



REPUBLIC OF KENYA



**BWN v ANW (Matrimonial Cause E001 of 2021)  
[2023] KEHC 22763 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22763 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MATRIMONIAL CAUSE E001 OF 2021  
RN NYAKUNDI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**BWN ..... PLAINTIFF**

**AND**

**ANW ..... RESPONDENT**

**JUDGMENT**

1. The plaintiff approached this court vide an Originating Summons dated 15<sup>th</sup> July 2021 and amended on 23<sup>rd</sup> March 2023 seeking the following orders;
  1. Spent
  2. That a permanent injunction be issued against the Defendant, his agents/servants or employees, from disposing, transferring or in any interfering with land parcel LR No. [Particulars Withheld].
  3. The Defendant be restrained from entering possession of the property whether in person or with his second wife or any of the Defendant's employees, agents or authorized persons pending the hearing and determination of this suit.
  4. Conservatory orders be issued preserving matrimonial property LR No. [Particulars Withheld] pending the hearing and determination of this suit.
  5. A declaration be and is hereby issued declaring that the Plaintiff is entitled to absolute ownership over land parcel LR No. [Particulars Withheld].
  6. A declaration be and is hereby issued declaring that the Plaintiff is entitled to absolute ownership over land parcel bought LR No. [Particulars Withheld].



7. A declaration be and is hereby issued declaring that the Defendant is entitled to absolute ownership over matrimonial property situate at Bungoma whose reference number and Title documents are with the defendants.
  8. The defendant be compelled to maintain the plaintiff to the standard of life she was accustomed to prior to the dissolution of their marriage.
  9. This court do exact the alimony to be paid by the defendant to the Plaintiff in the aftermath of the court declaring itself functus officio in Divorce Cause No. 35 of 2020.
  10. Cost of this suit be in the cause.
2. The plaintiff originating summon for grant of remedies enumerated above was premised on her affidavit evidence sworn and dated on 3<sup>rd</sup> March, 2023 which deposed as follows:
1. That: I swear this affidavit in support of the amended originating summons accompanying this supporting affidavit.
  2. That the Defendant and I have been married for close to Fifteen years now, having celebrated our union on the 12<sup>th</sup> of May 2007. (Attached and marked BW1 is a copy of the marriage certificate)
  3. That Our union was blessed with three issues namely:
    - a. MN
    - b. FN
    - c. PBN
  4. That Our union was one that could be described as tumultuous. The Defendant was cruel towards me, much so that in 2016 I had to move out of our matrimonial home for my safety and preserve my mental health.
  5. That on the face of an irretrievable marriage, the Defendant filed a divorce cause against me on 7<sup>th</sup> of July 2020. The marriage was subsequently dissolved on the 22<sup>nd</sup> of February 2021. (Attached and marked BW2 is a copy of the judgement that dissolved our union.
  6. That over the length of our marriage, we bought a number of properties and unlike the Defendant herein who bought a number of properties without disclosing the same to me. I disclosed mine to him. I even went ahead to include his name in the titles I purchased.
  7. That as for the 1<sup>st</sup> suit property LR No [Particulars Withheld], I secured a loan facility to purchase the same from one Nicholas Munyiri Muimami (attached and marked BW3 a is a copy of the sale agreement)
  8. That as for the 2<sup>nd</sup> suit property LR No [Particulars Withheld] we jointly acquired the same with the defendant
  9. That the Defendant is now trying to fraudulently transfer the ownership of the suit property entirely to her new wife and I invite this Honourable court to stop him in his tracks.
  10. That when I learnt that the Defendant was intending to transfer the title to her newfound lover, I moved the officer of the land registrar to register a caution over the piece of land. (Attached and marked BW4 is a copy of the caution)



11. That the defendant is also intending to move in to our matrimonial home with his new found lover and subsequently deprive me of any right/interest over the property.
3. This affidavit formed the basis of the testimony by the plaintiff as evidence in chief which was subjected to a further cross examination by the defence counsel M/s Khayo.
4. Essentially, the plaintiff's case can be summarised as herein under fashioned in the form of submissions. The plaintiff learned counsel Mr. Ogutu's written submissions dated 4<sup>th</sup> July, 2023 and filed on 26<sup>th</sup> July, 2023 contended and relied on the provisions of Section 6(i) of the Matrimonial Property Act No 49 of 2013 which matrimonial property as follows:
  - a. The matrimonial home or homes
  - b. Household goods and effects in the matrimonial home or homes
  - c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."
5. Further learned counsel made reference to the case of MNH V FHM (2018) eKLR on what constitutes matrimonial property. Learned Counsel's contention was that it is not in dispute that land parcel number [Particulars Withheld] And [Particulars Withheld] are matrimonial properties of the parties. What is in dispute is whether land parcel in Mwamba whose actual number is not even known at this juncture by the court was a matrimonial property. The defendant claims that the same is matrimonial, property and that they had acquired the same together during the subsistence of their marriage. However, unlike for the other marital estate they had purchased together, the defendant did not produce the sale agreement for the said plot.
6. It is also learned counsel's submissions that it is not in dispute that the plaintiff had contributed Kenya Shillings Three Hundred Thousand Only (Kshs. 300,000/-) for the purchase of land parcel No. [Particulars Withheld] measuring approximately ¼ of an acre. Further, that it is not in dispute that land parcel plot No. 232 which the plaintiff and the defendant purchased in the year 2007 is what was disposed of to purchase land parcel numbers [Particulars Withheld] and [Particulars Withheld] currently registered in the names of the parties. The same is evidenced by the testimony of the parties. To buttress the strength of the plaintiff's case, learned counsel cited the following authorities: Joo V MBO, Federation of Women Lawyer (FIDA Kenya) & Another (Amicus Uriae) Petition 11 of 2020 (2023), PNN V ZWN in Civil Appeal 128 of 2014 (2017) eKLR
7. Learned counsel for the applicant submitted that the defendant never made any monetary contribution towards the acquisition of the land parcel No. [Particulars Withheld]. That the plaintiff solely purchased land parcel No. [Particulars Withheld]. Further, it is not disputed that it was land parcel No. [Particulars Withheld] which was subsequently disposed and the proceeds therefrom used to purchase parcel number [Particulars Withheld] and Eldoret [Particulars Withheld] currently owned by the parties. This chain of transaction shows that the substantial investment made by the plaintiff in plot no. [Particulars Withheld] is what resulted to the acquisition of matrimonial properties currently owned by the couple. She urged the court to find that the applicant solely contributed towards the acquisitions of their matrimonial properties. The defendant has not tendered any iota of evidence showing that he contributed towards the purchase and/or development on the properties purchased during the subsistence of their marriage.



8. Learned counsel urged that the contributions towards the acquisition of matrimonial property must be strictly proven as per the provisions of Section 14 (b) of the Matrimonial Property Act. Further, that as the Plaintiff solely contributed towards the purchases of the matrimonial properties held by the parties, she is wholly entitled to the parcels of land acquired during the subsistence marriage. It is the applicant's case that the land at Mwamba which the defendant proposes to be given to the defendant is not matrimonial property of the parties hence not a subject matter of dispute. The applicant cited section 7 of the Matrimonial Property Act and the decision in JOO V MBO; Federation of Women Lawyer (FIDA Kenya) & Another (Amicus Curiae) Petition 11 of 2020 [2023] eKLR.
9. Learned counsel submitted that the plaintiff has proved her contribution towards the acquisition of the matrimonial properties owned by the parties herein and thus, urged the court to make a determination that she is solely and absolutely entitled to the ownership of the matrimonial properties. Further, that it is clear that the children sired by the divorced couples during the subsistence of their marriage is not a factor to be considered in the distribution of the matrimonial property. On a without prejudice basis, the plaintiff is willing to let go of any interest she may have on the land on condition that the defendant equally let go of any interest he may have acquired in both parcels of land and the parties have the same registered in the names of their surviving children as follows:-
  - i. Land parcel number [Particulars Withheld] to be registered in the name of their Son PBN.
  - ii. Land parcel number [Particulars Withheld] to be registered in the name of their daughter MN.with that learned counsel argued and submitted that the plaintiff's case has been proved on a balance of probabilities for the remedies coached in reference to the originating summons.
10. The defendant opposed the originating summons vide a replying affidavit sworn on 9<sup>th</sup> June 2023 which also formed the basis of evidence in examination in chief. He deposed as follows:
  1. That: on 12<sup>th</sup> May, 2001 we summoned our marriage and had a marital bliss working out everything effectively together as husband and wife until August, 2016 when the Applicant deserted our matrimonial home never to return.
  2. That: I made all efforts necessary to have the Applicant back but it was fruitless until 2020 when I decided to seek for divorce since ours was not a marriage anymore and I was being tortured.
  3. That during our marriage we did all family developments together. We had our ancestral land and bought other properties together this were:-
    - a. Land parcel Number at Bungoma was ancestral land which we sold and bought the land at Langas
    - b. Land parcel Number at Mwamba was bought measuring one acre and a quarter.
    - c. Land parcel Number Langas [Particulars Withheld] measuring quarter an acre which was bought at Kshs 300,000/=and later we sold at Kshs 3,300,000/= and purchased the current land [Particulars Withheld] and Eldoret [Particulars Withheld].
    - d. Land parcel Number Langas [Particulars Withheld] measuring quarter an acre.
    - e. Land parcel Number Langas[Particulars Withheld] measuring quarter an acre.
    - f. Land parcel Number Eldoret[Particulars Withheld] measuring 0.02275 hectares.



4. That we took land parcel Number Langas [Particulars Withheld] measuring quarter an acre as our matrimonial home, and that is where we decided to build our house since the Applicant moved out of the home and deserted me with two children
  5. That the Applicant did not take the loan for the purchase of the property herein at all. We had land at Bungoma and Langas which we sold and used the proceeds in purchasing the property Land Parcel Number LAngas [Particulars Withheld] and Land Parcel Number Eldoret [Particulars Withheld]
  6. That Land parcel Number Langas [Particulars Withheld] where we have rental houses too is our matrimonial property and none of us has a right over it than the other, we are equally entitled to it together with our children.
11. The defendant further stated that he was denied access to Land Parcel No. [Particulars Withheld] and together with the children, they did not have a place to stay. He stated that the plaintiff did not take a loan for the purchase of the property either. That they had land at Bungoma and Langas which they sold and used the proceeds to purchase LR No. Langas [Particulars Withheld] and land parcel LR No. [Particulars Withheld]. He further contended that he had not tried to dispose of the property at any instance and that his opinion is that the applicant has the property they purchased at Mwamba which she can continue using, they can let out LR No. Langas [Particulars Withheld] for their children and he be allowed to continue using LR No. [Particulars Withheld].
  12. The defendant in his evidence insisted that the Land Parcel No. Langas [Particulars Withheld] is their matrimonial home and they are both equally entitled to it together with their children. On the part of the defendant counsel as a way of rebuttal of the legal issues she placed reliance in Section 7 of the *Matrimonial Property Act* and in *SN vs FM* (1019)eKLR.

### **Analysis & Determination**

13. The jurisprudential foundation of this originating summons can better be described by the *locus classicus* by Sir William Blackstone (1723-1780) thus: “ By marriage the husband and the wife are one person in the law that is the very being and legal existence of the woman is suspended during the marriage or at least is incorporated into that of their husband under whose wing protection and cover, she performs everything and is therefore called in our law-French a feme-covert is said to be covert – boron, or under the protection and influence of her husband her baron, or lord, and her condition during her marriage is called her coverture. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.” Hence it mirrors the fundamental premise upon which the Kenyan Constitution and legislation on *Matrimonial Property Act* has fundamentally transformed access to property rights in the marital estate.
14. This is the basis upon which the discretion of this court has to be exercised within the rubric of the following issues:
  1. What constitutes the Matrimonial properties of the parties?
  2. Division of the Matrimonial Properties
  3. Whether the Applicant is entitled to the declaratory orders sought
  4. Whether the applicant is entitled to maintenance orders sought
  5. Whether the applicant is entitled to alimony



## What constitutes the Matrimonial Properties of the parties?

15. The *Matrimonial Property Act* under Section 6 provide that Matrimonial Property include.
- “(a) a) The matrimonial home or homes  
(b) household goods and effects in the matrimonial home or houses or  
(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”
16. In order for property to be considered matrimonial property, it must have been acquired during the subsistence of the marriage. Section 7 of the *Matrimonial Property Act* provides that 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 of their marriage is otherwise dissolved. The *Matrimonial Property Act* also defines contributions stating that is means monetary and non-monetary contribution and in that it 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 property and ( e) farm work. Therefore, the *Matrimonial Property Act* explicitly recognizes non-monetary contribution.
17. *constitution* in Article 27(4) prescribes a commitment to advance gender equality including discrimination based on sex, pregnancy, and marital status and provides for equal rights in marriage. In order to make sense of the letter and spirit of the *Matrimonial Property Act* the calls for proof of contribution should be both on monetary and non- monetary contribution. A point of departure and concerns in our trending jurisprudence in the scheme of the *Matrimonial Property Act* is the metrics to be adopted when evaluating the non monetary contribution made by either spouse to the welfare of the family. In *F.S v EZ* (2016), the court acknowledged the women’s non-monetary contribution but held that the husband deserved the bulky of the property since he made the monetary contribution. The likely ambiguity triggered by the text on monetary and non-monetary contribution is lack of a clear weight and measure to determine the value of non-monetary contribution of a spouse. It is equally a paradox to presume that in a family unit the wife with the predominant care giver whereas the husband focuses on wealth creation. In the 21<sup>st</sup> century, I take note such traditional roles have been reversed within the marital estate. It is significant to state that what either spouse has to show on his or her involvement as a homemaker remains in the realm of subjective approach. Apparently, that is not the case when one is dealing with evaluations of monetary contributions. It is time the phrase or passage in the Act be read in the context of the Section as a whole and the whether context of the statute to accord the parties to the marital union appropriate and fair share rights to the property acquired the subsistence of the marriage. Clearly the whole regime of the *Matrimonial Property Act* essentially focuses the rights between spouses to the marriage and sketchily so on the children of the marriage.
18. Properties in dispute are Langas [Particulars Withheld] and Eldoret [Particulars Withheld] which the plaintiff stated were acquired during the subsistence of the marriage. The defendant had laid claim to a property in Mwamba but the same has no registration number or sale agreement produced as evidence that it was part of the matrimonial property. From the documents on record, it is evident that the plaintiff and defendant purchased Eldoret [Particulars Withheld] jointly vide a sale agreement dated 27<sup>th</sup> February 2016 for Kshs. 850,000/-. They also purchased Langas [Particulars Withheld] vide a sale agreement dated 20<sup>th</sup> June 2016 for Kshs. 1,800,000/-. It is not in dispute that the properties were acquired during the subsistence of the marriage.



19. Eldoret [Particulars Withheld] Is 0.0455 Ha and Langas [Particulars Withheld] Is 1/8 of an acre which is 0.51 Ha. As for the Mwamba plot, there is no documentation on record to prove that the same was purchased by the parties or during the pendency of the union. Therefore, the following properties are to be considered Matrimonial property;
1. Eldoret [Particulars Withheld] 0.0455 Ha
  2. Langas [Particulars Withheld] – 0.051 Ha

### **Division of matrimonial property**

20. In determining the division of matrimonial property, it is trite law that the court must consider each of the parties' contribution towards the acquisition of the same.
21. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the *Matrimonial Property Act, 2013* 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.
22. In *TKM v SMW* [2020] eKLR the Court of Appeal 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. The plaintiff produced a copy of the sale agreement dated 20<sup>th</sup> June 2016 and evidence of a loan of Kshs. 501,016.40 which she claimed to have been taken out to help with the purchase of land LR No. Langas [Particulars Withheld]. She produced two cheques for Kshs. 34,560/- and Kshs. 91,230/-
24. The defendant, on his part, claimed that they sold ancestral land in Bungoma and Langas in order to raise funds to purchase Langas [Particulars Withheld] and ELdoret [Particulars Withheld]. The defendant produced a sale agreement between himself and Gerald Barasa Kwata where he sold a property known as Plot No. North Myanga West Bukusu 288 on 22<sup>nd</sup> October 2006 witnessed by the Plaintiff.
25. He also produced a sale agreement dated 21<sup>st</sup> September 2007 as evidence of the purchase of a parcel of land known as Langas [Particulars Withheld] between the parties herein and one Douglas Wanyonyi Walubengo for Kshs. 300,000/-. This plot of land was later disposed off and the proceeds used to purchase which proceeds were used to purchase Langas [Particulars Withheld]. However, the contributions of either party to the purchase of this property has not been proved. The defendant alleges that his contribution of Kshs. 35,000/- was from his sale of their ancestral home in Bungoma being Plot [Particulars Withheld]. Despite there being no evidence of the settlement of the balance, it is



- my considered view that the same was settled by the plaintiff. Otherwise, there is no explanation as to how they managed to acquire the property based on the contribution of the defendant alone.
26. The defendant produced documentary evidence of a transfer of Kshs. 300,000/- to Samuel Ngigi Karanu for the purchase of the Langas property known Langas [Particulars Withheld], as well evidence of payment of land rates for both properties. I note that the said property had a purchase value of Kshs. 1,800,000/- and as per the testimony of the plaintiff she is in possession and occupation of Langas [Particulars Withheld]. It follows that here contribution to the property was Kshs. 1,500,000/-. Further, with regards to the contribution to the purchase of Langas Plot 232, the defendant contributed Kshs. 35,000/- leaving the balance of Kshs. 765,000/- to have been contributed by the Plaintiff. It follows that the total value of both properties amounts to Kshs. 2,650,000/. In the acquisition of both the properties, the Plaintiff contributed Kshs. 2,315,000/- whereas the Defendant contributed Kshs. 335,000/- thus the ratio of contribution being 85:15 in favour of the plaintiff. I have also taken into consideration that during the pendency of the marriage, the parties contributed to the construction and development of the properties, albeit not strictly proven, the same cannot be ignored.
27. In determining this question, the comparative decision in *Kishindo vs Kishindo* (2015) MWHC 447. “ There is no blue print of fairness that fits all. Fairness depends on circumstances on each case. One cannot successfully list all the circumstance’s. Consequently, decisions of this should be understood as not laying general or broad principles. Each decision is the courts attempt to be fair in a particular situation.....Applying all these principles to this case, the correct order in the circumstances is that all property is up to be shared fairly subject to equality. Equality here implies tht both husband and wife come on equal footing to property which, from the reasoning above, is jointly held between them and, in respect of the house, irrespective of the motivation, the mode of acquisition or in whose name it is...
28. I agree with the evidence presented by the plaintiff that she obtained loans from various sources to make a contribution on the acquisition of the marital estate. The only differential minimum on this aspect is applying the mathematical formula it so happened she stands out having paid a lion share in comparison with the defendant. In the context of the guiding principles that relates to distribution to matrimonial property give the bedrock of the union the other spouse should not be rendered destitute for failure to match up the share of the monetary contribution by the plaintiff. The court notes that before the breakup of the marriage the intention to create wealth for the benefit of the family by the plaintiff and the defendant is explicit from the evidence. On the other hand, I would have no difficult on this inquiry to rule that the dissolution of the marriage does not extinguish the family heritage in view of the existence of the children born during the subsistence of the union. Whether the plaintiff is entitled to orders for maintenance and alimony
29. The plaintiff prayed for orders on maintenance and alimony but has not addressed the court on the same. In in *MSV v SJV & another* [2015] eKLR Justice Lenaola (as he then was) upheld cited the case of *W.M.M. vs B.M.L* (2013) eKLR where it was stated that:

In considering a claim for maintenance, regard must be had to the provisions of Article 45(3) of the *Constitution* of Kenya which recognizes that “parties to a marriage are entitled to equal rights at the time of the marriage, during marriage, and at the dissolution of the marriage ... it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices. Article 45(3) is in harmony with Article 21(3) of the *Constitution* which enshrines equality of men and women and specifically states that “women and men have the right to equal treatment...



...the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses does not hold true anymore ...

No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce. The financial capacity of the spouses has to be examined before the Court makes a finding as to whether a spouse should pay maintenance and if so how much ...”

It was further held that: -

“neither alimony nor maintenance should be paid as a matter of course. It should not be used as a field where spouses cash in on their partners. It should be established that the party claiming such alimony or maintenance is incapacitated to make his/her own earnings and therefore deserves the support of the other partner.”

30. As the plaintiff did not prove that she was incapacitated and in need of maintenance, the prayer for alimony and maintenance is untenable. From the look of things and the parties conduct during the survivorship of the marriage it is apparent they never encompassed at one season or another they would have to split. It must have come as a surprise when the court put asunder what had been put together by God through his servants as they took their vows to be one flesh until death set them apart. Oh Lord our God our homes are thine forever we trust to thee their problems toil and care. There bonds of love no enemy can sever. In this world, having both parents living happily together is the wish of every child and a family is the heart of God’s plan. Why is it then the children who the heritage of that family are not properly catered for in the letter and the spirit of the *Matrimonial Property Act*. I am of the considered view that as I pen off on the approach taken to distribute the marital estate to release each spouse to varying degrees of independence, let it not be lost that children raised in the marriage should not be rendered homeless.
31. In light of the foregoing on the issues of distribution the following orders shall abide:
1. The plaintiff is entitled to the property known as Langas [Particulars Withheld]
  2. The defendant is entitled to the property known as Eldoret [Particulars Withheld].
  3. Langas Plot No 232 be shared equally between the plaintiff and the defendant.
  4. Land at Mwamba be allocated to the plaintiff.

Each party shall bear their own costs.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**

**R. NYAKUNDI**

**JUDGE**

