



**JNM v PNK (Originating Summons 4 of 2018)
[2025] KEHC 1223 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 4 OF 2018**

G MUTAI, J

FEBRUARY 19, 2025

**THE MATTER OF SECTIONS 6, 7, 9, 13, 14 AND 17 OF THE
MATRIMONIAL PROPERTY ACT
(NO 49 OF 2013)**

AND

**IN THE MATTER OF QUESTIONS ARISING BETWEEN JNM AND PNK CONCERNING
OWNERSHIP AND DIVISION OF LAND, HOUSES AND HOUSEHOLD
GOODS ACQUIRED DURING MARRIAGE**

BETWEEN

JNM APPLICANT

AND

PNK RESPONDENT

JUDGMENT

Introduction

1. The claimant and the respondent are former spouses. According to the marriage certificate annexed to the supporting affidavit, they married on 10th October 1994 at KAG Changamwe Church in Mombasa. At the time of the celebration of the marriage, the claimant, then aged 26 years old, was a contract worker, while the respondent, then aged 28 years old, was a telephone operator.
2. The marriage between the claimant and the respondent was not blessed with any issues. During the course of the coverture properties were acquired by the parties. The properties in the name and or control of the claimant and the respondent are the subject of these proceedings. The respondent filed



a counterclaim in her replying affidavit in which she sought to have the properties in the rural home subdivided between them.

The Originating Summons

3. The Originating Summons dated 23rd April 2018, and filed on even date, seeks the following orders: -
 - a. Spent;
 - b. That this honourable court be pleased to order that the rental income from the matrimonial properties be deposited in this court or in the alternative, that it is deposited in a joint bank account held in the names of the parties herein until the determination of this application;
 - c. That it be declared that the matrimonial property, to wit, Plot No 7XX0 Section II Mainland North (hereinafter referred to as “the Kiembeni property”) registered in the name of the respondent, and Aldina/Jomvu property are owned jointly by the applicant and the respondent;
 - d. Spent;
 - e. Spent;
 - f. That this honourable court be pleased to order the sale, division and or apportionment of the same between the parties equally;
 - g. That the honourable court be pleased to order the sale division and or apportionment of household goods taken from the matrimonial home between the parties equally;
 - h. That it be declared that the following properties registered in the name of the applicant are owned jointly by the applicant and the respondent: -
 - i. Plot No 7XX0, Section II Mainland North; and
 - ii. Alidina/Jomvu property
 - i. That further and in the alternative, and in the event that title and ownership in any way of the suit properties has/have already been transferred in favour of any third party, an order that the respondent does account for the proceeds and that the same be divided between the applicant and the respondent equally;
 - j. That an order that the respondent does execute all documents where necessary to transfer the applicant’s portion in the absence of properties or in default the same be executed by the Chief Registrar, Deputy Registrar, Lands Registrar or Registrar of Titles or in the alternative that the same properties be valued by a qualified and reputable valuer, sold and the proceeds be shared equally between the applicant and the respondent; and
 - k. That all the costs of the suit be awarded to the applicant.
4. In the supporting affidavit sworn on 23rd April 2018, the claimant averred that at the time he filed the application, he had been married to the respondent for over 20 years. He averred that the respondent moved out of the matrimonial home at Mikindani on 7th April 2017 and took with her most of the household goods, leaving him with only his personal effects, a few cardboard and some cups, to go and live with another man.
5. He deposed that the first property, to wit Plot No CR 31XX3, Subdivision No 7XX0, Section II Mainland North, was purchased and registered in the name of the respondent after it was agreed that



she should take a mortgage. This is the house property we shall call the “Kiembeni property”. He stated that he repaired the house on the said property from time to time over the years. He would collect rent and pay the rent for their house at Mikindani. To illustrate his point Mr M stated that he repaired the house in 2016. In particular, he repaired the house and the main gate, painted one side of the house and the kitchen selves and fixed the fence. The cost of these works was Kes 50,000, which he paid.

6. Mr M further stated that he bought the plot at Alidina in Jomvu and that they jointly built rented units on it. The rent for these units was collected by Mr TK, the nephew of the respondent. The rent for the Kiembeni house and the Alidina properties was between Kes. 24,000/- to Kes 27,000/- per month. The claimant averred that he needs Kes. 10,000 per month for the treatment of his high blood pressure and diabetic ailments.
7. Mr M deposed that his contribution was by way of repair and maintenance of the suit properties, management and supervision of the suit properties and decision-making on their acquisition.
8. The claimant accused the respondent of plotting to kick him out and averred that he was entitled to an equal share of the same.

Replying Affidavit of the Respondent

9. The respondent filed a replying affidavit that she swore on 11th September 2019.
10. In her said affidavit, she averred that Plot No CR 31XX3, Subdivision 7XX0 Section II Mainland North, was solely owned by her as she bought it with the personal loan she took from her employer, the [particulars withheld] Corporation. The said loan was recovered from her through salary deduction. She deposed that the claimant made no contribution, nor did he carry out repairs.
11. In a similar vein, she stated that she bought the Alidina property and installed power thereat. She further stated that the claimant made no contribution at all to the purchase of the plot or in building the house thereon and consequently has no shares therein at all. The money used to buy materials solely came from her.
12. The respondent further deposed that the claimant owned several properties which she asserted were acquired by her and registered in the name of the applicant. These she listed as being: -
 - a. Plot at Ikisia Market, Edau, Kitui County;
 - b. Plot and house at Ikisia Market, Edau, Kitui County;
 - c. Plot at Kathua, Edau Market, Kitui county;
 - d. Motor vehicle registration number KAJ 1XXV; and
 - e. Motor vehicle registration number KAV 2XXJ.
13. She urged that the claim of the claimant be dismissed while, on the other hand, her claim be allowed.

The Evidence Adduced in Court

14. The matter proceeded by way of a viva voce hearing in open court. The hearing proceeded on 21 February and 9th April 2024. I shall set about below the summary of the witnesses' evidence.
15. The claimant testified that he is a bishop with the [particulars withheld] Church. He averred that the respondent was his former spouse. It was his evidence that he and the respondent bought four properties together. He prayed that the same be divided as he contributed towards the purchase of 3



- while the 4th was purchased through a mortgage. He denied that the couple still had cars, saying that they were sold.
16. Mr M testified that he proposed to the respondent that he keep the Alidina property, which has no title, and two upcountry properties and that the respondent retain the Kiembeni house, which was bought using a mortgage provided by her employer, but that she declined to accept the proposal. He accused the respondent of taking away household goods and removing him from her medical scheme, thus leaving him destitute.
 17. When cross-examined by Mr Mutisya, Mr M admitted that the Kiembeni property was purchased through a loan advanced to the respondent by her employer and that her salary was deducted until payment in full was made.
 18. Regarding the Alidina property, he denied that the purchase money came from the respondent. He averred that he had money of his own as he worked for [particulars withheld] Crusades. His money was in the form of cash that he kept at home, and thus, he didn't have to withdraw anything from the bank. He denied that the Alidina property had been sold, saying instead that it was leased to rent-paying tenants. He insisted that there were no cars and that the couple had only two properties in Kitui.
 19. The claimant denied that he lived a dependent life and was bankrolled by the respondent in respect of all his living expenses. In particular, he rejected the contention that his former wife paid for his college tuition.
 20. During the reexamination the claimant reiterated that he bought the Alidina properly. When asked about the existence of the two sale agreements in respect of the Alidina property, it was his evidence that his agreement was genuine while the sale agreement presented by the respondent was fake.
 21. Upon the close of the claimant's case, the respondent called two witnesses: herself and her nephew TK.
 22. Mr TK is the nephew of the respondent. He testified that on 5th November 2007, he and the claimant went to the bank together with the respondent. The respondent withdrew Kes. 150,000/- for the purchase of the Alidina property, which was to be registered in the respondent's name. That didn't come to pass as the claimant registered the property in his name.
 23. When cross-examined by Mr T, Mr K averred that he had known the couple for a long time since he had lived with them from the time he was in class 6. It was his testimony that the couple had separate finances. He testified that the claimant was a contract worker with no income. Mr K further testified that he knew about their finances as the respondent involved him in a lot of her decisions.
 24. He testified that the fact that the sale agreement was in the name of the claimant made the respondent unhappy but that she did nothing about it.
 25. Mr K claimed that the Alidina property was sold in 2022 without the involvement of the claimant. He was, however, at pains to explain how it was possible that he continued living within the same property even after it was sold by his aunt.
 26. The second witness for the respondent was Ms PNK. Ms K is the respondent in this cause. It was her evidence that she was a telephonist and that the claimant was her former husband.
 27. Ms K averred that the claimant didn't pay for or otherwise contribute towards the purchase of the Alidina property. The plot was purchased by her. She was also the one who developed it. Although she was the one who provided the money, he had the sale agreement prepared indicating that he was the purchaser. It was her evidence that although she was unhappy with the said action she took no action.



- She denied that the claimant had any income since, as a pastor, he had no salary. She claimed that the Alidina house was no longer in existence as she had sold it.
28. When cross-examined by Mr T, she stated that when she met the claimant, he wasn't a pastor. They got married in 1994 and were together for 21 or 22 years.
 29. She claimed that the purchase took place on 5th November 2007. The money was withdrawn from her Equity bank account through with an ATM card. When confronted by the claimant's counsel, she conceded that it wasn't possible to withdraw Kes.150,000/- through an ATM. She then testified that she withdrew the money herself and handed it over to Mr K.
 30. The respondent testified that the property at Alidina was vacant when she purchased it; the house was built later. She also testified that the house and the land had since been sold.
 31. Respondent testified that there are plots in Edau in Kitui. These were bought with the money she provided. Each plot was purchased at the consideration of Kes.500,000/-. It was her evidence that the claimant could keep the properties at Edau, provided that she retained those in Mombasa. She denied that the claimant made contributions towards the domestic expenses.
 32. The respondent reiterated that the Alidina house was sold for Kes.900,000/-. She was, however, categorical that she couldn't share the properties with him as he had other properties in his rural home.
 33. When re-examined by his counsel, the respondent averred that she made a cash withdrawal of Kes.150,000/- of which Kes.125,000 was paid to the seller of the plot.
 34. Once the hearing ended, this Court directed the parties to file written submissions. The submissions of the applicant are dated 29th September 2024, while those of the respondent are dated 5th December 2024.

The Claimant's Submissions

35. In his submissions, the claimant's counsel, Mr T, identified the following issues as coming up for determination: -
 - a. Whether the properties identified in the Originating Summons are matrimonial properties;
 - b. Whether the claimant contributed to the acquisition, development and maintenance of the said properties;
 - c. Whether the respondent tendered cogent evidence; and
 - d. How should the matrimonial properties be distributed between the applicant and the respondent?
36. Regarding the first issue, it was urged that the properties were acquired during coverture as the parties got married in 1994, and the marriage subsided until 23rd September 2021 upon issuance of the decree nisi, which became absolute 3 months later.
37. On whether the claimant contributed to the acquisition of the matrimonial property, Mr T, in his written submissions, urged that contribution under section 2 of the *Matrimonial Property Act* includes domestic work and management of the matrimonial home, child care, companionship, management of the family businesses or property and farm work.



38. Counsel averred that although the Kiembeni property was acquired by the respondent through a mortgage, the same was leased out after acquisition and that he managed it and collected the rent. Additionally, he carried out repairs.
39. He submitted that the Alidina property was purchased by the claimant and was a matrimonial property. Counsel urged that contribution had been proved. He submitted that in a matrimonial setting, proof of contribution was difficult but that the court could make presumptions. In support of this contention he relied on the decision of the court in RCL v MKK [2022] KEHC 10719 (KLR). It was thus urged that sufficient evidence had been produced to demonstrate that the claimant made a contribution and was, therefore, deserving of the orders sought.
40. The claimant submitted that the respondent's responses and evidence amounted to a bare denial. It was urged that the respondent forged and backdated a sale agreement for the Alidina property, which, in any case, lacked the signature of the Area Development Chairman. Counsel stated that no evidence had been tendered to show that the Alidina property was sold in 2022.
41. Regarding the division of the matrimonial property, it was urged that this court ought to uphold the tenets of equality, equity, fairness, justice, reasonability, proportionality, comity, conformity and solidarity that will result in the property being equally divided between the husband and the wife. Counsel relied on the decision of the Supreme Court of Kenya in the Supreme Court in JOO vs MBO & Kenya (amicus curiae) Petition No 11 of 2020) KESC (KLR) and RCL v MKK [2022] KEHC 10719 (KLR)
42. Counsel submitted that there ought to be a presumption that matrimonial properties are held on a 50:50 basis and that a party desiring to be granted a bigger share ought to demonstrate why that should be so. Counsel urged that in light of the contribution of the parties and the case law cited, the claimant ought to get a 50% share of the matrimonial properties.
43. It was urged that I allow the application as prayed.
44. I note that the claimant made no submissions regarding the counterclaim filed by the respondent.

The Respondent's Submissions

45. The counsel for the respondent submitted that the claimant did not prove his case on a balance of probabilities.
46. Counsel identified issues falling for determination in this matter as being:-
 - a. Whether the properties are matrimonial properties;
 - b. Whether the claimant contributed to the acquisition of the properties; and
 - c. Who should bear the costs?
47. On the first issue, it was urged that there was no evidence of the existence of the alleged household goods which were taken away by the respondent. For that reason, it was stated that this was not proved at all.
48. The respondent's counsel submitted that the Kiembeni house was not the matrimonial home of the parties. It was urged that the said home was at Alidina/Jomvu and that it was from the latter location that the respondent moved out of. Counsel further urged that the Kiembeni house was solely acquired by the respondent and, hence, was not a matrimonial property.
49. Regarding contribution, it was urged that the claimant made no contribution towards the purchase, maintenance or improvement of the properties in dispute. Counsel submitted that the Kiembeni



house was acquired through a mortgage. Although the claimant testified that he carried out repairs, it was urged that such action did not amount to acquisition.

50. The respondent's counsel submitted that the property at Aldina Jomvu was solely acquired by the respondent and that the claimant made no contribution. Counsel submitted that the purchase price was paid by her and that the claimant had his name indicated as the purchaser without her consent. Mr Mutisya urged that the claimant made no contribution towards the purchase.
51. The respondent counsel urged that there was no response to the counterclaim and that the counterclaim was, therefore, not controverted.
52. Counsel submitted that it was the duty of a party asserting that a certain fact existed to prove that indeed it. He urged that the claimant, though claiming contribution, never proved it and hence did not discharge the burden of proof.
53. The respondent's counsel thus urged that the originating summons be dismissed with costs.

Analysis of the Evidence and the Law

54. I have read the Originating Summons, the supporting affidavit and the annexures thereto, the replying affidavit and the annexures thereto and the written submissions filed by the parties. I must now determine if the orders sought ought to be issued.
55. To answer the foregoing question, I must look at the facts and analyze them through the constitutional and legal lens, bearing in mind the decisions made by the Kenyan courts.
56. It is common ground that the claimant and the respondent got married in 1994. Their union was dissolved 22 years or so later. There is also no contestation that the four suit properties were acquired while the parties were married to each other.
57. Article 45(3) of the *Constitution* of Kenya, 2010 states that:-
 - “(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.”
58. Section 6(1) of the Matrimonial Properties Act, 2013 defines matrimonial property as being:-
 - “(a) Matrimonial home or homes
 - a. Household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”
59. The mere fact that a property is matrimonial does not mean that it is owned by the spouses equally. Section 7 of the Act provides that matrimonial properties are, subject to subsection 6(3), owned by the spouses in accordance with the contribution of each party towards its acquisition and that upon divorce or dissolution of the marriage, it shall be divided among them in the proportions consistent with their contribution.
60. Section 14(a) of the said Act provides that:
 - “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



- b. in the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

61. Having set out what I consider to be applicable statutory provisions, it is important to state that the mere fact that a property was acquired during coverture does not give a spouse an automatic entitlement to a 50% share. A spouse must still prove contribution, for it is what one brought in that he/she takes away at the dissolution of the marriage.
62. The foregoing was eloquently stated by Kiage, JA of the Court of Appeal in PNN v ZWN [2017] eKLR as follows:-

“Thus it is that the *Constitution*, thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the *Matrimonial Property Act*, 2013, it knew better than to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.”

Issues

63. Having stated the foregoing it is my view that there are 3 issues in this matter that the court must determine: -
1. Whether the suit properties are matrimonial properties;
 2. Whether the Claimant contributed towards their acquisition; and
 3. What orders ought to be issued?
64. As each of the properties was acquired separately under different circumstances, I shall look at them individually.

Plot No 7XX0/Section II Mainland North – The Kiembeni Property

65. It is common ground that the said property was purchased by the respondent using a mortgage facility advanced to her by her employer, the [particulars withheld] Corporation. The transfer was registered on 10th April 2001. The respondent produced a letter dated 5th September 2019 written by the employer in which it was stated that LR No 7XX0 Section II Mainland North in Mombasa was purchased by the respondent. She also annexed a letter dated 24th November 2000 vide which she was advised of the approval of the loan and also the discharged of change duly executed and registered on 14th May 2009.
66. The said property was purchased during the subsistence of the marriage between the claimant and the respondent. Although the claimant averred that he carried out repairs on the said house over the years he did not produce any documentary evidence. Having said so, I note that payment of the mortgage must have had financial implications for the respondent’s ability to meet her domestic commitments. Since the parties were spouses of long standing the burden of paying for the domestic expenses must have fallen on the claimant. Paying for domestic expenses and providing companionship are contributions under the *Matrimonial Property Act*. I do not see how the marriage would have subsisted for over 22 years if the claimant was a good-for-nothing husband living off his wife.
67. Section 2 of the *Matrimonial Property Act*, 2013, in the following terms:-
In this Act, unless the context otherwise requires—



“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.

68. The court in the case of *AWM v JGK* [2021] KEHC 4780 (KLR) in dealing with non-monetary contribution stated:-

“It is my considered view that the non-monetary contribution often-times cannot be quantified. If that contribution were to be reduced to monetary terms I am sure that a woman’s non-monetary contribution in the home would amount to a higher amount compared to that of the man. It is my finding, therefore, that the Applicant made monetary and non-monetary contributions towards acquiring the matrimonial property and that her non-monetary contribution is higher than that of the Respondent.”

69. Although the property was acquired through a mortgage, which was paid off through salary deductions, the repairs he made, the management duties he undertook, and the non-financial contribution that he made are sufficient to entitle him to a beneficial interest to the said property.

70. The claimant testified that he made a non-financial contribution. As evidenced by the foregoing, I am persuaded that was the case. I note that the respondent bore the most burden in the acquisition of this plot and also in its development. I assess her to have greater claim which I set at 70%. In the circumstance, I find and hold that the claimant has a 30% beneficial interest in the Kiembeni house, which the respondent holds in trust for him.

Plot and Rental Units in Aldina/Jomvu – The Alidina Property

71. Both parties agree that the property was purchased from Mr Omari Masudi Wanje in 2010 for Kes 125,000. The claimant averred that he purchased it with his own savings. Two sale agreements were produced, which, though varying on certain terms, are in agreement with respect to the purchase price and the name of the purchaser.

72. In her replying affidavit, the respondent averred that:-

“I personally and solely bought the plot and built the house at Aldina, Jomvu area, Mombasa. I even installed power (see copy marked PNN2), but the applicant convinced me to have the sale agreement in his name, but he did not contribute anything in buying the plot or building the house and has no shares therein at all.”

73. When giving evidence, she testified that:-

“I gave my ATM card to my nephew with instructions that he withdraw money and pay. The Petitioner registered it in his name. He didn’t explain why that was so. I took no steps as we didn’t have issues.”



74. Her witness, TK, also testified that there was no consent by the respondent for the claimant to register the property in his name.
75. There is a variance between what the respondent stated in her replying affidavit and in her testimony, which casts doubt on the veracity of her account. The claimant produced receipts for purchases which he made at the time the units in the Aldina were being built. In the circumstances, I am persuaded that the claimant made a contribution towards the said property. In the circumstances, I find and hold that it is a matrimonial property
76. The property at Adina was also purchased during coverture, at a time when the parties were happily married. I am therefore persuaded that the said property is a matrimonial property. This is evidenced by the testimony of the respondent's witness who testified that the plot was purchased by both. Although neither of the parties produced documents which may help the court apportion interest, in the absence of evidence, I will find, on the basis of the maxim that equality is equity, that both parties have a 50% interest in the said property.
77. I am guided by the persuasive authority of the decision of the court in *PWK vs JKG* 2015 eKLR the Court said;
- “Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in *Gissing vs Gissing* [1970] 2All ER 780 Page 788.”
78. The respondent averred that the property was sold and was no longer available. No evidence to support this assertion was produced. Even if that was the case the sale appears to have taken place during the pendency of this cause and would be contrary to the doctrine of *lis pendens*. In the circumstances, in the event that the same has been sold, I order that its value be taken into account when reckoning the division of the remainder properties.

The Kitui Properties

79. It is common ground that the claimant has 2 or 3 plots in his rural home at Edau in Kitui County. The registration details of the said properties were not given. Since the claimant conceded that two properties exist and that they were purchased during the subsistence of the marriage I find and hold that these two properties are matrimonial properties. I find and hold that the respondent has a 50% interest in the said properties.

Motor Vehicles

80. Although motor vehicles were mentioned in the respondent's counterclaim, no evidence was led to prove their existence and ownership. The claimant categorically denied that they were still owned by the parties, asserting instead that they had been sold. It was the duty of the respondent to prove that the alleged motor vehicles were matrimonial properties. She failed to do so. I am, therefore, not persuaded that the said motor vehicles belong to the parties.

Disposition

81. What orders should be issued in the circumstances of this case?



82. I direct that the properties I have identified as being matrimonial properties be valued within 60 days of the date hereof by a valuer jointly appointed by the claimant and the respondent. If the parties are unable to agree on a valuer acceptable to both parties within 30 days of the date hereof then the valuation shall be done by a government valuer. In either case, the valuation must be completed within 60 days of the date hereof. These properties are:-
- a. Plot No. 7XX0, Section II, Mainland North;
 - b. Aldina /Jomvu Property; and
 - c. 2 plots in Edau market in Kitui county.
83. The claimant and the respondent are at liberty to agree on the apportionment of the said properties to each other, subject to reconciliation based on the respective values of the properties. If the parties do not agree on apportionment within 90 days of the date hereof, then the properties shall be sold through public auction, and the proceeds divided between the claimant and the respondent in the ratios I have identified above.
84. As this is a dispute between former spouses, each party shall bear his or her own costs.
85. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr T, for the Claimant;

Mr Mutisya, for the Respondent; and

Arthur – Court Assistant.

