



**EKM v JDO (Matrimonial Cause 77 of 2019)
[2024] KEHC 16076 (KLR) (Family) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE 77 OF 2019
EKO OGOLA, J
DECEMBER 19, 2024**

BETWEEN

EKM APPLICANT

AND

JDO RESPONDENT

JUDGMENT

1. The applicant instituted this suit vide Originating Summons dated 2nd December 2019. She prayed for the following orders:-
 - a. That a declaration be issued that the suit property Plot No. Kisumu/Dago/3097, Ukweli Area, Kisumu Municipality, Kisumu County was jointly acquired by the parties herein;
 - b. That the aforesaid matrimonial property be shared equally between the parties herein;
 - c. That the court do issue any other orders it deems fit;
 - d. That each party bears its own costs.
2. The Originating Summons were supported by the applicant’s supporting affidavit. She deposed that she got married to the respondent on 27th April 2001. However, due to irreconcilable differences, the marriage broke down and a decree Nisi was issued on 12th May 2017. The applicant deposed that the Kisumu plot was acquired during the subsistence of their marriage and that it was acquired through their joint efforts and contributions. The applicant further deposed that she is a clinical researcher while the respondent is a medical doctor.
3. The respondent opposed the Originating Summons vide a Replying Affidavit. He deposed that he is the sole proprietor of the Kisumu property, and he acquired the said property exclusively and solely



through his effort and finances. He added that he resides on the property with their three children. The respondent further deposed that he acquired the property around 2010-2011 using his savings from his employment and private businesses. Furthermore, he deposed that since he purchased the property, he has continuously developed and improved it.

4. The respondent contended that the applicant did not contribute in any way towards acquiring, developing and improving the Kisumu property. According to the respondent, the bank statements and receipt annexed to the applicant's supporting affidavit alleging her contribution are not genuine. He deposed that the receipts were inconsistent with the bank statement to show contribution. The respondent deposed that even though the property was acquired during the subsistence of the marriage, it is not true that it was acquired through joint efforts.
5. The Summons were canvassed by way of written submissions which I have read and considered.

Determination

6. The Court has considered the pleadings, the evidence adduced, the exhibits and submissions filed by both parties.
7. From the evidence, it is not in dispute that the parties herein were married and that the marriage was dissolved by a Court. The point of departure is on the Kisumu property mentioned in the pleadings. As such, this court will ascertain whether the properties are, in the first instance, matrimonial properties. In the event this court finds in the affirmative, then it will venture into whether the properties ought to be shared and if so, in what proportion.

Whether the Kisumu property is matrimonial property

8. Section 6 of *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.
9. The Kisumu property was purchased sometime in 2011 whilst the parties formalized their union in 2001. Hence, the Kisumu property qualifies as matrimonial property.
10. The longstanding quagmire on how matrimonial property is to be shared in the event spouses can no longer sustain their marriages and are unable to mutually agree on the distribution has now been settled by the law and the Superior Courts. The position is that the distribution depends on each spouse's individual contributions to the acquisition of the properties. Contribution may be direct monetary contribution or otherwise.
11. Section 7 of the *Matrimonial Property Act* has the following to say: -

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.



12. Section 9 of the Act also provides as under: -

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.

13. Section 2 of the Act defines 'contribution' as follows: -

"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;

14. It is imperative to note that the non-monetary contribution in law is not limited or exclusive to the five categories listed above, but it is rather inclusive. It, therefore, means that a court in determining a party's non-monetary contribution may consider other inputs by that party.

15. The Court of Appeal in PNN vs. ZWN [2017] eKLR looked into Article 45(3) of *the Constitution* which 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" and expressed itself as follows: -

.... 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.

16. The foregoing was affirmed by the Supreme Court in JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & Another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment). The said case remains the locus classicus in family law for it addressed three pertinent issues of great public interest.

17. On the interpretation of Article 45(3) of *the Constitution*, the Supreme Court variously stated thus: -

In this regard our view is that while article 45(3) deals with equality of the fundamental rights of spouses during and after the dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married....

Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of Article 45(3) of *the Constitution*. To hold that article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some



parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.

18. On the aspect of non-monetary contribution, the Supreme Court held as follows: -

“As was pointed out by the Court in the English case of *Gissing v Gissing* [1971] AC 886, the maxim ‘equality is equity’ has never been truer. To our minds, equity is an important principle when it comes to matrimonial property since what is fair as it relates to equity is not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to the acquisition of matrimonial property, even though such contribution is indirect, but nevertheless has in one way or another, enabled the acquisition of such property amounts to significant contribution. Such direct or indirect acts as was discussed by Lord Justice Fox in *Burns v Burns* [1984] 1 All ER 244 may include: -

- i. Paying part of the purchase price of the matrimonial property.
- ii. Contributing regularly to the monthly payments in the acquisition of such property.
- iii. Making a substantial financial contribution to the family expenses so as to enable the mortgage instalments to be paid.
- iv. Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.
- v. Caring for children and the family at large as the other spouse works to earn money to pay for the property.”

19. Based on the foregoing guidance and parameters on the monetary and non-monetary contributions, this Court will now apply such to the case at hand.

20. The parties’ marriage spanned around 16 years. The applicant averred that she made both monetary and non-monetary contributions towards the purchase, development and improvement of the suit property.

21. On the purchase of the land, the applicant claimed that she contributed Kshs. 250,000 to the purchase of the land. According to the respondent, the applicant’s annexures, show that the applicant withdrew such funds but there is no proof that the funds were used to purchase the property. The respondent’s annexures show that the purchase price was paid from his bank account. The respondent further averred that between the years 2008 to 2010, the applicant had travelled to Australia for further studies. Therefore, he was the sole financier of the home and the children. So, there was no way the applicant contributed to the purchase of the land.

22. On the construction of the home, the applicant annexed receipts and stated that she spent her money on purchasing and transporting construction materials; payment of laborers and buying furniture and fittings for the house. The applicant also said that she oversaw the construction of the house.

23. The respondent stated that during the construction of the property, the applicant was on full-time employment and that there was a supervisor hired. Hence, it is untrue that the applicant supervised the construction of the property. Also, it is not in contention that the respondent visited the site each



weekend to supervise and pay the workers. In addition to this, the respondent provided evidence that he has been the one who has been paying for the utilities of the home. He also stated that he has been improving the house since its construction. The respondent deposed that he also paid the school fees for the children during the subsistence of the marriage, while the applicant only paid the school fees once for the lastborn child.

24. On non-monetary contribution, the applicant further averred that as a wife she ensured that the home ran smoothly by ensuring that there was proper hygiene and sanitary conditions were maintained.
25. It is my considered view after carefully scrutinizing the evidence, that the evidence adduced by the respondent on the purchase of the land is heavier than the applicant. Hence, I am satisfied that indeed the respondent fully paid for the land.
26. On construction of the property, the evidence adduced by the applicant though contended by the respondent still tilts the scale in her favour. The applicant was a woman of means and it cannot be said that she did not spend a single cent in its construction and even purchase of fittings and furniture.
27. Non-monetary contribution oftentimes cannot be quantified. If that contribution were to be reduced to monetary terms I am sure that a woman's non-monetary contribution in the home would amount to a higher amount compared to that of the man. It is my finding therefore that the applicant made monetary and non-monetary contributions towards acquiring and developing the matrimonial property.
28. So, is the applicant entitled to 50% of the matrimonial property? In determining the percentage of the contribution made by each party, I have carefully scrutinized the evidence of each party. The Applicant in an effort to convince the court of her monetary contribution towards the acquisition of the matrimonial properties, produced bank statements and invoices of her purchasing construction materials. It is not disputed that she is a woman of means. The Respondent however contends that he contributed much more than the applicant to the tune of 99% of the total price of purchase and development of the home.
29. The totality of my analysis of the evidence presented before me is that the applicant made a substantial monetary contribution towards developing and improving the matrimonial property. She also made substantial non-monetary contributions, which cannot be quantified in monetary terms. 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 applicant has proved her case to the required standard. I do not think that her contribution amounted to nothing as claimed by the respondent.
30. To determine this matter on a 99% - 1% ratio to the respondent and the applicant respectively would be going against the provisions of the law and condemning the applicant to a share too small to reflect her total contribution both monetary and non-monetary. Her efforts in contribution to the matrimonial property is clear to see. Consequently, I find that the applicant's Originating Summons partly succeeds. I grant the following specific orders:
 - a. A Declaration hereby issue that the parcel of land known as Plot No. Kisumu/Dago/3097, Ukweli Area, Kisumu Municipality, Kisumu County is the parties' matrimonial property.
 - b. A joint valuation exercise to be conducted to ascertain the value of the property, that is, the land and the developments thereon.
 - c. Plot No. Kisumu/Dago/3097, Ukweli Area, Kisumu Municipality, Kisumu County shall be divided in the ratio of 70:30 in favour of the respondent.
 - d. Given the nature of this matter, each party shall bear its own costs.



Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

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E.K. OGOLA

JUDGE

In the presence of:

Ms. Kojienda h/b for Mr. Smaka for the Applicant

Mr. Ouma for the Respondent

Gisiele Muthoni Court Assistant

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