



REPUBLIC OF KENYA



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**LWW v NWG (Matrimonial Cause 5 of 2020)
[2022] KEHC 10421 (KLR) (16 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 10421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MATRIMONIAL CAUSE 5 OF 2020**

SN MUTUKU, J

FEBRUARY 16, 2022

(O.S)

BETWEEN

LWW ALIAS LWK PLAINTIFF

AND

NWG DEFENDANT

JUDGMENT

1. This Originating Summons (OS) dated 28th January, 2020, is brought by LWW alias LWK (the Plaintiff) under Section 17 of the *Matrimonial Property Act* (No. 49 of 2013), Article 45(3) of *the Constitution* of Kenya and Order 37 of the *Civil Procedure Rules* 2010 seeking the following orders that:
 1. That a declaration does issue that the property known as Ngong/Ngong/xxxx together with the buildings and improvements thereon (where applicable) all herein referred to as Matrimonial property or suit property were acquired by the efforts and/or joint funds of the Plaintiff and the Defendant.
 2. That the Defendant holds 50% share of the suit property in Trust for the Plaintiff despite the property being registered in the sole name of the Defendant.
 3. That a declaration does issue that the Defendant holds the suit property in Trust for the Plaintiff and the said suit property be settled for the benefit of the Plaintiff in such manner and proportion as this Honourable Court deems fit and just.
 4. That the said suit property be shared equally between the plaintiff and the defendant and if incapable of being shared that the same be sold and net proceeds be shared equally between the parties.
 5. That the Defendant does account for the rent collected from the year 2013 to date.



6. That the Defendant at his own costs and expense establish the value of the suit property and transfer to the plaintiff her half share.
 7. That the Defendant by himself, his representatives, agents and/or servants be restrained from alienating, encumbering or in any other manner dispose the said property.
 8. That the Defendant be condemned to pay the costs of the suit.
2. The Plaintiff swore an Affidavit on 28th January 2020 in support of the OS. Her case is that she got married to NWG, (the Defendant) under the *African Christian Marriage and Divorce Act* (CAP 51) Laws of Kenya on the 6th day of October, 1984. After the marriage they cohabited in Limuru and thereafter in Ngong. However, their marriage was not blessed with any children. At the time of their marriage, she worked as a typist with the Government while the Defendant worked as a clerk at [Particulars withheld]. The Defendant had purchased the property known as NGONG/NGONG/xxxx before they got married but the same had not been developed. Through their joint efforts, they developed that property, first by building their matrimonial home, a four bed-room bungalow, the construction of which she supervised. They later erected residential apartments consisting of ten two bed-room units each attracting rent of approximately 20,000/-.
 3. It is her case that in 1985 she resigned from formal employment to concentrate on farming and running the family business. In 2013 the Defendant chased her away from the matrimonial home. She consequently filed for Divorce in Divorce Cause No. 359 of 2013 leading to dissolution of their marriage on 13th November 2017. The Defendant was ordered to pay her alimony of Kshs 50,000 per month which was later reviewed by consent to Kshs 30,000 per month. She claimed that she has not been paid that money since May, 2019. The Defendant has been residing in the matrimonial home and has been collecting rent form the rental units. It is her case that she personally and directly contributed money, put in her time, energy and effort during her marriage to acquire the property and is therefore entitled to an equal share of it.
 4. On 4th March, 2020 the Plaintiff filed a further affidavit dated 2nd March, 2020. She reiterated her averments in her supporting Affidavit. She emphasised that when she got married the Respondent had only constructed a single room on the suit property while the rest of the matrimonial home was developed through joint efforts.

Defendant's Case

5. The Defendant has opposed the OS. He filed his Replying Affidavit dated 14th February, 2020. It is his case that the Plaintiff filed petition for divorce seeking dissolution of marriage on the grounds of adultery and cruelty which he denied. The Plaintiff filed an application on 1st October, 2013 and amended on 7th October, 2013 praying for alternative accommodation or a lump sum amount or periodical maintenance claiming that he had sent her away and that in its ruling the court awarded payment of Kshs 50,000/ which on appeal was reduced to Kshs 30,000.
6. He admitted that he married the Plaintiff on 6th October, 1984 and that he was working as a clerical officer with Kenya National Union of Teachers (KNUT) at the time. He admitted that he bought the parcel of land NGONG/NGONG/xxxx in 1979 before they got married which parcel was excised from NGONG/NGONG/xxxx and he eventually got a title in 1981. It is his case that soon after buying the land, he started constructing a four-bedroom house which he finished constructing in 1982 and moved in as a bachelor. Further that he used his salary and some loans from his employer to finance the construction. That when he got married, he moved the Plaintiff to the constructed matrimonial home. That in 1986 he constructed rental houses on the subject property with some loans from KNUT



and Co-Operative Bank and also from gratuity pay and his salary savings. That the Plaintiff never contributed to the purchase of Ngong/Ngong/ xxxxx nor any developments to it. That she deserted their matrimonial home and filed divorce proceedings and now wants to take his property through trickery and lies. He prays that the application herein should be dismissed with costs.

7. The Defendant also filed a further affidavit dated 4th March, 2020. He stated that while still a bachelor he sold his motor vehicle registration number KKC 690 to enable him buy the suit property Ngong/Ngong/xxxx. That since he was employed in 1974, he qualified for gratuity payment in 1979 but since he needed to purchase the aforementioned property, he requested his employer for an advance of Kshs 3,000 against his gratuity payment. That in 1980 he paid Kshs 800 for the survey of the property after applying for Land Board consent for subdivision. He said he further paid Kshs 750 for the certificate of title for the resultant subdivision. He stated that he applied for loans in 1981 for the construction of the house which became the matrimonial home, in 1987 and another loan of Kshs 48,000 to enable him install electricity, construct servant quarters, fencing and a steel gate.
8. It is his case that in 1987 he sold his two plots in Huruma and Githurai to enable him construct the rental houses and that to supplement this, he applied for another loan of Kshs 150,000 in 2004, a loan of Kshs 900,000 from his employer in 2008, in 2011 a loan of Kshs 500,000 from Co-operative bank of Kenya for development of the rental houses.
9. The matter proceeded by way of viva voce evidence with each party giving evidence as the only witness in support of their case. The Plaintiff and the Defendant reiterated their respective cases as stated in their pleadings. Subsequent to the conclusion of the hearing, parties filed written submissions.

Plaintiff's Submissions

10. The Plaintiff filed her submissions on 9th September, 2021. She has raised 5 issues for determination as follows:
 - (i) Whether the Plaintiff and Defendant jointly contributed to the acquisition of the property known as Ngong/Ngong/4371 matrimonial home and rental units herein by both financial and non-financial contribution.
 - (ii) Whether the Plaintiff is entitled to part of the household goods purchased during the subsistence of the marriage.
 - (iii) Whether the Plaintiff during the subsistence of the marriage contributed towards development/improvement of the matrimonial properties through non-monetary contribution.
 - (iv) Whether the Plaintiff/applicant is entitled to be given ½ of all matrimonial properties acquired despite the Respondent being the registered owner.
 - (v) Whether the court should order that all the matrimonial properties acquired or developed during the subsistence of the marriage be shared equally now that the marriage is dissolved?
11. The Plaintiff, while citing Section 6 of the Matrimonial Properties Act No. 49 of 2013 submitted that the suit property was indeed matrimonial property as the parties lived there during the subsistence of their marriage. That they jointly made improvements to the properties and by carrying out farming activities all geared towards generating income for the family. She made reference to section 12(3) of the [Matrimonial Property Act](#) to support her claim that the actions of the Defendant of throwing her out of their matrimonial home was in contradiction of the said section. She further stated that she only carried her clothes leaving behind her household effects purchased over the 29 years. It was her



submission that the court should order that the Defendant renders account for all the income derived from the matrimonial property since May, 2019 and remit the arrears to her.

12. She cited Section 7 of the *Matrimonial Property Act* that requires one to prove contribution in her argument that she was disadvantaged in that she was chased out of her matrimonial home and hence had no access to material evidence that she may have retained as proof of her monetary contribution. In addition, she claimed that the contribution made by the Defendant towards the development of the properties through loans and salary was not enough and a supplementary source of income was required which she provided. That she also made non-monetary contribution through domestic work, supervision of the rental units and management of the same. It was her submissions that the court should not undervalue her work or assign it a lesser economic value as to do so would be discriminatory and against the principle of equality and non-discrimination. She further stated that though she was childless she still took care of her household and that she was aged 65 years and that the court should take into account Article 57(c) on the rights of older members to live in dignity and respect and free of abuse. That since she was chased out of her matrimonial home, she has lived in destitution at the mercies of well wishes.
13. The Plaintiff cited Article 45(3) of *the Constitution* that govern the rights of parties within a marriage. She argued that the court in considering equality of parties at the dissolution of marriage should use the lens of substantive equality in order to have a fair and just determination on the proportion of distribution of the matrimonial property. That the right to equality must be in conformity with the international laws ratified by Kenya which include the *Convention on the Elimination of all forms of Discrimination against Women (CEDAW)* and the *African Charter on Human and People's Rights (The African Charter)*. She relied on Section 93(2) of the *Land Registration Act* 2012 which protects spousal interests on Land. She averred that by dint of this section she owns an interest as a tenant in common with the Defendant by her contribution and is thus entitled to half share having made both monetary and non-monetary contributions.
14. She cited *Echaria -vs- Echaria* (2007) eKLR and Civil Appeal No. 142 of 2016(*WM -vs- JPM* (2017) eKLR in support of her case.

Defendant's Submissions

15. The Defendant filed his submissions dated 27th September, 2021. He has raised three issues for determination as follows:
 - (i) Does Ngong/Ngong xxxx constitute matrimonial property?
 - (ii) What contribution, if any, did the Plaintiff make in the acquisition of Ngong/Ngong/xxxx?
 - (iii) How would the property in (2) above be shared, if at all?
16. On the first issue the Defendant emphasised that he acquired the suit property before he got married and that he has shown proof that the suit property was built using his own resources and loans from his employer and banks to finance the same. He further averred that the Plaintiff did not set out any household goods or effects that were in the matrimonial home or house and without such proof the court cannot grant any relief.
17. On the second issue he submitted that the Plaintiff did not show any proof that she conducted the farming activities stated by her. That the only proof tendered was a letter dated 20th January, and that the contents of the said document were discredited during cross-examination. He argued that whoever alleges must prove and made reference to the case of Chuka HCCC No. 2 of 2015 *AKM -vs- ANN* [2019] eKLR.



18. It was his argument that the Plaintiff's alleged indirect contribution which entailed supervision and management of the construction was neither here nor there as on cross-examination, she was unable to characterise or even define the supervision or the said management. Further that she did not have any skills to carry out the same and that he had hired a contractor to do that work. He argued that they did not have any children to take care of and that the Plaintiff did not provide companionship to him. He submitted that the Plaintiff did not demonstrate that she acquired any beneficial interest in the property known as Ngong/Ngong/4371 as required under Section 9 of the [Matrimonial Property Act](#). He Civil Appeal No. 128 of 2014 *PNN -vs- ZWN* [2017] eKLR to support his arguments.
19. His arguments on the third issue are that the Plaintiff was the one who filed for divorce and left the matrimonial home. That in the circumstances of this instant case, the absence of proof of any monetary and non-monetary contribution does not justify the sharing of the property as the same would be contrary to the provision of the law. To support his case, he relied [Federation of Women Lawyers Kenya \(FIDA\) -v - Attorney General and another](#) [2018] eKLR.

Analysis and Determination

20. I have considered the application, affidavits, submissions, the authorities cited by the parties. I have also considered the evidence adduced in court by both parties. I have understood the issues for determination raised by both parties. I have summarised the two sets of issues as follows:
 - (i) Whether the property known as Ngong/Ngong 4371 constitutes matrimonial property?
 - (ii) What contribution did the Plaintiff make in the acquisition of Ngong/Ngong/xxxx?
 - (iii) What share should be assigned to each party?
21. I find no dispute that the Plaintiff and the Defendant were husband and wife following their marriage on 6th October 1984. The Marriage Certificate annexed to the Plaintiff's Supporting Affidavit attest to that. Both have admitted that they did not have children. There is evidence showing that the Plaintiff was working as a Typist at the time of the marriage and the Defendant was working as a Clerk. Both were earning at the time of the marriage. Evidence shows that the Plaintiff resigned from her employment. This is not disputed. The plaintiff's evidence is that she resigned to take care of the home and supervise the development of the matrimonial property which she claims comprises of Ngong/Ngong/xxxx together with the building and improvements thereon. She also testified that she was involved in dairy farming, growing vegetables and fruits as well as poultry keeping and that whatever she earned from the sale of the farm produce was used to contribute towards development of their home. She also cited domestic work as part of the contributions.
22. The Defendant denied that the Plaintiff made any contributions towards the acquisition or development of suit property. He claims that he bought the property before the marriage between the parties but admitted that part of the property, the rental units, was developed during the subsistence of their marriage. He claims that the property was developed solely through his efforts with loans sourced from various financial institutions. He denied that the Plaintiff supervised the construction of their matrimonial home or the rental units and stated that she had no expertise to supervise such work. He stated that he employed people for that purpose. He however admitted that the Plaintiff used to do domestic work and take care of him and washed his clothes. He claimed that he bought the property and developed it before getting married to the Plaintiff.
23. The law under Section 6 of the [Matrimonial Property Act](#) defines matrimonial property as follows:
 - (1) 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.

24. The onus to prove allegations lies on he/she who alleges. It is upon the Plaintiff to prove the contribution she made towards the acquisition and developments of the property she calls matrimonial property. From the evidence given by the Plaintiff, it is clear to me that she was in gainful employment when she contracted the marriage with the Defendant. She resigned on 1st May 1985, less than one year after marriage. Her case is that she resigned after discussing the matter with her husband. The fact of her resignation is not denied.
25. I have seen a letter dated 20th January 2020 from the County Government of Kajiado that the Plaintiff started farming in 1985 and that she was engaged in dairy farming, poultry keeping, horticulture farming and goat rearing. I have no evidence to doubt that the Plaintiff was engaged in these activities.
26. Evidence shows that the parties are now divorced and that the Defendant had been paying the Plaintiff, through court order, a monthly alimony of Kshs 50,000 which was reduced to Kshs 30,000. The divorce, according to the evidence, was concluded in 2017. My quick calculation gives me over 30 years of marriage. During this time the Plaintiff took care of domestic work in addition to farming. The Defendant has admitted that the Plaintiff had been taking care of him and washing his clothes.
27. Section 7 of the Matrimonial Property Act states that:

“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.
28. In Civil Appeal No. 142 of 2018 in *CWM-VS- JPM* [2017] eKLR, the Court of Appeal had the following to say in this respect:

“..... 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”.
29. To my mind, the Plaintiff spent over 30 years of her marriage working to support her husband in their marriage. They did not have children but there was farming and domestic work. Even if this court were to doubt that she did not have the technical knowhow to supervise a construction, it is clear to me that the Plaintiff has not, for the time their marriage lasted, been idle. She had been busy, very busy indeed, with farming and domestic work. Her resignation was not in vain but was meant to give her free time to concentrate in the development of their matrimonial property by farming and doing domestic chores. Her toils in the farm and in domestic work for over 30 years of marriage must be taken into account. She was working for betterment of herself and her husband and for the development of the home they lived in and their property. The Plaintiff spent her entire youthful, and not so youthful, years dedicated to working towards the improvement of their home and therefore all her work should not have been in vain but must be taken into account.



30. The Plaintiff's efforts are recognized by the law. Section 2 of the Matrimonial Properties Act provides that:

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.

31. The Plaintiff may not have produced documents to show her contribution to the acquisition and development of matrimonial property. However, I have no doubt in my mind that her contribution, monetary or non-monetary cannot be questioned.

32. I have seen copies of documents to the effect the Defendant sourced for loans from various institutions although I have not seen bank statements or any other form of proof that this money was granted to him. I have no doubt that he too, in his own way, contributed to the acquisition and development of the matrimonial property. I also note that it is admitted that the Defendant had bought the property known as Ngong/Ngong/4371 before he got married to the Plaintiff. I have no doubt in my mind that the Plaintiff made her contributions as shown above in this judgment.

33. *The Constitution* of Kenya 2010 under Article 45(3) states that:

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage.”

34. To my mind this provision does not equate equal rights to a 50/50 sharing of assets but rather to the rights to be treated equally and fairly. Given the provisions of Section 7 of the *Matrimonial Property Act*, this court must look at both monetary and non-monetary contribution in assessing the share and or division of the matrimonial property. In this instant case there is no dispute as to the fact that the Defendant acquired the property Ngong/Ngong/ 4371 before the parties herein got married. There is also clear evidence of the monetary contribution by the Defendant. I have taken into account the fact that the Plaintiff was in gainful employment before marriage but resigned within one year of their marriage to concentrate in farming and taking care of their home. Her contribution in my view is both monetary and non-monetary. I so find.

35. Guided by the Civil Appeal No. 142 of 2018 in CWM-VS- JPM [2017] eKLR, cited above, and given the evidence placed before me, it is clear to me that the contribution made by the parties towards acquiring the matrimonial property was not equal for the fact that the property comprised in Ngong/Ngong/4371 was bought by the Defendant before the marriage to the Plaintiff, which is admitted by the Plaintiff, it is only fair that this court takes these facts to account in determining the share of each party.

36. In the case of AW -VS- MVCMAWM [2018] eKLR the Court of Appeal observed as follows:

“..... This now takes us to the crux of appeal; that is whether the appellant was entitled, to a larger share being 50/50 ownership of the suit premises or as cross-appelled by



the Respondent the award of Kshs.2 million was excessive. This suit was filed on 30th May, 2015 after the *Matrimonial Property Act* was in operation.....what proportion or share should the appellant be awarded? It is common ground that the suit premises was inherited by the Respondent and just as the learned trial Judge, we appreciate no case is like another and each must be considered on its own merit while bearing in mind the peculiarities, circumstances and the principles of fairness and human worth in each case. Just like the old saying goes, "no one should reap where they did not sow and none should reap more that they planted." That is the basic tenet of equity which follows the law."

37. Having found that the Plaintiff made monetary and non-monetary contribution in the development of the matrimonial property and having taken into account the fact that the Defendant had bought this property before marriage, it is my considered view that the share that speaks justice to both parties is one that is proportionate to the contribution each party made towards the acquisition and/or development of the matrimonial property. I have not seen evidence of the value of the property as at the time it was bought. I have also taken into account that the Defendant has been paying alimony through a court order, initially at Kshs 50,000 per month and later at Kshs 30,000 per month.

38. I am guided by Section 9 of the *Matrimonial Property Act* that provides that:

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.

39. In conclusion, I find for the Plaintiff. However, the prayers she is seeking seem mixed up and lack clarity. For that reason and for clarity's sake, I make the following orders:

1. That a declaration is hereby issued that the property known as Ngong/Ngong/xxxx together with the buildings and the improvements thereon, less the value of the undeveloped plot at the market value at the time it was bought, is matrimonial property developed with joint efforts of the Plaintiff and the Defendant.
2. That a declaration is hereby issued that the Defendant holds the suit property in trust for the Plaintiff and that the said suit property be and is hereby settled for the benefit of the Plaintiff in such a manner and proportion as shall be determined by this court in this Judgment.
3. That the said property be shared between the Plaintiff and the Defendant in the ratio of 40%/60%: forty percent (40%) for the Plaintiff and sixty percent (60%) for the Defendant.
4. That the Defendant at his own cost and expense establish the value of the suit property and transfer to the plaintiff her 40% share.
5. That the Defendant by himself, his representatives, agents and/or servants is hereby restrained from alienating, encumbering or in any other manner disposing the said property.
6. That the Defendant be condemned to pay the costs of the suit.

40. I decline to issue an order to have the Defendant render an account for all the rent collected from the suit property to date, given that the Defendant has been paying alimony on a monthly basis. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 16TH FEBRUARY 2022.

S. N. MUTUKU



JUDGE

