



**HRR v RMR (Matrimonial Cause 10 of 2015)
[2022] KEHC 14567 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 14567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE 10 OF 2015
JN ONYIEGO, J
SEPTEMBER 23, 2022**

BETWEEN

HRR PLAINTIFF

AND

RMR DEFENDANT

JUDGMENT

1. Vide a plaint dated June 23, 2015, and filed on June 26, 2015, HRR (hereafter the plaintiff) moved to this court against RMR her former husband (hereafter the defendant) seeking orders as follows;
 - a. A declaration that the plaintiff is entitled to an equal share in the matrimonial property.
 - b. An order directing there be appointed an independent agent to collect rent from the matrimonial property and distribute accordingly.
 - c. Costs of this suit.
2. It is the plaintiff’s case that on February 24, 1984, she celebrated her marriage with the defendant under Islamic law. That due to irreconcilable differences, the defendant deserted their matrimonial home sometime the year 2007 leading to their separation. According to the plaintiff, at the time of their marriage, the defendant had solely acquired LR/CR 30XXX plot No 2675/1/XX which comprised one-bedroom house.
3. She claimed that she did contribute both emotionally and financially after taking loans towards the improvement of the suit property to put it at its current state.
4. That despite having contributed heavily towards the said improvements, the defendant has refused and or ignored to give her neither a share of the suit property nor part of the proceeds out of the rent collected therefrom since their separation. She stated that the defendant’s actions are in contravention



- of her rights to own property as a spouse. She further demanded a share out of Kilifi/Mtwapa /2XXX and 2XXX which she claimed were acquired during coverture.
5. In response, the defendant filed a statement of defence dated August 24, 2015 thus stating that, the plot known LR MN 30690/2675/1/XX was solely acquired in 1981 about 5 years before their marriage and did developments thereof in 1983 also before their marriage. He denied the claim by the plaintiff that she did contribute towards its improvement.
 6. He further stated that he was the one who took a loan of Kshs 850,000 from KCB for purposes of improving the said property by constructing another storey on top of the existing one- bedroomed house. That further funds to improve the property were realized from the sale of two acres of his Mtwapa farm being plot No Kilifi/Mtwapa /1XXX sold to one JN Mugo at Kshs 700,000. That to further improve the property, he sold his Isuzu pick up Regn No KXA 4XX for Kshs 130,000.
 7. He denied the plaintiff's claim that she contributed towards the improvement of LR/CR 30690/2675 /1/XX nor the purchase of Kilifi/Mtwapa /2XXX and 2XXX.
 8. When the matter came up for hearing, the defendant was not present nor his counsel service of the hearing date notwithstanding. Accordingly, the matter proceeded ex parte. The plaintiff basically adopted the content contained in her witness statement recorded on June 23, 2015 and filed on the June 26, 2015 and a supporting affidavit together with the annexed documents thereof filed on the same day.
 9. She told the court that plot No 2XXX where she is currently residing consist of 3 shops and six rental houses of 2 bedroomed each. She basically urged the court to share the property together with the Mtwapa farm equally.
 10. Having closed her case and the defence having failed to turn-up, the case was deemed as closed on the defendant's side. Parties were directed to file their submissions. Unfortunately, the defendant did not file any submissions.
 11. However, the plaintiff through the firm of Marende Necheza and company advocates did file hers on December 3, 2021. It was contended that the subject properties were acquired during coverture and through the joint effort of both parties hence should be shared equally.
 12. Counsel relied on Article 45 (3) of the Constitution thus expressing herself that; parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and after the dissolution of the marriage. In that regard the court was referred to the holding in the case of *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* (Civil appeal No 127 of 2013 and *PNN v ZWN (2017) eKLR*
 13. It was further contended that the plaintiff did make direct monetary contribution through her salary while in employment and through funds acquired from loans. Besides, it was stated that the plaintiff was a poultry farmer whose income was used towards acquiring matrimonial property. Further, that she made non-monetary contribution by taking care of their 4 children besides providing companionship to the defendant as well as attending to their shop whose income was also used for the benefit and upkeep of the family.
 14. I have considered the pleadings herein, documents in support and oral testimony by the plaintiff and her submissions thereof. It is worth noting that the suit was presented by way of a plaint instead of an originating summons. However, under Article 159 (2) (d) of the Constitution, I will treat the omission as a want of form hence curable bearing in mind that courts should determine disputes without due regard to technicalities.
 15. From the pleadings and evidence at hand, I am able to discern issues for determination as follows;



- a. Whether the subject properties listed herein constitute matrimonial property
 - b. Whether the plaintiff is entitled to a share of the said properties
16. What constitutes matrimonial property. Section 6 of the [Matrimonial Property Act](#) is defined as;
- a. The matrimonial home or homes;
 - b. House hold goods and effects in the matrimonial house or houses or
 - c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage
17. However, for a spouse to be entitled to a share, one must prove contribution towards the acquisition of the subject property.
18. To fortify the aspect of contribution, Section 7 does provide that;
- “Ownership of matrimonial property-
- 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”.
19. However, it has been held in a plethora of case law that contribution does not necessarily mean direct financial or monetary contribution alone. It can be direct or indirect contribution. Under Section 2 of the [Matrimonial Property Act](#), contribution is defined as monetary or 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;
20. In the case of *NWN v KNM (2014) eKLR*, the court recognized that in determining spousal contribution, the court must give effect to both monetary and non-monetary contribution that both the applicant and the respondent made during the subsistence of their marriage in acquiring the matrimonial property.
21. Similar position was held in the case of [PWN v ZWN \(2013\) eKLR](#) and [PWK v JKG \(2015\) eKLR](#) where the court of appeal held that;

“we think that this is an appropriate case where subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five Judge bench of this court in [Echaria v Echaria](#) (Supra).

“where the disputed property is not so registered in the joint names of the spouses but registered in the name of one spouse the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has



made a substantial but un ascertainable contribution, it may be equitable to apply the maxim “ equality or equity” while heading the the caution of Lord Pearson in Gissing v Gissing (197-0) 2 All Er 780 at page 788 Para C that ;

“No doubt it is reasonable to apply the maxim in a case where there has been very substantial contribution otherwise than by way of advancement, by one spouse to the purchase of property of the other spouse but the portion borne by the contributions to the total purchase price or costs is of difficult to fix. But if it is plain , that the contributing spouse has contributed about one quarter , I do not think it is helpful or right for the court to feel obligated to award either one half or nothing”.

“we are of the respectful view that the principles restated by Echaria v Echaria are good law and contribution as the basis for distribution of matrimonial property remains valid”.

22. From the wisdom derived from the cited case law above, it is incumbent upon a party claiming to have contributed towards the acquisition of matrimonial property to prove the extent of his or her monetary or non-monetary contribution.
23. In the instant case, there are three properties listed as matrimonial property for division. The question is, were they acquired during coverture and who contributed what.
 - (1) LR / 30690 Plot No 2XXX
24. According to para.3 of the plaint, the plaintiff stated that by the time she got married, the property in question consisting of one-bedroom house had been acquired by the defendant. The plaintiff however claimed that she made contribution towards its improvement.
25. However, in his defence, the defendant confirmed that he bought the said property in 1981 about 4 years before he married the plaintiff. He further claimed that, he made improvements on the property in 1983 also much earlier before they got married.
26. From the admission of both parties, the property known as LR 2675/XX comprising one bed room was solely acquired by the defendant much earlier before their marriage. That part of the property being fixed land and the development comprising of one bed room house does not constitute matrimonial property as it was acquired before coverture.
27. The next question begging for an answer is the claim by the plaintiff that she did make contribution towards the improvements of the house/property.
28. From the list of 8 documents listed as part of documentary evidence, there is no proof that the plaintiff made any specific amount of contribution towards the development or improvement of the property.
29. However, according to her testimony, during her marriage, she was working with the ministry of livestock a job she quit at the whims of the defendant who wanted her to open a retail shop and at the same time look after their 4 children. She further claimed that in 1984 one year after their marriage they bought 5 acres of land at Kazengo along Malindi road which property they later sold at Kshs 2,000,000 to enable them develop plot No 2675/MN which they did by putting up one extra floor. That subsequently, tenants occupied some rooms thus generating income to further develop the property by putting up an extra room. She claimed that by time the defendant gave her a talaq, they had already developed the property.
30. It is clear that the testimony of the plaintiff was not controverted as the matter proceeded exparte. Although no specific evidence was tendered to prove contribution, it is clear that the plaintiff had a heavy burden in looking after the family after she was forced to resign from her job. Equally, having



been working before resigning and having managed a family shop thereafter, she definitely played a great role in home management and undertaking domestic chores. Besides, she attached a demand letter from the Agricultural Finance Corporation demanding Ksh 62,390 a loan (Ex.4 and Ex.7) as proof that she had taken a loan. However, no evidence was tendered to prove that funds from the said loan were used in improving the house.

31. In my view, the plaintiff had made some direct and indirect contribution by supporting other family services and responsibilities thus culminating to indirect contribution. See [ENK v MMN \(2021\) KECA 2019 eKLR](#) where the court recognized family management and family attendance as a form of indirect contribution towards property acquisition. Although the property is registered in the name of the defendant, the same is deemed to have been held in trust for the benefit of the plaintiff as well. It is trite that contribution need not be determined with mathematical precision. I am alive to the fact that equity is not synonymous to equality. The court however is duty to balance the scales of justice so that no one harvests where he or she has not sown. In this case, I find 40% contribution sufficient exclusive of the value of land and one-bedroom house which was acquired by the defendant solely before their marriage.

Plots No Kilifi/Mtwapa 2038 and 2039.

32. From the documents listed by the defendant on his list of documents, it shows that plot Nos Kilifi/Mtwapa/2XXX and 2XXX were registered on June 16, 2004 with the defendant as the registered owner. The registration date clearly falls within the period of the subsistence of marriage hence the properties are deemed to be matrimonial property.

33. The defendant in his defence merely stated that the two properties were not part of matrimonial property. No explanation was rendered to support the assertion. The question to answer is whether the plaintiff is entitled to a share. Section 14 of the [Matrimonial Property Act](#) is clear and provides guidelines in situations where one spouse is registered as the owner of the property acquired during marriage. It provides as follows;

“Presumptions as to property acquired during marriage-

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; and
 - b. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.
34. The court of appeal in the case of [Paul James Savage v Mona Hussein Ali Dude and Amina Mohamed Hassan](#) Civil appeal No 350 of 2017 Nairobi held that;

“the legal starting point is clear, where the legal estate in land is in the joint names of the parties, those named are presumed to hold the beneficial interest equally”

35. From the pleadings, the plaintiff stopped working in 1991 upon the defendant claiming that the salary she was getting was so little. After resignation, she took over poultry farming and management of a retail shop besides taking care of their four children. It cannot be said that all these roles were not adding value to the family. Although the plaintiff could not prove specific direct financial contribution she played a role indirectly thereby enabling the defendant to spare his resources to acquire the two properties.



36. In the circumstances, I find 40% contribution on the part of the plaintiff sufficient as well. Having held as above, I have come to the conclusion that;
- a. LR/CR 30690 plot No 2675/1/XX with one-bedroom house was acquired before marriage of the parties herein.
 - b. That the improvements on the property known as LR/CR/30XXX Plot No 2675/I/XX were made through the joint effort of both parties hence apportion their beneficial interest on the property in the ratio of 40:60% in favour of the plaintiff and defendant respectively.
 - c. That the property shall be valued by a mutually agreed valuer and then sold and proceeds realized therefrom shared out in the ratio stated above. Either party shall be at liberty to buy out the interest of the other on first priority before opening the sale to the general public.
 - d. That LR No Kilifi/Mtwapa /2XXX and 2XXX shall be shared out in the ratio of 40:60% in favour of the plaintiff and defendant respectively.
 - e. That this being a family matter each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER, 2022

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J N ONYIEGO

JUDGE

