



**MPJO v DNW (Matrimonial Cause E002 of 2021)  
[2023] KEHC 22811 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
MATRIMONIAL CAUSE E002 OF 2021  
WM MUSYOKA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**MPJO ..... APPLICANT**

**AND**

**DNW ..... RESPONDENT**

**JUDGMENT**

1. These proceedings were initiated at the instance of the applicant, for declaration that New-Bros Auto Spares business located within Busia town, Plot No xxx Busia Municipality, South Teso/Angoromo/xxx, South Teso/Angoromo/xxx, South Teso/Angoromo/xxxx, South Teso/Angoromo/xxxx, a black vehicle branded Noah, and household assets are matrimonial property jointly owned by the applicant and the respondent. The consequential orders sought are that the landed assets be registered in the joint names of the parties; the same be divided and apportioned as between the parties in such proportions as the court may deem fit; the said assets be sold and the proceeds apportioned between the parties; the respondent execute necessary documents to facility transfer of the portion due to the applicant, and in default the same to be done by the Deputy Registrar of the court; and for any property sold to a third party the respondent to account for the proceeds of sale to be shared equally between the parties.
2. The background given, by the applicant, is that the 2 parties had contracted a customary law marriage in 1995, which was solemnized in church in 2005, and was subsequently dissolved by court decree in 2020. There were 4 issues of the marriage. A matrimonial home had been established at Agolot, Busia town. The assets listed in paragraph 1, hereabove, had allegedly been acquired during the subsistence of the marriage, with the landed assets being acquired through the joint efforts and contributions of both the parties. South Teso/Angoromo/xxxx and xxxx were registered in the joint names of both parties.
3. The respondent counters that the applicant was at all material times a housewife, who did not contribute in any way to the acquisition of the property, the subject of the suit. He avers that he purchased Plot No xxx Busia Municipality in 2003 singlehandedly, and developed the same in 2008,



without any contribution from the applicant. He avers that he set up a school uniforms shop in one of the rooms, for the applicant, and she operated from that room until 2016, when she rented out the room to Simba Telkom Limited. He states that during the subsistence of the marriage, the applicant bought South Teso/Angoromo/xxxx and xxxx, which she later sold to John Karanja Gathuu, and did not share the proceeds with him. She had also acquired Uholo/Ugunja/xxxx which was registered in her name. He says that the auto spares business that he was running on Plot No xxx Busia Municipality collapsed during the Covid-19 pandemic, and he was still struggling to repay a loan associated with it. He states that that auto spares business pre-dated the marriage, as it was set up in 1990, and it was from the proceeds of the business that he bought South Teso/Angoromo/xxxx, xxxx, xxxx and xxxx. He said that he sold South Teso/Angoromo/xxxx and xxxx to revamp the auto spares business. He says that he never bought a Noah motor vehicle as alleged. He states that the household goods were carted away by the applicant following the dissolution of the marriage. He states that although the applicant did not contribute to the acquisition of the assets, he was willing to surrender South Teso/Angoromo/xxxx, xxxx and xxxx, and Uholo/Ugunja/xxxx to her; and retain South Teso/Angoromo/xxxx, xxxx and xxxx, and Plot No xxx Busia Municipality.

4. The applicant asserts that she contributed to the development of Plot No xxx Busia Municipality, with funds from her business, and that she owned 1 unit in the building. She concedes that she was allocated 1 room in Plot No xxx Busia Municipality, from where she ran a textile or clothing business, before she rented it out to Simba Telkom Limited. She asserts that she bought South Teso/Angoromo/xxxx and xxxx using her own resources, without contribution from the respondent. She sold South Teso/Angoromo/xxxx and xxxx to buy Uholo/Ugunja/xxxx, which she later sold to raise school fees. On the auto spares business, she asserts that the same was started immediately after the marriage was contracted, and that she worked there as a sales person. She states that she was unaware of the collapse of the business, and was also unaware of the loan taken to shore it up. She concedes that South Teso/Angoromo/xxxx and xxxx were registered jointly, and were still in their joint names. She asserts that South Teso/Angoromo/xxxx and xxxx were sold without her consent, and that the respondent owned motor vehicle registration mark and number KBT xxxx, a Noah. She denied removing household goods from the matrimonial home.
5. The matter was canvassed by way of *viva voce* evidence. Both parties testified.
6. The applicant testified that she listed the assets that the respondent had, and what was registered in their joint names. She conceded that she had some assets in her sole name, such as Uholo/Ugunja/xxxx, which was registered in 2013. She also conceded that she owned South Teso/Angoromo/xxxx and xxxx, registered in 2011, which she said she sold to buy Uholo/Ugunja/xxxx. She said that she sold them at a time when the respondent had left her. She said that the matrimonial home was on South Teso/Angoromo/xxxx, which was in their joint names, and that she collected rent from the units there, and also in South Teso/Angoromo/xxxx. She said that her name was not in the sale transaction document relating to Plot No xxx Busia Municipality, as a buyer, but she was present as a witness, and although she did not produce the sale moneys, the same came from the business that she ran with the respondent. She said that although she did not produce any documents, she contributed to that acquisition through working in the family business. She said that after the marriage and purchase of Plot No xxx Busia Municipality, the respondent took her to his shop, and she was also operating a clothes shop, within that plot. She conceded that she later rented out that space to a third party.
7. On his part, the respondent testified that the applicant had 3 plots and him 3 plots. She sold 2 of hers, and remained with 1. He further stated that the applicant was the one collecting rent from the 2 plots jointly owned, as well as from a portion of the other plot registered in his name. He stated that he was



- not rooting for equal distribution of the property. He asserted that the appellant never worked in the auto spares shop.
8. After the oral hearings, both sides filed written submissions, and cited judicial precedents. I have read through the written submissions, and noted the arguments made.
  9. There is only 1 issue for determination, division of the property as between the applicant and the respondent.
  10. The most recent decision on these matters is that in *JOO vs MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* [2023] KESC 4 (KLR)(Mwilu, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), where several principles were stated: that the equality principle in Article 45(3) of the *Constitution* did not empower the court to vary existing proprietary rights of the parties, and the other party is not entitled to a share in such property merely on account of marriage; that the guiding principle in apportionment and division of matrimonial property is that the same could only be done on the basis of what each party contributed to the acquisition of the property; among others. See also *TKM vs SMW* [2020] eKLR (Ouko P, Musinga & Gatembu, JJA).
  11. What has emerged is that there are 2 assets that are registered in the joint names of the parties, that is South Teso/Angoromo/xxxx and xxxx. The former matrimonial home sits in 1 of them. The 2 are developed, and rent is being collected by the applicant. The sale agreements in respect of both were not availed, and I cannot tell who was the purported buyer of both. Whereas the applicant asserted that they both contributed to the acquisition, the respondent stated that he bought it alone, as the applicant was a housewife. Housewives do contribute indirectly to acquisition of such assets, through the support they provide to the other party in other ways. The courts routinely assess such contribution at a percentage between 20% and 30%, usually in cases where the husband provides some proof that he contributed all or the bulk of the purchase price. In this case, the respondent did not provide any proof of that. It would appear that the applicant was also working, as she had a clothes shop, and possibly had capacity to contribute to the finances of the family. Both sides did not place before court statements of accounts of their respective businesses, to help me assess who could have contributed more. On account of that I shall find and hold that the assets jointly owned, South Teso/Angoromo/xxxx and xxxx, were acquired by the 2 parties equally. The former matrimonial home was on South Teso/Angoromo/xxxx, but the respondent has offered to surrender South Teso/Angoromo/xxxx, but he has assigned no reasons for that. As South Teso/Angoromo/xxxx has the family home, it should go to the applicant, where she can reside with the children.
  12. The applicant also claims a share of Plot No xxxx Busia Municipality. It was acquired during the marriage. It was registered in the name of the respondent, and the applicant was a witness to the sale. That is according to the sale agreement availed. Like in the case above, both sides claim to have had contributed to its acquisition. The respondent says that at the time of its acquisition, the applicant was a housewife. The applicant counters by saying that she worked at the respondent's shop, as he worked as a mechanic, and that she contributed to making part of the money that was used to acquire the property. Again, neither party provided any accounts of the moneys that they handled at the time, to enable assess the capacity of each of them to contribute to that acquisition. The property is registered in the name of the respondent, and it obliged the applicant to provide proof of her direct contribution. She provided none. I can only assess her indirect contribution in the terms stated above.
  13. Should I apportion Plot No xxx Busia Municipality based on indirect contribution? I do not think I should. As indicated above, this property is registered in the name of the respondent. The applicant also had assets registered in her name, South Teso/Angoromo/xxxx and xxxx and Uholo/Ugunja/xxxx, acquired during matrimony. None of the parties led evidence on the circumstances of the said



acquisitions, nor presented accounts of their incomes at the time. The applicant did not disclose these assets. She sold 2 of them, and has retained 1. The respondent too had 2 other assets, registered in his name, South Teso/Angoromo/xxxx and xxxx, that the applicant is claiming. He said that he sold them. At the end of it, both parties have a property registered in their sole names, and both sold 2 of the assets registered in their names. Equity and fairness would dictate that each of them retain what is in their sole names, that is to say Plot No xxx Busia Municipality for the respondent, and Uholo/Ugunja/xxxx for the applicant. I shall, therefore, not subject Plot No xxx Busia Municipality to apportionment. South Teso/Angoromo/xxxx, xxxx, xxxx and xxxx are not in the matrix, for they were sold, and are in the hands of third parties.

14. The other claim is on the auto spares business operated on Plot No xxx Busia municipality. My understanding of the evidence is that the same was started by the respondent. The applicant claims to have had worked there at some time, in sales. She has not testified to have injected any form of capital into that business. Indeed, after Plot No xxx Busia Municipality was acquired, the respondent opened a clothing shop for her within Plot No xxx Busia Municipality, and she moved out of the auto spares business. I am not persuaded that the applicant has presented any material, to prove entitlement to apportionment of part of the said business.
15. On the motor vehicle, said to be a Noah, registration mark and number KBT xxxS, the applicant did not provide registration details of the said motor vehicle. I have no way of telling whether it was registered in the name of the respondent or not. The respondent denied owning such a vehicle. He who alleges ought to prove. The applicant has alleged that the vehicle belongs to the respondent, but she has not discharged the burden of proving that allegation of fact. The little I say on it the better.
16. There is the claim for apportionment and division of household goods. No evidence was led on these household goods, in terms of specifics on what they were, when they were acquired, whether they still exist, where they are, and so forth. No receipts were presented. No photographic evidence was provided. I was left with no clue as to whether such goods existed, and as to where they were located. The applicant alleged they were at the matrimonial home. No concrete evidence was led as to who, between the 2 parties, had control of the matrimonial home, and, therefore, the said assets. The respondent testified that the applicant took them away, while the applicant said that the respondent had abandoned the family, and, presumably deserted the matrimonial home. As there is no proof that the said goods exist, I shall not make orders on their apportionment and division. Courts of law do not act blindly, and do not make orders in vain.
17. The final orders are:
  - a. That the jointly owned assets, South Teso/Angoromo/xxxx and xxxx, are apportioned and divided so that South Teso/Angoromo/xxxx goes to the respondent, and South Teso/Angoromo/xxxx goes to the applicant;
  - b. That each party shall sign the relevant transfer or registration documents to facilitate (a) above;
  - c. That the respondent shall retain Plot No xxxS Busia Municipality and the applicant Uholo/Ugunja/xxxx; and
  - d. That each party shall bear their own costs.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 28TH DAY OF SEPTEMBER 2023**

**WM MUSYOKA**

**JUDGE**



**Mr. Arthur Etyang, Court Assistant.**

**Advocates**

**Ms. Nabulindo, instructed by Korongo & Company, Advocates for the applicant.**

**Mr. Otanga, instructed by Bogonko Otanga & Company, Advocates for the respondent.**

