



**JOM v ZKK (Originating Summons E003 of 2022)
[2023] KEHC 26362 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS E003 OF 2022**

G MUTAI, J

NOVEMBER 24, 2023

BETWEEN

JOM APPLICANT

AND

ZKK RESPONDENT

JUDGMENT

1. Before me is the Originating Summons dated 28th March 2022 and amended on 21st October 2022. The Amended Originating Summons seeks the following orders: -
 - a. That the court declares that the property known as Plot Nos. B1352 and B1353 in Noonkopir, Kitengela, Kajiado County is matrimonial property;
 - b. That the court declares that the applicant has contributed 70% towards the development of the property known as Plot Nos. B1352 and B1353 In Noonkopir, Kitengela, Kajiado County;
 - c. That the court orders that the respondent compensates the applicant by refunding to the applicant 70% of the open market value of the property, and in the alternative, the court orders that the property known as Plot Nos. B1352 and B1353 in Noonkopir, Kitengela, Kajiado County be sold, and the proceeds, therefore, be divided between the applicant and the respondent in the ratio of 70:30, respectively; and
 - d. That the respondent do provide the costs of this summons.
2. In response, the respondent filed a replying affidavit sworn on 24th May 2022. She stated that prior to her marriage with the applicant, she had three children from her previous relationship, namely Amina Nuriah, Zuberi Abdala and Feisal Magenga, whom she solely maintained without the support of the applicant during the subsistence of their marriage.



3. Further, she stated that prior to her marriage, she was one of the directors of Nassam Manpower Solutions Limited and also the Assistant Secretary General of the Kenya Association of Private Employment Agencies (KAPEA), where she earned a substantial income that enabled her to sustain herself and her children and also to construct her home in Kitengela which is yet to be completed.
4. She stated that upon her marriage to the applicant, she registered Zunufe Enterprise Limited in the year 2016 and brought on board the applicant as a director so as to fulfil the provisions of the [Companies Act](#), which, in her view, then required a company to have at least two directors. They had a mutual understanding, as husband and wife, that the applicant would not play any active role in the management of the said company. The applicant contended that the word “Zunufe” refers to her three children from the previous relationship. The applicant was a passive director as he was not involved in the day-to-day management and operations of the company.
5. She further stated that she secured several contracts for migrant workers to go work in the Persian Gulf, amongst them being contracts with EKAL Human Resource, who issued 100 visas, out of which she managed to have eight stamped. The applicant brought only one cleaner. Two of the eight stamped visas were cancelled, leaving a balance of 94 visas open.
6. She averred that Zunufe Enterprise Limited operated two bank accounts with the Kenya Commercial Bank and Gulf African Bank, with herself and the applicant as the signatories. At first, it was either of them, but the applicant changed the same to be mandatory for both directors to sign. As a signatory to the accounts, the applicant withdrew substantial amounts of money for his personal use without her knowledge or consent.
7. She deponed that between 1st January 2017 and 30th January 2019, they operated a butchery where she also operated a Mpesa shop and sold water, groceries, cooking gas, diaries and other consumables. The applicant withdrew Kes. 1,000,000/- from the business without her knowledge and consent.
8. Further, during their marriage, they cohabited in Mombasa and settled at Bububu farm, where they had their matrimonial home, reared livestock, and did farming. She is the legal owner of the Kitengela home, which she constructed with her own income generated from her business and resources.
9. In conclusion she stated that the suit has no merit and urged the court to dismiss the same with costs.
10. The summons was canvassed by way of viva voce evidence.
11. The applicant told the court that he was relying on his witness statement dated 21st October 2020. He got married to the respondent on 29th July 2016 in Mombasa County and is blessed with one issue, a boy born on 21st August 2019. They divorced on 6th December 2021 before the Kadhi’s Court in Mombasa.
12. It was his evidence that during the marriage, they developed a matrimonial home on the properties known as Plot No. B1352 and B1353 in Noonkopir, Kitengela, Kajiado County. The respondent lived in the house on the two plots while he operated from the said house and his other home in Likoni, where he lives with his first wife. They lived together for one year before marital problems began.
13. Further, the money used to develop the suit properties was from Zunufe Enterprise Ltd, a company that he had set up and enrolled the respondent as a co-director. The company had several bank accounts, including Gulf African Bank and Kenya Commercial Bank. Both of them were signatories to the said accounts. The respondent withdrew various amounts for the development of the matrimonial home, firstly the sum of US Dollars 35,661.50, which, when converted to Kenya Shillings, at the exchange rate of Kes. 121 to the US\$, amounts to Kes.4,315,042/-, from the Gulf African Bank and



secondly, Kes. 984,000/- from the Kenya Commercial Bank. He averred that he managed the business. He further averred that the construction of the matrimonial home took place in 2019 as evidenced by the bank statements.

14. The applicant urged the court to declare the suit properties together with the house matrimonial property. In his view, he contributed 70% of the cost of construction of the said home. The respondent prayed that the respondent should, in the alternative, compensate him by refunding 70% of the open market value of the property.
15. It was his further evidence that Plot No.1007 Bububu is not matrimonial property. He acquired it in 2002 before contracting the marriage with the respondent, and the respondent made no contribution towards its purchase, construction or improvement.
16. On cross-examination, it was his evidence that the house was built in the middle of the suit properties. The respondent was the registered owner of the suit properties; however, he didn't have the title deed. He insisted that his claim was based on the development thereon which was done with his money.
17. That he registered Zunufe Enterprise in 2016 and they are co-directors with equal shares. He gave the respondent a 50% share as a spouse. He is the one who opened the office, obtained all licences and transferred money from other businesses to Zunufe Enterprise Limited. Further, the respondent was supervising the company while he was managing funds from his main company. The dollar account was opened in 2019 to receive foreign remittances, and the expenses were met by his main company.
18. It was his evidence that the company uses an online system called Musaret whereby documents are prepared and signed electronically. He is the one, he stated, who signed the contracts using his login credentials to transact.
19. In re-examination, it was his evidence that the withdrawals from the accounts coincided with the construction period.
20. In her evidence, the respondent told the court that she would rely on her replying affidavit and witness statement, both of which are dated 24th May 2023.
21. It was her evidence that the applicant did not contribute to the development of the suit properties. Further, she is the one who coordinated the construction from the beginning up to where it is. She testified that she used the applicant's details to register the company in order to comply with the law. The 35,000 dollars that she withdrew was business money to process migrant workers. She was running two companies at the same time.
22. Further, the suit properties are registered in her name. They lived together as husband and wife on the suit properties for a short period, as the applicant has his first family and business in Mombasa. Zunufe Enterprise had an office in Mombasa and Kitengela; however, she had to close the Mombasa office after some time.
23. It was her further evidence that the applicant used to withdraw money from the company's account through mobile money to run his own business. She resigned as a director of Zunufe Enterprise in 2021.
24. During cross-examination, she told the court that she started the construction of the house in 2014; however, she stopped and proceeded later. She stated that she used to make payments for construction through Mpesa.
25. In re-examination it was her evidence that the suit property is registered in her name.



26. Through his advocates Njeru & Company Advocates, the applicant filed his written submissions dated 19th July 2023.
27. Counsel relied on Sections 7 and 9 of the *Matrimonial Property Act*, Article 45(3) of *the Constitution* and the case of AWM v JGK [2021]eKLR and submitted that the share of each party to a marriage is pegged on contribution.
28. Counsel relied on Section 6 of the *Matrimonial Property Act* and submitted that the suit property was a matrimonial home and thus a matrimonial property. The said home was constructed using funds from the bank accounts of Zunufe Enterprises Ltd at the Gulf African Bank and the Kenya Commercial Bank, from which the respondent withdrew US\$ 35,661.50 (from the Gulf African Bank) and Kes.984,000/-. He submitted that taking into account his involvement in Zunufe Enterprises Ltd and being the one skilled in the manpower business and bearing in mind that it was he brought in all the work and funding to Zunufe Enterprises Ltd, he should get 70% of the suit matrimonial home as his contribution to the property. The respondent, on the other hand, should get 30% as her share.
29. Through her advocates, Owang & Associates Advocates, the respondent filed written submissions on 11th September 2023. Counsel submitted that the applicant's role as a director of Zunufe Enterprises Limited was passive since he had had his own company, namely Rawafid Manpower Ltd. The latter company was solely operated by the applicant and was not connected to Zunufe Enterprises Limited. The applicant never took part in the day-to-day management and operations of Zunufe Enterprise Limited, to wit, attending board meetings, executing contracts with foreign recruitment agencies, outsourcing workers and other general duties which were solely carried out by the respondent.
30. Counsel further submitted that the respondent, being the founder and managing director of Zunufe Enterprise Limited, secured several contracts for migrant workers to go and work in the Gulf, amongst them being contracts with EKAL Human Resource, who issued over 100 visas for those wishing to work as cleaners. The prospective migrant workers would pay for their respective visa processing fees, air tickets and other charges to enable the respondent to process their travel documents, out of which she earned the income that enabled her to erect a permanent structure on the suit properties. She resigned as a director of Zunufe Enterprises Limited when her relationship with the applicant became strained.
31. Counsel further submitted that the applicant had not substantiated his claim that he contributed 70% of the cost of development of the suit properties. Counsel urged the court to find that the applicant's application lacked merit and to dismiss it with costs.
32. I have considered the Originating Summons, the response therein, the oral evidence and rival submissions by both counsel and the issues that emerge for determination are;
 - a. Are Plot Nos. B1352 and B1353, Noonkopir, Kitengela, Kajiado County and the house erected thereon matrimonial properties?
 - b. If it is, what contribution did each of the parties make?
 - c. If both parties made contribution, what is each parties entitlement?
 - d. Who should bear the costs of the application?
33. On whether Plot No. B1352 and B1353 in Noonkopir, Kitengela, Kajiado County form part of matrimonial property, Section 6 of the *Matrimonial Property Act* No. 49 of 2013 provides: -
 - a. 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.
- b. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
 - c. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
 - d. A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.
34. In discussing section 6 of the *Matrimonial Property Act*, the court in the case of *TMW v FMC* [2018] eKLR stated: -
- “Turning the provisions of the *Matrimonial Property Act*, Section 6 of the *Matrimonial Property Act*, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Basically, 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.”
35. The respondent stated that she bought the two parcels of land before marriage, with the development therein taking place during the subsistence of their marriage. The applicant conceded that he did not buy the said parcels of land. His claim was that the house constructed thereon was developed with funds from the company account. In support of his contention, he referred the court to the withdrawals from the Zunufe Enterprises Account by the respondent, which appeared to have been made at about the same time as the purchases of materials used in the construction of the said house.
36. The respondent averred that she used her own resources to build the house on the matrimonial properties. However, She did not provide documentary evidence to back up the claim. It does, therefore, appear to me that she used proceeds from the Zunufe Enterprises Ltd business to do so. I do not think the timing of the withdrawals and the purchases was coincidental.
37. Both parties agree that at the material time, Zunufe Enterprises Ltd was jointly owned by the parties, with each of them having 50% shares. The business was, however, under the control of the respondent. The applicant had another business, Rawafid Manpower Ltd, that provides similar services. Given that she was in charge of the said business it is more likely than not that she was entitled to the greater share of the profits. The applicant did not, in my view, back up his claim that the money in the company’s account came from him.
38. The respondent owned the land and was entitled to a share of the profits of Zunufe Enterprises Ltd. Since funds from the said company paid for some of the construction expenses and as the house was used as a matrimonial home, it is my finding that the house on the said properties is matrimonial property. What, then, was the contribution made by each party towards the development of the same?



39. Section 7 provides: -

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.

40. Section 2 of the said Act defines contribution as;

“contribution” means monetary and non-monetary contribution and includes—

- i. domestic work and management of the matrimonial home;
- ii. child care;
- iii. companionship;
- iv. management of family business or property; and
- v. farm work;

41. The court in the case of MNH v FHM [2018] eKLR stated: -

“What the *Matrimonial Property Act* of 2013 does is formalize and make provision for giving due consideration to both the monetary and non-monetary contribution of parties in a marriage as is evident from the clauses cited in the antecedent paragraphs. This position has been cemented by the Courts in different instances. For starters, in NWM v KNM [2014] eKLR it was stated that the court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.

On the place of non-monetary contributions, I echo the sentiments held by The House of Lords decision in *White vs White* (2000) UKHL 54 where the Court alluded to the greater awareness of the value of non-financial contributions to the welfare of the family and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills.”

42. Further, the court in the case of EKTm v ECC [2021] eKLR stated:-

“It follows from the foregoing that despite the constitutional requirement that parties in a marriage have equal rights, each party must be able to prove either contribution was monetary or non-monetary 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 contribution.”

43. In this case both parties have argued that they made monetary contribution towards the acquisition and development of the suit properties through the income from Zunufe Enterprise Ltd and other companies that they own and or have or are working for. The respondent argued that she was the one managing the day-to-day operations of the company. At the same time, the applicant was a passive director, a fact which the applicant has not disputed.



44. Accordingly, it is my finding that the greater contribution was made by the respondent. She purchased the two parcels of land on her own. As no valuation was done to establish the cost of the said parcels of land and the value of improvements made thereon, it is difficult to determine what weight each of these should have. In the circumstances, I am inclined to find that the value of land and construction costs are equal.
45. On the division of the properties, it's my finding that the respondent purchased Plot No. B1352 & B1353 in Noonkopir, Kitengela, Kajiado County. The property was developed during the subsistence of coverture by the parties herein. The court finds that the greatest contribution was made by the respondent from the proceeds of the business she runs. Although the applicant contributed, his contributions were much less than that of the respondent. Giving due credit to the parties, I find and hold that the applicant is entitled to 25% of the said property. The respondent is entitled to 75%.
46. On who should bear the costs of the summons, costs ordinarily follow the event in civil matters. Given the nature of this matter, however, I am not persuaded that an award of costs would be an appropriate remedy. Each party shall therefore bear own costs.
47. I have found that Plot No.1352 and 1353 in Noonkopir, Kitengela, Kajiado County are matrimonial property. The court finds that the respondent made the most contribution and apportions the properties on a 25:75 basis. In the premises, I order as follows: -
- a. I declare that Plot No. B1352 & 1353 Kitengela, Kajiado County, is a matrimonial property. I further declare that the applicant has a 25% interest in the said property on the basis of his contribution towards its development;
 - b. I order that Plot No. B1352 and B1353 in Noonkopir, Kitengela, Kajiado County be valued within 60 days from the date of this judgement. Upon valuation, the respondent shall pay the applicant an amount of money equivalent to 25% of its value being his share of the said property;
 - c. In the event that the respondent is unable or unwilling to pay the applicant, Plot No. B1352 and B1353 Noonkopir, Kitengela, Kajiado County shall be sold by way of public auction and the proceeds therefrom divided in 25:75 ratio; and
 - d. Each party shall bear own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH NOVEMBER 2023 VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

