



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

**FAMILY DIVISION**

**ORIGINATING SUMMONS NO. 3 OF 2015**

**E M K ALIAS A .....PLAINTIFF**

**VERSUS**

**S S S ..... DEFENDANT**

**RULING**

**THE APPLICATION**

1. This is a ruling on an application on interlocutory basis by the applicant pursuant to prayers 2 and 5 of the Originating Summons dated 31<sup>st</sup> March 2015 for provision of some money in the sum of Ksh.100,000/-, expressed therein as a maintenance but urged in court as a payment on account of matrimonial settlement of property between spouses upon divorce, and for an injunction to restraining her eviction from, and alienation or waste of the matrimonial property, pending hearing and determination of the Originating Summons.

**THE DISPUTE.**

2. There was common ground between the parties that the parties were married for over 20 years; that they had three children aged between 20 and 13 years; they had assets acquired during marriage some which are registered in their respective names; and that the parties had now divorced by the taking effect of the Islamic *Talak*. The dispute between the parties is primarily whether the applicant contributed to the acquisition of the properties during the marriage which were registered in the separate names of the spouses so as to be entitled to a share of such properties.

3. The applicant asserts contribution to the acquisition through proceeds of family companies in which she held shares, management of the matrimonial home and family businesses, care for the children of the marriage and other means during the parties matrimonial relationship.

4. The Respondent denies any contribution by the applicant and maintains that he solely acquired the properties some of which he had registered in the name of the applicant as gift and that some of the properties claimed by the applicant were acquired before the marriage, while in any event some registered in the name of his eldest son and not available as matrimonial property for division between the spouses, and, moreover, that there are other wives would be entitled to share in the property. In accordance with the Matrimonial Property Act, the issue of division of property between the parties upon divorce has now arisen.

5. The Counsel for the parties – Ms. Osino for the Applicant and Mr. Adhoch for the Respondent – made brief submissions summarizing the parties’ cases and ruling was reserved for the 22<sup>nd</sup> June 2015.

## PRINCIPLES FOR THE GRANT OF INTERLOCUTORY APPLICATIONS IN MATRIMONIAL PROCEEDINGS

6. As held in *Mbuthia v. Jimba Credit Finance Corporation* (1988) KLR 1, the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. I consider that the principle applies to all interlocutory applications in any civil proceedings and the spouses’ propositions herein would then fall to be considered in accordance with the matrimonial property law as follows.

7. Section 3 of the Matrimonial Property Act

*“3. A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.”*

8. Customary law of the parties may also determine the law applicable in the division of the matrimonial property as provided for in section 11 of the Matrimonial Property act as follows:

*“11. During the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including—*

*(a) the customary law relating to divorce or dissolution of marriage;*

*(b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and*

*(c) the principles relating to access and utilization of ancestral land and the cultural home by a wife or wives or former wife or wives.”*

9. By prior agreement spouses may chose to separately own properties acquired during the marriage. Section 6 (3) an d (4) of the Matrimonial Property Act provides for such agreement as follows:

*“6. (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.*

*(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.”*

10. Sections 7 and 9 of the Matrimonial Property Act, provides as follows:

*7. 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.***

*9. 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.***

11. With regard to cases of dissolution of polygamous marriages section 8 (1) (b) of the Matrimonial Property Act provides:

8. (1) (b) *matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives **taking into account any contributions made by the man and each of the wives.***”

12. Section 2 of the Matrimonial Property 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;***

### **DETERMINATION**

13. As a general principle, Article 28 of the Constitution, commands that individuals be treated with dignity, as follows:

*“**28. Every person has inherent dignity and the right to have that dignity respected and protected”***

This constitutional imperative, in my view, is more important in a setting of spousal relations or post-spousal relations. It cannot be right in a civilized society underpinned by a Constitution of Kenya 2010 that a spouse or former spouse may be allowed to punish, exact revenge from, or get back to, his spouse as a punishment or reaction for the difficulties in the marriage relationship or break-up of the marriage, whatever the cause and whoever is responsible, to treat the other spouse in a mean, demeaning, undignified living. It is in the interests of dignity of the applicant, in meeting her basic daily needs as an individual and mother of her children with the Respondent, that the applicant has sought the payment of money on interim basis pending the determination of her share in the matrimonial property upon full trial of the originating Summons.

14. Attendant to this principle of dignity in the context of marriage is the constitutional provision under Article 45 (3) of the Constitution that –

*“**45. (3) 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.**”*

The division of the property under the Islamic Law or Customary Law as permitted under sections 3 and 11 of the Matrimonial Property act is subject to the provisions of the Constitution.

15. As regards the dispute before the Court, it was not shown, in accordance with sections 3 and 11 of the Matrimonial Property Act, that according to Islamic law or the customary law of the community of the parties herein, a female spouse cannot by contribution acquire a share in the property acquired by the husband during their marriage. Or put in another way, it was not shown that the concept of contribution to acquisition of property during marriage by direct or indirect contribution is inconsistent with Islamic law or Customary Law applicable to the parties to this suit.

16. Neither was it demonstrated by the Respondent who, in accordance with section 109 of the Evidence Act as the person who alleges, has the special burden of proof of particular fact that the spouses in this suit had entered into an agreement that each spouse would keep for himself or herself alone property acquired in his or her name during the marriage, pursuant to section 6 (3) of the Matrimonial Property Act.

17. In the absence of evidence of inconsistency with the Islamic Law or customary applicable to the parties and of any agreement pursuant to the Act to the contrary, the Court at this stage must proceed on the basis that the general provisions of the matrimonial property law of Kenya as set out above apply to this proceeding.

18. From the provisions of the matrimonial property law under reference, it is clear that a person in the position of the applicant is upon divorce or dissolution of marriage entitled to share in the matrimonial property, whether as between her and the husband alone or with other wives, in property acquired by the parties during their marriage, subject to demonstrated contribution, which could be direct and indirect to the acquisition or development of the property. The parties may agree to acquire and separately own specific properties registered in their names but this must be demonstrated by a valid agreement in accordance with the Act.

19. The question of contribution to the properties and whether the same are matrimonial properties will be determined at the full hearing of the suit. From the evidence before me at this stage, and without prejudice to or intention to hamper the finding of the Court that will eventually hear the dispute, I am not able to hold that the applicant has not contributed to the acquisition and or development of the properties the subject of the suit.

20. I consider that the applicant has demonstrated an arguable case of contribution, within the meaning of section 2 of the Matrimonial Property Act, directly, and in the least indirectly, by the services offered by her in the family businesses and property, the home and the affairs of the family including the taking care of the children of the marriage, for the benefit of the whole family. It is inconceivable, as urged for the respondent, that during their long cohabitation of over 20 years, the applicant did not in any way, even indirectly as permitted by section 2 of the Matrimonial Property Act, contribute to the acquisition of the properties by the spouses in their individual names or otherwise, by way of **“(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.”**

21. For this contribution, the applicant must be entitled to a share of the property, to the extent to be determined at the hearing of the Originating Summons, whether as a direct contribution under section 7 of the Matrimonial Property Act as between her and the Respondent; under section 8 (1) (b) of the Act as between her, the Respondent and his other wives; or under section 9 thereof for any contribution to any property which did not become matrimonial property. It is on account of this entitlement that the applicant may recover for her upkeep, in advance and on account, such monies as necessary to prevent her being rendered destitute and for purposes of maintaining her dignity in her ability to provide, however modestly, for her children as their mother, as urged by her counsel.

22. I consider the sum of Ksh.50000/- to be a reasonable sum for the upkeep of the applicant for her benefit and dignity as a person, and for playing her role as mother of the three children of the marriage. There is evidence from the Respondent himself that he used to pay the sum Ksh.40,000/- per month to the applicant during their happier times, and he cannot now be heard to say he is unable to meet such payment.

## **ORDERS**

23. Accordingly, for the reasons set out above, the Court directs that Respondent do pay to the applicant the sum of Ksh.50,000/- per month, not as a maintenance due, but on account of her share in the matrimonial property the full extent of which shall be determined upon the full hearing of the Originating Summons on the basis of *viva voce* evidence as scheduled on the 3<sup>rd</sup> September 2015 or on other date to which the hearing may be adjourned.

24. A temporary Injunction pending the hearing and determination of the suit shall issue in terms of prayer 5 of the Originating Summons to restrain the respondent from evicting the applicant and or disposing the matrimonial home.

25. For avoidance of doubt, the payment of Ksh.50,000/- does not take away the respondent's responsibility to pay for maintenance for the children of the marriage as he has done in the past and for the utilities in power, water and other charges attendant to the matrimonial home Subdivision No. 6186/I/MN (CR 24456/1) where the applicant lives and to other matrimonial property, pending the determination of the questions of the parties' shares therein upon determination of the Originating Summons.

26. Should the trial Court determine that the applicant was not entitled to a share in the property acquired during her marriage with the respondent and registered in the name of the Respondent or otherwise then the amount paid to her in the interim may be recovered from properties registered in her sole name. For the preservation of these properties, there shall be an order of injunction against the disposal of the properties registered in the name of the applicant pending the hearing and determination of the Originating Summons.

27. Costs in the cause.

**DATED SIGNED AND DELIVERED THIS 22<sup>ND</sup> DAY OF JUNE 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mrs. Onesmus for Ms. Osino for the Applicants

Adhoc for the Respondent

Ms. Linda - Court Assistant.