



**IWM v JMM (Originating Summons E096 of 2020)
[2025] KEHC 504 (KLR) (Family) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 504 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
ORIGINATING SUMMONS E096 OF 2020
EKO OGOLA, J
JANUARY 23, 2025**

BETWEEN

IWM APPLICANT

AND

JMM RESPONDENT

JUDGMENT

1. The parties formalised their union on 23rd March 2013. The applicant then filed for a divorce and a Decree Nisi was issued on 2nd December 2021. The applicant avers that during the subsistence of their marriage, they acquired the following properties: A matrimonial home erected on LR No. 12715/377; a Greatwall Gardens apartment located on Block A in phase 2; a property in Meru Township; and a property in Juja. It is for these reasons that the applicant filed an Originating Summon dated 8th December 2021, praying that the properties be divided equally between them. The applicant stated that they contributed equally to purchasing and developing the aforesaid properties.

i. LR No. 12715/377 (Syokimau property)

The applicant stated that in 2010, she lived as husband and wife with the respondent in a rented house. The respondent lost his job in 2010. She became the sole breadwinner. At that time, the respondent had started constructing a house on the Syokimau property. When the construction stalled, the applicant deposed that she took over the construction costs to make the house habitable. The applicant deposed that they moved into the property in December 2011. The applicant further alleged that the construction cost her over Kshs. 1,000,000. She added that the respondent was reemployed sometime in 2012. The applicant further deposed that even after the respondent got employed, she continued maintaining the property, doing the monthly shopping, and factoring in other bills such as fuel and utility bills. The applicant



stated that they agreed that the respondent invested his income in other ventures such as purchasing the Greatwall Gardens apartment located on Block A in phase 2.

ii. Greatwall Gardens apartment located on Block A in phase 2

The applicant stated that the respondent purchased this property and it was registered in his name. She alleged that the applicant was only able to purchase this property because she catered for everything in the Syokimau house) Therefore, she deserves an equal share in this Greatwall property.

iii. Meru property

The applicant deposed that the respondent bought other properties such as the one in Meru and Bungoma. She maintained that this was only possible because she was settling all the bills in the Syokimau house. She, therefore, prays that the said properties be distributed equally between them.

iv. Juja property

The applicant deposed that the said property is registered in both their names. Therefore, the same should be distributed equally between them.

Respondent's case

2. The respondent filed a replying affidavit in response to the Originating Summons. He confirmed that he married the applicant in 2013. He confirmed that he lost his job in December 2010. However, he secured another job in April 2011. The respondent deposed that he was in a courtship relationship with the applicant but they lived in separate apartments until they formalized their relationship in 2013.

i. LR No. 12715/377 (Syokimau property)

The respondent deposed that he purchased the property in 2004 and registered it in his name in 2006. He deposed that in 2009 he was issued with a loan facility of Khs. 1,320,000 to develop the property. The respondent further annexed proof of withdrawal of his retirement benefits of Ksh. 1,135,973. The respondent deposed that he used this money to finish the construction of the house. The respondent claimed that he bore the full cost of construction. He annexed the receipt of construction materials. The respondent deposed that before his marriage in 2013, he purchased a septic tank of Kshs. 80,000/=.

The respondent deposed that due to the irreconcilable differences in their marriage, the applicant deserted their home sometime in 2018. The respondent contended that the applicant did not pay any utility bills. He annexed copies of receipts and utility bills paid in his name.

ii. Greatwall Gardens apartment located on Block A in phase 2 (Apartment No. A.14 erected on LR No. 12715/449)

The respondent deposed that he acquired the property in 2014. He stated that the applicant did not know about this investment because their union was already in shambles. The respondent annexed purchase documents in his name.

3. The respondent deposed that the applicant never did any household shopping. He added that the applicant would write a shopping list and leave it on the table for him to purchase. The respondent annexed copies of supermarket receipts, all dated during the subsistence of their marriage. The applicant further deposed that they only lived with a domestic worker, so the household shopping could never amount to Kshs. 20,000/=.



4. The respondent deposed that the applicant earned approximately Kshs. 48,229/= after statutory deductions, hence, could not afford all that she alleged. The respondent annexed a copy of the applicant's pay slip dated 2015. He deposed that the applicant's income went towards improving her mother's house; purchasing two cars, and the Juja property.

iii. Meru Property and Bungoma property.

The respondent deposed that he has never purchased any property in Bungoma. As for the Meru property, he deposed that it is ancestral land and it was gifted to him by his father. The respondent annexed copies to prove that his father was the original owner of the land and passed it down to him.

Determination

5. I have considered the Originating Summons, the rival affidavits and submissions, as well as the *viva voce* testimonies of the parties. The case revolves around the application of Article 45(3) of the Constitution as read with section 7 of the Matrimonial Property Act, 2013. The former 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.”

6. What this provision stipulates, in my view, is that parties to a marriage do not lose their rights merely because they have entered into a matrimonial union but they continue to enjoy equal rights at the time of the marriage, during the marriage and at the termination of the marriage. Further to this, spouses may be in a union, each one with his or her rights which are not necessarily pegged on the said relationship. With respect to the present case, it is possible for the husband and wife to enter into a relationship with each other and own his or her separate property in his or her own rights without necessarily ceding the right merely because of the fact of their marriage.

7. What then is matrimonial property? Section 6 of the Matrimonial Property Act defines ‘matrimonial property’ as:

- “(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.”

8. Under Section 2 of the Act, ‘Matrimonial home’ has been defined as:-

“any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”

9. In the case of *T.M.V. v F.M.C* (2018) eKLR, Nyakundi J. opined that:-

“...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”

10. In this case, the parties agree that all properties other than the Syokimau property was purchased during the subsistence of their marriage.



11. When it comes to the Syokimau house, the issue is on the development of the house and not the purchase of the land. The applicant deposed that she assisted in the development and management of the home. She deposed that she gave the respondent Kshs. 650,000/= in cash when he lost his job. She provided evidence of withdrawals from her bank from the year 2010 to 2017. The respondent contended that the entries in the bank statements have inconsistencies and discrepancies.
12. The applicant deposed that the consulting job that the respondent got after he lost his job was not paying him well, so she assisted with the majority of the house bills and construction costs, and this was done by her giving him cash to pay the vendors since the respondent was the one who had the details. The applicant did not provide evidence of this.
13. It is not contended that during the subsistence of the marriage, the applicant was a woman of means, and there was a point in their relationship that the respondent had no income. At the time when the respondent was not employed, the couple were still in love and in the space of assisting each other. This is the only probable reason that the parties ended up solemnizing their relationship. Therefore, the court cannot look the other way when it comes to the relationship of the parties before their marriage. Indeed, the land in Syokimau was purchased solely by the respondent without the contribution of the applicant. As for the development of the house, the respondent has proved that he took out loan facilities to develop the house. The applicant has contended that she assisted in a way to the development of the house. The applicant has not pleaded indirect contribution and the respondent contends that no sooner had they formalised their union than their marital issues began.
14. However, it must be noted that the parties went ahead and located and jointly purchased their Juja property. In my view, the beginning of the marriage was not as bad as the respondent tried to allege.
15. That being said, I am satisfied that the applicant directly contributed to the development of the Syokimau house. That being said, I direct that the land and the house erected thereon be valued and the applicant be paid by the respondent 25% of the value of the property.
16. As for the Greatwall apartment, the applicant agrees that the respondent was only able to purchase the property because of her efforts in the Syokimau house. From the foregoing, I direct that the property be valued and the applicant be paid 15% of the value of the property. The respondent is also ordered to pay the applicant 15% of the rental income collected from 2nd December 2021 to the date the house is valued and the aforesaid 15% of the value of the property is paid to the applicant.
17. The Juja property is jointly owned. The same to distributed equally among the parties. The parties are at liberty to either buy each other out or the property be liquidated and proceeds shared equally between them.
18. As for the Meru property. The respondent claimed that it is ancestral land. The applicant has not provided evidence of contribution to the land being registered in the respondent's name. Therefore, the applicant should not get a share of this property.
19. There is no evidence of a Bungoma property. I will, therefore, not distribute what does not exist.
20. As for the property known as Kajiado/Kitengela/40382, the applicant deposed that she bought the said property on her brother's behalf. The respondent has not contributed to the purchase of this property. Therefore, the respondent is not entitled to a share of this property.

Disposition

- a. That LR No. 12715/377 (Syokimau property) is not matrimonial property



- b. That Greatwall Gardens apartment located on Block A in phase 2 (Apartment No. A.14 erected on LR No. 12715/449); the Juja property; and the Meru property are matrimonial properties.
- c. that LR No. 12715/377 (Syokimau property) shall be distributed in the ratio of 75:25 in favour of the respondent.
- d. That Greatwall Gardens apartment located on Block A in phase 2 (Apartment No. A.14 erected on LR No. 12715/449) shall be distributed in the ratio of 85:15 in favour of the respondent.
- e. That the Juja property shall be distributed equally between the parties.
- f. That the respondent has absolute proprietary rights of the Meru property.
- g. That the applicant or the registered owner of Kajiado/Kitengela/40382 shall have absolute proprietary rights.
- h. Each party to bear their costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JANUARY 2025

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E.K. OGOLA

JUDGE

In the presence of:

M/s Odera h/b for Mr. Chege for the Applicant

M/s Wairimu h/b for Mr. Onyang'o for the Respondent

Gisiele Muthoni Court Assistant

