



REPUBLIC OF KENYA



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**AWM v LMK (Matrimonial Cause 10 of 2015)
[2022] KEHC 16674 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE 10 OF 2015
TM MATHEKA, J
DECEMBER 19, 2022**

BETWEEN

AWM PLAINTIFF

AND

LMK DEFENDANT

JUDGMENT

1. LMK and AWM lived as husband and wife from 1981 but solemnized their relationship into an African Christian marriage on August 12, 2000 at the PCEA Kenana Church in Nakuru.
2. They had 4 children born in 1982, 1983, 1990 and 1997. By the time of filing the suit and this judgment are all adults.
3. On May 23, 2013 AWM filed HCC (OS) 45 of 2013. She sought orders;
 1. A declaration that plot No UNS Commercial plot 'xxxx' at Njoro Township (developed) is jointly owned in equal shares by the plaintiff and defendant.
 2. A declaration that plot No xxxx Jua Kali situated in Njoro Township is jointly owned in equal shares by the plaintiff and defendant.
 3. A declaration that motor vehicle registration number xxxx jointly owned in equal shares by the plaintiff and defendant.
 4. A declaration that motor vehicle registration number xxxx is registered in the defendant's name is jointly owned in equal shares by the plaintiff and defendant.
4. The originating summons was accompanied by the notice of motion dated May 23, 2013 seeking orders inter alia;



- (c) That pending the hearing and determination of the originating summons the defendant/respondent be restrained by way of an injunction by himself, his agents and or servants from selling, disposing off and/or in any other way adversely dealing with plot No xxxx commercial plot 'xxxx' at Njoro plot No xxxx situated in Njoro Township. Motor vehicle registration number xxxx and motor vehicle registration number xxxx.

Both the originating summons and the notice of motion were supported by the affidavits of AWM. LMK filed his replying affidavit as well.

5. The notice of motion was determined by Emukule J (as he then was) vide a ruling dated October 10, 2015. The learned judge found in favour of the plaintiff with the exception of motor vehicle registration number xxxx.
6. Before the originating summons could be heard, the defendant, in contravention of Justice Emukule's orders proceeded to commence construction on plot number xx situated in Njoro Township. He was indeed found to be in contempt of the court orders vide Justice Ndung'u's ruling of September 29, 2015, and sentenced to 6 months in civil jail.
7. On May 23, 2015, the matter was re-registered as Matrimonial Cause 10 of 2015. Hearing commenced before me on October 17, 2019.
8. The plaintiff AWM testified. She adopted the witness statement as evidence. She added that she had filed for divorce in Chief Magistrate's Divorce Cause 25 of 2013. The marriage was dissolved on March 2, 2016.
9. She testified how they acquired the properties in question. For unsurveyed commercial plot xxxx Njoro, she said it was owned jointly by themselves and a 3rd party. That they developed their side of the property and put up one storied building and ran Mambo Leo butchery there, she said she run the butchery business, where they made about Kshs 40,000/= per month.
10. She said for plot xxxx, she contributed to its purchase from her large scale farming of maize and beans where she would lease land, then farm and sell the harvest.
11. She said they also acquired motor vehicle registration number xxxx and xxxx. She said that for one of the motor vehicles the transfer was not effected to them upon purchase. She said she had Mpesa evidence that the defendant had borrowed money from her and repaid by instalments. She said this was part of the money from the proceeds of selling her farm produce. She produced evidence to show that indeed she had purchased some household goods in 2010, TV, blender, micro wave, she also installed DSTV. She said despite the court orders restraining him the defenadnt had sold the plots and the motor vehicle and was jailed for 6 months. Her prayer was that she be awarded 50% of the value of the property. Told the court that plot C Njoro was not jointly owned but that each owner bought their portion of the plot and she and the defendant had developed their own side. She denied the existence of any dispute over plot xxxx Njoro. She said she had been using motor vehicle registration number xxxx for the business she was running and xxxx for the butchery. That in 2007 – 2013 the defendant was a councillor and at that time she ran the business alone.
12. On cross examination by Mr Ikua for the defendant she said that there were 2 plots in Njoro. She produced a receipt for Kshs 625/= dated November 26, 1993 as evidence that the plot was in the name of the defendant. She said that the Kshs 625 per month was for purchase of shares from Njoro Jua Kali Association. She denied that the defendant was paying Kshs 625 per month for lease of the land for business. She insisted that the money was a monthly purchase of the land.



13. For plot xxxx she produced a receipt reading A/C 56 dated July 7, 1988, she said that the plot was there in 2013 and she and the defendant were using it. With respect to the purchase of plot xxxx she said he bought it at Kshs 270,000/= but sold it in 2014. She said motor vehicle registration xxxx, he bought at 700,000/= through a loan from Equity Bank, she said she did not contribute any money to its purchase. She was doing business of butchery in Njoro, but she had no supporting evidence of how much money was made from the butchery business. She said that the money borrowed from Equity Bank, the defendant would send her to deposit the monthly repayments. She said for the 5 years he was a councilor she ran the meat business alone. She said he was previously an adult teacher, while she stayed at home and took care of the children. That she also did farming. She said they had a matrimonial house in Njoro. She left in 2016. That the house was constructed through their joint effort. That the house is on the father in law's land. She confirmed that in the 32 years of marriage she had run away four times but each time they had reconciled, but true, the marriage had not been peaceful. She confirmed that in 2016 she carried off a bed, a sofa set, and a wall unit from the matrimonial home. That in 2013, the defendant had left the matrimonial home, was married and living elsewhere in Njoro. She denied that she had caused the defendant stress that brought him down. On re-exam, she went through the receipts and identified one dated December 10, 1998 showing that there was payment for the title deed with respect to plot xxxx. Hence it was not true that the defendant had been paying money to lease the same for business.
14. That for plot xxxx, she said it was brought in 2006 and the defendant paid Ksh 270,000/- for it. She said that with respect to the butchery he would collect the proceeds and give out money for new stock, and she would bank and he would keep the slips, that when he left in 2013 he left with everything, she did not have records. She said she raised the children, took care of the butchery and the defendant. And when he went about his councilor duties she took care of the family business.
15. PW2 MMW was the brother of the plaintiff. He told the court that during the marriage to the defendant, they had 4 children, one of whom was deceased, that his sister was a housewife, farming, doing the family business. He said they were selling meat in [particulars withheld]. He said that the couple had their own plots of land in Njoro, and one of them had their business. He said they had family land and she would farm that, then lease more land where she grew maize and beans for sale. He said that the couple worked together for some time in the butchery, then he went into politics. They also had a home at the defendant's father's farm. He did not know why they had divorced. He said he had no documentary evidence to support his evidence. He said that he knew their properties, 2 plots, and motor vehicles. He said that his brother in law did tell him that during the campaigns he had sold food stuffs for money for campaigns but that he did not know their internal affairs for the more than 30 years they lived together.
16. PW3 JMK testified that the plaintiff was his aunt. His evidence was about the disagreements between the defendant and the plaintiff, he spoke about an incident on March 23, 2016, when the defendant rang him, and told him to tell the plaintiff to leave the home or there would be bloodshed. He said he rang his aunt and told her to leave the home at the defendant's ancestral home, Ngundu farm where they had their matrimonial home. He testified that the couple had a butchery business, his aunt took care of the children and she was a farmer as well. He said she was the one who ran the butchery most of the time. He said he would see his aunt working in the butchery. He said he could not tell what percentage his aunt should get. He said his aunt worked very hard at the butchery and at home.
17. The plaintiff closed her case.



18. The defendant testified that he and the plaintiff got married in 1981. At that time, he was a full time adult education teacher and she was a housewife. They lived in Banita from 1981 to 1984. They had 2 children. They moved to Njoro. He said they had a rocky marriage.
19. With respect to plot xxxx, he said he bought it by himself in 1991, from his salary as a teacher, and a business he did buying and selling chemicals. He said he made big money. He said the plaintiff did not contribute anything because she was a housewife. He said she had run off from the matrimonial home and had just come back in 1988. He said he bought the plot for Kshs 20,000/=. He said he sold the plot in January 2012. He said the plot was unavailable for distribution. He also said that there was a dispute over the property, and in addition, it had been marked as a road reserve. With respect to unsurveyed commercial plot xxxx at Njoro, he said he bought the plot half the plot i.e 25 x 100 in 1989, but that they had a written agreement in 2006, to facilitate a document from the county council when he was the area councilor. He said that she did not contribute anything towards the acquisition of the plot. He said he developed the property by himself, the one storey building. He said he earned his own money, and paid for the building.
20. He said he retired voluntarily in 1997 and was paid Kshs 280,000/=. He said he paid for the plot. He said his bank records would confirm the transactions. He said he sold the plot. He said he had been selling the plot gradually. That by 2012, his wife had left, that she had left behind a child with a terminal illness, who required medication, that he required money for his own maintenance and to pay rates. That she had also left behind a daughter who was in form 2. That the buyer gave him money in instalments, as his needs arose, and in the end it was sold. He said the buyer was one Mustapha who had already put up a building on a plot.
21. With respect to the 2 vehicles he said that the two never belonged to them. He said that the plaintiff never contributed anything in the properties, and if she had, he challenged her to produce the evidence. On cross examination he said he was an adult teacher on full time basis, employed by civil service. He said he had not brought any evidence to prove this. About his testimony that the marriage was rocky and messy, he was referred to his replying affidavit of December 8, 2015, and asked whether he had mentioned this, his response was that this was his defence. He said he was married for 24 years. He said they had 2 marriages, 1981 – 1983 as the dowry was returned in 1983 by the plaintiff's father. That they had a Christian marriage in 2000. He confirmed that they had married in 1981. He said the marriage was dissolved in 2016, he denied that marriage never lasted for 35 or 32 years. He said there was no legal separation. He told the court that no one would ever understand the challenges that existed in his marriage with the plaintiff. He confirmed that the children were born in the marriage, and except for the one who was deceased, they were adults, and 2 of them had their own families. He conceded that plaintiff took care of the children but not 100%, because the 2nd born was divorced. He said that the last born was living with the plaintiff. The defendant kept answering the questions put to him with the answer 'you are never right, you cannot be right.' He did not have any evidence to show that he supported his last born child. He said his relationship with the PW3 was that of a former nephew, that it was good at the beginning, and 'filthy' at the end. He conceded that he did send him to tell his wife to leave the matrimonial home. He conceded to selling one plot 91 at Kshs 1.1 million. He said at the time of the sale he was still married to the plaintiff but did not involve her because she had not contributed anything to the same. He did not produce any evidence to prove that there was a dispute in court with respect to the same property, nor did he produce evidence to show that it was now a road reserve.
22. With respect to plot xxxx he conceded that at the time of purchase and obtaining the allotment letter the marriage was subsisting. He confirmed that there was a development on the property. With respect to the butchery he denied that the petitioner participated in the business, he testified that she was there but was carrying on a parallel business of selling ugali and sodas while he sold the meat. He said his 5



years stint as a councillor did not take him away from his meat business or the family. However, all this information of selling the plots, and others were not in his replying affidavits filed in 2013 and 2015. He could not recall how much he had sold Plot xxxx for, and did not have any documents to support the alleged sale. He however conceded that he was found to be in contempt of the orders of the court restraining him from interfering with the properties while the matter was pending and served 6 months in civil jail. He denied that they had bought motor vehicle xxxx but had not transferred the same. For xxxx he said that he bought the motor vehicle with his own money as he had money from Equity Bank for buying and selling motor vehicles. He said the motor vehicle had not been solely financed by Equity Bank, but that he would take money from the bank for his business. He said he did not have any documentary evidence to support his claim that he was paid over 280,000/- for retirement, or Kshs 1,040,000/= pension by the council.

23. When asked whether the plaintiff could have contributed to the purchase of the properties either directly or indirectly he said, she could have contributed, she could have bought food, she had her own money, there was nothing unusual with him providing for the family. On the purchase of home appliances, he agreed that she had bought home appliances. That indeed she did some contributions. He said he was not aware that she would lease land and farm the same. Asked about a sum of Kshs 100,500/= he had sent to her Mpesa being money he had borrowed from her and was returning, that this is money she had made from the farm produce he simply stated 'not true'. He said he had wanted her to buy 2 cows, stay at home and make money from those cows, however that was not captured in his affidavits. He said she had no right to share in his properties.
24. In re-examination he told the court that the plaintiff had carted away all the household goods and left, that the Kshs 100,500/= sent to her Mpesa was for the purchase of 2 cows to add to others that were at home.
25. The defendant closed his case.
26. Parties then filed written submissions.
27. I have carefully considered the submissions. The parties set out the same issues for determination;
 - i. Whether the properties listed in the originating summons are matrimonial properties.
 - ii. Whether the plaintiff made any contribution to the acquisition of the properties.
 - iii. Whether the plaintiff is entitled to the orders sought.
 - iv. Who should bear the costs.
28. Both parties cite section 6 of the *Matrimonial Property Act* No 49 of 2013 which defines matrimonial property
 - ' (1) 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.
 - (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.



- (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
- (4) A party to an agreement made under subsection (3) may apply to the court to set aside the agreement and the court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.'
29. The properties the applicant has set out fall under section 6(1) (c). However, all the properties were acquired in the name of the defendant. Section 14(a) of the same Act comes to play.
- ' 14. 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
- (b) ..'
30. It is not in dispute that the properties were acquired during the marriage, which lasted between 1981 to 2016, with intervals of the plaintiff 'running away' to her sisters and parents home due to matrimonial problems. The defendant disputes that the property was jointly owned, but that the same was acquired during the subsistence of the marriage.
31. The plaintiff argues that there is the rebuttable presumption that because the property was acquired during the subsistence of the marriage and is registered in the name of the defendant, section 14(a) falls in place and the presumption is that the defendant is holding the property in trust from her.
32. It is argued for the defendant that section 6 1(c) provides 2 factors to consideration,
- (i) Joint ownership
- (ii) Acquisition during the marriage
33. It is argued that proof of ownership of the property is by registration and for purposes of the *Matrimonial Property Act* by proving contribution towards acquisition as provided for by section 7
- ' 7. 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.'
34. The defendant relies on *Echaria vs Echaria* where the court stated
- ' Where the disputed property is not so registered in the joint names of the spouses but is 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.'
- And the words of the judge in ; *EKTM vs ECC [2021] eKLR*
- ' I appreciate that whereas a person's source of income may be evidence of his or her capability to contribute towards the purchase and development of a property, it does not necessarily



follow that the person did actually make the said contribution. It is therefore necessary that the spouses prove their respective proportions of the financial contribution either directly or indirectly towards the acquisition of the property rather than merely waving the source of income.'

On her part the plaintiff relies on [*ALM vs INN \[2022\] eKLR*](#)

'Section 14(a) of the Act provides that where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. In the instant case, the suit properties being a matrimonial property as it was acquired during the subsistence of the marriage and being registered in the name of the defendant, it can only be said that the same was held in trust for the applicant.'

On this issue the one thing that is clear is that the properties were all acquired during the subsistence of the marriage. Where direct evidence of financial contribution towards the acquisition of a property is not available the law has set out the other factor to consider in determining whether a property is matrimonial property, this one determined whether a party contributed to the purchase or acquisition of the property while at the same time, assisting in determining the shares of each party, so that brings us to the 2nd issue.

In this one both parties cite the provision of section 2 of the Act;

'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;'

35. The plaintiff further relies on [*TKM vs SMW \[2020\] eKLR*](#) where the court relying on *M vs M [2002] 1 EA, 186* stated that courts, in assessing the contribution of spouses in acquisition of matrimonial property must bear in mind the peculiar facts and circumstances of each case, while guided by the principle of fairness. The plaintiff also relied on [*MGNK vs AMG \[2016\] eKLR*](#) where the Court of Appeal stated;

' In the marriage set up, it is not realistic to expect partners to keep track of their respective contributions towards the purchase of family property because at the time of such purchase, divorce is not on their minds. It is therefore pretentious to expect any of them to be able to show their exact contributions towards the acquisition of the subject property.

Notwithstanding the difficulty in determining the exact contributions of each spouse towards the purchase of family property, the court still has the duty to apportion family property to be best of its ability taking into account not only the personal earnings of each spouse and how it was applied in the family, but also each party's indirect contribution not only to the purchase of the subject property but also to the welfare of the family as a whole.'

36. The defendant argues that the plaintiff has failed to establish her contribution to the acquisition of the property going by Echaria and EKTm cases. He also argues that even in marriage a party can acquire



- their own property. It is argued for the defendant that the only property to which the plaintiff made immense contribution was the matrimonial home. However, from her own pleadings she was not seeking any share in that property. He argues that her non monetary contribution was towards that home and cannot be counted in the acquisition of his properties. That in any event, she already took away the household effects from that house and there was nothing else for her to claim.
37. The evidence on record is that these two were married for 32 years, the plaintiff was a housewife, but according to her and her witnesses, she also supported the husband in the family business and also did farming. In addition, according to the defendant, she also ran an ugali and soda business within the butchery business. He said he was a full time teacher at some point. She bore and took care of their 4 children as he went about his work. He said at some point he was making big money, buying and selling chemicals to farmers. She was home taking care of the family and the children. He also said that he gave her money to buy 2 cows to add to the ones that were at home. It means that there was other farm work that was being done by the plaintiff. Hence the defendant cannot be heard to say that all this was nothing, yet the plaintiff did domestic work and managed the matrimonial home. She took care of the children, she supported the family business, and also did farm work, for 32 years she did a combination of all this, the defendant was able to pursue a teaching career, he was able to pursue his business, he was able to pursue his political career, while the plaintiff was at home keeping house. Even if he gave her cash to buy certain things, she made her non-monetary contribution and he was the one making the monetary contribution. If her work was to be monetized then it would be evident that all this time she contributed in her own house wife way, to the property that the defendant acquired. Hence it is my view from the evidence placed before me, and the defendant's own admission on cross examination, the plaintiff did contribute in a non monetary way towards the acquisition of the properties.
38. That brings us to the question: what was the proportionate contribution. Other than the fact that the properties were registered in the name of the defendant, he did not produce evidence to show how he paid for the properties. The plaintiff did produce some receipts in the defendant's name showing that some payments were made for the properties. The defendant argued that the receipts were for the lease of a field for business, but did not carry that argument to its logical conclusion, to show that for real, they were not for the payment of the land. He could not explain the payment for a title deed which contradicted this position. It is therefore not far-fetched to conclude that indeed some money came from the family business and the proceeds from some of the farm proceeds.
39. The record shows that the defendant went to great lengths to dispose of the properties pending the hearing of this matter despite clear orders by this court, (Emukule J as he then was). This culminated in his serving a 6 month civil jail term for contempt (Ndung'u J), why? From the evidence on record the defendant did not want the plaintiff to have any share of the said property.
40. I have considered this evidence that he sold plot xxxx, and plot xxxx, but he did so in violation of the court orders restraining him from doing so, there is no evidence that he has transferred the said properties to 3rd parties, except his own word, and even if he had done so, it is in willful disobedience of the orders of this court and such transfer would be null and void, as orders of court are not made in vain, and a party cannot be allowed to benefit from willful disobedience of court orders, so with respect to the 2 properties, plot xxxx and plot xxxx Njoro, any transactions he may have carried out in violation of the court orders, are null and void.
41. With respect to the 2 motor vehicles, it is evident that one did not bear his name, and the other one xxxx was in both his name and that of Equity Bank. It is not clear from his own testimony what the arrangement was because he said he took a loan from Equity Bank to top up and buy it. The plaintiff's testimony that the some of the repayment of the loan came from the family business and she would



be sent to deposit the money is believable and was not challenged. Hence it is my conclusion that for xxxx, there was contribution from the plaintiff towards its acquisition.

42. In determining this matter, I do find that the petitioner indeed contributed to the acquisition of the matrimonial properties, motor vehicle registration number, xxxx, plot xx and plot xx at 50%.
43. Hence in all fairness she ought to get a 50% share of the two properties. In the end the following orders issue:
 - a. A declaration that plot No xxx commercial plot 'xxxx' at Njoro Township (developed) is jointly owned in equal shares by the plaintiff and defendant.
 - b. A declaration that plot No xxxx Jua Kali situated in Njoro Township is jointly owned in equal shares by the plaintiff and defendant.
 - c. A declaration that motor vehicle registration number xxxx jointly owned in equal shares by the plaintiff and defendant.
44. The plaintiff will have costs.
45. Orders accordingly

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 19TH DAY OF DECEMBER, 2022.

MUMBUA T. MATHEKA,

JUDGE

C/A Edna

Elizabeth Wangari & Co. Advocates for the defendants

N. Ikua & Co. Advocates

