



**MNM v PM (Originating Summons E082 of 2021)
[2022] KEHC 13783 (KLR) (Family) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
ORIGINATING SUMMONS E082 OF 2021**

M THANDE, J

SEPTEMBER 23, 2022

BETWEEN

MNM APPLICANT

AND

PM RESPONDENT

JUDGMENT

1. In the Originating Summons (OS) before me dated 11.10.21, filed against Peter Maruga, the respondent the applicant Magdalene Njoki Mbugua, seeks the following declarations and orders:
 1. A declaration that Title No. Ruiru/Kiu Block 2/499 and the developments thereon and registered in the parties' joint names as the sole property of the applicant.
 2. A declaration that Title No. Ngong/Ngong/37643 is not matrimonial property and that the same is the sole property of the applicant.
 3. A declaration that Title No. Naivasha/Mwihiringiri Block 4/2073 and Naivasha Plot No. 13(6A) constitute matrimonial property and that the same were held by the respondent in trust for the applicant and that the respondent is accountable to the applicant in respect of 50% or higher portion of the proceeds of sale.
 4. Costs.
2. The applicant's case as set out in her affidavit sworn on 13.10.21 is that she and the respondent were married on 17.8.02 at the Holy Family Basilica, Nairobi. The marriage was subsequently dissolved on 9.7.21. In 2011 the parties obtained a mortgage from Kenya Re-Insurance Corporation (Kenya Re) to purchase a house on Title No. Ruiru/Kiu Block 2/499 (the Ruiru property). The Applicant has repaid the mortgage at the monthly sum of Kshs. 87,432/= without any contribution from the Respondent.



By a letter dated 7.6.18 to Kenya Re, the respondent voluntarily forfeited, relinquished and waived all his interests, rights, shares and liabilities over the Ruiru property. He also voluntarily executed all the necessary documents to effect the transfer to the applicant. The applicant is therefore entitled to be the sole owner of the property.

3. The applicant further stated that she purchased Title No. Ngong/Ngong/37643 in 2008, through a loan from Standard Chartered Bank. She urged that she be declared the sole owner of the same.
4. The applicant accused the respondent of poor financial management. He took a loan of from NIC Bank Limited but failed to pay the same. The applicant paid Kshs. 1,691,172.81 to bail him out after he was arrested. In 2014, he sold Title No. Naivasha/Mwichiringiri Block 4/2073 for Kshs. 320,000/=. She contended that she is entitled to half the amount paid. She further stated that between 1994 and 2002, they had purchased Naivasha Plot No. 13(6A), the registration of which the respondent obtained in his sole name. He then sold the same without the applicant's knowledge, for Kshs. 1.3 million. When the applicant discovered this, the respondent paid Kshs. 1.2 million to Kenya Re after being forced to do so. The applicant stated that she was entitled to half the proceeds of sale of this property. The applicant exhibited several documents to support her claim.
5. The respondent, though served, did not participate in the proceedings herein.
6. I have considered the OS and supporting affidavit as well as the submissions filed by the applicant. The issues that fall for determination are:
 - i) Whether the suit properties constitute matrimonial property.
 - ii) Whether the applicant is entitled to a share in the suit properties and if so, what share.

Whether the suit property is matrimonial property

7. Matrimonial property is defined in section 6 the *Matrimonial Property Act* as follows:

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.
8. For an immoveable property to constitute matrimonial property, it must be the matrimonial home of the parties, or jointly owned by the parties and acquired during the subsistence of their marriage. The applicant has not stated that any of the suit properties is the matrimonial home of the parties. The documents exhibited show that the Ruiru property is registered in the joint names of the parties while the Ngong property is in the name of the applicant. The applicant's evidence is that the 2 Naivasha properties were in the name of the respondent. Accordingly, applying the foregoing definition to the circumstances herein, it is only the Ruiru property, being in the parties' joint names and acquired during their marriage, that constitutes matrimonial property.



Whether the Applicant is entitled to a share in the suit properties and if so, what share

9. Section 7 of the Act makes provision relating to ownership of matrimonial property as follows:

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.

10. Further, section 14(b) of the Act provides that where matrimonial property is acquired during marriage in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal. Such presumption may be rebutted by evidence to the contrary.

11. In the case of *O K N v M P N* [2017] eKLR, the Court of Appeal had this to say about this presumption:

Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See *Kivuitu v Kivuitu*, [1991] KLR 248. The presumption is however, rebuttable by either party showing that their contributions were not equal.

The Court went on to say:

In determining the beneficial interest of cohabitees who are registered as joint owners of a property, it is the duty of the court to, first ascertain the parties' actual shared intentions whether expressed or inferred from their conduct and secondly, it must determine what, in all the circumstances is a fair sharing of what they acquired in the course of the union. See *Stack v Dowden (supra)* and *Jones v Kernott, Gissing v Gissing* [1971] AC 866.

11. Although the equality principle set out in article 45(3) of *the Constitution* extends to division of matrimonial property, it by no means suggests that such property is to be shared 50-50 between the parties upon the dissolution of their marriage. The court must treat each spouse equally by taking into account their respective contribution, whether monetary or non-monetary.

12. In the case of *P N N v Z W N* [2017] eKLR, Kiage, JA while considering the equality principle in Article 45(3) of *the Constitution* stated:

I think that it would be surreal to suppose that *the Constitution* somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say *the Constitution* gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."

13. From the material placed before me, it is evident that the respondent relinquished his interest in the Ruiru property and even executed a transfer of his share therein in favour of the applicant. It is therefore not clear why the applicant since 2018 has not effected the transfer. My view is that the applicant should proceed to have the transfer registered in her favour without involving the Court. I therefore decline to make any order in respect of this property.



14. As regards Naivasha Plot No. 13(6A) the applicant stated that out of the purchase price of Kshs. 1.3 million, the respondent paid Kshs. 1.2 million to Kenya Re towards the mortgage repayment after being forced to do so. Having done so, the applicant cannot again claim that she is entitled to the proceeds of sale of this property. Her prayer in this regard is therefore declined.
15. I now turn to Title No. Naivasha/Mwachiringiri Block 4/2073 which the respondent is said to have sold. The applicant claimed half of the proceeds of sale. The applicant's averment with regard to her claim is that "in October, 2014 the Respondent unilaterally and without my consent sold our joint property known Title No. Naivasha/Mwachiringiri Block 4/2073 at Kshs. 320,000/= which I realized he had registered in his sole name in 2008. I am thus entitled to half the amount he was paid."
16. The exhibited title shows that the property was registered to the respondent on 3.11.03. The sale agreement is dated 18.12.12. While this property was acquired during the subsistence of the marriage between the parties, it is registered in the name of the respondent alone. The applicant has not demonstrated that it was the parties' joint property as claimed, or that it was the matrimonial home of the parties. As indicated earlier, this property does not fall within the definition of matrimonial property under Section 6 of the Act.
17. There will be instances in a marriage, such as in the present case, where property acquired by one spouse does not constitute matrimonial property. recognizing this fact, Parliament made provision as to how the other spouse may acquire a beneficial interest in such property. Acquisition of such interest may only be by contribution. This is the import of section 9 of the Act which provides:
- "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."
18. In order for the applicant to qualify for half the purchase price of this property as claimed, she was required to demonstrate to the satisfaction of the Court, her contribution towards its acquisition or improvement. No material was placed before the court to show the applicant's contribution towards the acquisition of this property. Having alleged that she made contribution, she was obligated under section 109 of the *Evidence Act*, to prove her claim. It is immaterial that her claim was not challenged. Accordingly, her claim for half the purchase price being unsupported by evidence, must fail.
19. Section 9 of the Act similarly, applies to the Ngong property. Although it was acquired in 2008 during the subsistence of the marriage, it is in the applicant's name. No evidence was placed to show any contribution by the respondent towards the acquisition and improvement of the same. As such, he did not acquire any beneficial interest in the same.
20. In the end, after taking into consideration the totality of the evidence adduced in this case and the applicable law as analyzed herein, I find make the following orders:
- i. Title No. Ngong/Ngong/37643 is the sole property of the applicant.
 - ii. There shall be no order as to costs as the Originating Summons was undefended.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23RD DAY OF SEPTEMBER 2022

.....
M. THANDE
JUDGE



In the presence of: -

.....**for the Applicant**

.....**for the Respondent**

.....**Court Assistant**

