



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

**FAMILY DIVISION**

**CIVIL SUIT. NO.43 OF 2009 (0S)**

**M W M.....APPLICANT**

**VERSUS**

**J P M.....RESPONDENT**

**JUDGMENT**

The Applicant, **M W M** took out Originating Summons dated 8<sup>th</sup> December 2009 in which she sued the Respondent **J P M**. She brought the summons under the provisions of **Section 17** of the **Married Women's Property Act of England (1882)** (*now repealed and replaced by **Matrimonial Property Act***) and **Section 3** of the **Judicature Act** seeking a declaration that she is entitled to half share of the following movable and immovable properties;

- (a) L.R No. *[particulars withheld]* Riara Road, Nairobi registered in the name of the Respondent.
- (b) L.R No. *[particulars withheld]* Kyuna Estate, Nairobi registered in the name of the Respondent.
- (c) L.R No. *[particulars withheld]* Upper Hill, Nairobi registered in the name of *[particulars withheld]* Limited.
- (d) LR No. *[particulars withheld]* Mombasa Road, Nairobi registered in the name of *[particulars withheld]* Limited.
- (e) LR No. *[particulars withheld]* Gitanga Road, Nairobi registered in the name of *[particulars withheld]* Limited.
- (f) 10 acres agricultural land in [Muthengera, Nyahururu registered in the name of the Respondent.
- (g) 10 acres agricultural land in Igwamiti, Nyahururu registered in the name of  
the Respondent.
- (h) 5 acres in Naivasha, *[particulars withheld]* and *[particulars withheld]* registered in the name of the Respondent.

- (i) Motor Vehicle Registration Number **[particulars withheld]**.
- (j) Motor Vehicle Registration Number **[particulars withheld]**.
- (k) Motor Vehicle Registration Number **[particulars withheld]**.

The Applicant alleges that although the said properties are not registered jointly or in her name, they were acquired by the joint effort and financing of both herself and the Respondent during the subsistence of their marriage. She therefore sought a declaration that she is entitled to half share of all income accruing from the said assets pending the division and transfer of her share of the said assets into her name.

In support of the said summons, the Applicant filed a supporting affidavit sworn on 8<sup>th</sup> December 2009 and a further affidavit dated 2<sup>nd</sup> August 2010. The Applicant's case is that she and the Respondent were married on 12<sup>th</sup> February 1983. She stated that she has been in gainful employment since 1983 having respectively worked at **[particulars withheld]** Kenya Limited, **[particulars withheld]** Limited, **[particulars withheld]** Limited, as a Consultant for the **[particulars withheld]** (xxxxxx), **[particulars withheld]**, **[particulars withheld]** Insurance Broker Kenya Limited and **[particulars withheld]**. At the time she filed suit, she was a senior manager at the **[particulars withheld]** of Kenya. She claimed that on or about 1991, through a loan from the HFCK Limited, she purchased a house in South C, i.e LR No. **[particulars withheld]** for a sum of Kshs.950,000/- and utilized income from the house for the benefit of the Respondent and their two children who are now adults.

The Applicant claimed that in 2002 she sold the said house for Kshs.3,000,000/-. She gave the proceeds to the Respondent. He utilized the same to supplement in the development a parcel of land, LR No. **[particulars withheld]**, Gitanga Road, Nairobi which is registered in the name of **[particulars withheld]** Limited. This is a company where the Applicant is also a shareholder. It was the Applicant's contention that during the subsistence of the said marriage, apart from performing her wifely duties to the Respondent and their children, she made substantial contributions towards the upkeep of the family and acquisition of the said assets.

The Applicant further stated that she provided consultancy services for and on behalf of **[particulars withheld]** Consultants Limited which is a family business. She received consultancy fees on her account. She stated that she was able to obtain from her employer a comprehensive medical cover and tour packages which the family enjoyed. She also met the costs of the children's education related expenses.

In his response, the Respondent filed a replying dated 9<sup>th</sup> February 2010, responding to the affidavit dated 17<sup>th</sup> August 2010, a supplementary affidavit dated 21<sup>st</sup> February 2012 and a further affidavit dated 8<sup>th</sup> May 2012. The Respondent denied the allegations made by the Applicant to the effect that the said properties were jointly acquired by himself and the Applicant. The Respondent's case is that he was employed and was financially stable when he got married to the Applicant in 1983. He already commenced business in his own company, **[particulars withheld]** Limited in 1983 where he has since worked as a Managing Director.

He admitted that indeed the Applicant bought property LR No. **[particulars withheld]** but added that he also contributed a sum of Kshs.210, 447.30 towards its purchase. He produced copies of bankers cheques and receipts in confirmation of this assertion. He however denied the allegation that the proceeds from the sale of the said house were utilized for the benefit of the family. According to the Respondent, the amount might have been invested into **[particulars withheld]** College Limited in which both the Applicant and the Respondent were shareholders. The company was incorporated in 2003 but was sold to third parties on 21<sup>st</sup> June 2004 at a consideration of Kshs.2,000,000/-.

The Respondent stated that the Applicant kept all proceeds from the sale of **[particulars withheld]** College Limited despite him having invested the sum of Kshs.256, 112.50 towards the partitioning and decoration of the company's offices. He produced a copy of a cheque dated 7<sup>th</sup> June 2004 paid to Chege

Designers who was alleged to have provided interior design services to the company.

The Respondent also averred that he even contributed money towards the purchase of Motor Vehicle registration number **[particulars withheld]** belonging to the Applicant. He also alleged that he purchased for the Applicant motor vehicle registration number **[particulars withheld]** (formerly **[particulars withheld]**) which was later sold and proceeds contributed therefrom deposited for the purchase of Motor vehicle registration number **[particulars withheld]** which the Applicant was using at the time the suit was filed.

The Respondent avers that he single handedly purchased LR No. **[particulars withheld]** in 1988 through a mortgage obtained from Kenya Savings & Mortgages Limited. He produced copies of payments receipts to confirm the same. This property is however said to have been sold by the Respondent to cater for the children's overseas education. It was therefore no longer in the ownership of the Respondent. On L.R No. **[particulars withheld]** (I.R **[particulars withheld]**), the Respondent stated that he single handedly purchased the same for a purchase consideration of Kshs.14,000,000/-. He produced a sale agreement and receipts to confirm this position.

With regard to LR **[particulars withheld]** Upperhill, Nairobi, the Respondent stated that the property was owned by **[particulars withheld]** Consultants Limited, a limited liability Company in which the Applicant owns one share and the Respondent owns 2,499 shares. The Respondent also stated that LR No. **[particulars withheld]** is owned by **[particulars withheld]** Centre Limited, also a limited liability company in which the Applicant owns one share and the Respondent has 499 shares. He stated that motor vehicles Registration number **[particulars withheld]**, **[particulars withheld]** and **[particulars withheld]** are registered in the name of **[particulars withheld]** Limited where the Applicant owns 100 shares and the Respondent owns 19,900 shares.

The Respondent maintained that the Applicant did not contribute anything at all towards the purchase and development of LR. No. **[particulars withheld]** Gitanga Road, Nairobi. The Respondent contended that he had always had good jobs and businesses which enabled him to single handedly meet all the family's financial needs. He stated that he had also taken a medical cover for the family due to the Applicant's frequent change in employment. He denied going on any family holidays on account of the Applicant's employer.

The Applicant, in her further affidavit sworn on 2<sup>nd</sup> August 2010 insisted that the money used to set up **[particulars withheld]** College Limited was obtained from her terminal dues from her previous employers. She stated that the proceeds from the sale of **[particulars withheld]** College Limited was utilized in the acquisition and development of family assets. She stated that she single handedly bought herself the motor vehicle registration number **[particulars withheld]** through a loan advanced by her former employer. She reiterated that the motor vehicle registration **[particulars withheld]** was purchased from income from the family businesses.

The Applicant averred that, at the time she filed suit, she was living in a house she purchased through a loan from her employer after she moved from her matrimonial home. She produced a letter dated 27<sup>th</sup> June 2006 from her employer, **[particulars withheld]** of Kenya approving the said loan. She also produced bank statements for the period 1994 to 2006 in a bid to show that the income from the family businesses namely **[particulars withheld]** Limited, **[particulars withheld]** Centre Limited and **[particulars withheld]** Consultants Limited could not have sufficed to purchase all the family assets as alleged by the Respondent.

The parties to this suit agreed to dispose of the suit by submission. Prior to the hearing of the case, counsel for both parties filed written submissions in support of their respective opposing positions. Njagi J heard the submissions before he ceased to have jurisdiction in the Family Division. The parties to this suit agreed by consent to have this court write judgment on the basis of the proceedings that were taken before Njagi J. They made further oral submission before this court to clarify some issues that may have arisen since the suit was heard by Njagi J. This court has read the pleadings filed by the parties in support of their respective opposing positions. It has also considered the submission made by the parties, both

written and oral.

Although this suit was filed before the promulgation of the **2010 Constitution**, this court is of the view that the provisions of **Article 45(3)** applies. The said **Article** 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.”***

**Article 27(1)** of the **Constitution** provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. **Article 45(3)** of the **Constitution** was given judicial interpretation by the Court of Appeal sitting at Mombasa in **C.A. No.127 of 2011 Agnes Nanjala William –vs- Jacob Petrus Nicolas Vander Goes** where the court held that despite the fact that the case before it was filed before the **2010 Constitution** was promulgated, nevertheless, its provisions as it relates to human rights were applicable because the recognition of such rights by the **Constitution** did not imply that such rights did not exist prior thereto. The court was of the view that such rights were inherent and were not granted by the State. At page 22 of its judgment, the Court rendered itself thus:

***“We all know that the purpose of the bill of rights is to recognize and protect the fundamental rights and freedoms and to preserve the dignity of individuals and communities and more so, to promote social justice and the realization of the potential of all human beings. Human rights are universal for all persons and have several main characteristics. One of them is that they are:-***

***Inherent – This means that they belong to every person by virtue of birth. All human beings are born free and equal in dignity and rights.”***

***The new Constitution of Kenya captures this aspect in:-***

***“Article 19(2) which states that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities. Further Article 19(3)(a) provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State.”***

***The Appellant in the instant case is no exception in as far as the enjoyment and protection of her fundamental rights and freedoms are concerned. These are her inherent rights that she was born with and are not granted to her by the State.***

***Article 27(1) deems every person to be equal before the law and has the right to equal protection and equal benefit of the law. Article 27(3) states that:-***

***“women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”***

The above decision was rendered before the **Matrimonial Property Act 2013** was enacted. **Section 4** of **Matrimonial Property Act** reiterates the principle of equal status of spouses in a marriage.

In the present suit, the Applicant claims that the matrimonial properties which were acquired during the subsistence of the marriage should be divided equally between herself and the Respondent. The Respondent does not dispute that the properties listed in the originating summons were indeed acquired during the marriage. The Respondent however vehemently denies that the Applicant contributed anything at all towards the acquisition of the said properties. Indeed, the Respondent annexed exhibits in the replying affidavits which to some extent established his claim that he had purchased the particular properties. There are two categories of properties that are subject to these proceedings:

I. The first category is properties registered in the Respondent’s name. These properties are:

- (a) L.R No. *[particulars withheld]* Riara Road, Nairobi
- (b) L.R No. *[particulars withheld]* Kyuna Estate, Nairobi
- (c) 10 acres agricultural land in Muthengera, Nyahururu
- (d) 10 acres agricultural land in Igwamiti, Nyahururu
- (e) 5 acres in Naivasha, *[particulars withheld]* and *[particulars withheld]* Complex

II. The second category is properties registered in various companies incorporated by the Applicant and the Respondent. A distinct feature of the share holdings of these companies is that the Respondent is the majority shareholder by upto 99.9% of the shares. These properties are:

- (a) L.R No. *[particulars withheld]* Upper Hill, Nairobi registered in the name of *[particulars withheld]* Consultants Limited.
- (b) LR No. *[particulars withheld]* Mombasa Road, Nairobi registered in the name of *[particulars withheld]* Centre Limited.
- (c) LR No. *[particulars withheld]* Gitanga Road, Nairobi registered in the name of *[particulars withheld]* Centre Limited.

In the affidavits filed by the Applicant and the Respondent in support of their respective cases, it emerged that there was a property, LR. No. *[particulars withheld]* which the Applicant had purchased through a mortgage from her employer. The Respondent averred that he contributed the sum of Kshs.210,447.30 towards its purchase. The Applicant indicated that this property was purchased for a sum of Kshs.950,000/- but was later sold for Kshs.3,000,000/- when she started a business referred to as *[particulars withheld]* College Limited. The Respondent alleged the sum that he contributed towards the purchase of the said property was not refunded to him. He also did not get back the sum of Kshs.256,112.50 which he had applied towards the partitioning and decoration of the offices of *[particulars withheld]* College Limited. This was despite the fact that the Applicant later sold the college for a sum of Kshs.2,000,000/-.

The Applicant did not dispute this claim by the Respondent. What is however clear from this transaction is that during the subsistence of the marriage, the Applicant and the Respondent dealt with the acquisitions of this particular property on the basis of mutual trust and not with a view to either spouse keeping records regarding the contribution made by the particular spouse. There was another property being LR. No. *[particulars withheld]* which was purchased and registered in the Respondent's name. The Respondent explained that he sold the property to cater for the couple's children overseas education. This was not disputed by the Applicant. This court will therefore not take into consideration the above two properties in determining the distribution of matrimonial property for the simple reason that the two properties no longer exist.

As regard the second category of properties which were registered in the name of limited liability companies, there are several authorities by the Court of Appeal starting from Muthembwa –vs- Muthembwa [2002] KLR 1 to Mereka –vs- Mereka CA Civil Appeal No.236 of 2001 and Lillian Njeri Mungai –Vs- Dr. Njoroge Mungai CA Civil Appeal No. 191 of 1995 where the Court held that shares held in limited liability companies were not within the purview of the court to distribute between spouses under **Section 17 of the Married Women Property Act 1882**. In latter case, the court held as follows:

***“If there are disputes between husband and wife as to their respective rights to the shares in a company registered in the name of one spouse, then the court, like in the case of any other property in dispute between husband and wife has power to ascertain the respective beneficial rights of husband and wife to the disputed shares. It can declare, like the learned C.A. did in***

***this case, that one spouse holds a certain number of shares in trust for the other spouse. What the court cannot do under section 17 of the 1882 Act, like in respect of all other properties, is to order the transfer of the legal titles to property or in other words to pass proprietary interest from one spouse to the other.”***

In the present case, it is clear that this court cannot distribute or divide the properties registered in the names of limited liability companies between the Applicant and the Respondent. This is because the respective shares held by the Applicant and the Respondent is provided under the **Memorandum and Articles of Association** of the respective companies. As cited in the above case, the Applicant has a remedy if she desires for a court to declare that the Respondent holds certain shares in the said companies in her trust. The correct forum where she can litigate this issue however, is the **Companies Court** as established in **Companies Act**. This court therefore lacks jurisdiction in this case to apportion or divide the respective shares in the companies as between the Applicant and the Respondent. The Applicant’s claim in respect of the said properties therefore is disallowed. This also applies to the following motor vehicles which the Respondent established were registered to the respective companies in question:

- (a) Motor Vehicle Registration Number ***[particulars withheld]***.
- (b) Motor Vehicle Registration Number ***[particulars withheld]***.
- (c) Motor Vehicle Registration Number ***[particulars withheld]***.

As regard the properties registered in the name of the Respondent, this court holds that the said properties are available for division by this court. This due to the fact that the said properties, although registered in the name of the Respondent, were acquired during the subsistence of his marriage to the Applicant. Prior to the promulgation of the **2010 Constitution**, it was not clear how spouses were to be treated by courts when it came to division of matrimonial property. That doubt was however removed by **Articles 27 and 45(3)** of the **Constitution** which now enjoins the court to treat spouses in a marriage equally during subsistence of the marriage and after the dissolution of the marriage. This court agrees with the dicta of the Court of Appeal in the **Agnes Nanjala Williams** case cited above where the court held that the right to treat a woman and a man equally in a marriage and after the dissolution of the marriage was an inherent human right which was only codified in the **2010 Constitution**.

There are several decisions giving the parameters under which the court can divide matrimonial property between spouses who have divorced or separated. These parameters were not settled by case law until Parliament enacted the **Matrimonial Property Act 2013** pursuant to the requirement of **Article 45(4)** of the **Constitution**. **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.”***

**Section 6(3)** of the **Act** recognizes prenuptial agreements in relation to property rights.

**Section 2** of the **Act** defines the contribution thus:

***“...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.*

*“family business” is defined as:*

*“...any business which –*

(a) *is run for the benefit of the family by both spouses or either spouse; and*

(b) *generates income or other resources wholly or in part of which are for the benefit of the family.”*

Matrimonial property is defined under **Section 6** of the **Act** as:

*“(1) (a) the matrimonial home or homes;*

*(b) household goods and effects in the matrimonial home or homes; or*

*(c) any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.”*

Prior to the enactment of the **Matrimonial Property Act 2013**, courts grappled to define what constituted matrimonial property and what constituted contribution by a spouse. Prior to the decision of **Peter Mburu Echaria –vs- Priscillah Njeri Echaria [2007] eKLR**, where the Court of Appeal held that a spouse had to establish either direct or indirect financial contribution in order for such spouse to benefit from division of the particular matrimonial property, the courts had recognized that a wife’s contribution could be indirect, like for instance, taking care of the home and bringing up the children. With the enactment of the **Matrimonial Property Act 2013**, **Echaria –vs- Echaria’s** case is no longer good law.

In the present case, it was not disputed that both the Applicant and the Respondent were working during the entire period of the subsistence of the marriage. They brought up their two children together. They educated the two children to university level. It was clear from the annexures to both the Applicant’s and the Respondent’s affidavits that they contributed towards the education of the children. The Applicant and the Respondent took their children to the best schools in the country. Their children completed university education outside the country. From the affidavits sworn by the Applicant and the Respondent, it was clear that both the Applicant and the Respondent earned substantial income from their respective professional callings.

This court, in its assessment of conflicting evidence adduced in regard to whether the Applicant made any contribution towards the purchase of the properties registered in the Respondent’s name, is unable to agree with the position taken by the Respondent that the Applicant made no contribution whatsoever towards the acquisitions of the property in question. It was clear from her affidavit that during her employment with various firms, the Applicant provided the family with medical cover accruing to her by virtue of her employment. The Respondent too was a beneficiary of this medical cover. There was no evidence put forward by the Respondent to suggest that the Applicant did not take care of the children when they were young as was expected of her as a mother. The Applicant also provided the Respondent a home where he could return to after his daily business endeavours. This court holds that the Applicant established that she directly contributed towards the acquisition of the said properties registered in the Respondent’s name by contributing towards the education of their children and their medical cover. She also indirectly contributed by being a home maker in that she managed the matrimonial home during the subsistence of the marriage. This fact was not disputed by the Respondent.

In the premises therefore this court holds that the Applicant established, to the required standard of proof on a balance of probabilities, that she directly or indirectly contributed towards the acquisition of the

properties registered in the Respondent's name. This court therefore declares that the Applicant is entitled to the said properties as following:

(I) 50% share in LR. No. *[particulars withheld]* Kyuna Estate Nairobi. This property shall be valued by two (2) valuers, each appointed by the Applicant and the Respondent, after which the Respondent shall pay to the Applicant 50% of the assessed value. This sum shall be paid within ninety (90) days of the settlement of the value by the court.

(II) The Applicant shall get 10 acres agricultural land in Igwamiti, Nyahururu.

(III) The Applicant shall get 2.5 acres in Naivasha *[particulars withheld]* and *[particulars withheld]* Complex. The Applicant and the Respondent have the option to value the entire parcel of land in a similar manner to (1) above after which the Respondent shall pay to the Applicant the value of the said share after the same has been settled by the court. This sum shall be paid within ninety (90) days of the settlement of the value.

(IV) The Applicant shall have the costs of the suit.

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2015**

**L. KIMARU**

**JUDGE**