



REPUBLIC OF KENYA



KENYA LAW
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**HJL v EME (Originating Summons 2 of 2021)
[2022] KEHC 10791 (KLR) (20 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 10791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 2 OF 2021**

JN ONYIEGO, J

APRIL 20, 2022

BETWEEN

HJL APPLICANT

AND

EME RESPONDENT

JUDGMENT

1. The applicant herein HJL contracted her monogamous marriage with EME (hereinafter the respondent) on 29.4.1995. However, their marriage hit a rock and the inevitable divorce came knocking on 17th July, 2020 when a divorce decree absolute was issued by Mombasa Chief Magistrate's court vide divorce cause No 14 /2018.
2. Subsequently, HJL (hereinafter the applicant) moved to this court vide an Originating Summons dated and filed on 2nd February ,2021 seeking orders that ;
 - a. A declaration that the below listed properties are owned jointly by the applicant and the respondent.
 - (a) Plot in Moroto furnished with matrimonial home with 12 rooms.
 - (b) Shambas in Witu
 - (c) Motor vehicles registration Nos. KAG xxxx and Harrier No KBS xxxx.
 - (d) Plot in Bamburi savings [particulars withheld]
 - b. An order for the above properties hereto be given back to the applicant in such percentage as the court deems fit.
 - c. A mandatory injunction restraining the respondent by himself, his servants, agents and/or employees from interfering, selling or alienating the suit properties until this case is determined.



- d. An order that the above properties were acquired by the applicant and unless the court intervenes then the respondent be restrained from disposing the same.
 - e. An order that the respondent do execute necessary documents of transfer of the applicant's portion in the above properties and in default, the Deputy Registrar or any other court official do execute the same.
 - f. In the event that any property has been transferred to a third party before this suit was filed that the respondent to account for the proceeds therefore for equitable distribution between the parties.
3. The summons is anchored on the grounds stated thereof and averments contained in the affidavit in support sworn on 2nd February, 2021.
 4. The applicant's case is to the effect that the respondent had no material possession as at the time of their marriage .That it was during the subsistence of their marriage that they managed to jointly acquire a plot comprising of 12 rooms which constituted their matrimonial home, shambas in witu , motor vehicle Reg numbers KAG xxxx and harrier No KBS xxxx, Bamburi plot and savings at Metro Canon.
 5. She further averred that she bought two pieces of land at Shanzu Mombasa in which she erected a matrimonial house with 3 rooms on one plot and a rental house on a second plot.
 6. In response, the respondent filed a replying affidavit sworn on 22nd February, 2021 in which he averred that his marriage with the applicant was full of trouble and weird behaviour by the applicant towards him and children thus culminating to their divorce.
 7. He basically denied knowledge of the existence of all the properties listed by the applicant. He stated that the applicant did sell their farm in Kitale after demolishing their matrimonial home. He claimed that after selling the said farm, the applicant carried away all their property to a new farm which she had bought using the sale proceeds from the sale of their Kitale farm.
 8. In her rejoinder, the applicant filed a further affidavit sworn on 16th April, 2021 stating that, during the subsistence of their marriage ,they were both working as pastors and therefore earned a monthly salary from [particulars Withheld] church. She attached a letter from the said church dated 30th July, 2019 confirming to her that she was only entitled to a token of appreciation at kshs1,000 per month from 2008-2013 and kshs 2000 from 2016-2017 as assisting pastor.
 9. She reiterated the position that the subject properties were in existence and that the respondent was in possession of all ownership documents .She however attached a copy of the log book for motor vehicle KAG xxxx registered in the name of EME.
 10. During the hearing, the applicant (Pw1) told the court that, during corveture,the church gave them a plot located on government land. That they constructed 12 rooms without any ownership documents. She stated that they were occupying the said plot as squatters. She further told the court that, while serving the church as pastors, the church bought them motor vehicle Reg No. KAG xxxx. That they saved about Ksh 400,000 with metro Canon policy no xxxx.
 11. It was her further evidence that they bought 4 acres excised by the chief from witu forest. Regarding the Bamburi plot, she could not remember the number or how much it was bought.
 12. Pw2JKM a friend to the applicant and the respondent told the court that while worshipping together at [Particulars Withheld] church, PM ((respondent) was chased away the year 2018 due to bad behaviour. She told the court that as a church, they bought the couple (applicant and respondent) motor vehicle



Reg KAG and 5 acres at Moroto. She further stated that the two bought another 5 acres at Witu. She confirmed that the motor vehicle was held in the name of church trustees.

13. On his part, the respondent (Dw1) told the court that the only property they had as a couple was the Kitale property. Regarding motor vehicle Reg KAG it was his evidence it was bought for him by the church as a pastor. He however stated that in the year 2017 they ran into school fees arrears amounting to a sum of Kshs150,000 at [Particulars Withheld] college where their daughter was schooling thus forcing them to sell Kitale property and the motor vehicle to clear the fees.
14. He denied owning any car at the moment. As to Moroto land, he claimed that it was government land from which they were evicted. He further stated that, at some point, the church assisted them buy a plot in which they built 4 room and later extended to 12 rooms which they later sold to raise funds for him to go to Singapore for further studies.
15. As to Witu property, he claimed that he bought it at Kshs 14,000 from the local chief who was allocating land but they were later chased out as it was government property.
16. Upon conclusion of the hearing the applicant filed her submissions in person on 14th December 2021 attaching several documents with the view of proving her clam. Basically, the applicant adopted the averments contained in her affidavit in support of the application. She contended that the properties in question were acquired during coverture. She opined that the alleged sale of Moroto property and motor vehicle KAG xxxx was not true as there was no evidence to prove the sale.
17. On the other hand, the respondent filed his submissions in person on 14th December, 2021 reiterating the content in his replying affidavit. He contended that he had no idea over the existence of Harrier Reg No KBS xxxx.
18. He maintained that Moroto property was sold at Kshs120,000 out of which he spent kshs50,000 to travel to Singapore while the balance of 70,000 was paid to the applicant while he was in Singapore. He submitted that his monthly salary is kshs20,000 as a pastor and that he is the one paying school fees for their children. He purported to attach sale agreement for motor vehicle KAG xxxx and school fees for their child.

Determination

19. I have considered the summons herein, evidence by both parties and written submissions. Issues that arise for determination are;
 - a. Whether the subject properties form part of matrimonial property
 - b. Whether the subject properties were acquired during coverture
 - c. What was each party's contribution
20. The crux of the matter is determination of the question whether the subject properties does exist and whether they were acquired during the existence of their marriage hence matrimonial property as defined under section 6 of the Matrimonial Act which provides;
 - (1) For purposes of this Act, matrimonial property means;
 - (a) The matrimonial home or homes
 - (b) Household and effects in the matrimonial home or homes or
 - (c) Any other immovable and movable property owned and acquired during the marriage.



21. However, it is incumbent upon a party claiming that a certain property indeed constitutes matrimonial property to prove the same. For one to acquire an interest on property acquired during coverture, he or she must prove contribution which is either direct or indirect. This position is clearly provided for under Section 7 of the *matrimonial property Act* which defines contribution to mean monetary and non- Monetary contribution which includes -
- a. Domestic work and management of matrimonial home.
 - b. Child care
 - c. Companionship
 - d. Management of family business or property; and
 - e. Farm work
22. Section 2 goes further to define matrimonial home to mean;
- “any property that is owned or leased by one or both spouses or acquired by the spouse as their family home and includes any other attached property”
23. To galvanize the above quoted provisions, Section 7 of the said 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.
24. Section 14 further provides that;
- “Where matrimonial property is acquired during marriage
- a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse
 - b. In the name of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property be equal.
25. In further illuminating light on the significance of proving contribution in matrimonial property disputes, the court of appeal in the case of *Edward Ng'anga'a Kairu vs Mary Njoki Ng'anga'a* civil appeal No 559/2019 Nairobi had this to say ;
- “On the material placed before the Judge, there was no basis at all to reach the conclusion that the parties to the marriage were entitled to an equal distribution of the matrimonial property. There were not. Evidence showed that the appellant paid for the properties in full with no monetary contribution by the respondent at all. Although the properties were registered in their joint names, the appellant was able to show that he did that purely for the affection he had for his wife at the material time. When divorce came the appellant proved to the required standard that he had personally provided and paid for the properties. The respondent did not make any monetary contribution. The appellant was able to rebut the presumption that the properties which were jointly registered were equally owned. In any event marriage perse is not a basis for sharing properties acquired during marriage in an equal basis”



26. However, in assessing a party's contribution in the acquisition of matrimonial property, each case must be determined on its own peculiar facts and circumstances. see *Muthembwa v Muthembwa* [2002] eKLR.
27. In the instant case, a number of properties have been listed. I will therefore deal with each separately.

(a) Shamba in witu

28. According to the applicant, this property which has no ownership documents was given by the area chief after excising the same from Witu forest. This position was confirmed by the respondent who stated that they were allocated the said plot by the area chief after parting with kshs14,000. The applicant in her evidence in chief confirmed that it was government land. For all purposes and intent, there is no proof that the couple legally owned the said land. They were squatters hence this court has no powers to share out government property. If they are willing to continue staying there as squatters, that is up to them but not for this court to legalise their illegal occupation. For those reasons that land is not available for distribution.

(b) Motor vehicle Reg No. KAG xxxx

29. Both parties in their respective affidavits and oral evidence confirmed that the motor vehicle was bought for the pastor (respondent) and given as a gift. The respondent said he was the pastor and therefore his property although registered in the church trustee's name. He however claimed that he later sold the same. To prove the said sale he attached a sale agreement together with his submissions. However, it is trite law that a party cannot plead evidence through submissions. This position was succinctly stated in the case of *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi and another* [2014] eKLR and Kenneth Omollo Simbiri ELC appeal No 23 of 2019 Kisumu.
30. Although there is no proof of sale, none of the parties contributed to its acquisition. Nevertheless, it was a gift to the pastor who is the respondent as appreciation for pastoral services. Even Pw2 confirmed that fact. In the circumstances, this court can not purport to share out church property which was gifted to the respondent for rendering pastoral duties. Even if he sold it, it would still be with authorization by the church for their own good reasons in consultation with their pastor. Therefore, this property is not available for distribution.

(C) Motor vehicle KBS xxxx

31. This property was listed but its existence remains as a mystery. The respondent denied knowledge of the same. The applicant did not attempt to prove its existence. There is no evidence that such m/v was acquired during their marriage hence not matrimonial property. This property was listed but none of the parties adduced proof of its existence as no ownership documents was produced or tendered. Accordingly, I cannot distribute what does not exist.

(d) Saving Metro Canon.

32. The allegation that there is a policy with Metro Cannon savings with pastor's savings organization known as Generation, none of the parties produced evidence to prove their existence. It is trite law that he who alleges must prove. In the absence of any proof, the alleged savings can not constitute matrimonial property hence nothing to share.



(e)Moroto property comprising a matrimonial home.

33. The applicant claimed that the church helped them acquire the said property in which they constructed 12 rooms. She claimed that the property is on government land hence has no title deed. On the other hand, the respondent claimed that they sold the property at kshs120,000. That he used Kshs 50, 000 as he went to Singapore to study and a balance of Kshs 70,000 was given to the applicant while he was in Singapore.
34. To prove the alleged sale, he attached a sale agreement together with submissions. As stated above, this is valueless evidence as a case cannot be pleaded through submissions. Be it that as it may, the applicant's admission in her evidence in chief that the 12 rooms were erected on government land is clear in itself that they have no proprietary rights on the said property on which they were squatters. This court again cannot distribute government land as none of the parties had a legal right to occupy the same. If they want to occupy the same as squatters, that is their own problem but this court cannot sanitize an illegality.
35. Regarding property in Shanzu/Bamburi, none of the parties tendered evidence over the existence of such property hence nothing to share.
36. In view of the above reasons stated, I do not find sufficient evidence to prove that the subject properties amount to matrimonial property. Accordingly, the Originating Summons herein is dismissed. This being a family related dispute each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF APRIL, 2022

J. N. ONYIEGO

JUDGE

