



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 37 OF 2009 (O.S)**  
**IN THE MATTER OF AN APPLICATION BY E E G M**  
**UNDER SECTION 17 OF THE MARRIED WOMEN 'S PROPERTY ACT 1882**

**BETWEEN**

**E E G M.....PLAINTIFF**

**VERSUS**

**P N K.....DEFENDANT**

**JUDGMENT**

**1. E E G M** hereinafter referred to as the Plaintiff filed an Originating Summons dated 30<sup>th</sup> November 2009 against **P N K** hereinafter referred to as the Defendant. In the said Originating Summons she seeks the following orders;

i. That it be ordered that the following properties acquired during coverture through funds and efforts of the Plaintiff and the Defendant during their marriage and registered in the name of the Defendant are owned by the Plaintiff in the ration of 1.1 or in such proportions as the court may deem just.

**Schedule of properties**

- a. Title number Makuyu/Kimorori/Block XXX approximately 28.333 acres.
- b. LR no. 8336/17 Thika Municipality.
- c. Title number Makuyu/Kimorori Block XXX approximately 0.8173 Ha.

**Schedule of Motor Vehicle**

- d. Motor Vehicle Registration no. XXX Land Rover Discovery.
- e. Motor Vehicle Registration No. XXXX Toyota Corolla.

ii. That the properties and vehicles described in 1 above be sold and proceeds of the sale be shared by the Plaintiff and Defendant on the ratio of 1:1

iii. That the Defendant do account for rents and profits obtained from the properties and vehicles described above.

iv. That the defendant do pay the costs of this summons.

2. The Defendant filed a replying affidavit dated 26<sup>th</sup> January 2010. He depones that the parties have never established their matrimonial home in Thika Municipality XXX Block 17 and puts the Plaintiff to strict proof. That during the period the properties subject matter of these proceedings were acquired by him the Plaintiff was not in any gainful employment as alleged. That the Plaintiff did not contribute in any way to the acquisition, development or maintenance of the suit properties .

3. The Plaintiff testified as follows; she married the Defendant in December 1994 and they have two children. They divorced in 2009. That at the time she got married she was engaged in artificial insemination . She was self-employed and stopped working when she got married. This was by consensus so that she could raise the family. They lived in Thika. In 1998 she went back to work for a Company called [*particulars withheld*] (ABS). She worked until 1999. Sometimes during their marriage the Defendant's cousin informed them that land was being sold in Kimorori Makuyu area. It was xxx acres. They used funds from the fixed deposit account which funds were gifts from their wedding to purchase the said land. She recalled that the Defendant used to give her money to put in the said fixed account at [*particulars withheld*]. The property was undeveloped with coffee shrubs and teas. They began to develop the plot by planting maize and beans and later put up a cow pen, pig style and houses for workers. The Defendant by then was working at Delmonte. She sold produce from the farm, took feeds of animals and ploughed back the money she received into the farm. She stopped managing the farm in 2007 after they separated then she went back to her parents' home. The Defendant started managing the farm after she left. As a housewife she took care of the family 24/7, raised their children and took care of the Defendant. This was her contribution. They also acquired other properties Mukuyu/Kimorori Block XXX was a gift to them by her mother in law after their wedding. The title is in the Defendant's name. L.R XXX Thika Municipality was their matrimonial home. It was paid through funds from Delmonte Sacco. Although the Defendant was the sole contributor she was present at the time of breaking ground of their matrimonial home and they jointly chose the design for the home which was completed in 2008 after she left. The Defendant moved into the said house with the children. At the time of building the said house they lived in the quarters provided by [*Particulars*] as the Defendant was an employee of [*particulars*]. When she left the two children, their son and daughter lived with the Defendant. She saw them over the weekends and they stayed with her during some holidays. She maintained the children when they were with her. The LandRover was their family car and it was bought from Delmonte by the Defendant. She used a pickup registration no. XXX which the Defendant had acquired before their marriage. Vehicle Registration no. XXX Toyota Corolla was their family car. She seeks to have 50% of Land parcel Makuyu/Kimorori/Block XXX as she managed it and 50% of their matrimonial home in Thika Municipality. She did not benefit from the sale of Vehicle Registration number XXX Toyota Corolla.

4. During cross examination she testified that; they built a matrimonial home together and that she resided at the property in Thika for 3 months. She worked as an [*Particulars Withheld*] having qualified in 1990. She was earning Kshs.30,000/- from ABS. The monies they received during their pre-wedding was put in a fixed deposit though she does not recall the amount they used part of it to buy the property at Makuyu. She has no record of the account in the Fixed Deposit. She also does not recall the amount she got from the farming and however she contributed by ensuring that the farm was managed. She admitted that she was not entitled to Parcel No. Kimorori Block xxx as the property vested in the Defendant in 1989 before their marriage. The rest of her evidence reiterated her evidence in chief.

5. The Defendant testified that they lived in [*particulars withheld*] until November 2009. That he bought the said property with his own savings and he built in 2003. He used to get loans. He purchased the property at Delmonte with his own money and partly money from his brother. That during the construction he had a site supervisor and he went daily to supervise the construction. That the Plaintiff did not supervise the work. He purchased Makuyu/Kimorori/Block XXX for Kshs. 4,100,400.00 using his saving from [*Particulars Withheld*] and monies he borrowed from Barclays Bank. That he is not aware of the fixed account at Daima Bank though he had a savings account. The farm did not give him

any income though he invested. He stopped going to the farm in 2005 and 2006. That all along they had a house girl whom he paid and a gardener to maintain the home. He sold Land parcel Makuyu/Kimorori block XXX in 2003 when he applied the funds to develop the plot. He acquired it in 1989 and was not gifted to him by his mother. He does not know vehicle registration no. XXX Land Rover Discovery. He sold Vehicle Registration No. XXX Toyota Corolla in April 2014 for Kshs. 100,000/- and used it to develop Makuyu/Kimorori Block XXX. He urged the court to note that he contributed financially and that the Plaintiff made no contributions and that there was no way she could farm, supervise a site and take care of the children.

6. During cross-examination he testified that the construction in LR. No XXX Thika Municipality began when they were married but separated in 2007 and he moved in to the said house in 2008. They never lived as a couple in the same house. That he supervised the construction during lunch hour and had a site supervisor. The Plaintiff was not a contractor but he would know when if she was at the site. He admitted that the Plaintiff was involved in caring for the children.

7. Parties filed written submissions. The Plaintiff singled out 3 issues for determination;

*i. Whether the properties listed in the schedule in the Originating Summons are Matrimonial property?*

*ii. Whether there was any contribution by the plaintiff to the acquisition of the matrimonial property?*

*iii. Whether the Plaintiff is entitled to ownership of any other properties on the basis of her contribution or otherwise legally and in what proportion?*

On the 1<sup>st</sup> issue after analyzing the evidence the Plaintiff submitted that she relies on Section 6 of The Matrimonial Property Act which defines what is a matrimonial home and section 14 (a) which states that where a matrimonial home is acquired during the marriage there shall be a rebuttable presumption that the property is held in trust for the other spouse. That since the properties listed were acquired following the marriage on the 17<sup>th</sup> of December 1994 they are matrimonial property. She pointed out that Block XXX was acquired on the 23<sup>rd</sup> of February 2001, L.R. XXX was registered in the defendant's name on the 5<sup>th</sup> June 2001, Makuyu/ Kimorori Block XXX was registered in the defendant's name on the 2<sup>nd</sup> December 1997 which was prior to the marriage but was developed subsequently with the contribution of the Plaintiff. The 2 vehicles were acquired during their marriage and she should get 50% of the sale price for vehicle XXX. On the 2<sup>nd</sup> issue it was submitted that the court should consider the definition of the word contribution as defined in the Marriage Act at Section 2. That based on the definition contribution can either be monetary or non-monetary. That the court should consider the Plaintiff's evidence on the nature of her contribution on each property as stated in her evidence.

On the 3<sup>rd</sup> issue it was submitted that in addition to her submissions on the 2<sup>nd</sup> issue the Plaintiff relies on the provisions of Article 45 (3) of the Constitution that 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. That the court should hold that the Plaintiff is entitled to 50% ownership of all the properties, as the Plaintiff had the use of all the said properties but following her separation from the Defendant and subsequent divorce she has been denied use and benefit of the same. The Plaintiff to buttress this argument relied on the case of **ELC Case No. 208 of 2012 CMN vs. AWM** where the court in reliance of the 2010 Constitution held as follows;

*“in this case, plenty of effort has been expended to demonstrate that in fact, the Plaintiff is the one who made all the contributions to purchase the suit property and that the defendant was just a joy rider. In fact, this has been established through the various evidence that has been adduced before this court. It has been established without a doubt that it is the plaintiff who met all the financial requirements towards the acquisition of the suit property. However, the legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the*

*purchase of the matrimonial property which matters. The foregoing legal provisions spell a different legal landscape”.*

The Plaintiff also relied on the holding of the Court in **Busia HCCC No. 39 of 2012 UMMvs IMM** where the Court held that the provisions of the Constitution under Article 45 (3) for both monetary and non-monetary and direct, indirect contributions applied even to distribution of property acquired prior to 2010 Constitution and the Matrimonial Property Act coming into force.

8. The Respondent summarized the parties' evidence and submitted further as follows; that the Plaintiff did not adduce evidence documentary of otherwise to merit the grant of the prayers sought. The defendant demonstrated how he singly acquired the suit properties through his earnings, savings and loans. The Defendant submitted further that the Plaintiff did not adduce any evidence of the work she did her job qualifications or evidence of any income she received from the farming in parcel no.XXX. On XXX there was no evidence adduced by the Plaintiff that to prove that she had the technical knowhow to supervise construction. That there was no evidence led to show her direct or indirect contribution and thus her evidence amounts to mere allegations. On Makuyu/ Kimorori/ Block XXXC it was submitted that the Plaintiff had no beneficial interest in the property as it was acquired before the 2 married and that there was no development on the property at the time of the sale. On vehicle XXX it was submitted that with the Defendant denying that he owned the vehicle, the Plaintiff failed to produce any documentary evidence of the vehicle's log book nor a copy of search to prove that the vehicle was owned by the Defendant and therefore the vehicle cannot be part of the matrimonial property. It was further submitted that the Plaintiff failed to show her contribution in the purchase of vehicle registration XXX. The Defendant sought a dismissal and made reliance on the following case **CA No. 280 of 2012 MGNK vs AMG** where the Court of Appeal held as follows;

*(17) 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 V. Hazell, (1972) 1 All 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 they helping him indirectly. It need not be a monetary contribution but bearing on monetary expenditure.*

*(18) The position in Hazell –v- Hezell (supra) was taken in Karanja –v- Karanja, (1976-80) 1KLR, where it was observed that he contribution of the wife need not be direct payments towards purchase of matrimonial property, but may be indirect such a meeting household and other expenses which the husband would otherwise have had to pay. Nine years later, in 1985 in Njoroge –v- Ngari, (1985) KLR 480, the court held that in matrimonial property disputes, if the property is held in the name of one person, even if that property is registered in the name of one person but another contributed towards acquisition of the property, then both persons have proprietary interests in that property.*

*(19) In Echaria –v-Echaria, ( 2007) 2 EA 139, a five judge bench of this court stated that a wife's non-monetary contribution cannot be taken into account when determining the total amounts of contribution from the wife towards acquisition of the property. the court somewhat non-gallantly observed that marriage per se does not entitle a spouse to a beneficial interest in the property registered in the name of the other nor is the performances of domestic duties. The court however, relying upon the English case of Burns –v- Burns, (1984) 1 All ER 244, accepted that non-direct financial contribution by a spouse may be taken into account. The court stated:*

*If there is a substantial contribution by the woman to the family expenses, and he house was purchased on a mortgage, her contribution is, indirectly referable to the acquisition of the house since in one way or another it enables the family to pay the mortgage installments. Thus a payment could be said to be referable to the acquisition of the house if, for example the payer*

***either:***

***a. Pays part of the purchase price or***

***b. Contributes regularly to the mortgage installments or***

***c. Pays off part of the mortgage, or***

***d. Makes a substantial financial contribution to the family expenses so as to enable the mortgage installments to be paid.***

9. It was submitted further that Section 7 of the Matrimonial Property Act provides that contribution is not limited to direct monetary contribution or contribution which is preferable to acquisition of the subject property. On the Plaintiff's claim that the property should be divided in accordance with Article 45 (3) of the Constitution, the defendant relied on two cases **Busia High Court Civil Suit No. 39 of 2012 UMM Vs IMM** and **CA. No 128 of 2014 PNN V. ZWN** where the Courts held that Article 45 (3) whereas the said provision provides for a fifty fifty sharing of Matrimonial Property each case should be decided on the evidence adduced by the parties considering the contribution whether monetary or non-monetary.

## **10. DETERMINATION**

The issues for determination are:

*i. Whether the properties and vehicles listed in her Originating Summons are matrimonial property and whether they should be sold and proceeds shared and the ratio of 1:1.*

*ii. Whether the Respondent should account for rents and profits obtained from the properties and vehicles.*

From the facts adduced the Plaintiff and the Defendant got married in December 1994 and divorced in 2009. There is no dispute that all the properties listed on the schedule are in the Defendant's name as the sole proprietor. The Plaintiff claim that though she did not contribute financially she made her indirect contribution entitles her to a share of property as claimed. Matrimonial Property as per the Matrimonial Property Act at Section 6 is defined 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”.*

Section 14 (a) of the Matrimonial Property Act provides as follows;

*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.”*

11. Parties have submitted on what constitutes matrimonial property. The Plaintiff claims that since the properties listed in the schedule were acquired during their marriage she has a beneficial interest in them. The defendant has rebutted the same by stating that the plaintiff did not contribute financially to any of the properties. In making this decision the court is guided by the provisions of the Matrimonial Property

Act, the Marriage Act and Article 45 of the Constitution of Kenya. I have already cited the provisions I find relevant from the Matrimonial Property Act. The Marriage Act at Section 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;*

12. I will start with the schedule of vehicles. The plaintiff claims that vehicle registration XXX Land Rover Discovery was their family vehicle. The Defendant denies knowledge of the said vehicle. I find that the plaintiff did not adduce any evidence to show that the defendant owned the vehicle a record of search could have helped the court establish whether the vehicle belonged to the plaintiff. I find it was not part of the matrimonial assets. On vehicle XXX Toyota Corolla, the Defendant stated that he bought it and later on sold it for Kshs. 100,000/- and used the said monies to pay school fees for the children and their upbringing. This asset is not available for distribution and I accept the Defendant’s explanation that he used the monies to cater for the children expenses.

13. In the case of **M G N K vs. A M G**, the Court of Appeal reiterated their decision in **M .v. M [2008] 1 KLR 247 (G & F)** that *in assessing the contribution of spouses in acquisition of Matrimonial Property, each case must be dealt with on the basis of its peculiar facts and circumstances bearing in mind the principles of fairness*. I now turn to the properties. Matrimonial Property as defined in the Matrimonial Property Act is property that was acquired during the subsistence of the marriage. The properties listed by the plaintiff are all in the name of the Defendant. It is presumed under Section 14 (a) of the Matrimonial Property Act that such property is held in trust for the other spouse. The Plaintiff’s evidence that property title number Makuyu/Kimorori Block 5/12 was registered in the defendant’s name on the 2<sup>nd</sup> December and was developed subsequent with the contribution of the Plaintiff. The Respondent response is that he purchased the said parcel of land from his mother in 1989 and sold the same on the 6<sup>th</sup> June 2003 to finance the construction of LR No. XXX Thika Municipality. This was admitted by the Plaintiff during her cross examination. From the green cards attached in the Defendant’s supplementary bundle of documents filed on 14<sup>th</sup> April 2015 at page 10 that show that the property was transferred from the Defendant to J M W on the 11<sup>th</sup> May 2011. The Defendant claims that he used the proceeds of properties to finance the construction on LR. No. 8336/17 Thika Municipality. I find that the plaintiff has not proved that she is entitled to the proceeds as the Defendant has explained how he used the proceeds.

14. The next property is LR No. XXX Thika Municipality. This property was registered in the Defendant’s on the 14<sup>th</sup> December 2011. According to the Plaintiff she did not contribute towards its purchase as it was financed by the defendant’s solely. She testified that she was involved in the development and improvement of the said premises as they were to move into it once it was built. She claims that she is entitled to ownership of 50% of the same. The Constitution at Article 45 (3) provides that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage. In the case of **P.N. N v. Z.W.N Civil Appeal No. 128 of 2014**, the Court referred to their holding in the case of **Francis Njoroge v. Virginia Wanjiku Njoroge** and held that;

“... a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in **LOCK YENG FUN v. CHUA HOCK CHYE [2007] sgca 33**;

*It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and by its very nature cannot be – a precise mathematical exercise.”*

15. I appreciate the Plaintiff’s evidence that this property was acquired during their marriage and that she could have contributed in the initial stages of its construction, however the property was built by the defendant and occupied after she left the matrimonial home. Her contribution in my view does not entitle her to a 50% share. She never occupied it. It is the defendant and their two children who lived in it subsequent to her departure.

16. On property Makuyu/Kimorori/Block XXX. The Plaintiff’s evidence is that this property was acquired in 2001 partly from proceeds received from their wedding and also monies paid in by the Defendants into their fixed deposit account. The Defendant attached documents to show that he acquired loans to finance the purchase of the said parcel of land. Both admitted that they did not build but some farming was being done. According to the Plaintiff though she did not directly finance the purchase she contributed in the management of the said property by supervising the farm work and workers. This was vehemently denied by the Defendant though he admitted that she did go to the farm. In the case of M.G. N. K (supra) the Court of Appeal in noting the contribution of each party had this to say, *“As a court we were not a party or aware of the events as they happened. As is always, we as judges are called upon to adjudicate or determine matters, of which we had no knowledge of interest in. As part of our daily menu, we have no choice but to intrude legally into personal and often times distressing events involving what was yesterday a perfect marriage. As a matter of fact we rely on solely on the evidence adduced by the parties. We are only expected, indeed mandated to do our best despite our frailties as human being..... In a 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 the best of its ability taking into account not only the personal earning 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”*

17. The Plaintiff’s claim is based on her indirect contribution to the property and persuaded by her evidence that she did take time to be involved in the farm management in this parcel of land even though the defendant contributed most of the finances. To task the Plaintiff to proof what they got as cash gifts during their wedding would be unfair to her. As a court I have the duty to take into account both direct and indirect contribution. Courts have held that a wife’s indirect contribution towards the acquisition of Matrimonial Property has to be recognized. In M v M (supra) it was held in part that a woman’s contribution to acquisition of matrimonial property must be recognized. The Plaintiff’s contribution in this case was in managing the farm, selling produce and supervising the workers whilst the Defendant was at work. Her contribution enabled the defendant to carry on with his work as she dealt with the farm. She also did take care of the farm and all this came to an end when she left their matrimonial property due to their indifferences. She stated she was not employed during their marriage and this was by consensus Contributions as envisaged are not limited to direct monetary contribution. The Marriage Act defines contribution to mean both monetary and non-monetary contribution which includes; domestic work and management of the matrimonial home, child care, and companionship, management of family business or property; and farm work. Bearing this in mind it is my view that the Plaintiff is entitled to 20% of parcel no. Makuyu/Kimorori/Block XXX. Each party to bear its own costs.

**Dated, signed and delivered this 29<sup>th</sup> day of September 2017**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

Miss Maria h/b for Mrs Oduor for the Plaintiff

Mr. Mugo h/b for Mrs Wambugu for the Defendant

Ms. Charity Court clerk