



REPUBLIC OF KENYA



KENYA LAW
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**MK v NN (Family Originating Summons E013 of 2023)
[2025] KEHC 8366 (KLR) (20 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 8366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY ORIGINATING SUMMONS E013 OF 2023**

G MUTAI, J

MAY 20, 2025

JUDGMENT

**IN THE MATTER OF QUESTIONS ARISING BETWEEN MUTINDA
KINAMA AND NJOLE DIYO CONCERNING THE OWNERSHIP AND
DIVISION OF LAND AND COWS ACQUIRED DURING MARRIAGE**

BETWEEN

MK CLAIMANT

AND

NN RESPONDENT

JUDGMENT

1. Before this court is the Originating Summons dated 14th December 2023 seeking the following orders:-
 - a. Spent;
 - b. That a declaration be made that all those pieces or parcels of land known as Kwale/Shimoni Village Squatter Scheme/X5 and plot with rental houses bordering the compound of Bamba Sub County Hospital to the East and plot with residential house at Anziwani Centre near Shimoni and three shops located near the road reserve next to best bar at Shimoni registered in the name of the respondent is owned jointly by the applicant and the respondent;
 - c. That this honourable court be pleased to make a declaration that the Kwale/Shimoni Village Squatter Scheme/6X9 registered jointly in the name of the applicant and the respondent is owned jointly by the applicant and the respondent;
 - d. That a declaration do issue that each party herein is entitled to the properties acquired during the subsistence of marriage on a 50:50 basis. Further, this honourable court do proceed and apportion the said properties as follows:-



- i. Matrimonial home in Land Reference Number Kwale/Shimoni Village Squatter Scheme /6X9 to the applicant exclusively;
 - ii. Kwale/Shimoni Village Squatter/X5 to the respondent exclusively;
 - iii. Plot with rental houses bordering the County of Bamba Sub County Hospital to the East, to the respondent exclusively;
The rest of the following properties to be shared among the parties in equal 50:50 basis;
 - iv. Kwale Shimoni Village Squatter Scheme /2X8;
 - v. 13 cows each valued at 120,000 per cow (12 females and 1 bull);
 - vi. Land with residential house at Anziwani Centre, Shimoni;
 - vii. Motor Vehicle Registration No. KCY 4X4T Toyota Probox; and
 - viii. Motorcycle Registration No. KMGE 8X9S.
- e. Spent;
 - f. That the division to separate the interest in the properties be within 90 days from the date of the judgment at the respondent's cost;
 - g. That the respondent be ordered to transfer the applicant's share in the properties to her within 30 days from the date of the division;
 - h. That in default, the Registrar of the High Court of Kenya be authorised to sign and execute any transfer documents on behalf of the respondent or any other person holding any title on behalf of the applicant to effect all the orders of this honourable court in favour of the applicant;
 - i. That an order does issue declaring that the respondent is accountable to the applicant in respect of all the income derived from the said properties. In this regard, an order be made that an account in the joint names of the applicant and the respondent be opened and all the proceeds from the properties generating income be deposited therein;
 - j. That the honourable court be pleased to order that properties and income be settled in the proportions on a 50:50 basis or in such other portions as the honourable court may order; and
 - k. That the costs of summons/suit be awarded to the applicant.
2. The summons is supported by the Claimant's supporting affidavit sworn on 14th December 2023, in which she stated that she got married to the respondent on 12th November 2002 at the Registrar's Office in Mombasa. Their union was not blessed with any issues. Their marriage was dissolved on 6th October 2023, and a decree nisi was issued in Msambweni Divorce Cause No. E003 of 2023. A certificate of decree absolute was issued on 1st December 2023.
 3. Ms Kinama averred that all the listed properties were acquired during the subsistence of their marriage and that all through she has been residing in the matrimonial home on Land Reference No. Kwale/Shimoni Village Squatter Scheme/6X9, which she has been managing for all her working years. She stated that she was the one who had modified the interior of their matrimonial home.
 4. The Claimant stated that the rent from the suit properties is her only source of income, and she uses it to pay electricity for the matrimonial home and to pump water for tenants residing in the compound,



- as well as to pay the cleaning lady. It was her averment that she had been unable to pay November wages due to threats and rent diversion.
5. She stated that in 2014, they bought two cows, a Friesian and a white Jersey breed, from the sale of the traditional breeds which they had been rearing. Ms Kinama averred that she was the one supervising the herdsmen, checking on the health of the cows, and calling the veterinary doctor for their treatment whenever necessary. She was also the one collecting and storing feed for the cows to eat during the dry months of February to April. At the time the respondent took them away, she was milking five of them, getting an average of Kes.900/- per day, and had also become a successful dairy farmer in Shimoni.
 6. The Claimant stated that she not only contributed to the well-being of the respondent but also his productivity by diligently carrying out her role as a wife and making sure he had a stable home environment, purchasing day to day household goods and ensuring home amenities were fully functional, making meals for the respondent, handling house chores and demands, paying and training domestic workers, and maintaining good and proper hygiene conditions in their home. She also provided companionship and support through decision-making, problem-solving, and sympathy.
 7. She stated that she contributed towards the acquisition and development of the listed properties and urged the court to allow the originating summons.
 8. In response, the respondent filed a replying affidavit sworn on 11th January 2024, vide which he termed the originating summons application as bad in law and an abuse of the court process.
 9. He stated that the applicant excluded the following properties to frustrate him; Motor Vehicle Registration Number KAJ 2X5P, rental houses situated in Diani Msikitini Area, Harmony Rental Houses at Diani (Ukunda), parcel of land in Dima, parcel of land located at Diani Near Catholic Church Ukunda, near Ukunda Air Port and a family house where the applicant's father was buried.
 10. He further stated that the listed properties were purchased and developed by their joint efforts during the subsistence of their marriage and that they form part of matrimonial properties and ought to be distributed equally.
 11. On the properties listed by the applicant, he stated that they are neither jointly owned nor matrimonial properties as they were acquired in 2000, before their marriage. He averred that the applicant added her name to the title during the processing of the same in 2017 without his consent.
 12. The respondent averred that the listed property in Bamba is not a matrimonial property as a family member owns it. On the motorcycle KMGE 8X9S, he stated that although registered in his name, it is part of an initiative undertaken by him to empower unemployed youth and is therefore under the care of Emmanuel Mgalla, who uses it as his means of livelihood and submits payments to him to own it fully.
 13. In conclusion, he stated that he is not opposed to the division of the matrimonial property but wants the same to be done equitably.
 14. The applicant filed a further affidavit, sworn on 13th February 2024, and stated that she had excluded the following properties for the reason that they do not form part of the matrimonial property: Motor Vehicle Registration No.KAJ 2X5P, which was bought jointly by Stephen Kingoo, her business partner, and herself on 19th February 1999. The respondent took possession of the logbook while they were married; rental properties in the Diani Msikitini Area, built by her late father, now belong to her mother and brothers. That the same was registered in her name before she got married to the respondent and that she is just a caretaker; harmony rental houses in Diani Ukunda Area bought in July 1993; parcel of land in Diani catholic church was bought by her late father in 1996 and the same



- is registered in her name; the land where her father is buried is an ancestral land and not a matrimonial property.
15. She stated that the said properties are still in the same status, and the respondent benefited from them due to her father's goodwill.
 16. She averred that she used her income to acquire Plot Nos. 6X9, 2X8, and X5, and developed them during the early years of their marriage while the respondent was in college. The respondent left her to repair and modify the properties on her own, as he was busy engaging in adulterous affairs. The respondent gave consent to have properties registered jointly.
 17. The cause was heard through the adduction of oral and documentary evidence.
 18. The applicant testified in support of her case. She adopted the statements in her affidavits and informed the court that she and the respondent jointly acquired Title Nos. Kwale/Shimoni Village Squatter Scheme/X5 and Kwale/Shimoni Village Squatter Scheme/6X9, which are registered in their joint names. She urged the court to allocate her Plot No.6X9 and Plot No. X5, as well as the plot with rental houses at Bamba, to the respondent. She prayed that Plot No.2X8, as well as a house in Anziwani, be divided equally.
 19. She stated that the plot in Anziwani was found to be government land standing on Block 10/84 and that it was given to squatters. She later found out that the respondent had subdivided the same land into three parcels, A117, A118, and A131, with A117 and A118 registered in the respondent's name and A131 in the name of his nephew, Zuma Lugogo. She testified that the subdivisions took place while the matter was still pending in court. She urged the court to allocate the same to the respondent, and in exchange, allocate her Plot No.2X8.
 20. She told the court that they had 13 cows, a crossbreed of Friesian and Borana, each worth Kes.120,000/-. However, in January, the respondent and his relatives drove them away from the matrimonial home.
 21. On Motor Vehicle Registration No.KCY Toyota Probox, she told the court that it was acquired during the subsistence of their marriage in 2021 for family use and that she contributed Kes.350,000/-. The same is in the respondent's name and possession.
 22. On motorcycle KMGE 8X9S, she told the court that it was acquired during the subsistence of their marriage in 2022 to help her generate income and is registered in the respondent's name.
 23. It was her evidence that motor vehicle registration number KAJ 2X5P was purchased as part of a business venture between her and Mr Stephen King'oo and that it was acquired in 1999 before she married the respondent. Plot No. Kwale/Ukunda/3XX4 was acquired on the 15th of May 1997, before she married the respondent. The same applies to Harmony rental houses acquired on 20th July,1993, and the plot in Diani Catholic church acquired on 2nd February 1997.
 24. She further testified that she was 60 years old and couldn't work anymore, had spent 20 years with the respondent, took care of the home and urged the court to grant her the matrimonial home. She also urged the court to allow the application as prayed.
 25. The respondent was the sole witness in support of his case. Mr Diyo testified that before he married the Claimant, he was working in the hotel industry and that he had a previous marriage, which was blessed with one issue.
 26. It was his evidence that he acquired Plot No. 6X9 in 1999, before he married the applicant, from Stephen Wamalwa. He acquired Plot No. X5 in 1998, partly with funds he received from Mwadia



- Mwalaghu. It was his evidence that Plot Nos. 2X8 and 6X9 were acquired together, as they were purchased from one Ali Munga in 1998/99. The registration for 2X8 and 6X9 took place in 2017.
27. On the Anziwani property, he informed the court that he had subdivided it and built a rental house on the land. He also built a home on the Anziwani property where he now lives with his current wife and child. That subdivision A117 and A118 belong to him.
 28. On motor vehicle KCY, he told the court that he acquired it on 17th January 2022 from one Edward Kimani by trading in his previous car and topping up. The top-up payment was made via M-Pesa.
 29. On KAJ 2X5P, he told the court that the Claimant requested him to buy off Stephen King'oo and that the same should be included as matrimonial property.
 30. On the cows, it was his evidence that he had three cows before he got married to the claimant and that he employed a boy named Hassan who used to take care of the cows and the house. The cows were driven away in 2023, prior to the dissolution of their marriage.
 31. On the motorcycle, he stated that he had bought it for someone else, Emmanuel Mgalla, who had it, and that it was meant to be his upon full payment.
 32. On the properties owned by the claimant before their marriage, he told the court that he contributed towards their development. It was his evidence that the claimant had acquired properties before their marriage, which included a plot in Diani Msikitini, which he had developed by installing a perimeter fence and several rental houses, as well as Plot Diani/Ukunda/8X8, located in Diani Beach.
 33. It was his evidence that he left the matrimonial home to go live with his second wife and also to pursue further studies in Mombasa and Nairobi. The claimant has always had employment and has been living in Ukunda.
 34. He urged the court to grant him the Shimoni properties and the applicant the Ukunda properties and home properties in Machakos. On his earlier proposal of equitable sharing, he told the court that what he meant was that each party should get what is fairly theirs.
 35. Upon the conclusion of the hearing, the Court directed the parties to file written submissions.
 36. The claimant, through her advocates, Oloo & Company Advocates, filed written submissions dated 18th November 2024. Counsel submitted on two issues, namely, whether the suit properties constitute matrimonial property and whether the applicant contributed to the acquisition, construction, and development of the suit properties.
 37. On the first issue, counsel relied on Section 6 of the *Matrimonial Property Act* and submitted that the applicant proved that all the listed properties constitute matrimonial property.
 38. On the second issue, counsel relied on section 2 of the *Matrimonial Property Act* and submitted that the claimant had demonstrated that she had immensely contributed to the acquisition of the matrimonial properties.
 39. In conclusion, counsel urged the court to allow the summons as prayed.
 40. The respondent, on the other hand, through his advocates, M. Chibanda & Company Advocates, filed his written submissions dated 16th December 2024. Counsel submitted on three issues, namely: whether the properties are matrimonial property; whether the parties contributed to their acquisition; and whether the claimant is entitled to the orders sought.



41. On the first issue, counsel relied on section 6 of the *Matrimonial Property Act* and submitted that the respondent had proved that he acquired the listed properties way before he got married to the applicant. He used to live in their matrimonial house on the Kwale/Shimoni Village Squatters Scheme/6X9 with his former wife and child. That with his former wife, they had cows and employed a herdsman. Therefore, the same is not matrimonial property.
42. On the plot in Anziwani, counsel submitted that no evidence was tendered to show it was jointly acquired or that subdivision had taken place.
43. On the property in Bamba, counsel submitted that the same is not matrimonial property as the same was purchased by the respondent solely.
44. On the motor vehicle registration number KCY 4X4T, counsel submitted that the same is not matrimonial property, as the respondent acquired it without the claimant's assistance. The same was also the case with the motorcycle registration number KMGE 8X9S.
45. On the second issue, counsel relied on section 7 of the *Matrimonial Property Act* and submitted that the claimant did not contribute to the acquisition of the listed properties.
46. On the 3rd issue, counsel submitted that the claimant is not entitled to a 50:50 share of the properties or the orders sought.
47. In conclusion, counsel urged the court to find that the summons lacks merit and dismiss the same with costs.
48. I have considered the originating summons, the replying affidavit, the documents annexed to the parties' pleadings, the evidence adduced in court, as well as the parties' submissions. In my view, the issues are whether the properties in dispute are matrimonial property and, if so, whether the claimant contributed to their acquisition and/or development.
49. Section 6(1) of the *Matrimonial Property Act* defines matrimonial property in the following terms:-
 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.
 2. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
 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.
50. The court in the case of T M W v F M C [2018] KEHC 2X82 (KLR) stated:-

“Turning to the provisions of the *Matrimonial Property Act*, Section 6 of the *Matrimonial Property Act*, 2013 defines a matrimonial property to include the matrimonial home or



homes, any household goods in the home or homes, or any other property jointly owned and acquired during the subsistence of the marriage. Basically 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.”

51. 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.”

52. The claimant listed the following properties as matrimonial properties:-

- a. matrimonial home in Land Reference Number Kwale/Shimoni Village Squatter Scheme /6X9;
- b. Kwale/Shimoni Village Squatter/X5;
- c. Plot with rental houses bordering the compound of the Bamba Sub County Hospital to the East;
- d. Kwale Shimoni Village Squatter Scheme /2X8;
- e. 13 head of cattle, each valued at 120,000 (12 cows and 1 bull);
- f. Land with a residential house at Anziwani Centre Shimoni,
- g. Motor Vehicle Registration No.KCY 4X4T Toyota Probox; and
- h. Motorcycle Registration No. KMGE 8X9S.

53. I have perused the documents adduced in this matter. I note that Title Nos. Kwale/Shimoni Village Squatter Scheme/6X9 and Kwale/Shimoni Village Squatter Scheme/2X8 were registered on 7 July 2017 in the names of both the claimant and the respondent. Title No. Kwale/Shimoni Village Squatter Scheme/X5 was registered on the same date in the name of the respondent. It is therefore evident that these three properties were acquired during marriage between the parties and are consequently matrimonial properties.

54. The sale agreement for the plot bordering the compound of Bamba Sub County Hospital to the east shows the respondent as the buyer and Charo Baya Mwanyule as the vendor. The agreement is dated 18th July 2020. At the time the said property was acquired, the marriage between the parties was subsisting. It is therefore my view that the said property was a matrimonial property that can be divided between the parties upon the dissolution of the marriage based on contribution.

X5. Regarding the land with a residential house at Anziwani Centre, Shimoni, despite the absence of documentation, there is no dispute over its existence. There is also no dispute that the respondent has subdivided and developed the same.

56. I note that motor vehicle registration number KCY 4X4T was registered in the respondent's name on 28th May 2020, according to the logbook. The motorcycle KMGE8X9S is also registered in the



respondent's name. The latter was registered in the respondent's name during coverture. In my view, therefore, both are matrimonial properties.

57. I am also convinced, based on the evidence adduced, that there were 13 head of cattle that were acquired during the subsistence of the marriage. I am persuaded that these were driven away when the relationship between the parties soured. The said cattle are matrimonial properties.
58. The respondent claimed that the claimant owned motor vehicle registration number KAJ 2X5P, rental houses situated in Diani Msikitini area, Harmony Rental Houses at Diani (Ukunda), parcel of land in Dima, parcel of land located at Diani Near Catholic Church Ukunda, near Ukunda Airport, and a plot with a family house where the applicant's father was buried.
59. In response, the claimant stated that the motor vehicle registration number. KAJ 2X5P, which was purchased jointly by her and Stephen Kingoo, her business partner, on 19th February 1999. The respondent took possession of the logbook while they were married. Her late father built rental properties in the Diani Msikitini Area, and the same now belong to her mother and brothers. That the same was registered in her name before she got married to the respondent and that she is just a caretaker; Harmony rental houses in Diani Ukunda Area were bought in July 1993; parcel of land in Diani Catholic Church was bought by her late father in 1996 and the same is registered in her name and the land where her father is buried is an ancestral land and not a matrimonial property.
60. I note that Title Number Kwale/Diani Beach/8X8 was registered on 2nd February 1996, in the name of the applicant. There is no evidence that the respondent carried out any development on it. Title Number. Kwale/Ukunda/3XX4 was registered on 15th May 1997, in the name of the applicant and therefore does not form part of the matrimonial property.
61. The sale agreement for Nissan matatu KAJ 2X5P is dated 19th February 1999. It lists the applicant and Stephen Musyoka Kingoo as the purchasers, and James Mwaura Waitiki as the seller. The respondent argued that he had bought off Stephen; however, no evidence was tendered to support this claim. It is therefore my view that it does not form part of the matrimonial property.
62. It is my view that the respondent did not tender any evidence to substantiate his claim that the properties he listed as being owned by the claimant are matrimonial properties and that he contributed to their development. Consequently, I am unable to agree with him that the same form part of the matrimonial property.
63. Having identified properties that constitute the matrimonial property, I must now determine their division.
64. Section 2 of the *Matrimonial Property Act*, 2013 defines contribution as follows:-

“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.”



65. Further, Section 7 of the *Matrimonial Property Act* is clear in its terms that:

“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.”

66. The court in the case of *MNH v FHM* [2018] KEHC 1183 (KLR) stated,

“What the *Matrimonial Property Act* of 2013 does is formalize and make provision for giving due consideration to both the monetary and non-monetary contribution of parties in a marriage as is evident from the clauses cited in the antecedent paragraphs. This position has been cemented by the Courts in different instances. For starters, in *NWM v KNM* (2014) eKLR it was stated that the court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.”

67. Further the court in the case of *EKTM v ECC* [2021] KEHC 1359 (KLR) stated:-

“It follows from the foregoing that despite the constitutional requirement that parties in a marriage have equal rights, each party must be able to prove either contribution was monetary or non-monetary lest a party will not be entitled to any share in the matrimonial property. The onus squarely falls on the party who alleges contribution to prove such contribution in the acquisition of the subject property, be it monetary or non-monetary contribution.”

68. It is clear from the foregoing that the division of matrimonial property is pegged on contribution. Each party gets, to the extent that it can be ascertained, what they put in.

69. There is no dispute that the claimant has been living on Title No. 6X9 during their marriage and that she was responsible for managing the properties in question. There is also no dispute that the claimant was employed during the marriage's subsistence. The respondent was away at work or in study for a considerable period during coverture. In my view, the respondent has not rebutted the claim made by the claimant that she made both monetary and non-monetary contributions towards the acquisition and development of the subject properties.

70. The upshot of the foregoing is that it is my finding that the suit properties are matrimonial property and that the claimant made both monetary and non-monetary contributions towards their acquisition and development and is entitled to a share of the same.

71. What share of the properties should each party get? In my view, and as I have stated above both parties made contributions towards the purchase of the listed properties. The exact contribution of each party is unascertainable. In the circumstances, I find and hold that they are owned by the parties hereto on a 50:50 basis, as such division accords with the equitable maxim that equality is equity.

72. In arriving at the foregoing decision, I am guided by the persuasive authority of the decision of the court in *PWK vs JKG* 2015 eKLR where it was held that:-

“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.”

73. Based on the foregoing, the orders that comment themselves to me, and which are hereby issued, are the following: -

- a. I hereby declare that the following properties as being matrimonial properties: -
 - i. Matrimonial home on Title Number Kwale/Shimoni Village Squatter Scheme/6X9;
 - ii. Title Number Kwale/Shimoni Village Squatter Scheme/X5;
 - iii. Title Number Kwale/Shimoni Village Squatter Scheme/2X8;
 - iv. Plot with rental houses bordering the Bamba Sub County Hospital to the East;
 - v. 13 head of cattle (12 cows and one bull);
 - vi. Land with residential house at Anziwani Centre Shimoni;
 - vii. Motor vehicle registration number KCY 4X4T Toyota Probox; and
 - viii. Motorcycle registration number KMGE 8X9S.
- b. That the parties herein are entitled to an equal share of the properties listed in (a) above on a 50:50 basis;
- c. That the above-listed properties be valued within 60 days from the date of the judgment herein; and
- d. That either party is at liberty to buy the other out, failure to which the properties are to be sold by public auction within 90 days of the date hereof, and the proceeds of the sale are shared equally on a 50:50 basis.

74. As this is a matrimonial property dispute between former spouses, I do not think that the issuance of an order for costs would be helpful. Parties will therefore bear their costs.

75. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 20TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Busieka holding brief for Mr Oloo for the Claimant;

Mr Chibanda for the Respondent; and

Arthur – Court Assistant.

