



REPUBLIC OF KENYA



KENYA LAW
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**AWM v RWK (Miscellaneous Civil Case E004 of 2021)
[2022] KEHC 14625 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS CIVIL CASE E004 OF 2021
GMA DULU, J
OCTOBER 26, 2022**

BETWEEN

AWM APPLICANT

AND

RWK RESPONDENT

RULING

1. Before me is an originating summons dated October 25, 2021 seeking a number of orders some of which have been spent as follows –
 - a. (Spent)
 - b. (Spent)
 - c. (Spent)
 - d. That a declaration be issued that land parcel No xxxx and xxx both in Kinyoo and land parcel No XX Emali market were acquired by the joint funds and efforts of the parties herein during the subsistence of their marriage and registered in the name of or in the position of the respondent and the same is jointly owned by the application and the respondent and be deemed as matrimonial property.
 - e. That the said property be settled for the benefit of the applicant in such a manner and proportions as the honourable court deems fit and just.
 - f. That costs be in the cause.
2. The application has grounds on the face of the application that the applicant and respondent had their marriage resolved through Divorce Cause No 4 of 2017 vide decree made absolute on June 29, 2021,



- and that plots Nos xxxx Kinyoo and xxx in Kanyoo and Parcel No xx Emali market are matrimonial properties.
3. The application was filed with a supporting affidavit sworn by AWM dated October 25, 2021 which amplified the grounds of the application.
 4. The application has been opposed through a replying affidavit sworn by the respondent RWK on January 28, 2022, in which the respondent states that Plot No xx Emali is not matrimonial property, and that Plot No xxxxx Kinyoo Adjudication section, the deponent said that it was bought by his aunt in xxxx and transferred to him in 2017, and that Plot No xx Emali town was acquired through balloting.
 5. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the applicant in person, and the submissions filed by Stanley Nthiwa & Company Advocates for the respondent.
 6. From the evidence on record, it is clear to me that all the assets listed were acquired during subsistence of the marriage.
 7. The acquisition of property during marriage per se however, does not mean that the same is matrimonial property, since the law under the Constitution allows everybody, married people included, to own their separate property. This position is clearly stated under article 40(1) of the Constitution as follows –

'40 (1) subject to article 65, every person has the right, either individually or in association with others to acquire and own property –

 - a. Of any description; and
 - b. In any part of Kenya'
 8. The statutory definition of matrimonial property is contained under section 6(1) of the Matrimonial Property Act, 2013 which provides as follows –
 - 6 (i) (a) the matrimonial home or homes
 - (b) household goods and effects in the matrimonial home or homes, or
 - (c) any other immovable or movable property jointly owned or acquired during the subsistence of the marriage.
 9. Though the respondent has denied that plot No xxxx in Kinyoo adjudication section did not fall within the definition of matrimonial property, in my view, it did; as the claim of the applicant that she initially leased the land from the aunt of the respondent at monthly rent of KShs 10,000/=, to do farming, who later transferred it to them in the name of the respondent, is clear and unambiguous. She thus in my view, contributed to the acquisition of the subject land.
 10. Again, though the respondent relies on section 38(1) of the Land Act 2013 to claim that as there was no written agreement between him and his former wife (the applicant) with regard to that plot, and that as such her claim should fail, in my view, the requirement for such written agreements in land matters does not apply to spouses in regard to matrimonial property, as the marriage institution is principally a social relationship of love and trust, rather than a commercial venture and many commitments between wife and husband will not be reduced into writing.



11. With regard to the other plots, in my view, the applicant has not proved that she contributed to the acquisition of those other plots, I however hold that she proved contribution in part to the acquisition of Plot No xxxx Kinyoo. I thus find that the same is matrimonial property.
12. The question for this court is now how to deal with this property No xxxx Kinyoo. The size of the land has not been described by any of the two contesting parties. Thus in my view, division of the land, which is described as agricultural land, should be based on 50/50 basis between the two. In my view that is the most appropriate and fair order this court can grant in the circumstances of this case.
13. My orders are therefore as follows –
 1. The applicant’s claim on Plots Nos xx Emali and Plot No xxx Kinyoo has not been proved and fails.
 2. With regard to Plot No xxxx Kinyoo, I find that the applicant contributed to its acquisition during the subsistence of her marriage with the respondent, and is therefore matrimonial property.
 3. I order that the said matrimonial property Plot No xxxx Kinyoo herein, be and is hereby divided between the applicant (AWM), and the respondent (RWK) equally (50/50 basis).
4. The respondent will bear the costs of the sub-division of Plot xxxx Kinyoo, as ordered in 3 above.
5. Each party will bear their respective costs of these proceedings.

DELIVERED, SIGNED & DATED THIS 26TH DAY OF OCTOBER, 2022, IN OPEN COURT AT MAKUENI.

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George Dulu

Judge

