



**JAK v PJK (Family Originating Summons E011 of 2023)  
[2024] KEHC 16726 (KLR) (16 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 16726 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY ORIGINATING SUMMONS E011 OF 2023**

**G MUTAI, J  
AUGUST 16, 2024**

**BETWEEN**

**JAK ..... CLAIMANT**

**AND**

**PJK ..... DEFENDANT**

**JUDGMENT**

1. The Claimant herein moved this court vide Originating Summons dated September 26, 2023 and supported by his affidavit sworn on the same day. The summons seeks the division of the Title No. Kwale/Mabokoni/1XX7, together with the improvements made thereon, to be divided equally between the parties hereto on the ground that the same is matrimonial property.
2. In his affidavit the Claimant stated that he got married to the Respondent on 22<sup>nd</sup> December 2011 at the Registrar’s Office in Mombasa and that they got divorced in 2023 following the conclusion of the Divorce Cause No. E023 of 2023. Before their marriage broke down they had acquired Title No. Kwale/Mabokoni/1XX7 measuring about 0.84h.
3. He further deposed that the Respondent deserted the matrimonial home for California, USA, in 2014 without a trace, leaving him to care for the matrimonial home on his own. He averred that being a retiree of the [particulars withheld] Non-Governmental organization he used his retirement benefits to improve the matrimonial home. He asserted that he was the one who planted eucalyptus, orange, coconut, casuarina, lime, and pawpaw trees and even reared cows and goats throughout the said period. He also sank a well to deal with a water problem. He also connected electricity and entered into an agreement with a 3rd party who operates a children’s home and occupies the 6-roomed house.
4. In response, the Respondent filed a replying affidavit sworn on 9<sup>th</sup> October 2023. She stated that she is a retired registered nurse. She undertook charity work in Kenya in the year 1999 when she worked as a volunteer for [particulars withheld] in Makwang’ani, Kwale County. During her work, she noted



that there were many poor and underprivileged children in Kwale who grew up impoverished due to a lack of food, sanitation, health care and education, and she decided to offer them the necessary care and support. She then returned home to California, USA, where she worked for two years at [particulars withheld] Hospital so as to gather sufficient funds and experience to start a clinic and a children's home. She came back to Kenya in the year 2003 and opened a clinic and a children's home in Wema, Shimba Hills and Maweche in Kwale under the name [particulars withheld].

5. The children's authorities demanded she get a better facility for the children as she was running the children's homes from mud houses. That is when she acquired the suit property, Title No. Kwale/Mabokoni/1XX7 for the consideration of Kes.200,000/- and the title deed issued was on 28<sup>th</sup> July 2010. She drilled a well on the suit property and used the water for the construction of a clinic (a 6-roomed building) and the children's home (10 10-roomed building) on the suit property.
6. She further stated that she met the Claimant in 2011, around August or September, and got married to him in December same year. She then invited him to live with her in one of the rooms she was occupying at the children's quarters. It was, therefore, not true that the Claimant made any contribution towards the acquisition of the suit property and or construction of the buildings therein.
7. She averred that in 2014, she had to run for her safety as the plaintiff was physically abusive, forcing her to leave Kenya. She came back in 2023. That is when she petitioned for divorce. She contended that the Claimant ran down the clinic, leading to its closure, and denied the children access to the children's quarters. He then rented the premises to one Nelly, who has been running a children's home at a monthly rent of Kes.10,000/- (the 6-roomed building) and the children's quarters to different parties for a monthly rent of over Kes.20,000/-. For the last 9 ½ half years, the applicant has been collecting the rent from the said premises and using it exclusively.
8. She stated that the Claimant had not improved the suit premises in any way and that the premises became dilapidated due to his misuse. He sold all assets, furniture and fittings that were in the premises. He also sold and consumed the farm animals she was rearing, being two cows, four sheep, three goats, six ducks, three turkeys and a flock of chickens. The Claimant cut down the trees that were initially on the suit property and replaced them with a few trees. Further, before she left the country in 2014, she permitted KPLC to erect a transformer on the suit property. KPLC, in return, offered to supply power to the institution.
9. She further stated that when she returned to Kenya, she gave all tenants notice to vacate the property to enable her to carry out renovations, which they did on 26th September 2023 and 2nd October 2023. The Claimant left the premises for fear of the members of the community who ordered him to leave the property to enable her to carry out repairs and resume its use for the purpose it was intended for.
10. She averred that the suit property is not a matrimonial home, as alleged by the Claimant, and that it was developed solely for her charity work. That the Claimant has no beneficial interest in the suit property, neither has he made any direct/indirect contribution towards its improvement. She, therefore, urged the court to dismiss the summons with costs.
11. The Claimant filed a further affidavit sworn on 10<sup>th</sup> November 2023 in response to the Respondent's replying affidavit. He denied the contents of the replying affidavit. He stated the children in [particulars withheld] had never boarded the suit premises before or during the subsistence of their marriage. He contended that he was the one who drilled the well and not the Respondent.
12. He further stated that he is claiming a beneficial interest in the suit property on the basis that he developed and took care of the same from 2014 to 2023. He denied the allegation that he was abusive and violent towards the Respondent. When the Respondent left for California, she left behind



- employees, including nurses, with unpaid salaries, which he paid using his pension money, which rendered him financially unstable and unable to continue running the clinic. He deposed that he had only collected rent from the suit premises for 5 months.
13. He stated that the house was vandalized in 2020, and as a result, several assets were stolen, including furniture, a generator, a solar panel together with its battery and inverter, a television and double-decker beds. He reported the said incident at Diani Police Station. There were no ducks left at the home by the Respondent, as she only left one cow and a goat which were both poisoned by unknown people.
  14. The Respondent filed a supplementary affidavit sworn on 21<sup>st</sup> November 2023 and reiterated the position in her replying affidavit. She denied the allegations by the plaintiff and stated that the applicant took advantage of employees' salaries and withdrew Kes.250,000/- from their jointly held account at Barclays Bank. He further deposed that the monies that the Claimant claims to have expended on repairs were money from the rental income that he has been collecting and utilising exclusively.
  15. The Claimant, on the other hand, filed a further supplementary affidavit sworn on 5<sup>th</sup> December 2023. He reiterated his position in his affidavits and stated that his claim before the court is for a share of the matrimonial property and the beneficial interest for the amounts used to develop and take care of the home during the subsistence of marriage and during the absence of the Respondent.
  16. The matter proceeded by way of viva voce evidence in the open court. I will set out the summary of their respective evidence below.
  17. The Claimant reiterated the contents of his affidavits and stated that the Respondent denied him access to the property. The Respondent had the title to the land upon which she was operating a clinic. She had a 10-roomed house with a borehole. That he used the money paid by a lessee, Ms Nelly, to improve the property, and he also gave some teachers residence on the property. Save for those there were no other tenants.
  18. Further he used to cultivate the land and made improvements on the property. He conceded that he never carried out any repairs on the property. He blamed his failure to do so on a lack of support on the part of the Respondent. He stated that he only repaired the hospital but did not have any evidence to support the same.
  19. The Respondent, like the Claimant, had only one witness. The Respondent relied on her replying affidavit and documents annexed thereto as her evidence in chief and told the court that she bought the suit property in 2010 and the title was in her name. She developed the property by building a children's home. This was before her marriage to the Claimant.
  20. It was her evidence that when she met the Claimant, he was destitute and that she employed him in the shamba. The Claimant had no income at all and used to sleep in the boys' dormitory. After the marriage, he moved to her room in the girls' section.
  21. She stated that when she came back, she found the property in a bad state as the building was broken, and the sinks were not working properly as they were not being taken care of. Tenants were renting at Kes.1,700/-, whereas Ms. Nelly paid 10,000/-.
  22. The court ordered parties to file written submissions. I will set out the summary of the parties' submissions in the following paragraphs of this judgment.
  23. The Claimant, through his advocates Kilonzo & Aziz Company Advocates filed written submissions dated 11<sup>th</sup> June, 2024. Ms Juaje learned Counsel for the Claimant, submitted on four issues, namely, whether the home standing on Title No. Kwale/Mabokoni/1XX7 is a matrimonial property, whether



- the plaintiff contributed to the matrimonial property, whether the plaintiff is entitled to the orders sought, and who is to bear costs the costs of the Originating Summons.
24. On the first issue, counsel relied on Sections 2 and 6 of the *Matrimonial Property Act* and submitted that it is not in dispute that the suit property is owned by the Respondent and that they lived in the home as a couple after their wedding. For that reason, it was urged that the same is a matrimonial property.
  25. On the second issue, counsel relied on Sections 2 and 9 of the *Matrimonial Property Act* and submitted that the Claimant contributed towards the development and or improvement of the suit property by taking care of the home when the Respondent was away and farming, thus acquiring interest in the same and urged the court to find so.
  26. Regarding the third issue, counsel relied on Article 45 of the *Constitution*, Section 7 of the *Matrimonial Property Act* and decisions of the courts of record and urged the court to consider the circumstances of the case and divide the suit property equally between the Claimant and the Respondent.
  27. On costs, counsel relied on Section 27 of the *Civil Procedure Act* and submitted that costs follow the event and urged the court to allow the summons with costs.
  28. The Respondent, through her advocates, Waithera Ngigi & Co. Advocates, filed written submissions dated 28th June 2024. Ms Ngigi, learned counsel for the Respondent, reiterated the defendant's position in her affidavits and viva voce evidence. Ms Ngigi identified issues that were similar to those identified by the Claimant's counsel.
  29. On whether the property is a matrimonial property, Ms Ngigi submitted, based on the Respondent's evidence of ownership that the same is not a matrimonial property.
  30. On whether the structures erected on the suit property are matrimonial property, counsel reiterated the defendant's evidence, relied on various decided cases and also on section 9 of the *Matrimonial Property Act*. She submitted that property was acquired before marriage; thus, the Claimant cannot lay claim to the same.
  31. Ms Ngigi submitted that the Claimant did not prove that he made monetary and or non-monetary contributions towards the improvement of the suit property. He, however, benefited exclusively from the suit property for the 9 years that Respondent was away. Counsel submitted that the Claimant did not prove either monetary or non-monetary contribution and, therefore, was underserving of any share in the suit property.
  32. Counsel thus urged that the court to dismiss the suit with costs.
  33. Is Title No. Kwale/Mabokoni/1XX7 and the improvements made therein a matrimonial property? Did the Respondent make any monetary or non-monetary contribution? Is the said property liable for division as a matrimonial property? Are costs payable, and if so, by whom?
  34. From the evidence adduced, it is clear that the Claimant and the Respondent got married on 22<sup>nd</sup> December 2011 at the Registrar's Office in Mombasa. The marriage certificate was annexed to the affidavit in support of the Originating Summons as exhibit "JAK-1." In the said document, the name of the Respondent is given as PJM. The title deed for the suit property was issued on 28<sup>th</sup> July 2010 and is in the name of PM, ID No. 36XX77 (annexure "JAK-4"). It is clear that the suit property was acquired by the Respondent prior to the marriage.



35. The foregoing notwithstanding, was the suit property otherwise a matrimonial property? To answer this question, we must look at the provisions of the law and the statute.
36. Section 6(1) 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.
37. It would appear to this Court that the structures on the suit property, which were erected by the Respondent, were used for charity work that she was engaged in. The mere fact that the parties herein used the same as a temporary lodging after getting married does not change the nature of the buildings from being a children's home to a matrimonial home. That is evident from the fact that when the Respondent was absent, the Claimant himself leased it out to Ms. Nelly and a few other individuals for personal profit.
38. Even if it were used as a matrimonial home and were thus a matrimonial home, the Claimant would still have had the burden of proof to show that he made improvements thereon that would entitle him to a share thereof.
39. Section 7 of the *Matrimonial Property 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.”
40. Section 9 of the said Act is also very relevant. It provides that:-
- “Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”
41. From the evidence adduced it is clear that the dwelling structures erected on the land were erected by the respondent. As a matter of fact, the Claimant makes no claim of having erected the structures. He, however, avers that he improved the property once the Respondent left Kenya to live in the USA.
42. What the above statutory provisions say is that the mere fact that a property is matrimonial does not mean that it is owned by the spouses equally. Section 7 of the Act provides that matrimonial properties are, subject to subsection 6(3), owned by the spouses in accordance with the contribution of each party towards its acquisition and that upon divorce or dissolution of the marriage, it shall be divided among them in the proportions consistent with their contribution.
43. I am in full agreement with what Kiage, JA, stated in P N N v Z W N [2017] eKLR that:-
- “To my mind, all that the *Constitution* declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words all forms of gender superiority-whether



taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage covered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest-all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law.

Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in Francis Njoroge vs. Virginia Wanjiku Njoroge, Nairobi Civil Appeal No. 179 of 2009;

“... a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in Lock Yeng Fun v Chua Hock Chye [2007] SGCA 33;

“It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – e precise mathematical exercise’.”

I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words “50 per cent.”

44. Did the Claimant undertake any improvements on the suit premises? The photographs he annexed don't seem to bail him out. The property appears to be in a decrepit state. The state of disrepair and neglect is apparent everywhere. The receipts he annexed were for hardware purchases made shortly before the suit was filed presumably to provide him with evidence of contribution. Annexure JAK-6



is a copy of a tenancy agreement he entered into with Ms Nelly Zena. No accounting is made for the income he received.

45. Given the evidence adduced, I am inclined to believe the Respondent's account. She had the means to develop the property. The Claimant, on the other hand, is a man of modest means. Their marriage was short and appeared to have been extremely unhappy. In the circumstances, I am unable to find a contribution on account of companionship. Even if there was, the Claimant had the sole benefit of the property for 9 years. To find that he is entitled to a share would be double enrichment for him. I am guided by the case of *AIN v IMM* [2019] KEHC 11097 (KLR), where the court stated that:-

“For the Applicant to claim an interest in both Plot 162 and the tuk tuk which are not matrimonial property, she must demonstrate that she contributed towards its acquisition or improvement of the same. The Applicant did not place before this Court any evidence of contribution directly, indirectly, financially or otherwise, in either the acquisition or improvement of the two properties. It follows, therefore, that she has not acquired a beneficial interest in the same.”

46. In the circumstances, I find and hold that the Originating Summons has no merit. The same is dismissed.
47. As this is a matrimonial property dispute, each party will bear his or her own costs.
48. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 16<sup>TH</sup> DAY OF AUGUST 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Ms Ngigi, for the Respondent;

Ms Oloo, holding brief for Ms Juaje, for the Claimant;

Arthur - Court Assistant.

