



REPUBLIC OF KENYA



KENYA LAW
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**ZNK v Rock & Pure Ltd & 3 others (Family Originating Summons
2 of 2024) [2025] KEHC 13079 (KLR) (11 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 13079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY ORIGINATING SUMMONS 2 OF 2024**

**G MUTAI, J
AUGUST 11, 2025**

BETWEEN

ZNK CLAIMANT

AND

ROCK & PURE LTD 1ST RESPONDENT

LAND REGISTRAR MOMBASA 2ND RESPONDENT

PNW 3RD RESPONDENT

**CATHERINE WANJIKU WARUGURU ALIAS CATE WARUGURU 4TH
RESPONDENT**

JUDGMENT

1. This matter was initially filed by the Claimant in the Environment & Land Court as ELC case No 136 of 2021. The said matter was between the same parties as those in the instant matter. In the said matter, the Claimant, vide a plaint dated 10th July 2021, and filed on 13th July 2021, prayed for the following reliefs: -
 1. Declaration that transfer and registration of titles in respect of properties known as CR43865, CR43991, CR43992, CR44515, and CR44516 in Mombasa by the 3rd Respondent to the 1st Respondent was null and void;
 2. An order compelling the 2nd Respondent to cancel the transfers and titles, and registration of the said properties;
 3. An order declaring the said properties as matrimonial properties;



4. An order compelling the 2nd Respondent to transfer and titles in respect of the said properties and rectify the register to make the Claimant and the 3rd Respondent co-owners of the properties;
 5. General damages for unlawful transfers; and
 6. Damages and declaratory reliefs.
2. Upon hearing the parties, the Environment & Land Court delivered a judgment on 19th March 2024, vide which it struck out the plaint dated 10th July 2021 and transferred the matter to the Family Division of the High Court of Kenya at Mombasa. The Court ordered that the matter be mentioned before the Deputy Registrar of this Court on 16th April 2024. The Court awarded the Respondents the costs of the suit.
 3. The Claimant was dissatisfied with the said judgment and applied for review. Upon hearing the parties, the Hon Mr. Justice Naikuni, the trial Environment and Land Court judge, declined to review his orders, in a ruling delivered on 24th October 2024.
 4. Before the hearing of this matter on the merits, the parties entered into a consent vide which it was agreed that the status quo be preserved pending delivery of the substantive judgment herein.
 5. The hearing proceeded on 5th March 2025. The Claimant and the 3rd Respondent each testified in support of their respective cases. The 3rd Respondent averred that the 1st and 4th Respondents had authorised him to represent them. Despite being served, the 2nd Respondent never appeared. I shall set out a summary of each party's evidence below.
 6. The Claimant testified that she resides at Utange near Afro Estate in Bamburi. It was her evidence that she contracted a marriage with the Respondent and that she had 3 children with him, to wit:-
 1. JTWN, aged 14 at the time of the hearing;
 2. TMN, aged 12 at the time of the hearing; and
 3. TWN, aged four and a half years old at the time of the hearing.
 7. She testified that the 1st Respondent is a company in which the 3rd and 4th Respondents have shares. It was her evidence that she registered caution in respect of the suit premises, but that the cautions were removed without her being required to make a representation. The suit properties, though initially in the name of the 3rd Respondent, were transferred to the 1st Respondent. She averred that she didn't give spousal consent in respect of the said transfers.
 8. Ms. Kangara testified that she got married to the 3rd Respondent on 20th November 2010 in a church wedding that was celebrated at the Rock City Garden. At the time of the celebration of the marriage, the properties had not been purchased, and the couple lived together at VOK in Mombasa. Upon their purchase, she lived in CR Nos 43991 and 43992, which plots are developed and upon which the matrimonial home is erected. The matrimonial home was constructed in 2014. At the time construction commenced, two children had been born. The third born, Taliyah, was born later.
 9. It was her evidence that she supervised construction, did the interior design, and even went to China to buy materials. Ms Kangara testified that she made both monetary and non-monetary contributions.
 10. Ms Kangara testified that during coverture, she and the 3rd Respondent jointly contributed to the promotion of family welfare and acquisition of properties on the basis of trust. Regarding her



- monetary contribution, she testified that she took a loan, used her savings from employment with the Kenya Bureau of Standards, and also dividends from her company, Sunrise Investments Ltd.
11. She accused the 3rd Respondent of having assaulted her and the 4th Respondent of intimidating her by spilling liquids in their home when she visited in the company of the 3rd Respondent, while saying that she was casting out demons.
 12. She stated that all she wanted was justice and for the properties to be given to her in trust for her children.
 13. When cross-examined by Mr Obonyo, she admitted that she filed the case before the Environment & Land Court. She was dissatisfied with its judgment and sought to have it reviewed. The Court, however, declined to review its decision. Ms Kangara stated that her marriage to the 3rd Respondent was dissolved after the decree absolute was issued in the Divorced Cause No. 145 of 2021. The Claimant also filed a children's cause at Tononoka Children's Court in respect of which there is a pending appeal.
 14. The Claimant conceded that she had not provided direct evidence of monetary contribution. She, however, stated that all the properties were purchased after the marriage was celebrated and the union between her and the 3rd Respondent was subsisting. She testified that the properties were now registered in favour of the 1st Respondent, a limited liability company. She said that she wanted the properties to be owned by her and 3rd Respondent jointly.
 15. During reexamination, she expressed her wish to have her name noted in the suit premises so that she could not be evicted. It was her evidence that since the 3rd Respondent left, she had been solely providing for the children, as the 3rd Respondent had neglected his obligations.
 16. On the other hand, Peter Njogu Waweru testified in opposition to the Originating Summons. He testified that the Claimant was his ex-wife. They had, however, divorced. He relied on the documents that were produced in ELC No. 131 of 2021, the statement made therein, as well as the original documents produced in the said cause. He also filed a Replying Affidavit sworn on 18th February 2025.
 17. The 3rd Respondent testified that he had the authority to represent the 1st and 4th Respondents and to plead and testify on their behalf.
 18. Mr Waweru testified that the issue of ownership of the suit premises was heard and determined by another judge, whereas a different Court was seized of the children's matter. It was his evidence that the divorce matter had been concluded, and there was a pending appeal.
 19. During cross-examination, Mr Waweru testified that the properties were purchased before marriage but that he transferred them to himself in 2013. He, however, did not provide evidence of the prior purchase. He stated that had the home in Utange been a matrimonial home, he would have registered the Claimant as a co-owner, something that he didn't do. He denied that he was an irresponsible parent, stating that he was already paying rent of Kes 40,000.00 so that his children could have shelter.
 20. He further testified that the properties were now in the name of Patricia Nyambura, who had purchased the same from the 1st Respondent. Although the 3rd Respondent claimed that he obtained spousal consent, no evidence of such action was provided.
 21. The 3rd Respondent stated that he constructed the house alone with funds from Sunrise, a company of which he and the Claimant were shareholders. He conceded that the Claimant was in gainful employment as an employee of the Kenya Bureau of Standards.



22. It was stated that the 3rd Respondent built the house alone, without any support from the Claimant. The evidence of this wasn't, however, provided.
23. Mr Waweru urged that Ms Waruguru, the 4th Respondent, was a business partner and not his wife. Regarding spousal consent, he denied it was necessary. In his view, since the property was his, spousal consent was unnecessary. He testified that the Land Register agreed with him on this issue and thereafter registered the transfers without the spousal consent.
24. When reexamined by his own counsel, the 3rd Respondent reiterated that Patricia Nyambura presently owns the properties and that he solely purchased the properties without the contribution of the Claimant. In his view, the properties aren't matrimonial. He denied that he had shares in any company jointly with the Claimant. Mr Waweru, therefore, urged that the claim be dismissed.
25. Upon the conclusion of the hearing, the Court directed the parties to file written submissions. I shall give a precis of each party's submissions below.
26. The submissions of the Claimant are dated 15th April 2025. The Claimant's submissions were filed by her counsel, Derrick Odhiambo Advocates.
27. Counsel identified the issues for determination as being: -
 1. Whether the suit properties should be considered as matrimonial properties;
 2. Whether the caution dated 6th November 2020 was properly removed as per the provisions of sections 71-75 of the [Land Registration Act](#).
 3. Whether the 2nd Respondent breached the duty of care owed to the Claimant;
 4. The status of the 1st Respondent; and
 5. Whether the suit is subjudice.
28. Mr Odhiambo submitted that the Claimant and her children resided in the matrimonial home erected on Plot No. CR 43991 and CR 43992. By dint of that, the said home and the other suit properties were, according to him, matrimonial properties. All the suit properties were acquired during the coverture and are thus matrimonial properties.
29. On the contention that the parties agreed that the properties would not be matrimonial, it was contended that no prenuptial agreement was produced showing that the parties had agreed to such an arrangement.
30. Counsel contended that under section 2 of the [Matrimonial Property Act](#), contribution includes domestic work, childcare, companionship, management of family business or property, and farm work. Reliance was placed on the case of Muranga ELC CASE NO. 32 of 2017; MWK v SKK and five others, where the learned Judge cited Section 93 (2) of the [Land Registration Act](#), No. 3 of 2012, which provides that:

“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the [Matrimonial Property Act](#).”
31. Mr Odhiambo submitted that the spousal consent should have been obtained before the transfers and thus failure to do so rendered the transfers unlawful, null and void and of no effect.



32. Counsel urged that the 3rd Respondent had neglected his children and that his conduct preached the best interest principle. In support of the said contention, I was referred to the case of KBH v HMI (Civil Appeal E109 of 2022) [2024] KECA 172 (KLR).
33. On caution, it was submitted that the same was removed unlawfully and contrary to sections 71 to 75 of the *Land Registration Act*. For that reason, the same was void. Counsel submitted that the caution was removed through an act of collusion between the Respondents.
34. Regarding the duty of care, it was urged that the 2nd respondent had a duty of care to the Claimant. Mr Odhiambo relied on the case of Garsen HCCA No E018 of 2020; Christine Kalama vs Jane Wanja & another.
35. Counsel urged that the Court could issue orders notwithstanding the fact that the 1st Respondent is a company. This was necessary, he submitted, so as to safeguard the interests of the children.
36. On the claim that the matter was res sub judice, Counsel denied that it was.
37. In conclusion, it was urged that the Court ought to allow the suit and protect the Claimant and her children.
38. The submissions of the 1st, 3rd and 4th Respondents is dated 1st April 2025. Vide the said submissions, it was urged that the suit properties were solely purchased by the 3rd Respondent before his marriage to the Claimant. Mr Obonyo learned that counsel for the said Respondents urged that the Claimant neither contributed financially nor in any other form to their acquisition or development. The Claimant was accused of using the suit to enrich herself.
39. The 1st, 3rd and 4th Respondent's counsel identified the issues for determination as being: -
 1. Whether the suit properties are matrimonial properties and whether the Claimant made any contribution;
 2. Whether proprietary estoppel applies and if the transfer to the 1st Respondent followed due process;
 3. Whether the Plaintiff/Claimant had suffered any loss or damage; and
 4. Who should bear the costs of the suit?
40. It was contended that the Claimant had the burden of proving that the properties were matrimonial and of showing that she contributed. Reliance was placed on the case of Peter Mburu Echaria vs Priscilla Njeri Echaria [2007] eKLR and Kamore vs Kamore [2002]1EA80. It was contended that the Plaintiff failed to produce evidence of contribution and that her evidence was inconsistent and did not substantiate her claim.
41. It was submitted that under section 93(2) of the *Land Registration Act*, the purchaser obtained a good title.
42. Counsel contended that there was no proprietary estoppel as the Claimant failed to show that the 3rd Respondent gave her any assurance or representation that she had any interest in the suit properties.
43. Mr Obonyo submitted that the Claimant could not succeed as she had not shown that the Respondent was liable to compensate her. Further, it was urged that she had neither particularized nor quantified the damages arising from the transfer of the properties. Counsel submitted that her claim was therefore speculative and unsupported by any tangible evidence.



44. On costs, it was urged that the costs should follow the event.
45. I have considered the parties' pleadings, the evidence adduced, and the submissions filed. In my view, the issues in this matter are the following: -
1. Whether the suit properties are matrimonial properties;
 2. If so, what contribution was made by each party;
 3. What share should each party get; and
 4. Who should pay the costs of the originating summons.
46. Section 6(1) of the Matrimonial Properties Act defines “matrimonial property” as being: -
- “(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.”
47. In view of the foregoing statutory provisions, are the suit properties matrimonial properties? To determine this issue, I must first set out some salient constitutional and statutory provisions.
48. 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.”
49. Section 7 of the *Matrimonial Property Act* provides 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.”
50. The mere fact that a property is matrimonial does not mean that it is owned by the spouses equally.
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. 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 time of the dissolution of the marriage.



53. The foregoing was eloquently stated by Kiage, JA of the Court of Appeal in PNN vs 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.”

54. It is a common ground that the Claimant and the 3rd Respondent got married on 20th November 2010 at ACK St James Buruburu. Their marriage was blessed with three children, to wit: Jude Theo Waweru, born on 15th February 2011; Tiffany Muthoni Waweru, a daughter born on 6th March 2013; and Taliyah Wangari Njogu, a daughter born on 15th September 2020.

55. I have seen a copy of the title No Subdivision No 13473 (original number 11356/38/section I Mainland North was bought by the 3rd Respondent on 2nd December 2014. This was during coverture. Subdivision number 13472 (original number 11356/section I/Mainland North was transferred to the 3rd Respondent on 22nd September 2013, also during coverture. Both these properties were transferred to Rock & Pure Ltd on 19th April 2021.

56. At the time of the transfer, there was a caution dated November 2020, which appears to have been removed without the involvement of the Claimant.

57. The purchaser/transferee is Rock & Pure Ltd, a limited liability company in which Peter Njogu Waweru holds a minority (30% share), with the 4th Respondent owning 70% share. The said company was registered on the 9th day of June 2020.

58. The question then is whether the suit properties, having been purchased during coverture, were matrimonial properties? Matrimonial properties are defined as the matrimonial home, household goods, and effects in the matrimonial home, and any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

59. I note that matrimonial property vests in spouses in proportion to their contribution. Section 2 of the Act defines Contribution as monetary and non-monetary contribution which includes domestic work and management of the matrimonial home, childcare, companionship, management of the family business, and farmwork.

60. The said properties, that is to say, CR 43865, CR 43991, CR 43992, CR 44515, CR 44516, and Title No Nairobi/Block 83/672 were acquired during the pendency of the marriage. The parties' matrimonial home is on CR No 43992 and 43992. The union between the Claimant and the 3rd Respondent was blessed with three children. I take judicial notice of the fact that spouses rarely keep records of the dealings between them when a marriage is happy. There is no doubt that the Claimant had children with the 3rd Respondent. I do not doubt that she provided him with a home that enabled him to thrive in his business and must have carried out homemaking duties. In light of the foregoing, I find and hold that the Claimant made non-monetary contributions.

61. The court in the case of AWM vs JGK [2021] KEHC 4780 (KLR), while dealing with non-monetary contribution, stated that: -

“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 contribution towards acquiring the matrimonial property and that her non-monetary contribution is higher than that of the Respondent.”

62. What of monetary contribution? The 3rd Respondent stated in his evidence that part of the money used to purchase the suit properties was provided from the proceeds of a company called Sunrise. It would appear to me that the said company was owned jointly by the Claimant and the 3rd Respondent. The claim by the Claimant that she was a shareholder in Sunrise was not rebutted. In my view, both parties ought to benefit from the contribution made by a company they jointly own.
63. I note the Claimant is in gainful employment. She is an employee of the Kenya Bureau of Standards. I am not convinced that during the marriage she did not contribute anything towards the domestic budget or pay for things that freed the 3rd Respondent to make the monetary contribution towards the purchase of the suit properties.
64. Under the circumstances, I find and hold that the suit properties, having been acquired during coverture, were matrimonial properties. Since the Court cannot establish the exact contribution of each spouse, due to the dearth of evidence, the correct approach, in my view, is to find that each spouse is entitled to 50% of the same. I am guided by the decision of the Court in *PWK vs JK6* [2015]eKLR, where the Court stated as follows:-
- “Where the disputed property is not 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...”
65. In my view, the Claimant had a 50% interest in the said properties.
66. The parties have since been transferred to the 1st Respondent. Does that fact matter? In my view, the transfer appears to have been fraudulent for two reasons: firstly, it was done without spousal consent and contrary to a caution that the Claimant had placed in the said properties. I agree with the decision in the case of *Kadzo Mkutano v Makutano Mwamboje Kadosho & 2 others* [2016]eKLR, where the judge stated that:-
- “Section 28 of the *Land Registration Act* recognizes spousal rights over matrimonial property as an overriding interest. Spousal consent is therefore required before a spouse can sell a matrimonial property. In the absence of such a consent, the sale is null and void.”
67. The consent, notwithstanding the caution placed by the Claimant, was lifted unprocedurally. The Claimant never removed the caution. The caution was also not removed by the Court. Thirdly, the caution wasn't removed upon a demand being made to the cautioner.
68. Although the properties are now in the name of the 1st Respondent, a limited liability company, or the subsequent purchaser, Ms Patricia, the 1st Respondent is owned by the 3rd Respondent and the 4th Respondent. It would seem to me that the transfer to the 1st Respondent is a clever ruse to put the properties beyond the reach of the Claimant.



69. In any case, the 1st Respondent, if this was in fact a deal done above board, ought to have conducted due diligence to establish how exactly the 3rd Respondent removed the caution and should have asked for and obtained spousal consent. In my view, the 1st Respondent is not an innocent purchaser for value without notice.
70. The 2nd Respondent clearly failed in his duties and permitted fraud to be done. It must now bear the responsibility of restoring the titles of the said properties to the 3rd Respondent and also to note the interests thereon of the Claimant.
71. Under the circumstances, I find and hold that the suit properties, that is to say, CR 43865, CR 439991, CR 43992, CR 44515, CR 44516, and Title No Nairobi/Block 83/672, are matrimonial properties. I declare that the transfer of the said properties from the 3rd Respondent to the 1st Respondent, and from the 1st Respondent to any subsequent party or parties, was fraudulent, null and void, and of no effect. I order the 2nd Respondent to restore the properties to the name of the 3rd Respondent and also to note the interest of the Claimant therein.
72. Since the Claimant and the 3rd Respondent are no longer spouses, I order that the properties be valued within 60 days of the date hereof. The property shall be sold by way of public auction within 30 days thereafter. The proceeds shall be shared 50:50 between the Claimant and the 3rd Respondent.
73. Regarding costs, I order that each party bear its own costs of the suit.
74. It is so ordered.

DATED AND SIGNED AT MOMBASA, THIS 11TH DAY OF AUGUST 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Choni, holding a brief for Mr Derrick Odhiambo, for the Claimant;

Ms Khadija, holding brief for Mr Lawrence Obonyo, for the 1st, 3rd, and 4th Respondents;

No appearance for the 2nd Respondent; and

Arthur - Court Assistant.

