



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL SUIT NO. E017 OF 2020 (OS)**  
**IN THE MATTER OF MATRIMONIAL PROPERTY ACT NO. 49 2013**  
**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**  
**AND**  
**THE CONSTITUTION OF KENYA 2010**  
**BETWEEN**  
SM.....APPLICANT  
**VERSUS**  
ASM.....RESPONDENT  
**R U L I N G**

1. SM, the Applicant herein filed the Originating Summons (OS) dated 10.9.2020 against ASM, the Respondent, seeking several orders in respect of the following properties:

- a) House No. [particulars withheld], Spring Valley,
- b) 10<sup>th</sup> Floor, [particulars withheld], Ring Road Parklands,
- c) 6<sup>th</sup> Floor, [particulars withheld], Ring Road Parklands
- d) 3-bedroom Apartment on [particulars withheld], one West Park Apartments,
- e) 5-bedroom House Naivasha,
- f) 4-bedroom Penthouse, [particulars withheld], Mombasa
- g) 4-bedroom penthouse on 2<sup>nd</sup> Floor, [particulars withheld], Mombasa,
- h) EHSL Office in Zambia
- i) EHSL Offices in Dar-es-Salam Tanzania,
- j) KBM [...] Passat Volkswagen
- k) KCA [...] Range Rover,
- l) KBH [...] Range Rover,

m) KCS [...] Velfire Van,

n) KCU [...] Mercedes Van

2. The orders sought by the Applicant are:

i) That the suit properties be preserved pending the hearing and determination of Divorce Cause No. 694 of 2019 filed by the Applicant against the Respondent.

ii) A declaration that the Applicant has equal beneficial interest in the suit properties.

iii) An injunction restraining the Respondent, his servants or agents from evicting and/or excluding from or interfering with the Applicant's peaceful living in the matrimonial home, House No. [particulars withheld], Spring Valley, Nairobi, pending the hearing and determination of Divorce Cause No. 694 of 2019.

iv) That the Respondent submits all title documents, rent proceeds and any documents pertaining to the suit properties for purposes of clarification and transparency.

v) A declaration that the Applicant is entitled to 50% of any rental income that the Respondent derives from the matrimonial properties.

vi) Such further relief as may be just in the circumstances.

vii) That the Respondents be ordered to pay costs.

3. The grounds as stated on the face of the application and in the Applicant's supporting affidavit sworn on even date. The OS is opposed by the Respondent by his replying affidavit sworn on 3.2.21.

4. The undisputed facts of this case is that the parties married on 15.3.08 in Nairobi and are blessed with 3 daughters born in 2010, 2011 and 2015. The marriage has broken down and divorce proceedings are pending in Court. The parties' matrimonial home is House No. [particulars withheld], Spring Valley, Nairobi. Following the breakdown in the relationship, the Respondent in 2019 left the matrimonial home which the Applicant and their children continue to occupy.

5. It is the Applicant's case that during the subsistence of their marriage, they acquired the suit properties through joint efforts and direct and indirect contribution; that the Respondent is in possession of the title documents of the suit properties and the Applicant is unable to ascertain the value and the registration details thereof; that because the parties are now estranged, the Applicant no longer has access to or control of the suit properties and is apprehensive that the Respondent may dispose of the same without her knowledge and to her detriment; that at the insistence of the Respondent, she left employment and forwent her career to devote time and energy to caring for the family; that she provided love, companionship and support to the Respondent for the past 11 years; that she stepped in to care for the children when the Respondent neglected his marital and fatherly duties; that she managed all their homes, did domestic work and provided a homely environment; that she ensured that the properties were well maintained and oversaw all renovations in respect thereof. In view of the foregoing contribution, the Applicant believes that she is entitled to 50% of the income and proceeds of the suit properties.

6. The Respondent denied owning most of the suit properties. He further denied that the Applicant contributed to their acquisition. The Respondent averred that the matrimonial home is in the name of the Respondent and his father MM. The lease exhibited by the Respondent is for House No.[particulars withheld], Spring Valley, and not House No. 18 as indicated in the OS. The Respondent averred that his father purchased the property in 2011 using his life savings from his [particulars withheld] business in Tanzania; that his father asked the Respondent to have the property registered in both his and the Respondent's names. The Respondent exhibited remittance advice slips from his father for the funds for the purchase of the property. The Respondent averred that the 4-bedroom penthouse on 2<sup>nd</sup> Floor, [particulars withheld], Mombasa, though registered in his and his father's names were purchased by his father. Neither the Respondent nor the Applicant made any contribution to their acquisition. The 5-bedroom House, Naivasha was bought jointly with his father using their joint savings.

7. The Respondent denied owning 10<sup>th</sup> Floor, [...], Ring Road Parklands, 6<sup>th</sup> Floor, [...], Ring Road Parklands, 3-bedroom Apartment on 7<sup>th</sup> Floor, [particulars withheld]and the 4-bedroom Penthouse, [...], Mombasa. As regards the properties known as EHSL Office in Zambia and EHSL Offices in Dar-es-Salam Tanzania, the Respondent denied knowledge of the same.

8. The Respondent admitted owning KBM [...] Passat Volkswagen which he purchased through hire purchase for Kshs. 4 million and has availed the vehicle to the Applicant for her use. KCA [...] Range Rover, was purchased by him for Kshs. 13.5 million through a hire purchase facility which he serviced for 3 years from his own funds. He recently sold the vehicle to the [particulars withheld] business for Kshs. 12 million. He also owns KCU [...] Mercedes Van which he purchased with his savings with no contribution from Applicant. However, KBH [...] Range Rover and KCS [...] Velfire Van belong to the [particulars withheld] business.

9. The Respondent contended that the Applicant did not provide any proof of contribution towards the acquisition of any of the suit properties. Further, that her prayer that he produces documents of title has no legal basis and that the Applicant is just on a fishing expedition. He further accused the Applicant of being a gold digger

10. After giving due consideration to the parties' pleadings and submissions, the following issues emerged for determination:

- i) Whether the suit property is matrimonial property.
- ii) Whether the Applicant is entitled to a 50% share in the suit properties and in the proceeds of rent or sale in respect thereof.
- iii) Whether the suit properties should be preserved pending the hearing and determination of Divorce Cause No. 694 of 2019.
- iv) Whether the Respondent should submit all title documents, rent proceeds and any documents pertaining to the suit properties for purposes of clarification and transparency.

Whether the properties are matrimonial property

11. Matrimonial property is defined in Section 6 of the Matrimonial Property Act as follows:

**(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**

12. For a property to be declared to be matrimonial property, it must constitute the matrimonial home or homes of the parties and household goods and effects in such home or homes. Other property jointly owned and acquired during the subsistence of the marriage of the parties also constitutes matrimonial property. It is clear from the definition that acquisition of a property during the subsistence of a marriage does not necessarily make it matrimonial property.

13. It is undisputed that House No. [...], Spring Valley, Nairobi is the parties' matrimonial home. The exhibited copy of lease dated 30.4.13 indicates that the house is owned by the Respondent and his father as tenants in common in equal shares. This is the house which the parties made their matrimonial home and lived in, until the Respondent left in 2019, following the breakdown in the marriage. Accordingly, this property being the matrimonial home of the parties is by definition, matrimonial property.

14. The Respondent has conceded that he owns motor vehicles KBM [...] Passat Volkswagen, KCA [...] Range Rover and KCU [...] Mercedes Van. He also stated that he and his father own the 5-bedroom House Naivasha and 4-bedroom penthouse on 2nd Floor, [...], Mombasa.

15. Although the Respondent submitted that his father financed the purchase of the [Particulars withheld] House and penthouse in Nyali, the fact remains that the Respondent is registered as a co-owner of the same. The registration of the properties to the Respondent and his father conferred upon them certain rights over the properties, regardless of the source of the purchase price. Section 24 of the Land Registration Act provides:

**Subject to this Act—**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

**(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.**

16. Under the provisions of Section 24 of the Land Registration Act, 50% of the absolute ownership and leasehold interest in the said properties, as the case may be, is vested in the Respondent by dint of his registration as co-owner of the same.

17. Do these properties constitute matrimonial property? I think not. No evidence was placed before the Court to demonstrate that they are the matrimonial homes of the parties. They are also not household goods and effects in the matrimonial home or homes. Further, even if these properties were acquired during the subsistence of the marriage of the parties, none is jointly owned by the parties. As such, none of these properties falls within the statutory definition of matrimonial property.

18. The Respondent denied owning 10<sup>th</sup> Floor, [...], Ring Road Parklands, 6<sup>th</sup> Floor, [particulars withheld], Ring Road Parklands, 3-bedroom Apartment on 7<sup>th</sup> Floor, [...], 4-bedroom Penthouse, [particulars withheld], Mombasa KBH [...] Range Rover and KCS [...] Velfire Van. The Respondent claimed that these properties are owned by the [particulars withheld] business established by his father. The Respondent further denied ownership or knowledge of the EHSL Office in Zambia and EHSL Offices in Dar-es-Salam Tanzania.

19. Notably, the Applicant did not place before the Court any evidence of ownership of these properties nor did she rebut the claims by the Respondent, that the properties do not belong to him. It is trite law that he who asserts must prove. Section 107 of The Evidence Act stipulates:

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

20. The Applicant was obligated to place before this Court, cogent evidence that the Respondent owned the properties or that they were matrimonial properties. Unfortunately, the Applicant made no effort to demonstrate that the Respondent owned these properties and that they were indeed matrimonial properties. She therefore failed to discharge the burden of proof placed upon her by law.

21. From the material before the Court, it follows that only House No. 5 [particulars withheld], Spring Valley, Nairobi is matrimonial property as defined by Section 6 of the Act.

Whether the Applicant is entitled to a 50% share in the suit properties and in the proceeds of rent in respect thereof.

22. The Applicant has asked the Court to make a declaration that she is entitled to 50% of the suit properties and the rent derived therefrom. From the available evidence and the foregoing analysis, the only properties that can be the subject of consideration by the Court in this suit are the following:

- i) House No. 5 [particulars withheld], Spring Valley, Nairobi
- ii) 5-bedroom House Naivasha
- iii) 4-bedroom penthouse on 2nd Floor, [particulars withheld], Mombasa
- iv) Motor vehicle KBM [...] Passat Volkswagen
- v) Motor vehicle KCA [...] Range Rover
- vi) Motor vehicle KCU [...] Mercedes Van.

23. It is the Applicant's case that she made a non-monetary contribution towards the acquisition of these properties and is therefore entitled to equal share of the same. She relied on Section 2 of the Act which stipulates that non-monetary contribution 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;***

24. The Applicant outlined her non-monetary contribution as providing love, companionship and support to the Respondent for the past 11 years and stepping in to care for the children when the Respondent neglected his marital and fatherly duties. She did domestic work and managed all their homes. She also ensured that the properties were well maintained and oversaw all renovations in respect thereof. This was denied by the Respondent who claimed that the Applicant made no such contribution and relied on domestic staff to take care of the children and the home. He also denied that the Applicant was involved in maintenance or renovations of the properties, the details of which he said she did not know.

25. The law governing division of matrimonial property is contained in Constitution of Kenya, 2010 and the Matrimonial Property Act. Article 45(3) of the Constitution provides:

***Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.***

26. In an increasing line of authorities, Courts have held that the equality of parties in Article 45(3) does not translate to equal proprietary entitlement. In the oft cited case of P N N v Z W N [2017] eKLR, Kiage, JA succinctly stated:

***First, while I take cognizance of the marital equality ethos captured in Article 45 (3) of the Constitution, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough;***

The learned Judge went on to state:

***Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort***

*towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.*

*The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra.*

27. And in EGM v BMM [2020] eKLR the Court of Appeal faulted Musyoka, J. for finding that equality of parties in Article 45(3) means that the fact of marriage gives spouses an automatic 50% share of the matrimonial property. The Court opined:

*We think it was erroneous for the learned judge to assume and hold that the Constitution gives spouses an automatic 50% share of the matrimonial property simply by being married.*

28. The findings in the cited decisions of the Court of Appeal appear to be a departure from the previous holding in Agnes Nanjala William - vs- Jacob Petrus Nicolas Vander Goes. (Civil Appeal No. 127 of 2011) where the Court of Appeal interpreted the equality of parties thus:

*Article 45 (3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day.*

29. The Court of Appeal in the EGM v BMM case (supra), went on to state:

*The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed.*

30. It is clear from the foregoing that dividing property between spouses on a 50-50 basis would result in injustice in the sense that one spouse would be unfairly denied their due share and the other would be enriched beyond their contribution, thereby infringing on one party's rights. The equality of spouses in relation to property means that their entitlement thereto must be commensurate to their respective contribution. Accordingly, contribution is key to making a determination of ownership or interest of each spouse in property, whether matrimonial or otherwise.

31. The Matrimonial Property Act was enacted to give effect to the principle in Article 45(3) of the Constitution. 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.*

32. Out of all the suit properties, the Court has made a finding that only one, is matrimonial property and that is House No. 5 [particulars withheld], Spring Valley, Nairobi, the parties' matrimonial home. Under Section 7 of the Act, the Court may, on the basis of evidence before it, vest this property in the parties, according to their contribution and divide the same between them, upon dissolution of the marriage.

33. When enacting the Matrimonial Property Act, Parliament recognized that there will be property acquired by one spouse during the subsistence of marriage, that does not constitute matrimonial property. Provision was therefore made in the Act, as to how the other spouse may acquire an interest in such property. Acquisition of an interest in such property, may only be by contribution. This is the tenure 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.*

34. Additionally, there are certain presumptions that may be made as to property acquired during marriage. Section 14 of the Act provides:

*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.*

35. I have considered the affidavit evidence of the parties. The Applicant claimed that she left employment to devote herself to caring for the

family. The Respondent confirmed that the Applicant did at his request, leave employment as he was able to take care of the family financially. He did however refute the Applicant's claim that she did any housework and instead, insisted on having 6 domestic staff including nannies, house helps, a cook, a driver and a gardener working for her. He denied that the Applicant has made any contribution towards maintenance of the children despite having a lucrative business, the setting up of which he financed. That the Applicant insisted that the children's nannies accompany them on holiday as she found motherly duties a bother. Since their separation he has been paying maintenance for the children as directed by the children's Court.

36. These claims by the Respondent were not denied by the Applicant. It is trite law that what is not denied is deemed to be admitted. It is stated in Odger's Principles of Pleadings and Practice in the High Court of Justice 25th Edition, page 124:

**1. Any allegation of fact unless traversed is admitted.**

***The pleader must either admit or deny every material allegation of fact in the pleading of his opponent and he must make it absolutely clear which facts he admits and which he denies. To ensure this, Rule 13 provides that any allegation of fact is deemed to be admitted unless traversed and that a traverse may be either by a denial or by a statement of non-admission and either expressly or by necessary implication.***

37. The evidence on record shows that besides this suit, the Applicant instituted Children's Case No. 1103 of 2019 seeking maintenance for their children. In that suit, the Applicant sought inter alia a monthly sum of Kshs. 165,000/= for house help, cook and gardener. This belies her claim that she engaged in housework and devoted her time and energy towards caring for the Respondent and the children after having sacrificed her career. Further, the Applicant's claim that she oversaw the maintenance and renovations of the suit properties is not backed by any evidence. Accordingly, I find that her claim of contribution in this regard fails.

38. The parties herein were married for about 11 years before their separation in 2019. The Respondent stated that he discovered repeated instances of infidelity on the part of the Applicant in May 2019 and the marriage irretrievably broke down. The inference that can be drawn from this, is that prior to May 2019, the parties were in a happy marriage. During this period, the Applicant no doubt gave the Applicant love and companionship as his wife. She gave birth to their 3 daughters and obviously loved them as a mother should. Love and companionship cannot be delegated to domestic staff. The Respondent made reference to holidays they took as a family, which is indicative of a happy family going on holiday together. This undoubtedly gave him peace of mind to succeed at work thus enabling him acquire the properties herein. While it is difficult to quantify this non-monetary contribution, the same must be taken into account in determining the Applicant's entitlement to the property herein. To disregard this unquantifiable non-monetary contribution by the Applicant would clearly negate the equality principle in Article 45(3) of the Constitution and result in injustice. Accordingly, the Court makes a finding that based on this non-monetary contribution, the Applicant is entitled to a beneficial interest in the properties herein.

39. It is common ground that the divorce proceedings between the parties are yet to be concluded and are still pending in Court. Accordingly, the properties may not be divided between the parties at this stage. The Court may however make a declaration of the Applicant's rights in the properties. Section 17(1) of the Act provides:

***A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.***

Whether the suit properties should be preserved pending the hearing and determination of Divorce Cause No. 694 of 2019

40. The Applicant has sought preservation of the suit properties pending the hearing and determination of the divorce proceedings. As the Court has found that the Applicant is entitled to a beneficial interest in the 6 properties, and given that the same cannot be divided at this stage, it is necessary for the same to be preserved until the conclusion of the divorce proceedings. Accordingly, I find that a case has been made for preservation of the 6 properties pending the hearing and determination of Divorce Cause No. 694 of 2019.

41. As regards the prayer relating to rent, the Court finds the prayer rather vague. From which property is rent received? How much is received? Who are the tenants in the properties from which rent is received? Without any material being placed before this Court that there is rent receivable from the properties herein, the Court is unable to make any orders in this regard. The prayer for a declaration that the Applicant is entitled to 50% of rental income from the properties must also fail.

Whether the Respondent should submit all title documents, rent proceeds and any documents pertaining to the suit properties for purposes of clarification and transparency

42. The Applicant further seeks that the Respondent submits the title and any documents and rent proceeds pertaining to the suit properties. As indicated elsewhere in this judgment, the properties that are the subject to these proceedings are 6. Out of these, the 3 immovable properties are owned by the Respondent and his father Shiraz. The Court is unable to make orders regarding the title documents of these properties without the involvement of the Respondent's father. In this regard, I am duly guided by the holding in the case of J M K v M W M & another [2015] eKLR where the Court of Appeal stated:

***The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.***

43. Further given that the Court has found that an order for preservation of the properties ought to be made, then my view is that such order is adequate and it is unnecessary to make further orders for the deposit of titles to the property.

44. In the end, I make the following declarations and orders:

a) A declaration is hereby made that the Applicant has a 25% beneficial interest in the following properties:

i) The Respondent's half share interest House No. [particulars withheld], Spring Valley, Nairobi.

ii) The Respondent's half share interest 5-bedroom House Naivasha.

iii) The Respondent's half share interest 4-bedroom penthouse on 2nd Floor, [particulars withheld], Mombasa.

b) A declaration is hereby made that the Applicant has a 25% beneficial interest of in motor vehicles KBM [...] Passat Volkswagen, KCA [.....] Range Rover and KCU [...] Mercedes Van.

c) The Respondent, his servants or agents are hereby restrained from evicting and/or excluding from or interfering with the Applicant's peaceful living in the matrimonial home, House No. [particulars withheld], Spring Valley, Nairobi, pending the hearing and determination of Divorce Cause No. 694 of 2019.

d) The Respondent's half share interest in House No. [particulars withheld], Spring Valley, Nairobi, the 5-bedroom House Naivasha and the 4-bedroom penthouse on 2nd Floor, [particulars withheld], Mombasa together with the Respondent's interest in motor vehicles KBM [...] Passat Volkswagen, KCA [...] Range Rover and KCU [...] Mercedes Van are hereby preserved pending the hearing and determination of Divorce Cause No. 694 of 2019.

e) This being a family matter, each party shall bear own costs.

**DATED, SIGNED and DELIVERED in NAIROBI this 31<sup>st</sup> day of MAY, 2021**

**M. THANDE**

**JUDGE**

**In the presence of: -**

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

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

..... **Court Assistant**