



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**CIVIL SUIT NO. 2 OF 2017 (OS)**

**ESM.....APPLICANT**

**VERSUS**

**AOM.....RESPONDENT**

**JUDGMENT**

1. **ESM**, the Applicant has filed the Originating Summons herein dated 13.4.17 (the OS) against **AOM**, the Respondent seeking the following:

i) Declaration that the following properties belong to her:

- a) Kwale/Ukunda S.S./[xxxx], the house thereon and rental income from Kingston House rental cubicles built thereon worth Kshs. 3,000,000/=.
- b) House built on the Respondent's father's farm and all furniture and fittings therein worth Kshs. 650,000/=.
- c) Kshs. 240,000/= being proceeds of sale of casuarina trees planted by the Applicant. Developed plot at Misufini at Mzee Masha.
- d) Kshs. 45,000/= being proceeds of sale of 2 cows and 3 goats.

ii) Order that the Respondent refunds to the Applicant Kshs. 750,000/= incurred by the Applicant as rent of Kshs. 12,500/= per month for a period of 60 months.

iii) Order that proceeds of sale of some or the properties be shared equally between her and the Respondent.

iv) Injunction restricting the Respondent from accessing, disposing of, alienating or interfering with the matrimonial properties.

2. In her affidavit sworn on 13.4.17, the Applicant avers that she and the Respondent married on 7.8.10 which marriage has since been dissolved by this Court. At the time of the marriage the Applicant was a teacher while the Respondent did casual jobs but was mostly unemployed. The Applicant claims that during the subsistence of the marriage, using her own funds, she purchased Plot No. Kwale/Ukunda S.S./[xxxx] (Plot [xxxx]) which was registered in both her name and that of the Respondent. She also constructed 10 rental houses on the said property the income from which to date is Kshs. 126,000/=. The Applicant also singlehandedly built a house worth Kshs. 650,000/= on the Respondent's father's farm. She also purchased 2 cows and 3 goats at the cost of Kshs. 45,000/= by way of contribution to family life. The Respondent played passive and peripheral roles but did not make any financial contribution towards the acquisition of these properties. She used the rental income after all repairs, for maintenance of the couple and the larger family. She further alleges that the Respondent holds the said properties for himself to her exclusion. She also claims that the Respondent intends to sell Plot [xxx].

3. The Applicant further claims that she played the role of wife, homemaker and family member. While the Respondent was lazy, apathetic, uncaring and was often absent and. Due to the Respondent's infidelity, she left the matrimonial home in January 2012 and moved into Kingston House. Following threats from the Respondent however, she moved to rental premises at *Kona ya Musa* in March 2012 where she pays rent of Kshs. 12,500/= the total of which at the time of filing the OS amounted was Kshs. 750,000/=. She has been rendered homeless and deprived of her property and prays that the Court grants the orders sought.

4. In his replying affidavit sworn on 25.7.17, the Respondent averred that at the time of the marriage, he was working with [particulars withheld] as a mason. Plot No. [xxxx] is jointly owned by him and the Applicant. While the Applicant provided most of the funds, he

identified the property and negotiated with the vendor and also processed the title deed at Kwale Lands Registry as the Applicant was out of the country at the time. He did this in good faith as a joint investment for him and the Applicant. He further alleges that he supervised the construction of the rental units and he also contributed financially. All the receipts for building material however were on the Applicant's name as per their verbal agreement for accounting purposes. The income from the rental units is Kshs. 35,000/=, contrary to what the Applicant alleges, which has always been shared equally between them. He denied that the Applicant bought any cows and goats as his family already owned 10 cows and 5 goats. The Respondent denied that he had any intention to sell Plot No. [xxxx] as it is his only source of income and is in any event in their joint names. He denied engaging in infidelity and excluding or depriving the Applicant of her home and property and accuses the Applicant of adultery with the man she is with to date. She left the matrimonial home voluntarily and has refused to return in spite of his pleas to her to do so. As such, he should not be saddled with reimbursing her rental payments. He prayed that Plot [xxxx] be shared equally between him and the Applicant.

5. In her testimony before Court, the Applicant reiterated her averments in her in the OS and affidavits. She is a teacher at [particulars withheld] Primary School in Loitoktok. The properties she claims were solely acquired by herself without any financial contribution from the Respondent. Their first matrimonial home was built at the Respondent's father's land which did not have title. She spent Kshs. 700,000/= for the construction and also installed solar panels. She had a well dug a well, bought a pump and a 2000 litre tank and pipes which supplied water to the whole family. She also renovated the Respondent's parents' home at the cost of Kshs. 350,000/=. She worked the farm, planted a vegetable garden, and bought seeds, fertilizer, pesticides, cows and goats. She planted 800 casuarinas in 2 shambas owned by the Respondent's father. She also bought food for the family, washing soaps, etc. The funds used to do all this were from the proceeds of sale of a property she sold in the United Kingdom. She sold the property after she fell in love with the Respondent and they got married, thinking they would have a life together. From the same proceeds she purchased Plot No. [xxxx] for Kshs. 400,000/= and built 10 rooms for a total of Kshs. 2.2 million. She used to transfer moneys to the Respondent for construction. She also sank a well and installed a pump and water tanks. She employed people to do the construction while the Respondent was absent. She was present throughout construction save for a few weeks when she was in the UK. She produced bank statements to support her claims.

6. The Applicant moved to Kenya permanently in 2010 and relied on the proceeds of rent from the 10 rooms as she did not have a job. Initially both she and the Respondent collected rent. However things began to go wrong and the Respondent would take all the rent leaving her with no income. She last collected rent in 2015. In 2014, she got a job at [particulars withheld] Primary School in Loitoktok. When the Applicant first came to Kenya, she found the Respondent working as a mason at [particulars withheld]. Prior to the marriage, the Respondent had stopped working and did not at any time get a job thereafter.

7. The Applicant also purchased a motor vehicle KBK [xxxx] for Kshs. 1,200,000/=. The logbook was in her name. The Respondent however blew the engine by driving the vehicle with no water. After repairs, the vehicle was never good again and because she was short of money, she sold the same. She states that she paid Kshs. 45,000/= for the Respondent's father's kidney operation and similar amount for his cousin's caesarian operation. She also paid fees for the Respondent's sister K's at [particulars withheld] Hills Secondary School until she absconded and gave his other sister Kshs. 15,000/= to start a business. She assisted his brother JOM by buying household goods to enable him go to Majimboni where he was posted as a teacher. The Applicant further stated that she bought 2 motorbikes for the Respondent. 1 ceased operating after the Respondent had an accident with it while the Applicant sold the other one for Kshs. 50,000/=.

8. The Applicant claimed that when she left the matrimonial home she moved into 1 of the 10 rooms she had built. She moved out after 3 months as the Respondent told her he would not give her peace if she continued to stay there. She moved out in March 2102 and rented a house for KShs. 15,000/=. Had he let her stay in the room she would not have incurred the expense.

9. In his testimony, the Respondent stated that he lived with the Applicant for 2 years before marriage and 2 other years after marriage. They met at [particulars withheld] in Shimba Hills where he worked as a mason and she was a volunteer. After her 3 week stay she returned to the UK but returned after 3 weeks. The Respondent could not afford to pay rent for the house he had rented and a friend LK allowed them to build a mud house. Shortly after the there was a problem with the friend and the Respondent returned home while the Applicant returned to the UK. The Respondent's brother bought him a bicycle and he used to cycle to work. The Applicant returned after a month and the Respondent's father allowed them to build a house on his land. Thereafter they decided to buy a piece of land which the Respondent identified at Kona ya Musa. The title was registered in both their names. The Respondent got *fundis* while the Applicant was away for building the perimeter wall. Upon her return, they built the 10 rooms. The Applicant went to the UK again and during this time it was the Respondent who supervised the construction. The Respondent paid the contractor who did the roofing. Upon completion of the construction the Respondent applied for power connection in his name. The rooms were then rented for Kshs. 3,500/=. He prayed that the Applicant pays for his sweat and blood for the 4 years they lived together.

10. During cross examination, the Respondent stated that the facts stated in his testimony were not in his replying affidavit. He stated that he worked at [particulars withheld] from 2012 to 2014. His pay was about Kshs. 16,000/= per month. He was paid in cash and had no bank account. As such he had no document to show. He was unmarried and lived at home. He assisted his parents at home and in the farm with about Kshs. 10,000/=. He used Kshs. 6,000/= for himself and saved Kshs. 3,000/=. He married the Applicant in 2010 at the Registrar's office. He contributed Kshs. 100,000/= towards the wedding. In 2011, they build a stone house with an iron sheet roof on his father's piece of land at the cost of Kshs. 650,000/=. The Respondent claimed that he supervised the construction and contributed towards the purchase of building material and payment of the workers. While she was away, the Applicant would send him funds for construction through Western Union.

11. As regards the house at Kona Musa, the Respondent stated that the plot was purchased on 11.2.10 before their marriage. He negotiated the purchase price which the Applicant paid in full. During the construction of the Swahili house with 10 rooms and 4 toilets, the Respondent was out of work and he assisted in supervising construction when the Applicant was away. He says he contributed financial but cannot remember how much. Both the Applicant and the Respondent collected rent from the rooms until the Applicant left. The Respondent has since been receiving all the rent. He denies that the Applicant planted casuarina trees and claims that they belonged to him and his father. The Respondent stated that he wants to be paid for the 4 years he lived with the Applicant as her husband.

12. JOM a brother to the Respondent testified on his behalf. He denied that the Applicant bought food in their parents' home. According to him, the Applicant contributed not all but half of their father's hospital bill. The other half was paid by their brother S. The Applicant paid

school fees for their sister K in exchange of being taught how to cook and having her clothes washed. He stated that the Respondent and their father bought all building material for the house in Kona Musa. He denied that the family depended on the Applicant for their needs. He stated that the property and vehicle were purchased before marriage between the Applicant and the Respondent. He did not know the Respondent's contribution to the purchase. The house in Kona Musa has tenants and both parties collect rent but he does not know how they share the same.

13. Parties filed their respective written submissions which I have considered. I have also considered the pleadings and the testimony both of which are difficult to follow. Doing the best I can in the circumstances, I deduce that the issues for determination are:

- i) Whether the Applicant is entitled to compensation for rents paid, proceeds of sale of trees, cows and goats.
- ii) Whether the immovable suit properties constitute matrimonial properties.
- iii) Whether the Respondent made any contribution towards acquisition of the immovable suit properties.
- iv) Whether the Applicant is entitled to exclusive rights to the immovable suit properties.

Whether the Applicant is entitled to compensation for rents paid, proceeds of sale of trees, cows and goats.

14. The Applicant has made a claim for Kshs. 240,000/= being proceeds of sale of casuarina trees that she planted by the Applicant. She also claimed Kshs. 45,000/= being proceeds of sale of 2 cows and 3 goats. When she left the matrimonial home, the Applicant stayed in rented accommodation. She now seeks an order that the Respondent refunds to her the sum of Kshs. 750,000/= incurred by the Applicant as rent of Kshs. 12,500/= per month for a period of 60 months. For the Applicant to succeed in these claims, she must specifically prove each one of them.

15. In the case of Maritim & Another –v- Anjere (1990-1994) EA 312 at 316 where the Court of Appeal stated:

***“In this regard, we can only refer to this court’s decision in Sande –v- Kenya Cooperative Creameries Limited Civil Appeal No. 154 where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”***

16. And in Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR, Ngugi, J. stated:

***Our decisional law is quite clear now that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury.***

17. In the present case, the Applicant seeks payment to her by the Respondent of specific amounts for rent paid, proceeds of sale of trees, cows and goats. Although these amounts are quantifiable and have been pleaded, they must be proved. Before compensation is permitted by the Court, the Applicant must demonstrate that she actually made the rent payments. She must also prove that she owned the trees, cows and goats and that the same were sold for the amounts specified. With no receipts or other evidence exhibited, the Applicant has failed the test of specifically proving the amounts claimed. Accordingly, her claim fails.

18. As regards the prayer for an order that proceeds of sale of some of the properties be shared equally between her and the Respondent, the Court finds the prayer rather vague and is unable to make any order in this respect.

Whether the immovable suit properties constitute matrimonial properties

19. Section 6 of the Matrimonial Property Act defines matrimonial property as:

***(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***

20. In order for the suit properties to qualify as matrimonial property, it must be demonstrated that they are either the matrimonial home of the parties or they are jointly owned and acquired during the subsistence of the marriage. The evidence on record shows that Plot No. Kwale/Ukunda S.S./[xxxx] is registered in the joint names of the parties on 11.2.10. On the property stands the rental units. Although the property is jointly owned by the parties, it is not occupied or utilized by them as their family home. Further, this property was acquired before and not during the subsistence of the parties' marriage on 7.8.10, a fact that is not disputed. The property therefore is not matrimonial property within the definition of Section 6 of the Act. This property is also excluded as matrimonial property, by Section 5 of the Act which provides:

***Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property.***

21. As regards the house built on the Respondent's father's farm and all furniture and fittings therein. The evidence on record shows that the Applicant built a house on the Respondent's father's farm. She claimed that it cost her Kshs. 700,000/=. This is where the parties set up their matrimonial home. By dint of Section 6(1)(a) of the Act, it is matrimonial property. The Respondent, citing Section 6(2) of the Act however, contends that this is trust property and cannot be matrimonial property. Section 6(2) provides:

***Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.***

22. It is not disputed that the piece of land upon which this house was built belongs to the Respondent's father. Does this fact make the property trust property or property held under customary law? The Act does not define trust property or property held in trust under customary law. Black's Law Dictionary Tenth Edition defines trust property as :

***The property for which a trustee is responsible.***

23. It is noted that no document of title was exhibited to enable the Court come to the conclusion that the property upon which this house is built is trust property or is held in trust under customary law. It is also noted that this was not pleaded in his response to the originating summons. Court My view therefore is that the house having been the parties' matrimonial home falls within the definition of matrimonial property.

Whether the Respondent made any contribution towards acquisition of the immoveable suit properties.

24. The Court has found that the property in Kona Musa, though registered in the joint names of the parties, is not matrimonial property having been acquired by the parties before marriage. Section 9 of the Act 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.***

25. As regards the house built on the Respondent's father's piece of land, the Court found that the same fits the definition of matrimonial property. Section 7 of the Act provides that matrimonial property vests in spouses according to their contribution 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.***

26. In line with Section 7 of the Act, this matrimonial property vests in the parties according to their contribution.

27. It is the Applicant's case that she solely contributed towards the acquisition and development of the properties herein with no financial assistance from the Respondent. On the other hand, the Respondent contends that he made his non-monetary contribution. The Applicant used to send money to the Respondent through Western Union for the construction of the house. This is not disputed. He looked for young men to clear the ground to pave way for construction. He looked for the land for purchase, negotiated with the owner and did the search, which as a foreigner she was unable to do. He and his family took care of the Applicant including making meals, and washing her clothes. On several occasions the Respondent took the Applicant to hospital when she was sick and spent nights with her at the hospital. He gave her security, protection and love until she was happy living in the village.

28. The Constitution of Kenya, 2010 espouses the principle of fairness and non-discrimination that is to be applied by the Court in considering the entitlement of parties in the suit properties. Article 45(3) 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***

29. The principle of fairness and equality of rights does not mean equal entitlement to property upon division of the same. It simply means that the parties will be accorded fairness with no discrimination. In [P N N v Z W N \[2017\] eKLR](#) Kiage, JA had this to say about equality of spouses as contemplated by Article 45(3) of the Constitution:

***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.***

30. The Act recognizes that both monetary and non-monetary contribution should be taken into account in determining contribution of spouses in the acquisition of property during the subsistence of the marriage. Section 2 of the Matrimonial Act defines contribution as follows:

***“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

31. The Applicant has demonstrated through bank statements that she contributed the purchase price and construction costs of the properties solely without financial contribution from the Respondent. Indeed this fact is not disputed. The Respondent wants his non-monetary contribution to be taken into account. Contribution has been broadened by the Act to include non-monetary contribution. In the P N N case (supra) Kiage JA said the following about non-monetary contribution:

***What has changed, from my point of view, is the narrow conception of contribution espoused by ECHARIA in that it went as far only as recognizing indirect contribution which had essentially to be viewed in money or monetary equivalent leaving out such unquantifiable as child care and companionship which fall under non-monetary contribution which is now expressly recognized under the Matrimonial Property Act.***

32. The unquantifiable non-monetary contribution by the Respondent shall must be taken into account. The apportionment of each party's rights to these properties shall be equal to their respective contribution whether monetary or non-monetary.

Whether the Applicant is entitled to exclusive rights to the immoveable suit properties.

33. It is not disputed that all the financial contribution towards the acquisition and development of the properties herein was made by the Applicant. The evidence also shows that the Respondent made non-monetary contribution by way of love, companionship, protection and doing the groundwork in the acquisition of the Kona Musa property, supervision of construction of both properties. He got workers to do the work and also paid them. The Respondent also created such a conducive environment that the Applicant was fully integrated in the Respondent's family and village life. The non-monetary contribution of the Respondent in the purchase and construction of the properties herein is recognized in law. As such, the Applicant cannot be entitled to the exclusive rights to the properties to the exclusion of the Respondent.

34. Ascertaining contribution of spouses is always a challenging assignment. The difficult task of determining the rights of parties in a marriage in division of their property in the absence of concrete proof of contribution is left to judicial discretion. There is no formula and the Court has to make an unscientific estimate of each spouse's contribution. In the case of M A A v A R [2018] eKLR, Chitembwe, J. had this to say:

***There is no formula for distribution of Matrimonial Property. What the court should consider is the contribution by the parties towards the property which is the subject of distribution. Where the financial contribution of each party is known, it becomes easy for the court to distribute the property in line with Section 7 of the Matrimonial Property Act. However, where the contribution is non- monetary, the situation becomes difficult. The court has to estimate the efforts by the spouse who did not make any financial contribution and give it a value, either as a percentage or as a lump sum. The current situation is that the defendant equally did not make any financial contribution.***

35. After considering all the evidence I draw the conclusion that the suit properties were acquired and developed through the financial contribution of the Applicant and the non-financial contribution by the Respondent. The properties should therefore be divided according to each party's contribution. I estimate the Applicant's contribution to be 80% while that of the Respondent is 20%. The Court notes that the Applicant left the matrimonial home in 2012 and has never returned. This no doubt has soured the relationship between her and the Respondent's family. It would therefore be both imprudent and untenable to order that the Applicant goes back to the matrimonial home built on the Respondent's father's land. Accordingly, the following orders commend themselves to me:

a) The property known as Kwale/Ukunda S.S./[xxxx], the house thereon and rental income from Kingston House rental cubicles built thereon worth Kshs. 3,000,000/=, is hereby declared to be the property of the Applicant.

b) To give effect to order a) above, the joint ownership of Kwale/Ukunda S.S./[xxxx] between the Applicant and the Respondent is hereby severed;

c) The house built on the Respondent's father's farm and all furniture and fittings therein worth Kshs. 650,000/=, is hereby declared to be the property of the Respondent.

d) Each party shall bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 20<sup>th</sup> day of September 2019**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

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

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

.....**Court Assistant**