



**REPUBLIC OF KENYA**  
**IN THE HIGHCOURT OF KENYA AT NYAHURURURU**  
**CIVIL(MAT) CASE NO. 1 OF 2020**  
**IN THE MATTER OF AN APPLICATION BY SWM**  
**IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

**AND**  
**IN THE MATTER OF THE DIVISION OF THE MATRIMONIAL PROPERTY**

**BETWEEN**

SWM.....PETITIONER

**VERSUS**

JMK.....RESPONDENT

**JUDGEMENT**

1. By way of Originating Summons dated 13<sup>th</sup> February 2019 the applicant herein sought for the following orders;

*i. That this honorable court be pleased to declare that the immovable properties acquired during the subsistence of the marriage with the joint efforts of the applicant and the respondent and developed by their joint efforts are jointly owned by the applicant of the respondent, herein under tabulated together with the general improvements thereon under which have been acquired with the joint efforts or funds:-*

*ii. UNS Residential Plot No. [xxx] – within Nyahururu Municipality*

*iii. Nyandarua/Oljoro-Orok-Salient/ [xxxx] That the respondent be restrained by an order of injunction either by himself, his agents or otherwise from entering, interfering, disposing off, transferring of the applicant the said titles namely UNS residential Plot No. [xxxx] – within Nyahururu Municipality and Nyandarua/Oljoro-Orok-Salient/ [xxxx] pending the hearing and determination of this suit.*

*iv. That this court be pleased to order that the properties jointly acquired by the applicant and respondent be divided in such shares as the court may determine with the applicant getting the matrimonial home where she has been currently residing together with the children borne out of the marriage.*

*v. That there be an order that the properties herein and registered in the name of the respondent be valued and a 75% share thereof be assigned to the applicant.*

*vi. That this honorable court be pleased to grant such further or other reliefs as may be just and expedient in the circumstances.*

*vii. That the costs of this suit be borne by the respondent.*

2. The petitioner's case is premised on the grounds that she was a business person at the time she instituted this suit and a former wardress with Government of Kenya Prisons Department. She testified that she lived at [Particulars Withheld] within Nyahururu Township where her matrimonial home was located. That the suit was brought against the respondent who was her former husband having divorced him in 2020 vide a Decree Absolute dated 21<sup>st</sup> January 2020 which was issued by the honorable chief magistrate's court in Divorce Cause No. 13 of 2013 (Refer to Petitioner's Exhibit 2 (a) & (b)).

3. It was her testimony that her marriage with the respondent was blessed with four children who she remained with after the divorce. That during the subsistence of the marriage the duo purchased the aforesaid properties and that Nyandarua/Olgoro-Orok Salient/[xxxx] measuring approximately (40x80) ft. was jointly owned. She expounded that they had erected a semi-permanent house on the plot and someone lived there. **(Title deed produced as Petitioner's Exhibit 3).**

4. Further, she testified that they bought UNS Residential Plot No.[xx] located within Nyahururu Municipality measuring approximately (50\*100) ft. and they built their matrimonial home on the plot. She stated that the property had a letter of allotment in the name of Rosemary Waithera Muchangi who was the first allottee. She produced the agreement for sale of the plot as **Petitioner's Exhibit 4 (a)** and the letter of allotment as **Petitioner's Exhibit 4 (b)**.

5. The petitioner explained to this court that she used to buy everything with the respondent before their marriage broke down. That she used to take loans from Magereza Sacco. She produced a bundle of documents showing the loans as **Petitioner's Exhibit 5**.

6. It was the petitioner's case that she lived in the house on Plot 71 where she has brought up all her children singlehandedly since the respondent deserted their matrimonial home in 2010. That she had also made developments to her home since then and that the house was the only home their children had. The petitioner pleaded with this court to empathize with her situation since she was already a retiree and make orders for her to retain the house on Plot No. xx while the respondent retain the plot christened as Nyandarua/ Olgoro-Orok Salient/[xxxx].

7. The petitioner's counsel submitted that the issues for determination in this matter include; whether the matrimonial properties should be distributed between the petitioner and the respondent and who would bear the costs of this petition.

8. the first issue the petitioner placed reliance on **Section 2, 6 (1), 7,9,14 of the Matrimonial Property Act No. 49 of 2013, Article 45 (3) of the Constitution of Kenya 2010** and the cases of **PNN vs ZWN (2011) eKLR** and **NWM v KNM (2014) eKLR**.

9. It was averred that the petitioner and the respondent contributed in the purchase of the properties as well as in the construction of their matrimonial property as evidenced by the bundle of loan documents produced by her.

10. The petitioner prayed that this court should grant the petitioner the said matrimonial home developed on Plot No. [xx] and grant the remaining property to the respondent for the sake of justice and fairness. She submitted that she had proved both her monetary and non-monetary contribution in the purchase and development of both properties. Lastly, she prayed that costs be awarded in her favour.

#### **ANALYSIS AND DETERMINATION**

11. The issues of determination are whether the said properties are indeed matrimonial property and whether the applicant is entitled to a 75% share thereof.

12. At the outset, the instant case is an undefended suit as the respondent did not enter appearance or file any response or defence despite being properly served severally as evidenced by the petitioner.

13. From the foregoing, there was indeed the existence of a marriage between the petitioner and the respondent as evidenced by the Marriage Certificate Serial No. [xxxxx] produced in court as **Petitioner's Exhibit 1** but the marriage was dissolved vide decree nisi and a resultant decree absolute dated 21<sup>st</sup> January 2020 which was issued by the Chief Magistrate's Court in Divorce Cause No. 13 of 2019 (**Refer to Petitioner's Exhibit 2 (a) & (b)**). It is important to note that the petitioner indicates that the marriage existed from 1995 but was officially solemnized in 2010.

14. This being a matter of division of matrimonial property; the question of what constitutes matrimonial property is now well settled in law. **Section 6 of the Matrimonial Property Act**

17. In my considered view, and taking into account the law the petitioner has shown from the documents relied upon that she substantially contributed to the acquisition and development of UNS Residential Plot No. [xxx] – within Nyahururu Municipality though it was not registered in her name and in Nyandarua/ Oljoro-Orok Salient/[xxxx] whose title deed bears both hers and the respondent’s name indicating that it is jointly owned. Therefore, I find that these properties fall within the statutory definition of matrimonial property.

18. On the second issue at hand as to how the aforesaid properties ought to be distributed and specifically whether the applicant is entitled to a 75% share thereof. **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.***

19. Furthermore, **Section 7 of the Matrimonial Property Act 2013** provides 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.***

20. Notably, courts have upheld that the equality of parties envisioned by **Article 45(3) of the Constitution** does not translate to equal proprietary entitlement. This position was further espoused in the case of **PNN v ZWN [2017] eKLR**, where 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;***

21. Further, **Section 14 of the Matrimonial Property Act** provides that:

***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.***

22. In view of the foregoing, the onus of prove rested on the petitioner to prove both monetary contribution made and non-monetary contribution in acquisition and developments of the listed properties. Having considered the evidence tendered before me in its entirety, I find that the petitioner has satisfactorily proved both her monetary and non-monetary contribution towards acquiring the said properties within the meaning of **Section 2 of the Matrimonial Property Act** which defines "**contribution**" as monetary and non-monetary 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***

23. In the absence of the respondent’s participation in the instant suit I am prepared to presume that there is no contention as to the manner in which the petitioner prays that the properties be distributed. Therefore, in the circumstances of the instant case and in the interest of justice and fairness this court finds that the petitioner has on balance of probabilities proved her case on balance of probabilities and is thus entitled to 100% share of the property known as UNS Residential Plot No. [xxx]– within Nyahururu Municipality together with the home therein and the respondent retains 100% share of the property known as Nyandarua/Oljoro-Orok-Salient/[xxxx] . Thus the court makes the following orders;

***i. The petitioner to get 100% share of the property known as UNS Residential Plot No.[xxx] – within Nyahururu Municipality together with the home therein.***

***ii. The respondent retains 100% share of the property known as Nyandarua/Oljoro-Orok-Salient/ [xxxx]***

***iii. Each party to bear own costs as it’s a family matter.***

**Dated, Signed and Delivered at NYAHURURU this 29<sup>th</sup> day of July, 2021.**

.....

**CHARLES KARIUKI**

**JUDGE**