my view is an indirect contribution in that it eased the burden on the respondent on acquiring the matrimonial properties. In addition, the petitioner was a husband to the respondent for more than two decades and was a caring father to his children. Although the respondent claims that the petitioner did not make her life easier or happier, it cannot be ignored that the two stayed together, brought up the children and gave each other the companionship in the marriage, no matter how inadequate it was. All these contributions are indirect and ought to be take into consideration. Section 2 of the Act describes non-monetary contribution to include domestic work, management of the home, childcare, companionship, management of family business or property, farm work among others. I come to the conclusion that the petitioner contributed indirectly in the



acquiring of the properties which created a constructive trust in his favour in the properties acquired during the subsistence of the marriage.

43. Having considered all the evidence and balancing of the scales of fairness and equity, I hereby apportion the ratio of contribution to the petitioner at 40% and 60% to the respondent.
44. It is hereby ordered that the matrimonial home rests in the respondent as the petitioner already has another family provided that the ratio of 40:60 is maintained. The plots Thika/Gatuanyaga Nos 3, 4, 5, and 6 all excised from L.R. 11407/xx and 11407/79/x and LR. No. 11407/79/xx shall be shared between the parties based on the same ratio and bearing in mind the value of the matrimonial home that vests in the respondent.
45. In the event that any of the properties have been sold, each will be valued by a valuer agreed on by the parties based on the market value at the time of sale and the party who sold shall pay the other his or her ratio as declared herein.
46. This being a family matter, each party shall meet their own costs.
47. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 20<sup>TH</sup> DAY OF AUGUST 2024.**

**F. MUCHEMI**

**JUDGE**

