



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 68 OF 2015**

**CKM.....APPLICANT**

**VERSUS**

**PMK.....RESPONDENT**

**JUDGMNET**

1. The parties herein **CKM** and **PMK** initially married under Kikuyu customary law in 1997 and in 2000 they solemnised their union at [Particulars Withheld] Church in Thika. The two were blessed with 3 issues of their union.
2. Due to misunderstanding the couple no longer live together. The Applicant's case is that the two stopped living together in 2013 whereas the Respondent's version is that they ceased living together in 2008 which ever the correct version the parties are yet to pursue a divorce and remain tied to each other in matrimony in the eyes of the law.
3. The Applicant (wife) moved the court on the 10<sup>th</sup> of December 2015 citing the **Matrimonial Property Act of 2013** and the **Constitution of Kenya 2010**.
4. The orders sought for include declaration of several land parcels and motor vehicles as being matrimonial properties, which are owned jointly by the parties, preservation of the same and in the alternative disposal of the same and the proceeds thereof being shared.
5. The Respondent's (husband) case is that he acquired majority of the properties after he separated from the wife in 2008.
6. The wife set out the following properties as matrimonial property:

**Land Parcels:**

**A.**

**i. L.R. No.xxxx /X -Thika Ngoigwa**

**ii. L.R. No. xxxx/xxx – Juja**

**iii. Plot No. xxxon L.R. No. xxxx/X-Ndalani Mavoloni**

**iv. Juja/Kiaora/Block/xxx/Kiaora Gachororo**

**v. Plot No. xx, Phase X –Thika Bidco**

**vi. Plot No. x/xxxx Magogoni**

**vii. Plot No. xx Dandora**

**viii. Plot No. xxxx/xxxx – Ngoigwa**

**ix. Plot No.x/xxx – Thika, Kisii Estate**

**x. Plot No. xx/xxx – Thika, Kisii Estate**

xi. L.R.NO. xxxxxx/xxx, Kiganjo Estate, Thika

xii. Plot No. xxxxx/xxxxx Syokimau

**Motor vehicles:**

**B.**

i. KBW xxx L Toyota S. Wagon

ii. KBQ xxxQ Toyota S. Wagon

iii. KBJ xxxN Toyota Salon

iv. KBL xxxF Toyota S. Wagon

v. KAU xxx Toyota S. Wagon

vi. KAV Xxx Toyota Station Wagon

**c. A micro finance business**

7. The husband's case on the other hand is that he acquired most of the properties after 2008 he listed the same as follows:

-L.R. No.xxx/x

-L.R. No. xxxx/xxx

-L.R. No. xxx(Ndalani/Mavoloni/Block x/xxx

**Acquired on 12<sup>th</sup> May 2011.**

- Plot No. x/xxxx Magogoni (Gatuanyaga/Ngoliba Block

1/1076 bought on xx/x/xxx

- Plot No. xx Dandora bought on 1/8/2011.

- Plot No. x/xxx acquired on 7/10/2009.

- Plot No. Xx/Xxx on 16/12/2010.

**Motor vehicles**

**KBL xxxF**

**KBJ xxxN**

**KBW xxxl**

Acquired in 2010 and 2014.

8. According to the husband the only properties acquired during the marriage are;

- L.R. No. Juja/Kiora/xxx in 1996

- Plot No. XX Phase xin 2001

- **Motor vehicles KAU xxx and KAV xxx**

9. It was his assertion therefore that save for properties ( paragraph 8 above) though he has no intentions of selling the said properties, he does not hold any of them in trust for the wife.

10. **Article 45** of the **Kenyan Constitution 2010** on family provides as follows:

- i. The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.**
- ii. Every adult has the right to marry a person of the opposite sex, based on free consent of the parties.**
- iii. Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of marriage.**

11. The **Marriage Act 2014** and the **Matrimonial Property Act 2013** were enacted after the Constitution and anchored on the provisions of the Constitution and more particularly **Article 45**.

12. Under the Marriage Act one can petition for separation or divorce if they have grounds so to do. Notable is that despite the allegations by the wife and husband neither has moved the court for legal separation or a divorce.

13. **Section 6** of the **Matrimonial Causes Act** defines Matrimonial Property to be the matrimonial home or houses, household goods and effects, any other immovable and movable property jointly owned and acquired during the subsistence of marriage.

14. **Section 7** instructs the court on when and how to distribute matrimonial properties. It provides that;

**“Subject to subsection 6(3), ownership of matrimonial property vests in the spouses or 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.”**

15. The wife and husband herein having taken no steps to obtain a divorce decree cannot enjoy the provisions of Section 7 above. This court has no mandate in the circumstances to distribute the properties.

16. However, **Section 17(1)** of the **Matrimonial Properties Act** does allow one to apply to court for a declaration of rights to any property that is contested between that person as a spouse or a former spouse of the other person.

17. **Section 2** of the **Matrimonial Property Act** defines contribution both in monetary and non-monetary terms so that management of the matrimonial home, domestic work and child bearing are to be considered.

18. In line or in furtherance of the provisions of the **Matrimonial Property Act** courts have made pronouncement of what constitutes matrimonial property, acquisition of the same and division at the point of divorce. Some notable decisions are:

In *MGNK V AMG* [2016] eKLR where the court stated;

**“A wife’s indirect contribution towards acquisition of matrimonial property has been recognized for some time now. The English position with regard to the issue has been stated in several decisions including that of *Hazell -vs- Hazell*, [1972] 1All 923. There, it was held that in order to entitle the wife to a share in the proceeds of the matrimonial home, it was sufficient if the contributions made by the wife to family expenses and well-being, progression or otherwise were such as to relieve the husband from expenditure which he would otherwise have had to bear and thereby helping him indirectly. It need not be a monetary contribution but bearing on monetary expenditure.....”**

In *TMW Vs FMC* (2018) eKLR the court said;

**“As regards non-financial contribution I wish to rely on The House of Lords decision in *White vs White* (200)UKHL 54 in which the Court cited the greater awareness of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills, a position that was reiterated in subsequent decisions of the House of Lords in *Miller vs Miller & McFarlane* [2006]UKHL24 with courts endorsing the jurisprudence of equality. She argued that any law that advocates for the division of matrimonial property on the basis of proved contributions alone, runs counter to the spirit embodied in the Maputo Protocol and that the division of matrimonial property must be effected having due regard to the principle of equality.”**

In *L W W v J G T* [2018] eKLR the court said as follows;

**“The matter before us relates to the perennial war between husband and wife over matrimonial property after the collapse of their marriage. It has always been a murky waterway for the courts in this country to navigate since the applicable procedural law was a piece of archaic legislation enacted in England in 1882 and inherited as a statute of general application in this country. That was the Married Women’s Property Act, 1882, (MWPA)... The opportune moment for change came during negotiations on the new constitution which was promulgated in August 2010, three years after the Echaria case. The people of Kenya in a referendum decided to expressly pronounce themselves on the institution of family in Article 45 as “the natural and fundamental unit of society and the necessary basis of social order” which must enjoy the “recognition and protection of the state”. As relates to marriage, Article 45(3) provides as follows: “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.” ... Parliament indeed rose to the occasion two years after that decision and enacted The Matrimonial Property Act, 2013 which received assent on 24<sup>th</sup> December, 2013, and commenced on 16<sup>th</sup> January, 2014... A combination of the above provisions of the Constitution 2010 and the Matrimonial Property Act 2013, has settled the law on matrimonial property and chartered a clear vision for the future.”**

19. Guided by the above authorities, for now, taking into account that the wife and husband herein remain married and the properties in question acquired during coverture, I will not hesitate to find and hold that all properties acquired since the traditional marriage between the parties in 1997 to date are matrimonial properties.

20. The question now is whether the court can declare that even if the properties in question are registered in the name of the husband, he holds the same in trust for the wife.

21. **Section 14** of the **Matrimonial Property Act** stipulates that where a property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is being held in trust for the other spouse.

22. Since this court is not yet distributing the properties, I am satisfied that for now the applicant as a wife has demonstrated to this court on a balance of probabilities that the properties listed were acquired during coverture and though registered in the husband's name she has a beneficial interest in each and every one of them.

23. The properties listed in paragraph 6 above are for now declared to be matrimonial property the ratio of contribution will be held in abeyance to be apportioned if at all at the point of distribution.

24. None of the properties listed in Paragraph 6 above will to be alienated, disposed of, sold, charged and/or interfered with without the consent of both spouses and or by order of the court.

25. Costs to the Applicant in any event.

**SIGNED DATED and DELIVERED in court this 28<sup>TH</sup> day of Day of NOVEMBER, 2019.**

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**ALI-ARONI**

**JUDGE**