



**SEM v III (Matrimonial Cause E070 of 2024)  
[2025] KEHC 4503 (KLR) (Family) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4503 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MATRIMONIAL CAUSE E070 OF 2024  
H NAMISI, J  
APRIL 8, 2025**

**BETWEEN**

**SEM ..... APPLICANT**

**AND**

**III ..... RESPONDENT**

**RULING**

1. Before the Court is Notice of Motion dated 10 October 2024 filed under sections 4 and 17 of the *Matrimonial Property Act*, 2013 and Article 159(2)(d) of *The Constitution*. The same seeks the following orders:
  - i. (spent).
  - ii. That this Honourable court be pleased to compel the Respondent to remit the monthly mortgage for the mortgage facility at the rate of Kshs. 93,664/= per month to Kenya Commercial Bank for Title No. Nairobi/Block 32/XXX, Ngumo pending hearing and determination of the application;
  - iii. That this Honourable court be pleased to compel the Respondent to remit the monthly mortgage for the mortgage facility at the rate of Kshs. 93,664/= per month to Kenya Commercial Bank for Title No. Nairobi/Block 32/XXX, Ngumo pending hearing and determination of the suit;
  - iv. That this Honourable court be pleased to compel the Respondent to remit the monthly mortgage for the mortgage facility at the rate of Kshs. 93,664/= per month to the Defendant or a joint account that can be remitting the payments to Kenya Commercial Bank pending hearing and determination of the application;



- v. That this Honourable court be pleased to compel the Respondent to remit the monthly mortgage for the mortgage facility at the rate of Kshs. 93,664/= per month to the Defendant or a joint account that can be remitting the payments to Kenya Commercial Bank pending hearing and determination of the suit;
  - vi. That this Honourable court be pleased to compel the Respondent to remit the monthly mortgage for the mortgage facility at the rate of Kshs. 46,832/= per month to the Defendant for remittance of payments to Kenya Commercial Bank pending hearing and determination of the application;
  - vii. That the cost of the application be in the cause.
2. The Application is premised on the grounds on the face thereof and supported by the Affidavit sworn by the Applicant. The Applicant averred that he and the Respondent contracted a Christian marriage on 28 November 2014 and were blessed with 2 children. Due to the irreversible breakdown of their marriage, the same was dissolved and a Decree Absolute issued on 16 August 2021.
  3. During their marriage, the Applicant, secured a mortgage facility to purchase Title Number Nairobi Block 32/XXX, Ngumo under the Civil Servants Housing Scheme by Kenya Commercial Bank. The property was registered in joint names of the Applicant and Respondent. The Respondent issued a Personal Deed of Guarantee and Indemnity of Kshs 13,050,000/=.
  4. The Applicant pleaded that both he and the Respondent were in formal employment during their marriage and were capable of providing for and contributing to the wellbeing and welfare of their family. The Applicant undertook the monthly repayments of the mortgage, at the rate of Kshs 93,664/= from 23 January 2017.
  5. The Applicant averred that he had since left the property, which is occupied by the Respondent and their two children. That notwithstanding, the Applicant continues to make the mortgage repayments to date. Additionally, the Applicant shoulders some of the responsibility of providing for the children, including but not limited to, paying school fees and school-related expenses. The children visit the Applicant every weekend at his current residence, where the Applicant pays rent of Kshs 70,000/- monthly.
  6. The Applicant averred that on various occasions he has requested the Respondent to take part in the payment of the mortgage but the same has become a bone of contention for both parties without any resolution in sight. Due to the default in payment, the Applicant now has a bad credit report. The Applicant averred that he has even gone to an extent of requesting the Respondent to consider selling the house by way of private treaty in order settle the mortgage and the Respondent to find alternative accommodation, but the Respondent has declined. The Applicant averred that his payslip is over burdened and it has become apparent that he cannot service the mortgage, pay his own rent and cater for his daily needs while the Respondent continues to enjoy the property without any form of contribution.
  7. It is the Applicant's contention that the liability of the mortgage repayments ought to be shared by both parties. He pleaded that he is not interested in the division of the said property and wished to transfer the same to the Respondent. Therefore, it follows that the liability must be transferred to the Respondent as he will not have any legal interest over the property.
  8. In response to the Application, the Respondent filed a Replying Affidavit as well as the following Grounds of Opposition:



- i. That the Application as drawn and taken out is misconceived, bad in law and is devoid of merit as it is based on speculations bereft of any supporting evidence to warrant the grant of the Orders sought as against the Respondent;
  - ii. That the Orders sought in the Application are misconceived, vexatious and not anchored in any law as Sections 1, 2 and 3 of the *Civil Procedure Act* relied on by the Applicant as read together with Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules and Sections 4, 6, 10 and 17 of the *Matrimonial Property Act* do not in any way envisage a scenario where this Honourable Court can compel the Respondent to undertake the fulfilment of any liability incurred by the Applicant prior to, during the subsistence of or even after marriage. Any liability incurred in this regard remains the sole responsibility of the spouse who incurred it and has to be treated as such;
  - iii. That in any event, a mortgage is a contract between a mortgagee and a mortgagor. The Respondent, being a third party, is not privy to such a contract and cannot therefore be compelled to meet the liability incurred by the Applicant;
  - iv. That be that as it may, the doctrine of legitimate expectation clearly stipulates that the Respondent legitimately expects the Applicant to meet his liabilities without necessarily and unjustifiably shifting the burden to the Respondent.
  - v. That in the upshot, the Respondent prays that the instant Application be dismissed with costs to her for being incurably bad in law, ill-conceived, vexatious, scandalous, and for abusing this Honourable Court's processes
9. In her Replying Affidavit, the Respondent termed the Application as an illegal, irregular and unjustifiable attempt by the Applicant to compel her to take responsibility for the liability incurred by the Applicant. The Respondent averred that the mortgage facility was secured by the Applicant solely and her only involvement was in consenting to the creation of the charge since the property is registered in joint names. The Applicant argued that although she was in formal employment at the time when the Applicant secured the mortgage facility, does not mean that she should be compelled to incur the liability of repayment. Furthermore, the Applicant has parental responsibility obligations to meet and the present applicant is a guise for the Applicant to abdicate his parental responsibilities.
  10. It was the Respondent's contention that the law does not in any way envisage a scenario where the Court can compel the Respondent to undertake the fulfilment of any liability incurred by the Applicant prior to, during the subsistence of or even after marriage. The Respondent pleaded that any liability incurred in this regard remains the sole responsibility of the spouse who incurred it and shall be treated as such and that the Court cannot be used as a venue to enable abdication of liability and responsibility.
  11. The Applicant filed a Further Affidavit refuting the Respondent's averments.
  12. Parties were directed to file written submissions. The Applicant filed his submissions while the Respondent indicated that they would rely on their Replying Affidavit and Grounds of Opposition.

### **Analysis and Determination**

13. I have keenly read the Application, Affidavits and submissions filed herein.
14. First and foremost, it is not in dispute that the property was acquired during the subsistence of the marriage between the parties and is registered in their joint names. It is also not disputed that the Respondent resides on the said property with the children, while the Applicant resides elsewhere. It



is not disputed that the Applicant continues to pay Kshs. 93,664/= per month towards the mortgage repayment.

15. That being said, the only issue for determination by this Court at this juncture is whether the Applicant is deserving of the orders sought and the Respondent ought to be compelled to participate in the mortgage repayments.
16. It is common ground that the Applicant approached the Bank and secured a mortgage facility for purchase of the suit property, which property was subsequently registered in the names of the Applicant and Respondent. Both parties resided on the suit property, with their children, until the point when the Applicant left. A charge was registered over the property, with the consent of the Respondent. The Applicant has been making the mortgage repayments to date.
17. The Applicant pleaded that he is unable to continue servicing the monthly repayments for the loan due to financial constraints. In addition to the mortgage repayments, the Applicant has to pay school fees and other expenses relating to the children, as well his own rent. It is his prayer that the Respondent, who now occupies the property, should be the one compelled to service the loan repayments. The Respondent has neither denied the monthly mortgage repayments made by the Applicant nor the expenses towards the upkeep of their children.
18. The fact of the matter is that the Applicant is currently repaying a loan on a property from which he no longer derives any real benefit. Instead, it is the Respondent who is in occupation and who derives benefit from the same.
19. Article 45(3) of *the Constitution* of Kenya, 2010 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”
20. In interpreting Article 45(3) the Court of Appeal in the case in *Agnes Nanjala v Jacob Petrus Nicolas Vander Goes* [2011]eKLR, held as follows:-

“This Article clearly gives both parties to a marriage equal rights before, during and after the marriage ends. It arguably extends to matrimonial property and is a Constitutional statement of the principle that matrimonial property is shared 50%, 50% in the event that the marriage ends.”
21. On the issue of spousal liability, section 10(3) of the *Matrimonial Property Act* provides thus:

Parties to a marriage shall share equally any—

  - (a) liability incurred during the subsistence of the marriage for the benefit of the marriage; or
  - (b) reasonable and justifiable expense incurred for the benefit of the marriage.
22. Faced with similar facts, in the case of *MWG v DGW* [2021] eKLR, the Court held as follows:

“The suit property had been utilized on the matrimonial home before the parties herein divorced. The Applicant has now left the home. It cannot be fair that she continue to shoulder the burden of meeting the entire loan repayment. The property is registered in the joint names of the Applicant and the Respondent. In the circumstances it is only fair and just that pending the final determination of this Originating Summons, the parties should equally bear the burden of meeting the loan repayments.”



23. I hold a similar view to that expressed in the case cited hereinabove. There is no reason why the Applicant should be saddled with the mortgage repayments, yet both parties enjoy equal rights before, during and after the marriage. Further, the Applicant has clearly indicated that he has no interest in the property.
24. Accordingly, I allow the Application dated 10 October 2024 and make the following orders:
- i. That the Applicant and Respondent be equally liable on 50:50 basis for any outstanding arrears on the mortgage facility from Kenya Commercial Bank in respect of the property known as Title No. Nairobi/Block 32/873, Ngumo;
  - ii. Pending the hearing and determination of the Originating Summons herein, the Respondent, who is the current occupant of Title No. Nairobi/Block 32/873, Ngumo is directed to meet half (50%) of the loan repayments as demanded by Kenya Commercial Bank in respect of the said property;
  - iii. There will be no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 8 DAY OF APRIL 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

Ms. Kemunto h/b Sinana.....for the Applicant

Mr. Momanyi h/b Ogutu.....for the Respondent

Libertine Achieng..... Court Assistant

