



**SKK v CCN (Originating Summons 15 of 2017)
[2022] KEHC 14566 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 14566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 15 OF 2017
JN ONYIEGO, J
SEPTEMBER 23, 2022**

BETWEEN

SKK APPLICANT

AND

CCN RESPONDENT

JUDGMENT

1. On December 29, 2001, the applicant and respondent herein exchanged their vows to live in holy matrimony for worse and for good until death did separate them. Unfortunately, the love hit a rock in 2016 due to various irreconcilable differences thus ending up in divorce on January 19, 2018 vide divorce Petition Number 109/2017. The couple was blessed with two children namely; BW and ST aged 15 and 10 respectively as at 2017.
2. Consequently, the applicant moved to this court on December 19, 2017 vide an originating summons dated December 18, 2017 seeking orders as follows;
 - a. That the matter be certified as urgent and service of this application upon the respondent be dispensed with at the first instance.
 - b. That a temporary injunction do issue restraining the respondent, her servants and /or agents from interfering with the quiet possession by the applicant and the issues of marriage, tenants, caretaker and or employees on the suit property and/or, wasting, damaging and/or otherwise interfering with the said property known as 14111 (Original No 472/36) Section 1MN (CR 41031), pending hearing and determination of the originating summons herein.
 - c. That the joint ownership in respect of plot sub division Number 14111(original No 472/36) Section 1MN (CR 41031), Mombasa be severed.
 - d. That the applicant be allowed to buy the respondent’s share if any of the said property.



- e. That a temporary injunction do issue restraining the respondent, her servants and/or agents from interfering with the quiet possession by the applicant and the issues of marriage of the suit property and/or ,wasting, damaging and/or otherwise interfering with the said property pending hearing and deamination of the originating summons herein.
 - f. That the Deputy Registrar be empowered to sign any documents that the respondent may refuse to sign.
 - g. That an order that if the respondent does execute all documents where necessary to transfer the applicant's portion in the properties or in default the same be executed by the Chief Registrar, Deputy Registrar, Lands Register or Registrar of Titles
 - h. That this honorable court be pleased to grant further or other reliefs as may be just in the circumstances.
 - i. That the respondent be condemned to pay the costs of this suit/application and incidentals thereto
3. The originating summons is supported by an affidavit deponed by the applicant on December 18, 2017 in which he stated that during the subsistence of their marriage, he solely acquired plot No/4111 (Original No 472/363 Section /MN/ (CR41031 on January 21, 2008. That he later developed the property by constructing a three storey building valued at 32 million for commercial purposes thus fetching about KShs 195,000 rental income. He averred that besides acquiring this family asset, he shouldered the burden of educating and providing for their two children without any support from the respondent.
 4. He further stated that on October 3, 2012, he transferred half share of the property to the respondent for the sole purpose of protecting their children's interest in the event something happened to him as the sole breadwinner. As proof of this effort towards acquisition and development of the subject property, he attached payment documents and transfer of title; original (first) title deed in his name and the second title deed in their joint names; his employment letter, pay slip and several school fees payment and other expenses.
 5. In response, the respondent filed a replying affidavit sworn on March 8, 2018 terming the originating summons as mischievous, misleading, a mare red herring and utterly devoid of any merit.
 6. She averred that she and the applicant did jointly purchase a parcel of land No CR 41031/Section/ Mombasa North Situate - Bamburi Mombasa and later on developed the same by erecting 22 units for purposes of collecting rent.
 7. It was her case that although she was a house wife, she remained at home as a house worker while the applicant and their two children relocated to UAE where he was working. She further deponed that their agreement in respect of the property was for her to get 25% against the applicant's share of 25% and the balance of 50% for their two children.
 8. She accused the applicant of frustrating her by taking all rental income thus exposing her to financial stress. That as a result, she was forced to return back to Kenya from UAE. That despite occupying one of the units within the flat, she was forced to move out by the applicant an act that rendered her homeless and destitute. She urged the court to dismiss the application.
 9. During the hearing, the applicant basically adopted the content contained in the affidavit in support. He claimed that he solely acquired and developed the subject property and that he only included the respondent later as security for the children against any relatives who might want to encroach in-case



he was not there. He accused the respondent of deserting him in the year 2016 while in Dubai thus abandoning the children. He further stated that the respondent has never worked nor engaged in any income earning activity or business. He urged the court to completely remove the respondent's name from the ownership documents.

10. On her part, the respondent also adopted the content contained in her affidavit in reply to the affidavit in support of the originating summons. She claimed that she was entitled to a share of the property as she did contribute to the acquisition and development of the property out of funds realized from her business.
11. On cross examination, she admitted that she had not attached any proof of any direct financial contribution. She however claimed that she took care of the family as a house wife while in Dubai. She also told the court that when she left Dubai, she left her children with their father the applicant herein. Further, she stated that she was the one engaged in supervision of the construction works as she provided materials and paid workers whenever she visited Kenya.
12. Upon close of the hearing, parties agreed to file submissions.

Applicant's submissions

13. Through the firm of M/s Osino, the applicant filed his submissions on January 25, 2022 thus submitting on 5 issues *inter alia*;
 - a. Whether the subject property was acquired during coverture;
 - b. Whether either party contributed directly or indirectly towards its acquisition;
 - c. Whether the joint ownership should be severed
 - d. Whether the applicant can buy the respondent's share if any of the said property;
 - e. Whether the Deputy Registrar should be empowered to sign any documents that the respondent may refuse to sign and who should pay the costs.
14. M/s Osino basically adopted the content contained in the affidavit in support of the originating summons with cross reference to sections under the [Matrimonial Property Act](#) *inter alia*; sections 2,6,7,and 14 of the [Matrimonial Property Act](#) and article 45 of the [Constitution](#).
15. Counsel submitted that although under article 45 (3) of the [Constitution](#) spouses to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage, the same does not mean equality. To support this submission, counsel made reference to the holding in the case of [EGM v BMM](#) [2020] eKLR where the court expressed itself that article 45 (3) of the [Constitution](#) does not mean 50% to 50% after dissolution of marriage.
16. It was contended that equality in a marriage should not be applied blindly nor is it intended to encourage dependency. In this regard, the court was referred to the position held in [MEK v GLM](#) [2018] eKLR, [PNN v ZWN](#) [2017] eKLR and Civil Appeal No 559 of 2014 [ENK v MNNN](#)
17. It was counsel's further submission that the property in question was solely acquired and developed by the applicant with no direct nor indirect contribution from the respondent hence 100% contribution and ownership of the property by the applicant.
18. Regarding the question of severance of the parties' interests, counsel submitted that it was inevitable taking into account that parties have since divorced and that under section 7 of the [Matrimonial Property Act](#), it was necessary that they do sever their interest.



19. Concerning the issue whether the applicant can buy the respondent's interest, counsel submitted that the respondent having not contributed anything towards its acquisition, the question of severance does not arise.
20. On the issue whether the Deputy Registrar should sign necessary transfer documents, counsel submitted that in the event the respondent declines to sign, the Deputy Registrar can sign.
21. As to payment of costs, counsel urged the court to exercise its discretion in favor of the applicant or in the alternative, each party to bear own costs in light of the holding in the case of [ENK v MNNN](#) Civil Appeal No 559 of 2019

Respondent's Submissions

22. Through the firm of Gichuki Thiaka and Company Advocates, the respondent filed her submissions on February 9, 2022 submitting on three issues as follows;
 - a. Whether the suit property is matrimonial property;
 - b. Whether the respondent is entitled to beneficial interest in the suit property and;
 - c. Whether the applicant is entitled to prayers sought.
23. On the first issue, counsel submitted that under section 14 of the [Matrimonial Property Act](#), the property which is acquired in joint names and obtained during marriage is presumed to be held in equal share.
24. Regarding the respondent's beneficial interest on the property, counsel held the view that the property was obtained through joint effort based on indirect contribution which includes rendering companionship, taking care of the children, and supporting the applicant for over 15 years. To support this position, reliance was placed on the case of [CWM v JPM](#) [2019] eKLR where the court recognized indirect contribution *inter alia* as executing domestic work, children care and companionship.
25. Further reference was made in the respect to the case of [SM v ASM](#) [2021] eKLR and [TJF v AWF](#) [2020] eKLR where the court upheld non- monetary contribution as a mode of contribution towards acquisition of property.
26. On the aspect of severance of each party's beneficial interest, counsel submitted that it was necessary so as to enable the parties get their respective share after joint valuation.
27. As to whether the Deputy Registrar should sign any documents to facilitate severance of shares, counsel was of the view that the same was not necessary as the respondent was more than willing to comply with any order the court may find necessary.
28. On the question of issuance of any other relief, counsel opined that parties had agreed for each to take 25% and the balance of 50 % to the children. On costs, it was averred that each party to bear own costs.

Determination

29. I have considered the summons herein, response thereto and submissions by both parties; issues that arise for determination are;
 - a. Whether the subject property was acquired during coverture and therefore matrimonial property;
 - b. Whether there was direct or indirect contribution by each party;



- c. Whether the property should be shared;
 - d. Who will bear costs of the suit.
30. There is no dispute that the applicant and respondent got married in the year 2001 and divorced in the year 2018. There is also no dispute that the subject property was acquired during coverture. It was further admitted that the property was acquired by the applicant initially in his own name but later included the respondent as a co- owner hence the title is currently registered in their joint names.
31. The question which begs for an answer is whether the property in question constitutes matrimonial property under section 6 of the [Matrimonial Property Act](#). Under that Section, Matrimonial property is defined as;
- (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.
32. In the instant case, the property in question was acquired during the subsistence of the marriage hence matrimonial property; How was it acquired and through whose effort. Who contributed what? Section 2 of the [Matrimonial Property Act](#) defines contribution as ;

“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;

“family business” means any business which—

- (a) is run for the benefit of the family by both spouses or either spouse; and
- (b) generates income or other resources wholly or part of which are for the benefit of the family;

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;

“matrimonial property” has the meaning assigned to it in section 6;

“spouse” means a husband or a wife.”



33. According to the applicant, he was the sole contributor towards the acquisition of the subject property. He claimed that as the only employed Person working in the oil industry both in Kenya and UAE, he was the sole provider and financier towards the acquisition of the property, its development and family responsibilities including paying school fees for the children.
34. He further claimed that he included his wife (respondent) to joint ownership for security purposes in the event he was not there.
35. On her part, the respondent in her cross examination stated that she didn't make any direct contribution. She however insisted that as a house wife, she was a house keeper, provided companionship to the applicant, undertook child care and supervision of construction works of the subject property.
36. It is trite law that contribution is not necessarily measured in monetary terms. Indirect contribution is also a crucial consideration in determining contribution.
37. Section 7 of the aforesaid Act provides;
- “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”.
38. In the case of *CWM v JPM* (*supra*) the court held as follows;
- “..to the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of the respondent at the time of such coverture. In our view, that contribution, be it domestic work and management of the matrimonial house, child care or companionship falls within the definition of contribution under the Act”
39. Similar position was held in the case of *SM v ASM* (*supra*) where the court observed that;
- “...while it is difficult to quantify this non-monetary contribution, the same must be taken into account in determining the appellant's entitlement to the property herein...accordingly, the court makes a finding that based on this non- monetary contribution the appellant is entitled to beneficial interest in the properties
40. Equally, in *ENK v MMN* [2021] the court was of the view that contribution by supporting other family services and responsibilities was relevant in determining indirect contribution in property.
41. For 15 years the respondent was in their marriage, she served as a house wife while in Kenya and Dubai. Ordinarily, as a wife in the African set up, she was responsible in executing domestic chores, taking care of children, and more importantly, providing companionship. All these factors although not necessarily quantifiable with mathematical provision, they are crucial. As a consequence, the applicant's life was made easier and peaceful courtesy of the respondent's services and responsibilities. Although the respondent admitted not making direct monetary contribution, she did make indirect or non-Monterey contribution.
42. The next question is, does joint ownership imply equal share? Section 14 of the *Matrimonial Property Act*, does provide as follows;
- “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.”

43. In this case, the appellant stated that on account of security reasons, he decided to include the respondent as a co-owner to the property.
44. It is clear from the evidence that the property was acquired initially by the applicant alone. Even then, he could not claim absolute ownership simply because the respondent did not make direct contribution. It is trite that mere joint registration in a property is not enough to entitle a party to equal share without proof of equal contribution. The court is duty bound to interrogate circumstances under which joint registration was obtained.
45. If out of good will and affection a spouse makes a co-spouse a joint owner to a property acquired by such spouse during the climax of their love, it does not mean that such co-spouse made equal contribution. Neither does article 45 (3) of the Constitution translate to automatic equal rights without proof of contribution. See ENK v MNNN (*supra*) where the court of appeal held that;
- “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 purchased and paid for the properties. The respondent did not make any contribution..... we do not understand why the respondent want to benefit the hard earned labour of the appellant. Considering the facts of the case that was before the judge and putting all facts into play including provisions of the matrimonial property we are of the considered view that the respondent was not entitled to anything more that 10% of the total value of the town house , which was the matrimonial home.”
46. Further in the case of PJS v MHAD; AMH (Interested Party) Civil Appeal No 350 /2017 the Court of Appeal shared the joint matrimonial property in the ratio of 70:30% in favour of the spouse who contributed more towards its acquisition.
47. In the instant case, the applicant was the sole breadwinner in the family. He paid school fees for the children and made provision for their needs. He purchased the property alone. Companionship alone which in any event is a two way traffic and domestic duties which was not 100% exclusive of her to discharge cannot attract equal share. In my view, the respondent’s role cannot justify 50% share. In my opinion, and in the best interest of justice, the respondent can adequately be awarded by getting a share of 20% of the property.
48. As to whether the children are entitled to 50% share, the law does not recognize any role by children in the acquisition of matrimonial property. In the circumstances therefore, it is my finding that the applicant is entitled to 80% share against 20 % for the respondent.
49. Concerning severance of the shares, it is inevitable as the property is not physically divisible. The parties shall therefore value the property through a mutually agreed valuer, sell the same and share the proceeds.
50. Regarding the question whether the Deputy Registrar should sign the documents, the prayer is premature as none of the parties has refused to execute the necessary documents.



51. Regarding costs, this is a family dispute hence each spouse to bear own costs. For avoidance of doubt ,upon valuation of the property, any one party shall have first priority to buy out the other spouse's share in default, it be sold to the highest bidder through a public auction and each party to get his or her share.

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

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JN ONYIEGO

JUDGE

