



REPUBLIC OF KENYA



KENYA LAW
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**RMM v RWR (Matrimonial Cause E006 of 2022)
[2024] KEHC 16722 (KLR) (16 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 16722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE E006 OF 2022**

G MUTAI, J

AUGUST 16, 2024

IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT, 2013

BETWEEN

RMM CLAIMANT

AND

RWR RESPONDENT

JUDGMENT

1. Before this court is an Originating Summons dated 11th May 2021 vide which the Claimant seeks the following orders:-
 - a. That an order do issue that 50%, or such other proportion, of the properties listed below and held jointly and/or severally by the Applicant and the Respondent is for the beneficial interest of the Applicant:-
 - i. Residential properties known as Dagoretti/Riruta/4599, 6690, and 6691;
 - ii. Commercial cum residential property known as Dagoretti/Riruta/6692;
 - iii. Motor vehicle registration number KCF522F;
 - iv. Motor vehicle registration number KCZ906D;
 - v. motor vehicle registration number KCU563J.
 - b. That the division to separate the interest in the properties be done within 90 days from the date of the judgement;
 - c. That the Respondent be ordered to transfer the Applicant's share in the property to him within 60 days from the date of division;



- d. That in default, the Registrar of the court is to sign any transfer documents in place of the respondent.
 - e. That an order do issue declaring the Respondent is accountable to the Applicant in respect of all that income derived from the said properties;
 - f. That this honourable court be pleased to order that the properties and the income from the same be settled in proportions aforesaid or as the court may order; and
 - g. That the costs of the summons be provided for.
2. The Originating Summons is premised on the grounds therein and the supporting affidavit of the Claimant, identified as the Applicant in the pleadings, sworn on 11th May 2022.
 3. The Claimant stated that he solemnized his marriage with the Respondent in 1998 under the Islamic Sharia Law and that they divorced in 2022 before the Kadhi's Court Mombasa via Kadhi Court Divorce Cause Number E38 of 2022.
 4. He averred that the Respondent, in collusion with her children and third parties, have colluded to render him destitute, leaving him to live like a pauper. He stated that the Respondent deprived him of all the matrimonial property.
 5. Further, the properties are registered in the name of the Respondent. However, some are subject to matrimonial rights as he made significant contributions of a monetary and non-monetary nature, including but not limited to child support and care, compassion and companionship.
 6. He stated that the suit properties property were all acquired by the Respondent during the subsistence of their marriage and that the same amount to matrimonial property. That he is entitled to a share of the matrimonial property.
 7. In response, the Respondent filed a Replying Affidavit sworn on 23rd November, 2023. She stated that the suit properties, save for the motor vehicles, were solely acquired by her through inheritance from her parents. She deposed that she took loans to develop the same, which she has been servicing by herself, and that the only contribution made by the Claimant was giving the spousal consent.
 8. Further, she inherited Plot No. Dagoretti/Riruta/4599 with rental houses on it from her grandfather, which she used together with the income generated from the rental houses to secure a bank loan of Kes.1,000,000/- from Barclays Bank and another loan of Kes.2,000,000/- for purposes of developing Plot Number Dagoretti/Riruta/5221 belonging to her late mother, Mary Njoki Zakaria, which she singlehandedly settled. That Plot No. Dagoretti/Riruta /6690 was subdivided out of Plot No. 5221, which was subdivided through a court order dated 3rd February 2014 in Succession Cause No. 1828 of 2010; re Estate of Mary Njoki Zakaria. She further used Plot No. Dagoretti/Riruta/4599 to secure loan facility of Kes.2,500,000/- from Equity Bank to develop Plot No. Dagoretti/Riruta/6692.
 9. She stated that Plot Nos. Dagoretti/Riruta/6691 and Dagoretti/Riruta/6692 are a result of the subdivision of plot number Dagoretti/Riruta/3455, inherited from her mother with rental houses on it. Further, the proceeds from all the developments went into interest repayments on the loans. She had to sell Plot No.4599 to settle the loan in part and to negotiate for a takeover loan from Absa Bank.
 10. She further stated that the Claimant did not contribute to the development of the said properties in any way as she was also catering for food, shelter, clothing, education and medical care costs. She urged the court to dismiss the Originating Summons with costs.



11. The Claimant filed a Supplementary Affidavit in response to the Respondent's Replying Affidavit sworn on 5th January 2024. In the deposition, he stated that from 1987 to 1993, he worked as a driver, earning an income of Kes.4,2000 per week. He deposed that he and the Respondent ran a wholesale business selling eggs, which made Kes.1500-2000 per day. When the business prospered they set up a grocery shop at Kawangware 46. The proceeds of all the businesses were used to construct 34 rooms on Plot Number Dagoretti /Riruta/4599, which the Respondent had inherited from her grandfather.
12. He stated that he constructed five shops and five residential rooms on the said plot using cedar posts lent to him by a timber lady and money from a merry-go-round for roofing. That all his money was used to develop the said properties and to facilitate loans from the merry-go-round. The rental income from the houses was Kes.54,000/- per month. He further deposed that they used the title of the aforesaid plot to secure a loan of Kes.500,000/- from Barclays Bank in 2002 and also got Kes.250,000/- from the merry-go-round. Thereafter, they moved to Mombasa and purchased a Nissan Matatu registration number KAL 358W, for Kes.450,000/-, for which they paid Kes.250,000/-. They rented a two-bedroom in Mikindani, where they stayed, and were blessed with three children.
13. He averred that the Respondent's mother asked them to sell the Matatu as it used to have constant breakdowns and use the money to carry out construction on her Plot No.5221. However, he used the sale proceeds to construct a perimeter wall on 4599 in 2005. They also built 33 permanent rooms on Plot Number 5221 and used the rent collected to pay the loan and for the construction of the extension of the houses on the plots. They collected a rental income of Kes.157,500/- from plot no. 6690 and 6692 per month and used the same for loan repayment. They also sold Plot No.4599 to settle loans. They obtained a loan from an Equity Bank, which they used to construct residential flats with 75 bedsitters and 16 shops comprising 4 flats on Plot no.6692. they had a total of 182 houses, out of which 16 were given to Respondent's sister, Esther Nyokabi, through a court order.
14. The Respondent filed a further affidavit sworn on 1st February 2024. She denied the contents of the Claimant's affidavit in response to her Replying Affidavit, reiterated her position in her Replying Affidavit and stated that an affidavit is not proof of contribution to the development of property Title No. Dagoretti/Riruta/4599 by the Claimant. She urged the court to dismiss the Originating Summons with costs.
15. The Originating Summons were canvassed by way of viva voce evidence. The Claimant testified that he was relying on the Supporting Affidavit sworn on 11th May 2022 and the Further Affidavit sworn on 5th January 2024 as his evidence in chief.
16. He reiterated his position in his affidavits. He stated that he was seeking upkeep from the Respondent, funds for medical treatment, and a share of the property they acquired together during marriage.
17. On her part, the Respondent adopted her Replying Affidavit sworn on 23rd November 2023, affidavit of means sworn on 1st December 2023 and the Further Affidavit sworn on 1st February, and the annexures therein as her evidence.
18. She stated that spousal consent does not mean the suit properties are co-owned. She testified that the Claimant did not contribute to the repayment of the loan.
19. Upon the closure of the Respondent's case the court directed the parties' s to file written submissions. Subsequently, the Claimant, through his advocates Khaminwa & Khaminwa Advocates, filed written submissions dated 7th March 2024. His Counsel submitted on six issues for determination, namely, whether the Claimant made a monetary contribution in respect of residential property known as Dagoretti/Riruta/4599 and whether it formed part of the matrimonial properties, whether the suit



properties formed part of the matrimonial properties, whether the Claimant proved his case on a balance of probability and whether reliefs sought should be granted.

20. On the first issue, Ms Wanjiku, learned counsel for the Claimant, reiterated the Claimant's position. She urged that it was in dispute that the suit properties were in Respondent's name. She submitted that the Claimant made tremendous efforts to develop, improve and maintain Plot No.4599 during the pendency of marriage. Despite his efforts and monetary and non-monetary contributions, the Respondent sold the said property without his consent. Counsel urged that by the year 2005, he and the Respondent had built 61 rooms, 59 temporary rooms and two permanent rooms on the said plot which accrued an income of Kes.219,000/- per month. The said property was sold to Mr David Kinyanjui. Mr Kinyanjui was also their management agent, through his firm, Takim Agencies.
21. On the second issue, Ms Wanjiku submitted that Plot No.5221, which previously belonged to the Respondent's mother, was now Plot No.6690. The parties took a loan of Kes.2,500,000/- from Equity Bank to develop the same.
22. Regarding the third issue counsel submitted that on 23rd December 2021 the Respondent changed the management agents from Takim Agencies to Olive Joy. She directed Olive Joy Agencies to deposit the rent collections in her account, leaving him with a loan of Kes.1,005,754/99. To pay off the loan balances they had to get another loan from Absa Bank.
23. Counsel submitted that where property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.
24. Counsel submitted that upon disbursement of Kes.33,700,000/- by the Equity Bank, they constructed residential flats on Plot No. 6692 comprising 75 bedsitters and 16 shops.
25. Ms Wanjiku submitted that the subject motor vehicles were all in the name of the Respondent but that they were acquired by her during the subsistence of their marriage. That made them, counsel submitted, matrimonial properties.
26. On the sixth issue, counsel submitted that the Claimant had proved his contribution towards developing the suit properties and urged the court to grant him a 50% share of the matrimonial properties.
27. The Respondent, through her advocates, Edwin Omulama & Associates Advocates, filed written submissions dated 29th February 2024. Counsel submitted on three issues: do the properties referred to by the Claimant as "Dagoretti /Riruta/4599/6690/6691" exist?; do the assets listed at prayer 1(b), (c),(d) and (e) of the originating summons dated 11/05/2022 constitute matrimonial property? and is the Claimant entitled to the prayers in the originating summons dated 11/05/2022?
28. Regarding the first issue it was submitted that the Respondent did not own the properties listed by the Claimant as belonging to her. It was urged on her behalf that the Claimant did not produce any evidence proving that they exist. Mr Omulama, therefore, urged that the Claimant's prayers pertaining to non-existent property must fail.
29. On the second issue, learned counsel relied on sections 2, 6, 7, 9 and 14 of the [Matrimonial Property Act](#) and submitted that the suit properties were not jointly owned and acquired and, therefore, do not fall under the definition of matrimonial property. He submitted that the Claimant did not make any contribution towards their acquisition or improvement, nor did he acquire a beneficial interest in them. He urged that the presumption that the properties were held in trust for him had been That presumption that they are held in trust for him had been rebutted.



30. Mr Omulama submitted regarding the third issue that the Claimant did not deserve the prayers sought.
31. I have considered the originating summons, the responses thereto, the viva voce evidence and rival submissions by counsel for both parties. I must now determine whether the properties claimed by the Claimant are matrimonial properties and, if so, what share of the same is due to him. I must also determine if costs are payable and by whom.
32. To do this I will have to, at the outset, set out the applicable constitutional and statutory provisions that will determine what decision this Court will make.
33. Article 45(3) of the Constitution provides that:-
- “(3) 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.”
34. 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.”
35. The court in the case of T M W v F M C [2018] KEHC 2482 (KLR) stated,
- “Turning the provisions of the Matrimonial Property Act, Section 6 of the Matrimonial Property Act, 2013 defines a 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. 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.”
36. Matrimonial property vests on a party according to their distribution as provided for in Section 7 of the Matrimonial Property Act, which 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.”
37. The court in the case of EKT M v ECC [2021] KEHC 1359 (KLR) stated,
- “Based on section 7 aforesaid, it is my understanding that where the contribution towards the acquisition of matrimonial property can be identified, in the event of divorce or dissolution of the marriage, the said property will be divided between the spouses in accordance with their respective contribution towards the acquisition. In that event, there is no presumption of 50:50 ownership of the said property. In my view, the 50:50 presumption is only to be invoked where there is evidence that both spouses contributed towards the acquisition of the property and there is no way of determining each spouse’s contribution thereto. It is in



that light that I understand the position in *Falconer –vs- Falconer* [1970] 3 All ER where Justices of Appeal held that:

“And the principles applicable to whether a matrimonial home standing in the name of the husband belonged to them both jointly (in equal or unequal shares) were that the law imputed to the husband and the wife an intention to create a trust for each other by way of inference from their conduct and the surrounding circumstances; an inference of trust would be readily drawn when each had made a substantial financial contribution to the contribution was stated to be such or indirectly as where both parties went out to work and one paid the housekeeping and the other paid the mortgage instruments; but whether the parties held in equal shares would depend on their respective contributions.”

...It follows from the foregoing that despite the constitutional requirement that parties in a marriage have equal rights, each party must be able to prove either contribution was monetary or non-monetary lest a party will not be entitled to any share in the matrimonial property. The onus squarely falls on the party who alleges contribution to prove such contribution in the acquisition of the subject property, be it monetary or non-monetary contribution..”

38. The Respondent, in her submissions, stated that the Claimant hadn't proved that the properties a share of which he is seeking exist. This contention is, however, not in consonance with her pleadings and the evidence she gave in Court. As a matter of fact, the only property she categorically stated didn't exist was Plot No. 4599, which she indicated was sold by her.
39. Both parties agree that there were substantial improvements carried out on the suit properties during the subsistence of the marriage between the Claimant and the Respondent. These were made partly from business incomes and also through loans borrowed from Barclays/Absa Bank and Equity Bank and merry-go-rounds.
40. It is common ground in this matter that the Claimant made no contribution towards the purchase of the properties. He contended in his pleadings, testimony and written submissions that he contributed to the improvements of the same.
41. Section 2 of the *Matrimonial Property Act* defines contribution 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.
42. Section 9 of the same Act recognizes contribution through the improvement of a property acquired before or during the marriage in the following terms:

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the 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.”

43. Section 14 of the said Act provides that:

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.

44. The Respondent, during the hearing, conceded that they joint trading company, that they borrowed money together for business purposes. The bank accounts had joint signing mandates. Given the foregoing, it does not appear to me as though the Claimant was a flower girl in the family business. He appears to have had a vital central role with real decision-making powers.

45. The Claimant gave a cogent, believable, detailed account of their relationship and business dealings.

46. The court in the case of *MNH v FHM* [2018] KEHC 1183 (KLR) held that,

“The logical conclusion flowing from the judicial precedence quoted above is that in determining the distribution of matrimonial property at the dissolution of a marriage, the Trial Court ought to dispassionately scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties. Furthermore, where property is registered in singularly in the name of one spouse, there shall be a rebuttable presumption that such property is held in trust for the other spouse.”

47. Further the court in the case of *T M W v F M C*(supra) stated,

“However, it makes sense to state that the Bank accounts presented contain records of the respondents. The account in question was in the name of the respondent with no evidence of any deposits being made by the petitioner at any given time. When it comes to mortgage repayments which has already been alluded to elsewhere in the evidence by the parties only the respondent has been responsible in liquidating the debt. It follows therefore that the petitioners share would be assessed in terms of non – financial contribution parameters and other factors in the event this court was to reach its logical conclusion in the cause. On the other hand, it is not lost in the mind of this court that when the marriage takes place between two people as recognized in the law of the Republic the property acquired during the marriage becomes an asset belonging to both of them. In a trusteeship relationship it does not matter who has the legal title as opposed to the beneficial interest. They each approach the alter of justice as equal partners for the court to apply the legal tools and solomonic skills of adjudication to settle for a property distribution model suited to each specific case..”

48. From the evidence adduced, it is clear that the Respondent inherited Title Nos. Dagoretti/Riruta/4599, 6690, 6691 and 6692. It, therefore, follows that the Claimant cannot claim to have contributed to their acquisition.

49. The foregoing notwithstanding, it would appear to this court that the Claimant and the Respondent engaged in various businesses whose proceeds paid for the properties' development. As those



improvements were made during coverture, with the Claimant's contribution, the improvements are matrimonial property capable of being divided.

50. Having said so, Title No. Dagoretti/Riruta/4599 is no longer in the name of the Respondent and won't be considered further.
51. Title No. Dagoretti/Riruta/6690, 6691 and 6692 are in the name of the Respondent. in my view in Nairobi land generally has greater value than improvement which in this case appear to be rather rudimentary. In the circumstances, it is my view that land has 60% of the value with improvements being 40%. In the circumstances, Claimant can only claim a share of improvements, i.e. 40%.
52. What share of the improvements is the Claimant entitled? As with most family businesses, no records of their respective contributions were kept by the parties. The most reasonable thing to do is to rely on the equitable maxim that equality is equity. I therefore award the Claimant 50% share of the improvements
53. I, therefore, find and hold that the Claimant has a 20% share in Title Nos. Dagoretti/Riruta/6690, Dagoretti/Riruta/6691 and Dagoretti/Riruta/6692.
54. The motor vehicle registration nos. KCF 522F, KCZ 906D and KCU 563J were acquired during coverture. In the circumstances, I order that they be sold and the proceeds, net of all liabilities, be divided equally between the parties.
55. I order that Title Nos. Dagoretti/Riruta 6690, 6691 and 6692 be valued within 60 days of the date hereof. The Respondent shall have 30 days to buy out the Claimant's 20% share of the said properties, from the date of the release of the valuation report.
56. If the Respondent is unable to buy out the Claimant, the Titles Nos. 6690, 6691 and 6692 shall be sold by public auction, and the proceeds shall be distributed in the proportion I have stated.
57. As this is a matrimonial property dispute, an award of costs will not be appropriate. Each party shall, therefore, bear its own costs.
58. Orders accordingly.

DATED AND SIGNED IN MOMBASA THIS 16TH DAY OF AUGUST 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Wanjiku, for the Claimant;

Ms Sheila Okumu, holding brief for Mr Omulama, for the Respondent; and

Arthur – Court Assistant.

