



REPUBLIC OF KENYA



JNK v RMN (Civil Case 7 of 2021) [2023] KEHC 19347 (KLR) (27 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL CASE 7 OF 2021
LM NJUGUNA, J
JUNE 27, 2023**

BETWEEN

JNK APPLICANT

AND

RMN RESPONDENT

JUDGMENT

1. The applicant brought this suit by way of an originating summons against the respondent seeking determination of the following issues;
 - i. That the Honourable Court be pleased to issue a declaration that all the under listed properties known as:
 - a. Mbeti/Gachoka/xxxx.
 - b. Mbeere/ Kirima/xxxx.
 - c. Mbeere/Kirima/xxxx.
 - d. Stall No. xx Mutugu Market.
 - e. Kayole-Matopeni Plot No. c-xxx LR xxxx/ R Block Z.
 - f. Saloon Car reg. No. KCB xxxx .
 - g. Motor cycle registration number KMCY xxx
 - ii. With all the developments thereon were acquired during the subsistence of the marriage between the applicant and the respondent and all registered in the name and/or in possession of the respondent are owned jointly by the applicant and the respondent.
2. The originating summons is supported by the applicant's affidavit sworn on 22.05.2018 wherein he deponed that the respondent was his wife whom he married on 28.08.1994 and that they were



blessed with two children. That amongst the properties that were acquired during the subsistence of the marriage include Mbeti/Gachoka/xxxx, Mbeere/Kirima/xxxx, Mbeere/Kirima/xxxx, Stall No. xx Mutugu Market, Kayole-Matopeni Plot No. C-579LRxxxx/R Block Z, Saloon Car Reg. No. KCB xxxx and Motor Cycle Registration No. KMCY xxxx . It was his case that he contributed either directly or indirectly towards the realization of the said properties. That he was a High School Teacher while the respondent was unemployed and therefore it is only fair that the Honourable court determines their rights in the said matrimonial properties according to their respective contribution.

3. The respondent filed a replying affidavit denying that the properties listed by the applicant were acquired during the subsistence of their marriage. She deponed that she bought the saloon car registration number KCB xxxx before she married the applicant. Further, that she bought Land Parcel No. Mbeti/Gachoka/xxxx after the applicant had chased her away from their matrimonial home. It was her contention that the properties that they bought together include Land Parcels Mbeere/Mbita/xxxx, Mbeere/Kirima/xxx, Pick up Chevrolet KJV xxx, motor bike Tiger, store/Kiosk No. 8 Mutugu, Eight cows, Ten goats, 20 chickens and also the matrimonial homestead. She stated that there was no way the applicant could have contributed towards the acquisition of the properties registered in her names. She therefore urged this court to dismiss the suit herein for lack of merit.
4. The respondent filed a further replying affidavit 09.07.2018 wherein she reiterated that it is not true that the properties mentioned by the applicant were acquired during the subsistence of their marriage. She stated that she bought the saloon car registration number KCB xxxx and not KCB xxxx as averred by the applicant after she had already left the matrimonial home. She clarified that she bought the motor vehicle KCB xxxx and Land Parcel Mbeti/Gachoka/xxxx after the applicant had chased her away from their matrimonial home. She contended that she single handedly bought Land Parcel No. Mbeere/Kirima/xxxx part of which, she disposed off to expand her business and pay school fees for her children. That she acquired a loan which she single handedly paid back to purchase motor vehicle No. KBT xxxx in as much as the same was acquired during the subsistence of the marriage. She averred that the applicant has failed to mention all other properties registered in his names simply because he wants to mislead the court. She reiterated that all the properties registered in her name were solely acquired by her and therefore the same should not form part of the matrimonial property.
5. The applicant also filed a further supplementary affidavit stating that the respondent bought vehicle registration no. KCB xxxx after selling Land Parcel Nos. Mbeere/Kirima/xxxx and xxxx which are resultant subdivision of their land parcel No. Mbeere/Kirima/xxxx without his knowledge. That after the respondent sold the said land, she bought Land Parcel No. Mbeti/Gachoka/xxxx using proceeds from their mentioned land. He contended that the respondent left their matrimonial home in the year 2014 and not in the year 2011 as she claimed. He averred that he contributed directly and/or indirectly towards the acquisition of the said properties and as such, the court should determine so.
6. Directions were given that the matter proceed by way of viva voce evidence following which, the parties filed their respective witness's statements and documents.
7. I have considered the evidence on record and I form the view that the main issue for determination is whether the orders sought herein can issue.
8. This case revolves around the application of Article 45(3) of the *Constitution* as read with section 7 of the *Matrimonial Property Act*, 2013. The former provides that:

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.



9. What I understand by this provision is that parties to a marriage do not lose their rights merely because they have entered into a matrimonial union but they continue to enjoy equal rights at the time of the marriage, during the marriage and at the termination of the marriage.
10. Section 6 of the *Matrimonial Property Act* 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.
11. Under Section 2 of the Act, ‘Matrimonial home’ has been defined as:-

any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.
12. In the case of *T.M.v v F.M.C* (2018) eKLR, Nyakundi J. formed the view that:-

“...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.”
13. Similarly, in the case of *Paul Kagwa v Jackline Muteteri* (Matrimonial Cause-2005/23) [2006] UGHC 17 (18 May 2006) while citing Bossa, J in *John Tom Kintu Mwanga v Myllious Gafafusa Kintu* (Divorce Appeal No. 135 of 1997) (unreported) Mwangusywa J expressed himself as hereunder:-

“On the last issue of whether the petitioner is entitled to matrimonial property, I clearly believe that she does and I so hold. Matrimonial property is understood differently by different people. There is always that property which the couple chose to call home. There may be property which may be acquired separately by each spouse before and after marriage.... The property to which each spouse is entitled is that property which the parties choose to call home and which they jointly contribute to.”
14. In this case, the respondent has submitted that the properties listed by the applicant do not form part of matrimonial property since she acquired the properties listed under her name single handedly and therefore, this court was therefore urged to find so. It was her evidence that she was running a business and from the same, she realized the funds used to purchase the said properties. In my view, the fact that the properties were acquired through proceeds of business, the same cannot not tie this court’s hand to order for an appropriate share between the parties if this court is convinced that the parties contributed towards the realization of the properties and the same were acquired during the subsistence of the said marriage.
15. It is not in dispute that the parties herein were husband and wife but later on, their marriage went under; it is also not in dispute that they have two issues of marriage and several properties listed as having been acquired during the subsistence of the said marriage. I adopt the holding of Kemei, J in *ENN v SNK* [2021] eKLR that a matter regarding division of matrimonial property ought/shall have the following facets proved by either party:-
 - a. The fact of a valid, legal, regular marriage in law;
 - b. Dissolution of such marriage by/through an order of the Court;



- c. That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage;
 - d. Contribution by each party to the acquisition/development.
16. A similar view was adopted in *P.O.M v M.N.K* (2017) eKLR where the court appreciated that:

“This is a suit for division of matrimonial property. The legal regime governing such endeavor is the *Matrimonial Property Act*, Act No. 49 of 2013. The relevant provisions are to be found in Part III thereof. According to those provisions, in particular section 7, such property is to be divided upon divorce or dissolution of the marriage. The prerequisites are that the parties ought to have been in a marriage, to have acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made. A party, who moves the court for orders relating to division of matrimonial property, or declarations thereon, must strive to bring his case within the prerequisites stated above.”

17. 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.

18. However, Section 7 of *Matrimonial Property Act*, provides as follows:

Ownership of the matrimonial property vests in the spouses according to the contribution of other spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

19. 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 contributions 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 v 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 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.

20. It is however clear that contribution need not necessarily be in financial terms since according to section 2 of *Matrimonial Property Act*, 2013:

“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.

21. The applicant testified that they were married and but they legally divorced in the year 2019 when they divorced officially. That Land Mbeti/Gachoka/xxxx was bought from the proceeds of Land Parcel No. xxxx which the respondent sub divided into Mbeere/Kirima/xxxx and xxxx and proceeded to sell the land. Stall No. xx Mutugu was jointly acquired in as much as the same was registered under the name of the respondent; Land Parcel No. 4004 was acquired jointly from one Nelson Ngari and by then it was Land Mbeere/ Kirima/xxxx which they bought at Kes. 150,000.00 and that he paid the whole amount by himself. That Kayole/Matopeni/ C/xxx/LR xxxx/R/Block Z was also bought jointly at Kes. 750,000.00 which he contributed Kes. 350,000.00 while the respondent contributed Kes. 400,000.00. Saloon car KCB xxxx was bought from the proceeds of KBT xxxx and from the proceeds of the sale of Land Parcel Mbeere/Kirima/xxxx. The motor cycle KMCY xxxx was also bought jointly by the parties. He stated that there are developments on Mbeti/Gachoka/xxxx and an incomplete buildings and that is where the respondent resides. Motor vehicle KBT xxxx was bought on 03.10.1999 and that he bought the same from one Wahome at Kes. 145,000.00; that Mbeere/Kirima/xxx and motor cycle KMCF xxxx were bought by him. He also claimed that he bought Mbeere /Mbita/xxxx sometime on 12.10.2008. That motor cycle KBY xxx X was bought by the respondent when she sold KBT xxx B. He conceded that the respondent bought some properties after their separation and that he had no interest on those.
22. It follows that there is no rule of the thumb that in the event of a divorce the property must be shared in the ratio of 50:50. That each case must be decided on its own facts was appreciated by the Court of Appeal in *TKM v SMW* [2020] eKLR where it 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.”
23. It was held in *Federation of Women Lawyers Kenya (FIDA) v Attorney General & Another* [2018] eKLR 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.”
24. It follows from the foregoing that despite the constitutional requirement that parties in a marriage have equal rights, each party must prove either monetary or non-monetary contribution 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. Accordingly, it is my view that even monetary contributions ought not to be simply pegged on documentary evidence but on any viable proof that this court may find irrefutably convincing. The Court may, based on the evidence presented before it be able to ascertain whether or not there was in fact any monetary contribution which was due to the fact that the spouses never contemplating that the marriage would go south, never documented.

25. In this case, it is not disputed that the applicant was a teacher while the respondent was a business person. From the evidence on record, it is also not in doubt that their marriage was solemnized sometime back on 28.08.1994 and that they finally divorced on 23.09.2019.

26. In Civil Appeal No. 142 of 2018 in *CWM v JPM* [2017] eKLR, the Court of Appeal recognized this reality and held as follows:

“...Parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of Respondent at the time of such overture. In our view, that contribution, be it domestic work and management of the matrimonial home, child care or companionship falls within the definition of contribution under the Act”.

[See also *White v White* (200) UKHL 54 and *Miller v Miller & McFarlane* {2006} UKHL 24].

27. In the case herein, the applicant/plaintiff submitted that he was a teacher right from the year 1990 to 2008 when he retired; The respondent on the other hand stated that she was a in a business of cereals and further, she was running a posho mill. She also submitted that she contributed towards the purchase of the properties herein for she acquired loan from the Kenya Women Finance Trust.

28. It is trite that he who alleges must prove; the applicant/plaintiff annexed and further produced documents supporting the fact that he was a teacher. The respondent on the other hand did not attach nor produce any evidence that she was involved in any income generating activity.

29. In reference to the evidence before this court, it is not in dispute that both the applicant and respondent directly and indirectly contributed towards the realization of the properties herein.

30. In the above premises, I therefore make the following orders that:

a. The under listed properties are hereby declared matrimonial property:

- i. Stall No. xx Mutugu was jointly bought in as much as the same was registered acquired during the subsistence of marriage and therefore a matrimonial property.
- ii. Kiosk No. x was also acquired during the subsistence of the marriage hence a matrimonial property.
- iii. Mbeti/Gachoka/xxxx was bought from the proceeds of Mbeere/Kirima/xxxx which was initially registered in the name of the respondent but acquired during the subsistence of the marriage. The same is matrimonial property.
- iv Mbeere/Kirima/xxxx was bought during the subsistence of marriage and therefore a matrimonial property.
- v Kayole-Matopeni / C/xxx/LR xxxx/R/Block Z xxxB is a matrimonial property.
- vi. Motor Vehicle KJV xxxx PickUp is a matrimonial property.



- vii. Mbeere/Mbita/xxxx is a matrimonial property.
 - viii. Mbeere/Kirima/xxx is a matrimonial property.
 - ix. Motor cycle registration Nos. KMCY xxxx and KMCF xxxx are matrimonial property.
 - x. Motor Vehicle registration number KCH xxxx is a matrimonial property.
- b. That the applicant and/or the respondent be at liberty to purchase either's share of contribution of the property known as:
- i. Stall No. xx Mutugu.
 - ii. Kiosk No. x.
 - iii. Mbeti/Gachoka/xxxx.
 - iv Mbeere/Kirima/xxxx.
 - v Kayole-Matopeni / C/xxx/LR xxxx/R/Block Z xxxB.
 - vi. Motor Vehicle KJV xxxx PickUp is a matrimonial property.
 - vii. Mbeere/Mbita/xxxx.
 - viii. Mbeere/Kirima/xxx.
 - ix. Motor cycle registration Nos. KMCY xxxx and KMCF xxxx .
 - x. Motor Vehicle registration number KCH xxxx .
- c. That in the event that the applicant and/or the respondent is unable to purchase either's share of the properties in (b) above, the same be divided between the applicant and the respondent in the ratio 50:50.
- d. No order to costs.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

