



REPUBLIC OF KENYA



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**JN v BKM (Originating Summons 7 of 2018)
[2022] KEHC 11754 (KLR) (22 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 11754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 7 OF 2018**

JN ONYIEGO, J

APRIL 22, 2022

**N THE MATTER OF: SECTION 6,7,9,13,17 OF THE
MATRIMONIAL PROPERTY ACT NO.49 OF 2012**

**IN THE MATTER OF: QUESTIONS ARISING BETWEEN JN; BKM
CONCERNING THE OWNERSHIP AND DIVISION OF A HOUSE, HOUSEHOLD
GOODS, LAND AND ACCOUNTS ACQUIRED DURING THE MARRIAGE**

BETWEEN

JN PETITIONER

AND

BKM RESPONDENT

JUDGMENT

1. The petitioner herein moved this honourable court on 21st September 2011 vide petition No.61 of 2011 seeking declaratory orders in respect of matrimonial house on Plot No.xxx in Mariakani. Upon hearing the parties, Tuiyot J (as he then was) made the following declarations vide his ruling of 9th June,2014:
 - a. That the respondent's attempt to evict the petitioner from her matrimonial home at Makaburini Estate, Mariakani violates her equal right to that property.
 - b. The petitioner has equal proprietary rights to the petitioner in the matrimonial home comprising of 4 rooms at Makaburini Estate, Mariakani.
 - c. The respondent, his agents and servants are restrained from evicting the petitioner from, or disposing or in any other way alienating that property.
 - d. As the litigants herein are husband and wife, each party shall bear its own costs of these proceedings.



2. Dissatisfied with the said court orders, the respondent herein filed a notice of motion dated 8th June 2015 under the same file seeking the following orders;
 - a. Spent
 - b. That there be a temporary injunction to restrain the petitioner /respondent, her agent or servant from collecting rent in all sixteen roomed house of the matrimonial home situated at Makaburini Estate in Mariakani at Kshs 1,500/=despite the honourable court's judgement of 9th June ,2014, pending the hearing and determination of this application.
 - c. That there be an order to compel the respondent to open the said house and allow the petitioner access and possess the rooms and also collect rent from the twelve rooms and remove his goods according to the judgement delivered on 9th June,2014 by honourable justice F.Tuiyott, pending the hearing and determination of this application.
 - d. That the petitioner be ordered and condemned to compensate the applicant the monies collected in the twelve rooms since the delivery of the judgement.
 - e. That costs of this application be provided for.
3. Upon hearing the respondent /applicant exparte, Justice Ogola in his ruling of 10th July,2018 issued the following orders;
 - a. That the matrimonial home comprising of four (4) rooms at Makaburini Estate, Mariakani be shared equally between the petitioner and respondent in terms of the judgement dated 9th June, 2014.
 - b. That the respondent is entitled to half of the rent from the said house mentioned in (a) above from 9th June, 2014.
 - c. The respondent is also entitled to access the said matrimonial home to collect his personal household items mentioned in the ruling.
 - d. The officer commanding station OCS, Mariakani Police Station shall effect the execution of these orders and to ensure that peace is maintained as the applicant/respondent collects his aforesaid household goods.
 - e. Parties shall bear own costs.
4. Later, the petitioner herein moved this honourable court vide the instant Originating summons (O.S.No.7 of 2018) filed on 4th October, 2018 seeking the following orders;
 - a. That the honourable court be pleased to issue a declaration that the following properties registered in the name of the respondent are owned jointly by the petitioner and the respondent:
 - i. Matrimonial house in Makaburini Estate, Mariakani(Plot No.61)
 - ii. Matrimonial house in celebration estate, mariakani (plot no.415 block 4 R 6
 - b. That the honourable court be pleased to order the sale and division of the said properties and apportionment of the same between the petitioner and the respondent.
 - c. That further and in the alternative and in the event that title and ownership in any way of the suit properties has/have been transferred in favour of any third party an order that the



respondent does account for the proceeds and the same be divided between the petitioner and the respondent equally.

- d. That a temporary injunction be issued restraining the respondent, his servants and/or agents from selling, transferring, alienating, wasting, damaging and/or otherwise adversely interfering with the said properties pending the hearing and determination of the originating summons herein.
 - e. That the honourable court be pleased to grant such further or other relief orders as may be just in the circumstances.
 - f. That the respondent be condemned to pay costs of this suit.
5. The originating summons is premised on the grounds therein and the supporting affidavit of Joan Namakangala sworn on 3rd October, 2018. According to the petitioner, she got married to the respondent around 1983 through customary marriage and her dowry paid in 1984. She stated that they were not blessed with any biological child. That in spite of that biological challenge, the respondent did accept parental responsibility over her adopted children namely; EN and JN who are now adults.
 6. The petitioner averred that they separated with the respondent intermittently between the year 1989 and 2003 but kept in touch through telephone communication and visits by the respondent in Kitale where she was staying and working as a teacher. The petitioner further averred that she was a supportive wife to the respondent during the subsistence of their marriage and that it was during coverture that they acquired the suit properties.
 7. She stated that in the year 2000, the respondent informed her that he had bought Plot No.xxx Block 4 row 6 at celebration estate which property he wanted developed jointly. That she took a loan of Kshs 180,000 from Kenya commercial bank which she contributed towards the development of that property. That she also added Kshs 30,000 for the purchase of doors for the house besides carrying out major renovations in the Makaburini House Plot No.61 at a cost of 1.2 million shillings.
 8. The petitioner deponed that she was employed by the Teachers Service Commission since the year 1975 to 2014 when she retired hence her source of income through salary payment. That through her monetary and non-monetary contribution she managed to make tremendous improvements on both properties.
 9. The petitioner further stated that in 2011 the respondent attempted to sell the Makaburini House which was stopped through a court order. That in 2018 the respondent went into her house with police and took away all her goods and left the house vacant. She urged the court to distribute the properties equally.
 10. The petitioner in her further affidavit sworn on 12th March 2019 referred to the ruling of 10th July, 2018 and judgment of Justice Tuiyott (as he then was) delivered on 9th June, 2014. She stated that Justice Tuiyott's ruling had settled the matter but the respondent misled the court into issuance of a second ruling. That she did not understand why the respondent was claiming her portion of the matrimonial property a fact that forced her to file this suit.
 11. She also filed a supplementary affidavit sworn on 17th June 2020 thus reiterating her position that the suit properties form part of matrimonial property. She also asserted her position on contribution and annexed several receipts. Further, she claimed that the respondent had disposed one of the houses and attached photographs of the same.



12. In response, the respondent filed a replying affidavit on 11th December, 2018 stating that the suit is incompetent and bad in law as the subject properties were not jointly acquired nor owned; that the allegations raised by the petitioner had already been determined by this honourable court in Petition Case No.61 OF 2011 by justice Tuiyot.
13. The respondent denied the content of the supporting affidavit and urged this court to dismiss with costs the originating summons for lack of merit. He filed a further affidavit sworn on 6th July 2020 stating that the petitioner owns her own properties which are in her name. To prove that claim, he annexed photographs of the same. He reiterated that the suit properties were not jointly owned as he bought them with his money and without any contribution nor assistance from the petitioner.
14. The matter was canvassed by way of viva voce evidence. The petitioner through her evidence in-chief told the court that she got married to the respondent in 1984. That she adopted two children J and E who is mentally challenged while the respondent was a divorcee with three children. It was her evidence that when she got married, the respondent was staying in a mud walled house with a Makuti roof of which he was paying rent at Kshs 150/= per month. She claimed that they jointly built a mud house in Plot No.xx.
15. It was the petitioner's evidence that the respondent was also a teacher who lived in Mariakani while she lived in Kitale. She claimed that she took a loan of Kshs 200,000 to support the respondent in developing Plot No.xxx which comprised of shops in front, rental rooms and a hardware.
16. It was the petitioner's further evidence that in the year 2007 the respondent decided to divorce her. That the respondent proceeded to sell Plot No.xxx without her knowledge nor consent. She stated that when the respondent attempted to sell plot No. xx, she filed a suit (petition No. 61 of 2011) through which she obtained orders restraining the sale and a declaration that she was the sole owner.
17. The petitioner further told the court that; she assisted the respondent in developing Plot No.xx as she was cooking for fundis and supplying water for mixing sand; she was given Plot No.xx vide Judge Tuiyot's ruling; she took a loan of Kshs 100,000 to renovate the house which was in bad shape; through her pension received in 2016 she bought a water tank, put up a wall, plastered and painted the house and put up 3 permanent toilets.
18. The petitioner went further to tell the court that she wanted her house to stay with her children whom the respondent had rejected That she gave the respondent all her money from her salary out of trust but he has now disowned her.
19. On his part, the respondent adopted his witness statement dated 27th October 2021. He stated that after separating with the applicant/petitioner, he left her in Plot No.xx out of which she was collecting monthly rent amounting to Kshs 5,000 per room. He claimed that he has two other wives and 14 children in respect of whom he was struggling paying school fees hence needed part of the rent collected from that house to meet those expenses. He told the court that he was seeking the suit properties and authority to collect rent with the petitioner paying rent as a tenant.
20. On cross examination, the respondent told the court that he got Kshs 400,000 as pension after retiring the year 2000. He denied receiving any money from the petitioner to support any joint development. He alleged that when he married the petitioner he was staying in a two bed roomed house and that plot xxx which he sold at Kshs 400,000 was solely his. That he did not know anything about Petition No.61/2011 although he had appealed against it albeit without proof. That in petition 61/11 the petitioner was given 4 rooms while he was given 12 rooms.



Determination

21. I have considered the originating summons, response thereof and oral evidence on record. Issues that emerge for determination are:
 - a. Whether the suit properties form part of matrimonial property
 - b. The contribution of each party towards the acquisition of the suit properties.
 - c. Distribution of the suit property
22. Before I proceed to determine the salient issues in controversy, certain issues ought to be clarified. Firstly, in petition number 61 of 2011, the petitioner herein was seeking declaratory orders key among them, a declaration that plot number xxx makaburini mariakani and celebration mariakani properties were matrimonial properties hence parties had equal rights to own the same. In its judgment delivered on 9th June 2014 the court clarified that plot number 120 may have been a misdescription of property and that the same referred to plot number xx makaburini mariakani.
23. Secondly, it is notable that there are no clear ownership documents attached in respect of the two subject properties despite parties' concurrence that the properties the subject of these proceedings are matrimonial house in makaburini estate mariakani plot no.61 and matrimonial house in celebration estate mariakani plot number xxx block 4 R6
24. Thirdly, the judgment in petition number 61 of 2011 delivered on 9th June 2014 found that the petitioner and respondent had equal proprietary rights over the four rooms in makaburini mariakani plot number 120 now plot number xx. This position was reinforced by Judge Ogola's ruling of 10th July 2018 where the learned judge ordered that the matrimonial home comprising of four rooms (4) rooms at makaburini estate mariakani be shared equally between the petitioner and the respondent.
25. Fourthly, both the judgment and ruling a foresaid in petition number 61 of 2011 have not been challenged hence the orders arising therefrom remain intact. Based on the two decisions above quoted, do the contested properties qualify to be matrimonial property capable of division? For a property to qualify as matrimonial property, it must meet the definition under Section 6 [matrimonial property act](#) which provides:
 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.
 2. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
 3. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
 4. 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.



1. Regarding plot No.xx, it was the petitioner’s argument that when they got married, the petitioner was staying in a mud walled house and that is when they developed plot No.xx.The respondent disputed this position thereby claiming that plot number xx was not acquired during coverture. In his witness statement the respondent stated that he had already acquired Plot No.xx before his marriage to the petitioner. However, he did not offer any explanation nor proof on how it was acquired.
27. Equally, the petitioner did not attach evidence to show on how that plot was acquired and when. That notwithstanding, she attached several hardware receipts in support of her supplementary affidavit sworn on 17th June 2020 to express the point that around the year 2014, she bought construction materials among them cement, nails, iron sheets, ridges, plywood and an assortment of building materials marked JN-1 for purposes of renovating the house erected on the said property and therefore proving contribution to justify her claim.
28. Does improvement of a house serving as matrimonial home amount to contribution? Under section 2 of the [matrimonial property Act](#), contribution towards acquisition of matrimonial property is defined as;

“ 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.
29. The other question begging an answer is whether improvement on matrimonial property justifies a claim of ownership. Section 7 of the [Matrimonial Property Act](#) provides 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.”
30. Taking into account the fact that none of the parties proved with certainty when the subject property was acquired, the presumption is that it was acquired during coverture. Further, considering the amount of improvement made on the property by the petitioner and the existence of the judgment and ruling in petition number 61 of 2011 declaring equal rights over the property, I have no reason not to uphold the position that both parties are entitled to equal share of the property in question at the ratio of 50:50 having contributed towards its acquisition and improvement both directly and indirectly. To that extent, the petitioner cannot be said to be a tenant in her matrimonial home.
31. Regarding plot No.xxx, the petitioner stated that in the year 2000 the respondent informed her that he had bought Plot No.xxx Block 4 row 6 at celebration estate and wanted it developed jointly. That she took a loan of Kshs 180,000 from Kenya commercial bank which she contributed to the construction of that property. That she also added Kshs 30,000 for the purchase of doors for the house. Evidence to that effect by way of a cheque was attached in support of the supplementary affidavit sworn by the applicant on 17th June 2020.



32. Save for a mere denial by the respondent that the petitioner did not make any contribution, he did not tender any evidence to prove how the property was developed or improved. It is trite that contribution in acquisition of matrimonial property cannot be assessed with mathematical precision. In this case both parties made contribution either directly or indirectly towards either acquisition or improvement. See Section 9 of the *matrimonial property Act* which spells out the beneficial interest of a spouse who has contributed to improvement of matrimonial property as follows”

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the 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.”

33. The above position was upheld in the case of *AWM v JGK* [2021] eKLR where the court in dealing with non-monetary contribution stated that;

“It is my considered view that the non-monetary contribution often-times cannot be quantified. If that contribution were to be reduced to monetary terms, I am sure that a woman’s non-monetary contribution in the home would amount to a higher amount compared to that of the man. It is my finding therefore that the Applicant made monetary and non-monetary contribution towards acquiring the matrimonial property and that her non-monetary contribution is higher than that of the Respondent.”

34. The act of supervision in renovating the house is in itself an act of indirect contribution. In any event, division of matrimonial property is not about equality but equity. See the case of *Peter Njuguna Njoroge v Zipporah Wangui Njuguna*(2013) e KLR where Kiage JA went to a great extent to emphasize on what equality means in division of matrimonial property under Article 45(3) of *the constitution* as follows;

“Does this marital equality recognized in *the constitution* mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement”

35. However, in the instant case, the fact that the property was solely acquired by the respondent who in one way or the other also contributed towards its development using his pension which is not denied and, further considering that the court in petition number 61 of 2011 had found at para.34 that the petitioner had made partial contribution in developing the property at celebration estate which is plot 415 in this case, I am inclined to find that the respondent did make substantial contribution than the petitioner hence apportion the property in the ratio of 30:70 in favour of the respondent.

36. Regarding the question that plot known as celebration no. 415 may have been sold, the court correctly observed in the judgment of judge Tuiyot, the same although not proved was without court’s authority as there was an injunction in place. In any event, nobody has come up as an interested party to claim beneficial interest over the property.

37. Having made the above finding, I am inclined to make the following orders;



- a. The suit property being matrimonial house in Makaburini Estate, Mariakani (Plot No.xx) and matrimonial house in celebration estate, Mariakani (Plot No.xxx) are matrimonial properties.
- b. That Makaburini plot number xx Mariakani be and is hereby distributed equally at 50% each.
- c. That plot known as celebration mariakani xxx block 4 R6 be and is hereby shared out in the ratio 30% against 70% in favour of the respondent
- d. That if the properties are not capable of subdivision, parties shall engage a mutually agreed valuer to value the property and thereafter sell the same at the market value and then share the proceeds thereof in the ratio or percentage directed above.
- e. That in the event title and ownership of any of the suit properties has/have been transferred in favour of a third party, the proceeds be accounted for and the same be divided as directed above in default, the 3rd parties contemplated herein to pursue the respondent for recovery of their purchase price having bought the property that was already injunctioned at the material time.
- f. This being a family matter, each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL, 2022

J. N. ONYIEGO

JUDGE

