



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**CIVIL SUIT NO. 78 OF 2013 (O.S)**  
**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**  
**AND**  
**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)**  
**BETWEEN**  
**H W R .....APPLICANT**  
**VERSUS**  
**P R K..... RESPONDENT**  
**JUDGMENT**

1. H W R filed the Originating summons dated 14/11/2013 seeking determination on the following;
  - i. That it be declared that the properties (moveable and immovable) acquired by the joint funds and efforts of the applicant be divided equally between parties.
  - ii. That this honorable court be pleased to make orders for the division of matrimonial property
  - iii. That pending the hearing and determination of this application, an interim order be made restraining the respondent from solely enjoying and benefiting from the use of matrimonial property with regards to rent.
  - iv. That this court be pleased to grant such further or other reliefs as it may deem just and fit.
  - v. That cost of this application be provided for.
2. The application is based on grounds that the petitioner is entitled to have part of the matrimonial property as she contributed in the acquisition and also to enable her cater to her needs. Further, that she is not in a financial position to support herself and hence it is proper she be allowed to acquire half of the matrimonial property.
3. In her affidavit in support dated the 14<sup>th</sup> November 2013 H W R the petitioner avers that she got married to the respondent on 13<sup>th</sup> November 1985 under the African Christian Marriage and Divorce Act, but the said marriage was dissolved on 4<sup>th</sup> July 2008 in Divorce Cause no. 105 of 2003 and the decree nisi was made absolute 90 days after the said dissolution. She avers that in the course of her marriage to the respondent they acquired the following properties;
  - i. Kayole house 4 Flats

- ii. Umoja House No. G *[particulars withheld]*
- iii. Pioneer House L.R. No. *[particulars withheld]*
- iv. Dandora House- Dandora VI/Block *[particulars withheld]*
- v. Nyeri Farm-Thegenge Ithi/*[particulars withheld]*
- vi. Naro Moru Farm 20 acres
- vii. Ruai Plot
- viii. Mjiru Plot /Ageria Development Company Limited No- *[particulars withheld]*
- ix. *[Particulars withheld]*

4. She avers that the respondent solely collects rent and enjoys the use of the said properties to her exclusion and the same are registered solely in the names of P R K and having contributed towards the same during the duration of the marriage she is entitled to 50%.
5. The respondent in his replying affidavit dated 17<sup>th</sup> November 2014. He admits to having been married to the petitioner and dissolution of the said marriage but denies that he and the petitioner acquired any property jointly during the subsistence of the marriage. That despite he and the respondent being employed the petitioner spent her money without consulting him. While he was left to provide for the children, pay their school fees, buy their food clothing and personal effects until they completed university as is the case with 3 of his sons who were settled by the petitioner in America. That whilst married the petitioner spent her money on frequent trips Dubai and India to buy merchandise which she sold in Nairobi when she was not working as a primary school teacher but later on in 2006 she settled in America where she is working and living with an American husband and that she also enjoys Kshs. 7,000/- per month as government pension which accumulates in her bank account. He denied owning any plot in Ruai. On the *[particulars withheld]* properties he avers that the petitioner who introduced him to the said company had two plots and a house in Umoja Estate No. N *[particulars withheld]* which properties are in her name where she currently gets Kshs. 30,000/- as rent from the main house but that in 1987 he built a one storey building (extension) comprising of three units of one bedroom each on the Umoja estate No. N *[particulars withheld]* and that she did not contribute even a single cent to the said developments . He denied owning any house in Dandora VI/Block *[particulars withheld]* as alleged by the petitioner as the same was vandalized and demolished by garbage touts as the plot was adjacent to Dandora dumping site particulars which were well within the petitioner's knowledge and as such the same does not exist.
6. He avers that he solely bought and developed the Kayole house in 1989 which he solely rely on for rental income of Kshs. 16,000/- for his upkeep and maintaining his new wife and children. That in 1991 he bought the Nyeri farm- *Thegengeithi/ [particulars withheld]* from James Wangombe despite the petitioner's objection and that she did not contribute or assist in developing the same he attached the copy of agreement . That **Umoja No. G** *[particulars withheld]* was bought in 1984 from Joseph Kirubi Kahiga which gives rental income of Kshs. 20,000/-. While pioneer house is his matrimonial home and attracts no rental income and he only completed paying his mortgage on the same on 24<sup>th</sup> October 1985. While Naro Moro farm is jointly owned by him and his brother Mr. Wahome and that the property was bought in the form of shares from *[particulars withheld]* Holdings Limited in 1978 whilst is currently being cultivated by an adult son. That Njiru Plots/Ageria Development Company was purchased in form of 1 share on 6<sup>th</sup> June 1980. He refutes the petitioner's allegations that she is entitled to a 50% share of the said property.
7. The matter was heard on 24/9/2015. The petitioner in her testimony stated that he met the respondent in **1973** and they cohabited as friends until she got her son in 1978 and they later got married under customary law and in 1983 they moved to Pioneer. That in **1985** they solemnized their marriage at the Attorney General's chambers. She stated that at the time she was a teacher and she bought everything when they started living together. That after her first son she had a daughter and then 3 other sons. She stated that she helped in feeding the family and developing the home and even took loans to assist her do so. She testified that the **Pioneer house** bought in **1983** when she moved in and that the same was a mortgage and she contributed towards the said payments. She testified that the property in Umoja she bought it in 1975 before she met the respondent and extended 2 bedrooms in 1987 and they had gotten a house in the respondent's name **Umoja G** *[particulars withheld]* and extended her house too. She got money and they made 3 extensions. After the said extension the respondent stated that he wanted to recover the money

he had used to extend the same from the rental income and he collected the rent of 12,000 from 1988 to 2003 giving her only 10,000. That in 2003 she discovered that he was paying rent for his mistress and she took over the rent from him. She stated that **Umoja G [particulars withheld]** was bought within the time of the marriage and has rented it out all this while. That he bought 2 acres Nyeri farm when they were constructing the house in Dandora and the respondent had asked her to get him a loan of 100,000/- , which the respondent used Kshs.60,000/- to buy the Nyeri farm. After this she got fruits to plant and the respondent asked the brother to plant coffee and stopped her from seeing what was happening in the said farm. That later the respondent purchased **20 acres at Naru Moro** which purchase was made through a company and buyer was to make monthly contributions the said property is in his name. That the **Dandora house** was bought in **1985 or 86** and had been rented out to people adding that currently the said plot has no tenants due to its proximity to the dumping site. That later the respondent constructed the **4 flats in Kayole** after **Dandora**. On Mwana Mukia she testified that they went to see the plots together and that she had earlier bought 2 plots before she met her husband. That she introduced her husband who also bought two plots and at the time they were married. She added that they went to see the Njiru plots together. She testified that she took loans to purchase the **Nyeri farm** and **Umoja house** and also assisted in educating the children. She denied having remarried and urged the court to award her part of what the respondent is getting from the property as she contributed towards the acquisition of the same.

8. The respondent in his testimony admitted to having married the petitioner and details upto the dissolution of the said marriage. The respondent sought to rely on his replying affidavit as his evidence.
9. On cross-examination he testified that he met the petitioner in 1970 and they were friends before he visited the petitioner's parents and they got married in 1985. He denied owning a house in Dandora stating he owned a plot which he developed but the same was demolished by City Council. He stated that he bought the Kayole plot in 1989 which he admits was during his marriage to the petitioner. That he collected money from the said property to educate and feed his children and denies the petitioner's allegations that he contributed Kshs. 20,000/- adding that at the time he was employed as a customs officer with KRA. He avers that he bought all the property from his income adding that he and the petitioner did not have any joint account nor purchase any property jointly. He avers that he paid maids and paid them but also admits that the petitioner also contributed towards developing the children and consulted on where the children went to school and the petitioner's job did not influence the said decisions and both contributed towards the running of the house. He stated that the two plots the petitioner bought from Mwana Mukia were bought around the year 2000 during the subsistence of the marriage and at the time they stayed at Pioneer.
10. Parties filed written submissions. The petitioner in her submissions gave a background of her case and the petitioner's case. In her view only two issues were coming for determination.

- i. **Whether the petitioner contributed towards the acquisition of the said properties**
- ii. **Whether she is entitled to a share in the said properties.**

11. She relied on section 7 of the Matrimonial property Act which provides that ***“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.”***

12. Further made reference to Section 2 of the Matrimonial property Act which contribution as, **“monetary and non-monetary contribution and non-monetary contribution to include**

- 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**

**“family business” means any business which is run for the benefit of the family by both**

**spouses and generates income and other resources wholly or part of which are for the benefit of the family.**

13. It was her submission that she provided both monetary and non-monetary contribution towards the acquisition and development of the matrimonial property. That she developed the matrimonial home by painting and decorating it installing security fixtures, did domestic work and took care of the children.
14. That as per **Article 45** of the **Constitution of Kenya** provides that, “*parties to a marriage are entitled to equal rights as at the time of the marriage, during the marriage and at the dissolution of the marriage.*”

Further in the case of *UMM v IMM [2014] eKLR* where it was held, “*that u made a non-monetary contribution to the development of plots... of importance of the plot is the matrimonial home in which she resides. That the offer made by I is that plot no....is sufficient to settle the matter. On My part there is no doubt that U’s contribution towards the developments of the plot is acknowledged.*”

That **Article 16 (1)** of the Universal Declaration of Human Rights to which Kenya is a signatory states that, “*married women of full age without any limitation due to race, nationality or religion have the right to marry and to found a family. They are entitled to equal rights as to marriage during marriage and at its dissolution.*”

That further Article 7 (d) of the protocol to the African Charter on Human and Peoples Rights states that, “*in cases of separation, divorce or annulment of marriage, women and men shall have the rights to an equitable sharing of property deriving from the marriage.*”

15. The respondent on his part reiterated the averments on the face of his replying affidavit. He submitted that there was no evidence that the petitioner did any domestic work or took care of the children as he had to employ nannies to take care of the children whom he paid salaries and that the petitioner was employed full time as a primary school teacher travelled to Dubai and India leaving the children under his care. Other times she was busy selling her imported merchandise. He refutes the petitioner’s claims that she painted Pioneer house nor the petitioner planting any fruit trees at the Nyeri farm adding that the petitioner did not even want him to purchase the said farm. He also denies that the petitioner ever contributed Kshs. 100,000/- towards the extension of Umoja house adding that after extending the petitioner’s house at Umoja she took over and he never collected any rent from there. He submits that for the petitioner petition to succeed she must show her financial contribution towards the said property if claiming 50/50. That the petitioner has not proved non-monetary contribution, he submits that the petitioner is a divorce fortune seeker as she had been divorced previously and failed to disclose the property she acquired from the said divorce. That in the hearing she admitted that she was currently working as a nurse in USA owning a green card and as such awaiting to become a citizen of the said country. That being a retired schoolteacher she was also earning a monthly pension. He submitted the petitioner’s reason to bring the said petition is to acquire property to sell and finalize her construction in Embakasi while destabilizing him and his young family.
16. The petitioner was a schoolteacher and was also involved in other businesses with an aim to generate an income, the respondent does not dispute this. It is in my view that the petitioner in one way or the other contributed financially towards the said family and as such she I find that she has contributed financially towards the family and is therefore entitled to a share of the property acquired during the subsistence of the marriage.
17. There is a sale agreement dated 18<sup>th</sup> October 1984 for purchase of a house **Umoja G. [particulars withheld]**. The petitioner in her testimony stated that she got married to the respondent on 13<sup>th</sup> November 1985 under the African Christian Marriage and Divorce Act. It is evident that the said house was purchased prior to the said marriage however, the petitioner alleges that she contributed Kshs. 100,000/- towards the extension of the said house though the respondent and though the respondent argues that the petitioner took over and he never collected any rent from there, there is no evidence or proof to show that. As such I find that the petitioner is entitled to the said

- contribution of Kshs. 100,000/- she put in towards the extension of the said property said house.
18. In regards to the **Pioneer house L.R [particulars withheld]**, the respondent has adduced a letter from Pioneer Building Society dated 24<sup>th</sup> October 1985 acknowledging receipt of the respondents letter and confirming receipt of Kshs. 137,544.25 from his Investment account to clear the outstanding mortgage. It is evident that by the time the parties got married in November 1985 the respondent had completed payment of the said mortgage and as such the same does not form part of the matrimonial property having been acquired before the said union. Though the petitioner alleges to have made some repairs and re-painting, she has no evidence to prove the same and as such, I find that the petitioner in regards to the said property has not proved any financial contribution towards the said property.
19. In regards to the **Kayole property no. D1- [particulars withheld]** the respondent has adduced a payment receipt for the same dated 1/9/1989. This shows that the said property was purchased during the subsistence of the said marriage and as such forms part of matrimonial property.
20. In regards to **Njiru plots/ Ageria Plots** the respondent adduced a certificate no. **[particulars withheld]** and dated 6<sup>th</sup> January 1980, which indicates that the same were acquired prior to his marriage to the petitioner and as such I find the same having been acquired before the said marriage does not form part of matrimonial property. In essence the respondent has adduced evidence that the following properties do not form part of matrimonial property having been acquired before his marriage to the respondent.
21. **Nyeri Farm-Thegenge Ihithe/ [particulars withheld]** in regards to this parcel of land the respondent had adduced a sale agreement dated 19/2/1991 where by the seller James Ngotho acknowledges to receiving payment for the sale of the said property from the respondent. As at the said date the petitioner and respondent were married and as such the said land forms part of matrimonial property. In regards to the said property I find that the same was acquired during the subsistence of the marriage and forms matrimonial property and as such the petitioner is entitled to get 50% share in the same.
22. The respondent did not adduce any documents to support when the following were acquired;

- i. **Dandora House- Dandora VI/Block [particulars withheld]**
- ii. **Naro Moru Farm 20 acres**
- iii. **Ruai Plot**

23. It is evident that the petitioner contributed financially and non-financially towards the said family. She was a companion to the respondent and despite there being a house maid employed by the respondent as claimed she took part in maintenance of the home, child care and as admitted by the respondent she managed family property as such I find that the petitioner has proved non-financial contribution towards the family. Further the petitioner was in formal employment as a teacher and earned a salary which with no doubt she contributed something towards the maintenance of the family the respondent also stated that she used to travel outside the country in China and India where she got merchandise to sell. This I find was to generate an income which she used to better her family especially her children. The respondent in his own words has stated that the petitioner financed the children's travel abroad this only shows that she earned a living which she used to assist the family and especially their children. From the fore going I find that the petitioner has proved financial contribution towards the acquisition of the property acquired during the subsistence of the marriage and as such is entitled to a share in the same. In my view the following are the properties that form matrimonial property and since the petitioner has proved both financial and non-financial contribution she is entitled to 50% share of the following properties.

- i. **Nyeri farm - Thegengeihithe/ [particulars withheld]**
- ii. **Kayole property no. D1- [particulars withheld]**
- iii. **Ruai Plot**

24. In addition the petitioner is entitled to recover the **Kshs. 100,000/-** she spent in the development of the **Umoja House no. G [particulars withheld]**.

25. The respondent shall retain solely the properties acquired before contracting the said marriage that

is;

- i. **Kayole house 4 flats**
  - ii. **Umoja House No. G [particulars withheld]**
- iv. **Pioneer House L.R. No. [particulars withheld]**  
v. **Njiru Plot /Ageria Development Company Limited No- [particulars withheld]**

Each party shall retain their plots at **Mwana Mukia**. On the **Naro Moru** Farm 20 acres it appears it was bought through a company the petitioner failed to persuade this court that she is entitled to it as she testified that the respondent paid for it. There was evidence that the Dandora house is not habitable and its existence is in doubt. It is so ordered. Cost in the cause.

**Dated, signed and delivered this 29<sup>th</sup> day of February 2016.**

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....**For the Petitioner**

.....**For the Respondent**

**Ms. Charity**

**Court Clerk**