



**RNM v GNM (Civil Case E070 of 2021)
[2023] KEHC 24417 (KLR) (Family) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL CASE E070 OF 2021
MA ODERO, J
OCTOBER 27, 2023**

BETWEEN

RNM PLAINTIFF

AND

GNM DEFENDANT

JUDGMENT

1. Before this Court for determination is the summons dated 4th October, 2021 by which the Plaintiff RNM seeks the following orders:-

- “ 1. That a declaration do issue that the property namely Plot 286 Kahawa West Phase II, Lease and Businesses in Ruaka, 2 (two) plots in Kiserian and 2 (two) plots in Boi Kamiti were acquired, improved, developed and maintained by the parties jointly.
2. Spent.
3. That a declaration do issue that 2 (two) plots in Kiserian and 2 (two) plots in Boi Kamiti which are registered in the name of the Respondent are owned jointly by the Applicant and the Respondent.
4. That a declaration do issue that the property named PLOT 286 Kahawa West Phase II belongs to the Applicant to hold in trust for SNN , DMN and ANN pursuant to an agreement dated 5th February 2014.
5. That an order do issue declaring that the Respondent is accountable to the Applicant in respect of all the income derived from their businesses in Ruaka, and applied to the Respondent’s exclusive use.



6. That an order do issue declaring that the Respondent is accountable to the Applicant for the income derived [from]business in Ruaka where he is collecting rent of over Kshs. 100,000 per month.
 7. That this Honourable court be pleased to order that the properties and the income aforesaid be settled in proportions aforesaid or as the court may order.
 8. That the Respondent be restrained from evicting the Applicant from matrimonial home and/or alienating, wasting, damaging or alienating and/ or otherwise interfering with the aforesaid matrimonial properties until the shares thereof are determined and apportioned.
 9. That the costs of the Summons be provided for. “
2. The summons was premised upon Section 17 of the *Matrimonial Property Act*, Cap 49 of 2013, Section 3 (a) of the *Civil Procedure Act* and Order 37 Rules 86 of the Civil Procedure Rules 2010, Section 93 of the *Land Registration Act* (2012) and all other enabling provisions of law and was supported by the Affidavit of even date sworn.
 3. The Respondent GNM opposed the summons through his Replying Affidavit dated 4th May 2022. The summons was canvassed by way of vive voce evidence. Each side called only one (1) witness in support of their case.

Background

4. The Parties herein were a couple who got married in the year 1990 under Kikuyu Customary Law. The couple later solemnized their union on 20th June 1992 at the Banana Kingdom Hall in Kiambu County. A copy of the Marriage Certificate Serial Number 049866 is annexed to the Plaintiff’s Supporting Affidavit.
5. The marriage was blessed with three (3) children namely:
 - (i) SNN
 - (ii) DMN
 - (iii) ANN
6. The Plaintiff told the court that all three children are now adults living and working for gain or studying in Australia.
7. The Plaintiff and the Defendant later parted ways and their marriage was legally dissolved vide a Decree Nisi issued on 25th July 2018 and a Decree Absolute issued on 28th November 2018 in Milimani Divorce Cause No. 55 of 2018.
8. The Plaintiff later relocated to Australia where she now resides. She seeks to division of matrimonial property.

THE EVIDENCE

9. The Plaintiff confirmed to the court that she was onces married to the Defendant but they are now are divorced. She confirms that they had three (3) children together and that the children all reside in Australia. The Plaintiff further confirms that she herself now resides in Adelaide, South Australia where is employed as a disability support worker.



10. The Plaintiff states that during the subsistence of their marriage the couple acquired the following properties:
 - (a) Plot No. 286, Kahawa West, Phase II (hereinafter ‘the Kahawa Property’) That the said property was initially registered in the name of the Defendant. However later vide an Agreement dated 5th February 2014 the Defendant transferred all his interest in this Kahawa Property to the Plaintiff to hold the same in trust for their three (3) children.
 - (b) Lease and Carpentry Business in RUAKA – The Plaintiff states that she contributed and assisted the Defendant in setting up a carpentry business on the Ruaka Plot and that she also ran a carwash business there. That currently the Defendant is collecting an amount of Kshs.100,000/= monthly from the Ruaka Plot.
 - (c) Two (2) Plot in Mboi Kamiti
 - (d) Two (2) Plots in Kiserian
11. The Plaintiff claims that she made both financial and nonfinancial contribution towards the acquisition of these properties. She asserts that the same are all matrimonial properties to which she is entitled to a share.
12. The Plaintiff states that although she is the registered owner of the Kahawa Property she derives no benefit from it as the Defendant now lives in the said property with his new wife and children.
14. The Respondent on his part also confirms that he was once married to the Plaintiff but that they are now divorced. He confirms that their union was blessed with three (3) children who all now reside in Australia.
15. The Respondent claims that he was not aware of the Divorce Proceedings at the Milimani Court and that he was not aware that the divorce was granted. However, he does not wish to challenge the Decree Absolute.
16. The Respondent stated that he is a qualified carpenter whilst the Plaintiff has no known source of income. He states that he did open up a chemist business for the Plaintiff but she later sold off the business without his knowledge.
17. The Respondent concedes that he was running Carpentry Business at the Ruaka Plot but states that during the Covid Pandemic the business went under. He denies that he is currently realizing an income of Kshs. 100,000/= monthly from the said business. He states the two (2) Mboi Kamiti Plots and the two Plots in Kiserian were sold off to raise money to cater for the relocation and university education for their three (3) children in Australia. The Respondent states that during the course of the marriage he did acquire Plot No. 286 Kahawa West Phase II. He states that this was the matrimonial home where the couple lived with their three (3) children.
18. The Respondent confirms that although the Kahawa Property was initially registered in his name he did later transfer the same to the Plaintiff to hold in trust for their three (3) children. That his intention was that once the children reach the age of majority the said property would devolve to the children and as such the Kahawa Property does belong to the Applicant.
19. The Respondent finally states that before relocating to Australia the Plaintiff swept the house clean and sold all the household property for Kshs.1.3 Million. He also alleges that the Applicant sold his properties known as Embakasi L.R. 7340/162 Mavoko to her sister one Damaris Ngima for



Kshs.800,000/=. That in both cases the Plaintiff utilized the monies realized from these sales on her own and gave no share to the Respondent.

20. The Respondent prays that the Plaintiffs suit be dismissed in its entirety.

Analysis and Determination

21. I have carefully considered the originating summons before this court, the evidence adduced by the parties as well as the written submissions filed in court. Since this is a Civil matter the required standard of proof is “on a balance of probabilities” i.e. the court must be satisfied the occurrence of the events was more likely than not.

22. In RE H & C (Minors) 1995 UKHL the House of Lords in defining what is meant by the term preponderance of probability or a balance of probability stated:-

“The balance of probability standard means that the court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not....”

23. Two main issues arise in this case:-

- (a) Whether the properties in question constitute Matrimonial property.
- (b) Whether the Plaintiff is entitled to the orders prayed for.
- (a) Matrimonial Property

24. It is not in dispute that the Plaintiff and the Defendant got married in the year 1992. It is also not in dispute that the couple divorced in the year 2018. A copy of the Decree Absolute issued on 25th August, 2018 appears as Exhibit ‘4’ to the supporting Affidavit dated 4th October, 2021.

25. The Plaintiff told the court that the properties listed in her summons were all acquired during the subsistence of the marriage. She states that she contributed to the acquisition of said properties.

26. Section 6(1) of the Matrimonial Act 2013 provides as follows:-

“6(1) For the purpose of this Act, matrimonial property means

- 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.”

27. The Plaintiff has in her suit claimed a share of two (2) Mboi Kamiti as well as a share in two (2) Plots in Kiserian. Firstly, to merely refer to two (2) plots in Kiserian and two (2) Mboi Kamiti Plots is not sufficient description – the description is too vague and court would not be able to make any orders in respect of those properties. In any event parties agree that the above properties no longer exist. They were sold way back in the year 2015.

28. The Respondent has exhibited two sale Agreements as follows:-

- (i) Agreement for sale dated 12th October 2015 (Annixture ‘GNW 1 ‘a’) indicating that Plot 1257 and Plot Mboi Kamiti were both sold to one Samuel Wahome Mwhungi for Kshs.500,000. (Annixture ‘GNW ‘19’)



- (ii) Land Sale Agreement dated 31st March 2015 indicating that LR No. KJD/Kitengela/59268 was sold to one Samuel Wahome Mwihungi for Kshs. 500,000 (Annexure ‘GNW ‘16’)
29. The Plaintiff seeks a share of the proceeds of sale of the said plots in Mboi in Kamiti and in Kiserian. That is a claim which the Plaintiff ought to have filed when the plots were sold. In any event such a claim cannot be entertained under this cause. The Plaintiff is at liberty to file a Civil Suit to recover from the Respondent any monies she may believe are owed to her. This court will not go into making orders for division of non-existent assets. Accordingly, I will make no orders in respect of the above properties.
30. The Respondent asserts that those properties were sold to raise funds to provide for the relocation and education of the three (3) children in Australia. Much time was spent in arguing as to who between the two paid fees for the children and the Plaintiff claimed that the Respondent made no financial contribution towards the education of their youngest child.
31. This is not a children's matter and this court is not determining the issue of maintenance. Those arguments have no place in a case for division of matrimonial property.
32. As I see it the only two (2) properties which this court needs to make a determination on are:-
- (i) Lease and Business in Ruaka – Two (2) Plots
 - (ii) Plot 286 Kahawa West Phase II
- (i) Ruaka Plots
33. The Plaintiff claims that the two (2) plots were acquired during the subsistence of her marriage to the Respondent. The Plaintiff further claims that she contributed to the acquisition of the two plots in Ruaka and is therefore entitled to a share.
34. The Respondent denies that the Plaintiff made any contribution towards the acquisition of the two (2) plots in Ruaka. He also denies the Plaintiff's claim that she took loans to assist in setting up the carpentry business.
35. As stated earlier it is trite law that he who alleges must prove. Any party seeking division of matrimonial property has a legal obligation to prove their contribution towards the acquisition and development of said property.
36. In law the burden of proof lies on the party who asserts the existence of a fact or set of facts Section 107 of the Evidence Act Cap 80, Law of Kenya Provides as follows:
- “ 107 Whoever desires any court to give judgment as to any legal or liability
(1) dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
37. Contribution by a spouse for purposes of sharing matrimonial property may be monetary or non-monetary or both. According to section 2 of the Matrimonial Property Act:
- “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; [own emphasis]

38. Non-monetary contribution is defined in the Act to include Domestic work, management of the matrimonial home, child care, management of family businesses farm work, and companionship

39. Section 7 of the Act provides that:-

“Subject to section 6(3), ownership of matrimonial property vests in the spouse 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.”

40. In *Federation of Women Lawyers Kenya (FIDA) –vs- Attorney General & another* [2018] eKLR the court stated that:-

“The law recognizes equal worth and equal importance of the parties in marriage. Thus the beneficial share of each spouse as the 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.” [own emphasis]

41. In *U M M -vs- I M M* [2014] eKLR the court was of the view that:

“As far as I can see it is the provisions of Sections 2,6 and 7 of the *Matrimonial Property Act*, 2013 fleshes out the right provided by Article 45(3). By recognizing that both monetary and non-monetary contribution must be taken into account, it is congruent with the Constitutional provisions of Article 45 (3) of *the Constitution* 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. I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by Article 45(3).” [own emphasis]

42. Unfortunately neither party has annexed any Title Documents in respect of the two (2) plots in Ruaka. As such this court is unable to tell with certainty who the registered owner of those plots is.



43. The Plaintiff stated that she contributed towards setting up the business in Ruaka by taking loans from Womens Chama's. However she does not state how much she took as loan and there is no documentary evidence of any of these loans allegedly taken by the Respondent.
44. The Plaintiff admits that she has no carpentry skills and states that she cannot recall exactly how much she contributed towards setting up the business.
45. The Plaintiff claims that the Respondent is currently earning Kshs.100,000/= monthly from the carpentry business. However under cross-examination the Plaintiff admits

“I have no documents to prove how much is being realized.”
46. In respect of the Ruaka Plots no title/ownership documents have been exhibited in court and the Plaintiff has been unable to prove financial contribution towards the acquisition of the two (2) plots or contribution towards setting up the business.
47. The Plaintiff is also unable to satisfy this court that the business is still running or how much is realized from said business. I therefore find that the Plaintiff has failed to prove her claim to these properties on a balance of probability. As such I decline to make any orders in respect of the two (2) plots in Ruaka.

(ii) Plot No. 286 Kahawa West Phase II

48. The parties both agree that this property was the matrimonial home where the family resided before the Plaintiff relocated with the children to Australia. Therefore in terms of Section 6(1) of the Matrimonial Properties Act this Kahawa Property does constitute matrimonial property.
49. The parties are both in agreement that though this Kahawa West Property was initially registered in the name of the Respondent he later transferred the said property to the Plaintiff with the intention that she hold the same in trust for their three (3) children. Annexed to the plaintiff's supporting Affidavit is the Transfer by Gift (Exhibit '3') dated 5th February 2014 duly signed by both parties.
50. The Respondent confirms that he did transfer the Kahawa West Property to the Respondent to hold in trust for their three (3) children.
51. The transfer document (Exhibit '3') indicated as follows:-

“It is hereby agreed

 1. That on signing of the agreement the said GNM has hereby transferred his interest to Ricarranda Nyokabi Mburu his wife in trust of her children namely:-
 - i. SNN - 23 years
 - ii. DMN - 17 years
 - iii. ANN - 9 years”
52. The letter of Allotment later issued by the Nairobi City Council indicates that the Kahawa West Property was transferred by one Nancy Njoki to the Respondent GNM on 2nd May 2000. The Respondent in turn transferred the property to the Plaintiff (see Allotment letter Exhibit '2')
53. The transfer by the Respondent was made exclusively to RNM . There is no indication in the allotment letter that the property was to be held by the Plaintiff in trust for the couples three (3) children.



54. The Plaintiff submits that by so transferring the property to herself the Respondent effectively relinquished all right and interest in the said property. She therefore prays that the Kahawa property be handed over to her.
55. The Respondent insists that he only transferred the property to the Plaintiff on the understanding that she would hold it in trust for their children. Both parties agree that the Respondent still resides in the Kahawa property. In the circumstances it cannot be said that the Respondent has relinquished all interest in that property.
56. By prayer (8) of the summons the Plaintiff seeks orders to restrain the Respondent from evicting her from the matrimonial home (the Kahawa property). The Plaintiff told the court that she currently lives in Australia. She does not occupy the matrimonial. How can the Plaintiff seek orders to prevent her eviction from a property which she does not even occupy. I find no merit in Prayer (8) and the same is dismissed.
57. Be that as it may both parties concede that this Kahawa West Property was the matrimonial home of the couple where the family lived. They both had an interest in the property and both contributed to its development.
58. The Plaintiff claims to have contributed towards the acquisition of the property. Although the Plaintiff has not adduced any evidence to demonstrate any financial contribution towards the purchasing of this asset, the fact that she was a wife who contributed towards the care and upbringing of the children, domestic work not to mention providing companionship to the Respondent before the couple divorced then the Plaintiff would be entitled to a share of said property.
59. The parties appear to be in agreement that the matrimonial home i.e. the Kahawa West Property be divided on a 50:50 basis. In her cross examination the Plaintiff says:-
- “... The matrimonial home is registered in my name. I claim 50% share in the matrimonial home. In my documents I claimed the entire property. We had agreed that the property be in trust for the three (3) children. Later the defendant said he wants it to be our matrimonial home. When Defendant moved there with his second family I said we sell it and I get 50% of the proceeds...”
60. Similarly in his evidence the Respondent says:-
- “My wish is that I be allowed to stay in the Kahawa House. Otherwise the house can be sold and the proceed be divided between myself and the Applicant.”
61. Given my finding that the Plaintiff made indirect contribution towards the acquisition and development of the matrimonial home and given the sentiment of the parties themselves I find and hold that the Plaintiff is entitled to a Fifty percent (50%) share in the Kahawa West Property.

Conclusion

62. Based on the foregoing this court now makes the following orders:-
- (1) A declaration be and is hereby issued that the property known as Plot No. 286 Kahawa West, Phase II is matrimonial property.
 - (2) It is hereby ordered that the property known as Plot No. 286 Kahawa West, Phase II be apportioned between the Plaintiff and the Respondent in shares of 50:50 i.e. (50%) each.



- (3) The said Plot No. 286 Kahawa West, Phase II to be valued within sixty (60) days by a registered valuer agreed upon by the parties.
- (4) In the event the parties fail to agree on a valuer then the Hon. Deputy Registrar is authorized to appoint the Chief Government Valuer to conduct the valuation.
- (5) Upon valuation the property known as Plot No. 286 Kahawa West, Phase II to be sold at the best available price and the proceeds of sale be divided between the Plaintiff and the Respondent on a 50:50 Fifty percent (50%) basis.

In The Alternative

- (6) The Respondent is at liberty to buy out the Plaintiff share in the property known as Plot No. 286 Kahawa West, Phase II by paying her Fifty percent (50%) of the value of the said property.
- (7) Prayers (3), (4), (5), (6) and (8) of the summons are dismissed.
- (8) This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

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MAUREEN A. ODERO

JUDGE

