



WSE v VNW (Civil Appeal E140 of 2023) [2025] KEHC 4481 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E140 OF 2023**

M THANDE, J

APRIL 4, 2025

BETWEEN

WSE APPELLANT

AND

VNW RESPONDENT

*(An Appeal from the judgment of Hon. James Ong'ondo, SPM
delivered on 30.8.23 in Malindi Matrimonial Cause No. E007 of 2023)*

JUDGMENT

1. The Respondent filed an Originating Summons (OS) against the Appellant dated 13.2.23, in Malindi Chief Magistrate's Court No. E007 of 2023 seeking that the following orders:
 1. This Honourable Court be pleased to issue a declaration that all the under listed properties acquired during the subsistence of the marriage and registered in the joint names of the Applicant and the Respondent are held beneficially and/or in trust for the Plaintiff to wit: -
 - a. Cottage No.X0 [particulars withheld] Key Residence on Land Portion Number 9XX9 Malindi registered at the land office Mombasa as CR No.35919.
 - b. Ordinary shares held in [particulars withheld] Cottage Management Limited.
 2. An order do issue declaring that 50% of such other or higher portions of the properties aforesaid, are held by the Respondent in trust and for the beneficial interest of the Plaintiff.
 3. That the division to separate the interest in the properties be done within 90 days from the date of the judgment at the Respondent's cost.
 4. That the Respondent be ordered to transfer the Applicant's share in the property to her within 60 days from the date of division.



5. That in default, the Executive Officer of the Court be authorized to sign any transfer documents in place of the Respondent or any other person holding any title on behalf of the Applicant to effect the orders of this Court in favour of the Applicant.
 6. An order that the properties and the income from the same be settled in proportions aforesaid or as the court may order.
 7. An order do issue declaring that the Respondent is accountable to the Petitioner in respect all income derived from the said properties.
 8. An order that the properties and the income from the same be settled in proportions aforesaid or as the court may order.
 9. The cost of this summons be provided for.
2. The Appellant opposed the OS vide a replying affidavit sworn on 17.4.23 and raised a counterclaim in which he sought:
1. A declaration that the Petitioner's Break-in, entry and lodge into the suit property (cottage Number X0) was illegal and unlawful.
 2. A declaration that the suit property is not matrimonial property.
 3. A declaration that the entire purchase price of the suit property was paid for by the Respondent.
 4. A declaration that the suit property (Cottage No.X0) belongs to the Respondent alone up to the One Hundredth per centum (100%).
 5. An order compelling the Petitioner to transfer/execute all necessary transfer documents necessary for the transfer of the suit property to the Respondent.
 6. That in default of prayer 5, the Executive Officer be ordered to execute the transfer documents in favour of the Respondent.
 7. An order that the Petitioner does pay Rent to the Respondent at a rate of Kenya Shillings Seven Thousand (Kshs.7,000/=) per day from the date of breaking in and entry into the suit property being 8th February, 2023 to the date of judgment hereof.
 8. An order that any rent proceeds paid to the Petitioner pending the determination of this suit/mense profits derived in connection to the suit property be transferred to the Respondent.
 9. Cost of the suit be provided for.
3. In its judgment of 30.8.23, the trial Court ordered as follows:
- a. Cottage No.X0 [particulars withheld] Key Residence on Land Portion Number 9XX9 Malindi registered as CR No.35919 and (ii) Ordinary Shares held in [particulars withheld] Cottage Management Limited be and is hereby declared as matrimonial property.
 - b. A declaration be and is hereby issued that the applicant is hereby awarded 50% of the aforesaid properties and/or income emanating from the same.
 - c. The division to separate the respective interest mentioned at (b) above shall be effected within 90 days from date of this judgment and subsequent transfer of the applicant's share by the respondent within 30 days from date of division.



- d. In default of (c) above, the Court Administrator, Malindi Magistrate's Court is hereby authorized to sign any transfer documents in place of the respondent or any other person holding any title on behalf of the respondent to effect all the orders of the court herein in favour of the applicant.
 - e. Each party to bear own costs.
4. The Appellant being aggrieved by the said judgment, filed the present appeal raising the following grounds in his amended memorandum of appeal:
1. That the learned magistrate erred in law and fact in concluding that Plot No.9XX9 Malindi was matrimonial property by virtue of it being registered in joint names in total disregard of evidence tabled by the appellant to rebut the presumption.
 2. That the learned magistrate erred in law and fact in ignoring the fact that the appellant proved to the required standard that he had personally purchased and paid for the property and that the respondent did not make any monetary contribution towards acquiring the property.
 3. That the learned magistrate erred in law and fact by ignoring the fundamental consideration in distribution of matrimonial property which are contribution and fairness as pronounced by the Supreme Court.
 4. That the learned magistrate erred in law and fact by ignoring evidence tabled on the ground that it was in a foreign language which evidence was meant to prove Danish bank transactions made towards the Kenya Bank for the purchase of the property and which evidence was never rebutted by the Respondent at all.
 5. That the learned magistrate erred in law and fact by arriving at the conclusion that the property and shares be shared at the ratio of 50/50 in total disregard of the weighty evidence tabled by the appellant.
 6. The learned magistrate erred in law and in fact in disregarding the Appellant's explanation on why the Respondent was included as co-owner of the property.
 7. That the Learned magistrate erred in law and in fact in disregarding the fact that the Respondent never denied receiving money from the Appellant which was used to pay the deposit of the purchase price as deposed by the Appellant.
 8. The learned magistrate erred in law and in fact in disregarding the fact that the Respondent did not deny receiving money from the Appellant through her bank and M-pesa accounts as deposed by the Appellant.
 9. The learned magistrate erred in law and in fact in failing to consider the evidence of transfer of money for repairs to the contractor.
 10. The learned magistrate erred in law and in fact in failing to consider the evidence that the Respondent was not in any gainful employment during the subsistence of the marriage.
 11. The learned magistrate erred in law and in fact in not giving reasons for his decision to divide the property in the ratio of 50-50.
 12. The learned magistrate erred in law and fact in failing to address the question of occupation/possession and use of the property.
5. Parties filed their written submissions which I have duly considered.



6. On whether the suit property is matrimonial property, it is necessary to look at the definition in the *Matrimonial Property Act* (the Act). Section 6 of the Act stipulates what constitutes matrimonial property as follows:
 1. For the purposes of this Act, matrimonial property means—
 - 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
7. For any property to be said to be matrimonial property, it must constitute the matrimonial home or homes of spouses, household goods and effects in such home or homes. Other property jointly owned and acquired during the subsistence of marriage also constitutes matrimonial property.
8. From the evidence on record, the property is jointly owned by the Appellant and the Respondent and was acquired during the subsistence of their marriage. By dint of Section 6 of the Act, the property constitutes matrimonial property.
9. Turning to the parties' entitlement to the property, it is noted that in his judgment, the trial Magistrate distributed the same to the parties equally. The trial Magistrate found that the Respondent had proved that she had paid the initial deposit of Kshs. 1,500,000/= based on the receipt in her name. He also found that the Appellant's claim that he sent her the money was not backed by evidence. The trial Magistrate rejected the Appellant's documents for being in an unfamiliar language. In short, the trial Magistrate found that the Respondent had proved her contribution while the Appellant had not.
10. It is well settled that the basis upon which property, matrimonial or otherwise, is divided between spouses, is proven contribution. Section 7 of the Act makes provision relating to ownership of matrimonial property 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. (emphasis)
11. In *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment), the Supreme Court reaffirmed this principle of contribution and stated:

The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution.
12. Article 45(3) of the *Constitution* provides:

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.



13. The equal rights to which spouses are entitled to does not however mean that property shall be shared between them equally, regardless. In the case of P N N v Z W N [2017] eKLR, Kiage, JA. had this to say of Article 45(3) of the Constitution:

First, while I take cognizance of the marital equality ethos captured in Article 45 (3) of the Constitution, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage.

14. The learned Judge went on to state:

I will also comment briefly on Echaria vs. Echaria [2007] eKLR. In view of my stated understanding of what Section 45(3) means and what it does not mean, I do not see that taken in context, the analytical approach taken by the five-Judge bench in deciding that case, together with their appreciation of the law on matrimonial property rights leading to the conclusion that division must be based on actual quantifiable contribution was amiss. Holding as I do that contribution must be proved and assessed, I do not find that the central thrust of ECHARIA is violative of the marital equality principle of Article 45(3). I would therefore eschew any bold pronouncement that it is no longer good law and should be interred.

15. Weighing in on the import of Article 45(3) in the JOO v MBO case (supra), the Supreme Court stated:

While therefore reiterating the finding in Echaria, we also find that article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in the Constitution do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.

16. The fact of marriage alone does not entitle a spouse to equal share in matrimonial property, however held.

17. I have looked at the documents on record that the Appellant relied on to prove that he made payment for the property. The Court notes that there are several documents that are not in the language of the Court. One such document relates to the Kshs. 1,715,000/= which he said he sent to the Respondent for payment of the deposit of the purchase price for the property. Without a translation, the Court must disregard the same and the trial Magistrate was right in doing so. I accordingly agree with the learned Magistrate that the Respondent proved on a balance of probability that she paid the said deposit.

18. The Court notes that the Appellant did exhibit his KCB Bank statement which is in the English language and clearly shows debits on 7.10.2021 relating to Harbor Key property purchase of Kshs. 9,000,000/=, Kshs. 600/=, Kshs. 280,000/= and Kshs. 600/=. This evidence remained uncontroverted and shows that the Appellant contributed Kshs. 9,000,000/= towards the purchase price and taxes of Kshs. 281,200/=, roughly 85% of the cost of acquiring the property, while the Respondent contributed Kshs. 1,500,000/=, roughly 15%. The Court thus finds that the trial Magistrate erred in disregarding this evidence.



19. After rejecting the Appellant’s evidence, the trial Magistrate then stated:

But that does not mean the respondent loses out on the division. The respondent will be provided for by virtue of the spouses’ joint registration of the matrimonial property.

20. The trial Magistrate’s finding in this regard was a clear misapprehension of the law relating to division of matrimonial property. It bears repeating that the basis upon which property, matrimonial or otherwise, is divided between spouses, is proven contribution. Joint ownership does not, in and of itself, entitle a party to 50% share in matrimonial property as the trial Magistrate found. Where property is acquired during marriage, Section 14 of the Act provides certain rebuttable presumptions as follows:

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 rebuttable presumption that their beneficial interests in the matrimonial property are equal.

21. It is not disputed that the suit property was acquired during the subsistence of the parties’ marriage in their joint names. The presumption under Section 14(b) that the parties’ beneficial interest in the suit property is equal has been rebutted by the evidence on record.

22. A party seeking a share in such property must demonstrate that they have contributed to the acquisition or development of the said property and the extent of that contribution. This was observed in the P N N v Z W N case (supra), where Waki, JA citing the case of Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR stated:

The Court also examined local decisions and came to the following conclusion:-

In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see *Essa vs. Essa* (supra); *Nderitu vs. Nderitu*, Civil Appeal No. 203 of 1997 (unreported), *Kamore vs. Kamore* (supra); *Muthembwa vs. Muthembwa*, Civil Appeal No. 74 of 2001 and *Mereka vs. Mereka*, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife’s (sic) contribution as equal to that of the husband.”

23. Duly guided by the cited authorities, the trial court ought to have appreciated that for the Respondent to be entitled to a share of the suit property she had to prove contribution towards the acquisition of the same. By dividing the suit property equally, the trial Magistrate in effect passed property rights from the Appellant to the Respondent by fact of joint registration only, without proof of equal contribution.

24. From the record, the Respondent provided no evidence of her earnings. Section 2 of the *Matrimonial Property Act* however recognizes non-monetary contribution. The evidence shows that the parties



were married in June 2020 and separated in November 2022. During this time, the Respondent no doubt gave the Appellant companionship, took care of their home and together were able to identify and purchase the suit property. This non-monetary contribution must count for something. I would consider that this contribution amounted to 15%, which in my view is a fair share of the matrimonial property.

25. Given that the parties are no longer married and the acrimony between them, it is necessary that the joint ownership of the suit property be severed. It will not be prudent to order that the parties continue holding the property jointly.
26. In the end, the Court finds that the Appeal partly succeeds. The judgment of the trial Magistrate of 30.8.23 is partially set aside. I substitute therefor the following orders:
 - i. Declaration is hereby made that Cottage No. 30 [particulars withheld] Key Residence on Land Reference No. 9XX9, Malindi as well as the shares held in [particulars withheld] Cottage Management Limited are matrimonial property and are vested in both the Appellant and the Respondent in the ratio of 70:30 respectively.
 - ii. Either party is at liberty to buy off the other within 90 days from the date hereof. In the event that none is able to buy the other, the property shall be sold and the proceeds shared in the proportions set out.
 - iii. To give effect to order ii), the parties shall sign all documents necessary. In default, the Deputy Registrar of this Court is hereby authorised to sign the documents in place of the defaulting party.
 - iv. The circumstances herein do not call for an award of costs.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 4TH DAY OF APRIL 2025

M. THANDE

JUDGE

