



REPUBLIC OF KENYA



KENYA LAW
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**JNW v FWN (Civil Case 59 of 2018)
[2022] KEHC 12848 (KLR) (Civ) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 59 OF 2018

MA ODERO, J

AUGUST 5, 2022

BETWEEN

JNW PETITIONER

AND

FWN RESPONDENT

JUDGMENT

1. Before this Court for determination is the Originating Summons dated 3rd September 2018 by which the Plaintiff JNW seeks the orders:-

“ 1. THAT it be declared that the properties listed below herein were acquired and developed by joint funds and efforts of the Applicant and the Respondent during the subsistence of the marriage and registered in the name of the Respondent in trust and are owned jointly by the Applicant and the Respondent in equal shares. Plot No. 58XX – Embakasi Ranching company Ltd Plot No. 58XXX – Embakasi Ranching company Ltd Plot No. 28XX – Embakasi Ranching company Ltd Plot No. 28XXX – Embakasi Ranching company Ltd Parcel Numbers Nairobi Block 105/6000-60XX (Ruai) House No. 127/5XX in Saika Estate Title No. Nairobi/Umoja/Block 109/22XX Jada Plot No. X Saika Estate Title No. Narumoru/Kiamathage Block 1/1XX-3 acres Title No. Narumoru/Mururu Block 2/8XX – 4 acres Tigithi Land in Narumoru – 10 acres Endana Land in Narumoru – 12 acres Motor Vehicle Registration No. KAE XXXP Subaru Leone Motor Vehicle Registration No. KAM XXXL – Mazda Motor Vehicle Registration No. KWN XXX – Range Rover Motor Vehicle Registration No. KAC XXXD – Subaru Pick up Motor Vehicle Registration No. KAM XXXF – Toyota Hiace Motor Vehicle Registration No. KAE XXXU – Nissan Caravan Motor Vehicle Registration No. KAB XXXW – Toyota Hilux Motor Vehicle Registration No. KRD XXX – Land Rover Motor Vehicle Registration No. KVD XXX



– Land Cruiser Motor Vehicle Registration No. KCA XXXV Harrier Motor Vehicle Registration No. KAT XXXZ – Mercedes Benz Motor Vehicle Registration No. KBR XXXS – JMC Pick Up Motor Vehicle Registration No. KTN XXX – Fiat Lorry Motor Vehicle Registration No. KYH XXX – Toyota Lorry Motor Vehicle Registration No. KZY XXX – Toyota Lorry Motor Vehicle Registration No. KAJ XXXC – Mitsubishi Fuso Lorry Motor Vehicle Registration No. KAN XXXY – Mitsubishi Fuso Lorry Motor Vehicle Registration No. KAL XXXC – Hino Lorry.

2. THAT an order do issue declaring that 50% or such other or higher proportion of the properties aforesaid is held by the Respondent in trust and for the beneficial interest of the Application.

3. THAT the said properties be shared equally and that if any, it is incapable of being shared, it be sold and the net proceeds be shared equally between the Applicant and the Respondent or in such manner the court may deem just.

4. That this Honourable court be pleased to order that the sale proceeds from any of the aforesaid properties be settled in portions of aforesaid or as the court may order.

5. That the Respondent do transfer at his own costs and expense of the aforesaid portion of the said properties as the court will find in favour of the Applicant forthwith and in default of the Respondent signing, executing or endorsing the necessary documents for the transfer, the Deputy Registrar of this Honourable Court do sign, execute and/or endorse such papers/documents to effect the relevant transfer.

6. That the Respondents to pay the costs of the summons.”

2. The summons was supported by the Affidavit of even date as well as the Further Affidavit dated 14th December 2018 both sworn by the Plaintiff.
3. The Defendant FWN opposed the summons through his Replying Affidavit dated 19th November 2018 as well as the Supplementary Affidavit dated 11th January 2019. The matter was canvassed by way of viva voce evidence on the virtual platform.

EVIDENCE

4. The Plaintiff relied entirely upon her witness statement dated 20th November 2019. The Plaintiff stated that she got married to the Defendant in the year 1978 under Kikuyu Customary Laws. That the couple later formalized their marriage at the PCEA church on 5th November 1987. A copy of their Marriage Certificate Serial Number 20XXX appears as Annexure ‘JNW-1’ to the Plaintiff’s Supporting Affidavit dated 3rd September 2018. Their union was blessed with four (4) children.
5. The Plaintiff informed the court that the Defendant filed in the Milimani Commercial Court Divorce Petition No. 4 of 2002. That their marriage was dissolved on 3rd December 2004 vide the Decree Nisi dated 17th August 2006 (Annexure ‘JNW-3’).
6. The Plaintiff states that she and the Defendant operated together the business known as [particulars withheld] which Company had been contracted by Kenol, Kobilto transport fuel. She states that arising from this business the couple jointly acquired the following properties. Plot No. 58xx – Embakasi Ranching company Ltd Plot No. 58XXX – Embakasi Ranching company Ltd Plot No. 28xx – Embakasi Ranching company Ltd Plot No. 28XXX – Embakasi Ranching company Ltd Parcel Numbers Nairobi Block 105/60xx-6XXX (Ruai) House No. 127/5xx in Saika Estate Title No. Nairobi/Umoja/Block 109/2XXXX Title No. Narumoru/Kiamathage Block 1/1XX-3 acres Title No.



Narumoru/Mururu Block 2/8XX – 4 acres Tigithi Land in Narumoru – 10 acres Endana Land in Narumoru – 12 acres
Motor Vehicle Registration No. KAE XXXP Subaru Leone
Motor Vehicle Registration No. KAM XXXL – Mazda
Motor Vehicle Registration No. KWN XXX – Range Rover
Motor Vehicle Registration No. KAC XXXD – Subaru Pick up
Motor Vehicle Registration No. KAM XXXF – Toyota Hiace
Motor Vehicle Registration No. KAE XXXU – Nissan Caravan
Motor Vehicle Registration No. KAB XXXW – Toyota Hilux
Motor Vehicle Registration No. KRD XXX – Land Rover
Motor Vehicle Registration No. KVD XXX – Land Cruiser
Motor Vehicle Registration No. KTN XXX – Fiat Lorry
Motor Vehicle Registration No. KYH XXX – Toyota Lorry
Motor Vehicle Registration No. KZY XXX – Toyota Lorry
Motor Vehicle Registration No. KAN XXXY – Mitsubishi Fuso Lorry
Motor Vehicle Registration No. KAL XXXC – Hino Lorry.

7. That although the above properties were jointly acquired during the course of their marriage all except two (2) of the properties were registered in the sole name of the Defendant.
8. The Plaintiff claims that following their divorce the Defendant has been selling, disposing and otherwise dealing with the said properties to her exclusion and without her consent. That she has been denied any share of the income derived from the rental properties, which amounts to over Kshs 900,000/- per month. The Plaintiff states that by virtue of her having been wife to the Defendant and by virtue of her having contributed towards the acquisition of the properties when she was a partner in the family business, she is entitled to a fifty per cent (50%) share of the matrimonial property.
9. The Plaintiff further stated that after her eviction from the matrimonial home in the year 2000 the Defendant accused her of the offence of Robbery with violence resulting in her being locked up in jail and being charged in court. That although the charges were later withdrawn, the pressure from the divorce and the court case caused her to suffer depression. That this couple with her precarious financial position prevented the Plaintiff from filing this suit for division of matrimonial property earlier. That she has only recently recovered sufficiently to enable her file this suit in court to recover what is due to her.
10. As stated earlier the summons was opposed by the Defendant who relied on his witness statement filed in court on 4th December 2019. The Respondent confirms that he and the Respondent were married for about twenty (20) years and that they bore four (4) children together. However, the Defendant states that the couple divorced in August 2004. According to the Defendant the Plaintiff ought to have filed this suit immediately after their divorce. He claims that her action in filing suit fourteen (14) years after the divorce is calculated to vex and harass him and disturb his peace.
11. The Defendant denies that the property listed by the Plaintiff are all registered in his name. The Defendant states that the Plaintiff sold off the following properties without his knowledge and/or consent.
 - i. Umoja House No. 8XX
 - ii. Githurai Kimbo Plot
 - iii. 20 cows on Ruai Farm
 - iv. 20 cows on Nyeri farm
 - v. 30 cows on Narumoru farm
 - vi. Motor Vehicle Registration No. KWN XXX-Toyota K70
 - vii. Motor Vehicle Registration No. KAE XXXP – Subaru Leone to Kahiraini Parish



- viii. Motor Vehicle Registration No. KAM XXXF- Toyota Hiace
- ix. Motor Vehicle Registration No. KYH XXX – Toyota Lorry
12. The Defendant further states that after the couple separated the Plaintiff withdrew funds to totaling Kshs 3.0 million from their account held at Barclays Bank of Kenya. That she left the matrimonial home carting away all the household goods leaving him financially crippled. The Defendant confirms that he lodged a complaint to the police, which led to the Plaintiff being charged with the offence of Robbery. That charge was later withdrawn.
13. The Defendant claims that some of the vehicles listed by the Plaintiff has been sold off. He further states that several of the properties listed by the Plaintiff are properties, which he acquired after the couple had divorced and therefore cannot be deemed to be matrimonial property.
14. The Defendant states that some of the properties being claimed by the Plaintiff actually belong to her. The Defendant further denies all knowledge of the following properties and puts the Plaintiff to strict proof of the existence of the same.
- a. Tigithi Land in Narumoru – 10 acres (unknown to the Respondent)
 - b. Endana Land in Narumoru – 12 acres (unknown to the Respondent)
 - c. Motor Vehicle Registration No. KAE XXXP Subaru Leon (sold by Petitioner to a Catholic Priest)
 - d. Motor Vehicle Registration No. KAM XXXL – Mazda (unknown to Respondent)
 - e. Motor Vehicle Registration No. KWN XXX – Range Rover (grounded)
 - f. Motor Vehicle Registration No. KAC XXXD – Subaru Pick up (it was written off after an accident)
 - g. Motor Vehicle Registration No. KAM XXXF – Toyota Hiace (unknown to Respondent registered owner Diana Jepchirchir Lagatt)
 - h. Motor Vehicle Registration No. KAE XXXU – Nissan Caravan
 - i. Motor Vehicle Registration No. KAL XXXC – Hino Lorry (unknown to the Respondent)
 - j) Motor Vehicle Registration No. KVD XXX – Land Cruiser (unknown to Respondent)
 - k) Motor Vehicle Registration No. KRD XXX – Land Rover (unknown to the Respondent)
 - l) L.R. No. Nairobi Block 105/6XXX-6XXX (Mawe Police Post and Neighbours)
15. The Defendant states that the averments made by the Plaintiff in her Affidavits are misleading. He terms the present suit as frivolous and vexatious and urges the court to dismiss the same with costs.
16. At the close of oral evidence the parties filed their written submissions. The Plaintiff filed the written submissions dated 15th November 2021 whilst the Defendant filed written submissions dated 14th December 2021.

Analysis and determination

17. I have carefully considered the summons dated 3rd September 2018, the Replying Affidavit filed by the Defendant, the evidence adduced by both parties as well as the written submissions filed by both parties.



18. The following are the issues, which arise for determination –
- (i) Whether the properties listed by the Plaintiff constitute matrimonial property.
 - (ii) Whether the Plaintiff is entitled to the orders sought in this summons.

(i) Whether the named properties constitute matrimonial property.

19. Section 6 of the *Matrimonial Property Act*, 2014 defines Matrimonial Property as follows:-

“(1) For purposes 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.”

20. Article 45 (3) of *the Constitution* of Kenya 2010 provides that-

(3) 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.”

21. The Plaintiff has listed several properties, which she claims were acquired during the subsistence of her marriage to the Defendant. It is common ground that the parties herein got married in 1978 and divorced in the year 2004. In order to prove her claims to the share of the alleged matrimonial properties, the Plaintiff must prove firstly that the said properties/Assets exist and secondly that they were acquired during the subsistence of the marriage.

22. The burden of proof lies squarely upon the Plaintiff. Section 107 of the *Evidence Act*, Cap 80 Law of Kenya provides that –

107 (1) “Whoever desires any court to give judgment as to any legal or liability 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.”

23. The court did in the initial stages refer this matter to Court Annexed Mediation. The Mediation was partially successful and the parties entered into a consent dated 5th July 2019 as follows: -

“That by consent the plaintiff and defendant agree as follows during the mediation session of 5th July 2019 held at Milimani Commercial Court:-

1. That the following properties per the attached copy receipts made in favour of the Plaintiff/Applicant belong to the Plaintiff/Applicant and are hereby deemed to be hers: -
 - i. Plot No. 58XX
 - ii. Plot No. 58XXX
 - iii. Plot No. 2XXX
 - iv. Plot No. 28XXX



2. That the Respondent formally renounces any claim to the aforesaid properties.
 3.”.
24. Under the terms of that consent the Defendant renounced any claim to the four (4) plots named in the consent. He stated that the four (4) Plots 58XX, 58XXX, 28XX and 28XXX belong entirely to the Plaintiff. The Defendant in his evidence reiterated the plots in Embakasi Ranching Company being Plot Nos 58XX, 58XXX, 28XX and 2884B all belonged to the Plaintiff and are registered in her name. As such, the Defendant confirms that he has no claim whatsoever over the said four (4) plots. In the circumstances, those four (4) Plots being Plot Nos 58X, 58XXX, 28X and 28XXX Embakasi Ranching Company are declared to be the exclusive property of the Plaintiff and do not form part of the Subject matter of this suit.
25. Similarly, the Defendant told the court that Title Number Narumoru/Kiamathage Block 1/108-3 comprising of three (3) acres is their rural matrimonial home. He states that although he connected water and electricity to the said plot he has left it entirely to the Plaintiff as she occupies said property to date. The Defendant states that he has ceded the three (3) acres in Narumoru to the Plaintiff. Under cross-examination, the Defendant reiterates that –
- “Narumoru/Kiamathage is our rural home. I have given it to the Plaintiff.”
26. Accordingly Title No. Narumoru/Kiamathage Block 1/108 is deemed to belong to the Plaintiff and does not form part of the Subject matter of this dispute.
27. Regarding the eight (8) plots which had been purchased in Ruai, the Defendant states that four (4) of the plots belong to the Plaintiff and only four (4) are registered in his name. The Defendant states that he has no objection to the Plaintiff being given four (4) of the Plots in Ruai. In his evidence, he states that Nairobi Block 1XX, Plots 60XX, 60XX, 60XX and 60XX in Ruai all belong to the Plaintiff and are registered in her name. The Defendant states that the Title Document for the four (4) plots are in the possession of the Plaintiff. Accordingly, Plots 60XX, 60XX, 60XX and 60XX, Ruai are removed the issues requiring determination from this suit.
28. The Plaintiff has claimed an equal share of the eight (8) plots in Ruai. This court finds that the Defendant has already ceded four (4) of the Ruai Plots to her. Therefore, the Plaintiff already has a fifty percent (50%) share of the Ruai Plots. The court find this to be fair and just.
29. Regarding Plot 109/2XXX in Umoja to which the Plaintiff claims a share. The Defendant has informed the court that he has given the said Plot to the couple’s eldest son to reside in. That the said son runs a business in this Umoja Plot. The Plaintiff herself confirmed to the court that her son resides on that Plot with his family. Her son earns a living from the business which he runs on that property. The Plaintiff has not demonstrated why her son should be denied the property given to him by his father from which he earns a living. She has not demonstrate what contribution if any she made towards the acquisition of this Umoja Plot.
30. The Plaintiff has claimed a share of Title Number Narumoru/Kiamathage Block 2/8XX consisting of four (4) acres. The Defendant admits the existence of this parcel of land but states that the same was sold in the year 2004 in order to offset a debt owed to Barclays Bank in respect of a loan taken using the rural home as security. He states that he sold the Plot for Kshs 2.0 million.
31. Although the Defendant has not exhibited a Sale Agreement in respect of the sale of this property he has annexed his Supplementary Affidavit dated 11th January 2019 a Notification on sale dated 13th July 2013 issued by Garam Investment as well as a charge (Annexure ‘FWN-2’) in respect of the property



- known as Naromoru/Block II/Muriru/8XX. The Respondent insists that he sold this property to offset a loan owed to the bank. He insists that he paid the Kshs 2.0 million purchase price to Barclays Bank to offset a loan owing on the rural home, which he has now ceded to the Plaintiff.
32. From the evidence there existed two parcels of land in Naromoru. One was three (3) acres being Plot No. 108, which by the consent of the Defendant now belongs to the Plaintiff. The other was a four (4) acre Plot No. 8XX which the Defendant sold to offset a bank loan due on Plot 1XX. In the circumstances, each party has benefited from one plot each in Naromoru. In my view, this is just and fair. I find that Plaintiff is only entitled to Title No. Naromoru Block 1/1XX.
 33. The Plaintiff claims a share of House No. 127/5XX Saika Estate, which she claims, was acquired during the subsistence of the marriage. On his part, the Defendant states that the Saika House belonged to the Plaintiff's brother in law one AMK who sold it to him in the year 2015. The Defendant has annexed to his Further Affidavit a copy of a Sale Agreement dated 30th April 2015 in respect of the Sale of this Saika House. (Annexure 'FWN-2'). Therefore, I find that this property was acquired by the Defendant several years after the marriage had been dissolved. It therefore cannot be deemed to be matrimonial property and the Plaintiff is not entitled to a share of the same.
 34. Regarding the other priorities to which the Plaintiff claims a share, the onus lies on her to prove the existence of the said properties as well as proof that the same are registered in the name of the Defendant. The Defendant states that he has no knowledge of the following assets:- Tigithi Land in Narumoru – 10 acres Endana Land in Narumoru – 12 acres Motor Vehicle Registration No. KAM XXXL – Mazda Motor Vehicle Registration No. KAM XXXF – Toyota Hiace Motor Vehicle Registration No. KAE XXXU – Nissan Caravan Motor Vehicle Registration No. KAL XXXC – Hino Lorry. Motor Vehicle Registration No. KVD XXX – Land Cruiser Motor Vehicle Registration No. KRD XXX – Land Rover
 35. The Plaintiff has not availed to the court any documentary evidence to prove that the Endana Land 12 acres or the Tigithi land are registered in the name of the Defendant. The court cannot make orders in respect of properties whose ownership is unknown.
 36. The Defendant claims that L.R. No. Nairobi Block 1X is not his property but belongs to the Mawe Police Post and to neighbours.
 37. The Plaintiff has not availed to the court any evidence in the form of Title Documents to prove that the said properties/assets exist and belong to the Plaintiff much less evidence of when those assets were acquired. Some of the properties claimed by the Plaintiff (motor vehicles) are registered in the names of third parties e.g. Motor Vehicle Registration No. KAM XXXF – Toyota Hiace (unknown to Respondent registered owner Diana Jepchirchir Lagat) Motor Vehicle Registration No. KYH XXX Toyota Lorry registered to Cyrus Riiru Mwaura
 38. These vehicles do not belong to the Defendant and thus court will not make orders in respect of assets owned by third parties who have not been given an opportunity to be heard by the court.
 39. Several other vehicles had log-books produced but the names of the owners were not indicated. The onus is on the Plaintiff to prove that these vehicles were registered in the name of the Defendant. She failed to discharge this burden of proof in respect of any of the listed vehicles.
 40. Finally and in conclusion this court makes the following orders:-
 - (A) The following properties are hereby declared to be matrimonial property and are to be immediately transferred exclusively to the Plaintiff.



1. Plot No. 58XX – Embakasi Ranching Company Ltd.
2. Plot No 58XXX - Embakasi Ranching Company Ltd.
3. Plot No. 28XX - Embakasi Ranching Company Ltd.
4. Plot No. 28XXX - Embakasi Ranching Company Ltd.
5. Parcel Numbers Nairobi Block 105/60XX, 60XX, 60XX and 60XX (Ruai)
6. Title No. Naromoru Kiamathage Block 1/1XX – 3 acres

(B) That the Plaintiff has no entitlement to the property known as Jada Plot No. 6 Saika Estate.

(C) This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 5TH DAY OF AUGUST, 2022.

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MAUREEN A. ODERO

JUDGE

