



**DC v JKM (Matrimonial Cause E015 of 2022)
[2024] KEHC 693 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE E015 OF 2022**

G MUTAI, J

JANUARY 19, 2024

BETWEEN

DC APPLICANT

AND

JKM RESPONDENT

JUDGMENT

Introduction

1. The applicant filed the Originating Summons dated 20th November 2022 on 28th November 2022. Vide the said Summons, she sought the following seven orders:-
 1. This honourable Court be pleased to issue a declaration that all the underlisted properties which are jointly and or individually owned and or individually operated by the respondent, are held beneficially and or in trust for the Applicant;
 2. An order to issue that all the properties listed below are held by the respondent in trust and for the beneficial interest of the applicant:-
 - i. Land registration number Kilifi/Mtwapa/7518;
 - ii. Permanent house situated within Kikambala in Kilifi County;
 - iii. Motor bike;
 - iv. Tuktuk registration number(particulars withheld);
 - v. Plot registration number Kilif/Mtwapa/6524 measuring approximately 0.20 Ha and registered jointly, which was also the matrimonial home;
 - vi. Motor vehicle registration number (particulars withheld)Toyota Vitz;



- vii. Land parcel registration number Kwale/Diani SS/4843 registered jointly; and
 - viii. Livestock and farm animals.
3. The respondent should transfer 100% of the interest in the properties within 60 days from the date of judgment at the respondent's cost;
 4. In default, the Deputy Registrar be empowered to sign any transfer documents in place of the Respondent or any other person holding any title on behalf of the applicant to effect all the orders of this Court in favour of the Applicant;
 5. That order does issue declaring the Respondent is accountable to the Applicant in respect of all the income derived from the said properties from the date of purchase;
 6. This honourable Court be pleased to order that the properties and the income from the aforementioned investments be handed over to the Applicant together with interest at Court rates; and
 7. In the alternative to the foregoing, the forested properties be valued and sold and the net proceeds be given entirely to the Applicant.
2. The summons was grounded on the fact that the applicant had filed a divorce cause (No. 132 of 2022; Deborah Curtis versus John Kajoho Mrabu), seeking to dissolve her marriage to the respondent. She averred that she had solely purchased all the properties above-mentioned. Despite having possession of the said properties, the respondent had never rendered statements of accounts of the said properties and had instead threatened to sell or destroy the same once the parties disagreed. The applicant was apprehensive that the properties would be damaged or sold by the respondent without her knowledge and or consent.
 3. In her supporting affidavit, the applicant, an American citizen, averred that she got married to the respondent on 21st July 2019 under the provisions of the *Marriage Act*, 2014. She stated that the properties she was claiming were purchased by her and that, in addition, she constructed a 3000 square foot house that cost her “not less than US\$ 45,000”, installed custom closet and kitchen cabinets, tiled the floors and bathroom walls and worked on the interior and exterior paint, constructed a well for water and a well for sewage and built a tower for water tank, purchased and installed the water tank, constructed a gym and two storage units that cost her “not less than US\$ 5,000” and constructed an area for livestock and paid for landscaping wall around part of the property, among other things.
 4. The applicant deposed that she purchased a motorcycle for US\$1,000 (whose registration number wasn't given), motor vehicle registration number (particulars withheld) Toyota Vitz “at approximately US\$4,900”, an unknown number of livestock “including but not limited to hens, turkeys, goats and pigs” for a sum that wasn't disclosed, Plot in Kilifi Mtwapa Plot 6523 for US\$22,000, which she developed, tuk-tuk registration number(particulars withheld) for US\$4,900, the plot in Diani Plot 4843 for US\$21,000. The Applicant stated that the Respondent never made any contribution towards the purchase of the said properties. She accused the respondent of having been abusive.
 5. Ms Curtis also filed a Notice of Motion dated 13th November 2022, vide which she sought certain interim reliefs. This Court, upon hearing the application, per Onyiego J, ordered on 17th February 2023 that the respondent be restrained from leasing, selling and or disposing of the properties mentioned herein pending the hearing and determination of the originating summons and awarded her costs of the application.



6. The applicant filed a Supplementary Affidavit which she swore on 19th May 2023. In the said affidavit, she provided further documentary evidence of what she said were her contributions. Ms. Curtis averred that she spent US\$32,320 in renovating his house, which house she stated earns the respondent Kes.150,000 as rent, US\$23,604 on the construction of 11 rentals on his mother's land, Kes1,800,000 for the purchase of Title No Kilifi/Mtwapa/6524 and US\$116,836 for construction of 4 bedroom, four bathroom house on the latter property, Kes1,200,000 for purchase of an adjoining Plot, US \$1,744 for purchase of a motorcycle, US\$5,185.00 for purchase of a tuk-tuk, Kes.1,800,000 for a plot in Diani and US\$39,463 for development of the project.
7. The applicant further deposed that the Respondent earns approximately Kes.250,000.00 per month from her investment and "does not bother to update me nor split the income." She stated that he does not have any source of income and solely relies on her investments for survival. It was her testimony that she takes care of his children and has enrolled them in school in the United States.
8. The Respondent never appeared. He also didn't file a response to the Originating Summons.

The Evidence of the Applicant

9. This matter came up for hearing on 26th July 2023. The Applicant was the sole witness.
10. She testified that she lives in North Carolina in the United States of America, where she works as a registered nurse. She stated that she was previously married to the Respondent and that the marriage was dissolved in December 2022. She adopted the averments she made in her affidavit sworn on 20th May 2023 and relied on its contents as well as the documents attached thereto, which she produced as exhibits in this cause.
11. She prayed that the Court grant her sole ownership of the properties on the ground that she solely purchased the same. She also sought to have the money she expended for the benefit of the respondent repaid.
12. The Applicant stated that their marriage wasn't blessed with issues.

The Evidence of the Respondent

13. The Respondent, as I have stated, never entered an appearance. Despite being served with the notice of the hearing that took place on the 26th day of June 2023, he failed to come to Court. The matter, therefore, proceeded in his absence. The evidence of the applicant was, therefore, uncontroverted.

Submissions of the Applicants

14. The Applicant filed Written Submissions dated 18th July 2023. In the said submissions, she urged this Court to grant her the orders she sought in the Originating Summons on the grounds that the properties she had listed were matrimonial properties.
15. The Applicant identified five issues as coming up for determination. These are:-
 - i. Whether the Applicant contributed towards the acquisition and the development of the suit properties;
 - ii. Whether the Respondent is accountable to the Applicant in respect of all the income derived from the matrimonial properties;
 - iii. Whether the Respondent is accountable to the Applicant in respect of all the income derived from the matrimonial properties;



- iv. Whether the Applicant is entitled to 100% of the suit properties; and
 - v. Whether the Applicant should be granted the prayers sought.
16. The Applicant submitted that the suit properties were acquired in the period between 21st July 2019, when they got married, and December 2022 when the marriage was dissolved. Her counsel, relying on the decision of Musyoka J, in POM versus MNK [2017]eKLR stated that the properties were matrimonial properties as the parties were married to each other at the time of the acquisition.
 17. I was referred to the case of TMW versus FMC[2018]eKLR, where Nyakundi stated that:-

“for the 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.” The Applicant reiterates that the properties listed in this cause were acquired during the pendency of the marriage and therefore constitute matrimonial property”
 18. It was urged that Title No. Kilifi/Mtwapa/6524 was the matrimonial home as it was owned and occupied by the parties as the family home.
 19. On the second issue the Applicant’s counsel submitted that the Respondent never made any contribution towards the purchase of the suit properties. She stated that at no time did he contribute towards the purchase of the same either by way of domestic work or through management of the matrimonial home, child care, companionship, management of the family business or property or farmwork. In support of her submissions, I was referred to the case of PNN versus ZWN [2017]eKLR, and NWN Versus KNM[2014]eKLR. The applicant averred that she supports the Respondent’s children in the United States and that this amounts to a non-monetary contribution.
 20. The Applicant argued that as the properties were registered in the name of the Respondent, she was entitled to accounts of the incomes that accrued from the rental house, tuk-tuk, motorbike and motor vehicle KCJ 792E, Toyota Vitz.
 21. It was submitted that under section 7 of the *Matrimonial Property Act*, matrimonial property vests in the spouse according to the contribution either spouse made towards its acquisition “and shall be divided between spouses if they divorce or their marriage is otherwise dissolved”.
 22. The Applicant averred that she solely financed the purchase of the suit properties as she was the sole breadwinner of the family. Relying on the Supreme Court decision in JOO versus MBO [2023]KESC 4 (KLR), it was submitted that marriage does not entitle a spouse to a beneficial interest in a property but that a party must prove contribution to enable the Court to determine the percentage available for distribution. It was urged that the Applicant had proved her contribution, whereas the Respondent, on the other hand, did not. For that reason, it was urged that the Applicant is entitled to 100% of the matrimonial property.
 23. The Applicant thus urged that I allow the Originating Summons.
 24. The Respondent did not file submissions in opposition to the Originating Summons

The Applicable Law

25. At the heart of our constitutional order is the equality of the sexes and also the equality of the spouses when they get married. To illustrate this point, it is important that I set out the relevant provisions



of *the Constitution* of Kenya, 2010 and the applicable law as these shall underpin the decision that I shall make.

26. 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”.

27. Sections 6 and 7 of the *Matrimonial Property Act*, Act No 49 of 2013, provide that:-

“6.

- (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.
7. 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.”

28. Section 14 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 rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

Issues for Determination

29. I have looked at the matter and considered the testimony of the Applicant as well as the submissions filed herein. Although the Respondent did not appear for the hearing, I must nevertheless consider whether the Applicant proved her case. In my view, it is not enough that the case was not contested; facts and the law must support her case. The court must make a reasoned decision.



30. It would thus appear to me that I must determine: -
- i. Are the properties claimed by the Applicant matrimonial properties?
 - ii. Did the Applicant contribute towards the acquisition and the development of the suit properties?
 - iii. Is the Applicant entitled to 100% beneficial interest in the suit properties?
 - iv. Is Respondent accountable to the Applicant in respect of all the income derived from the matrimonial properties?
 - v. Should the Applicant be granted the prayers sought?

I will look at each of these issues in turn.

Are the properties claimed by the Applicant matrimonial properties?

31. The Applicant set out in her Originating Summons the properties she is claiming. These are described in prayer No. 2(i) to (viii). Are these properties matrimonial properties? I shall look at each property in turns.

Title No Kilifi/Mtwapa/7518

32. The Applicant produced a certificate of title in respect of the said property. The same was issued on 12th April, 2022. The property is registered in the name of John Kajoho Mrabu and Deborah Frances Curtis. It is apparent from the date the title was issued that this property was purchased during the subsistence of the marriage and is thus a matrimonial property.

Permanent House in Kikambala in Kilifi County

33. The Applicant did not provide a certificate of title of the above-referenced property. The Court is unable to tell when the same was purchased. In any case the claim in respect of the same fails for want or specificity.

Motor Bike

34. Although the Applicant provided extracts of her bank statements no evidence was led showing when the said motorcycle was purchased, and if so, in whose name it is currently registered. The claim in respect of the said property similarly fails for want of specificity.

Tuk-tuk Registration No (particulars withheld)

35. The Applicant attached a photograph of the said motor vehicle. In her Supporting Affidavit (paragraph 14), she deposed that she purchased it at the cost of US\$4,500.00. In her Supplementary Affidavit, she indicated that the figure was US\$5,185.00. Although the discrepancies in the figures she gave are significant, this Court is persuaded that the Tuk-tuk was purchased during coverture and that it was a matrimonial property as her evidence was unchallenged.

Title No Kilifi/Mtwapa/6524

36. The Applicant provided a copy of the certificate of title. The same is registered in the name of John Kajoho Mrabu and Deborah Frances Curtis and was issued on 27th January 2020 when the marriage



between the parties was subsisting. That being the case, this court is satisfied that the same is a matrimonial property.

Motor Vehicle Registration No. (particulars withheld)Toyota Vitz

37. Ms Curtis provided extracts of her bank statements. This shows that the Applicant provided funds that were used to purchase the motor vehicle. The Applicant deposed that the motor vehicle was purchased during coverture. Her evidence to that effect was not controverted. In the circumstances, I find and hold that the said motor vehicle is a matrimonial property.

Title No. Kwale /Diani SS/4843

38. The Applicant provided a copy of the certificate of title of Title No. Kwale /Diani SS/4843 in the name of John Kajoho Mrabu and Deborah Francis Curtis. The title was issued on 12th November 2021. The date of issue was during coverture. She also produced evidence, that this Court finds credible, that she paid for the cost of its purchase. In the result, I find and hold that the said property is a matrimonial property.

Livestock and Farm Animals

39. This claim fails for want of specificity. The court is unable to determine whether there were livestock in the said properties and, if so, what their numbers were.

Unpleaded Claims

40. In her submissions, the Applicant urged that she spent US\$22,000.00 to purchase LR No Kilifi/Mtwapa/6523. Although she provided evidence of payment, the Court is unable to make a determination as the said claim was not pleaded. The Court in Independent Electoral and Boundaries Commission & another versus Stephen Mutinda Mule & 3 others [2014]eKLR stated that:-

“... it is now trite principle in law that parties are bound by that pleadings and that any evidence led by any of the parties which does not support the averment in the pleadings, or put another way, which is at variance with the averments in the pleadings goes to no issue and must be disregarded...”

41. In the circumstances I am unable to consider any prayer that wasn't in the Originating Summons and accordingly disregard them in this judgment.

42. That being the case I find and hold that the following properties are matrimonial properties:-

1. Title No Kilifi/Mtwapa/7518;
2. Tuk-tuk registration number(particulars withheld);
3. Title No. Kilifi/Mtwapa/6524;
4. Motor vehicle registration Number (particulars withheld)Toyota Vitz; and
5. Title No. Kwale/Diani SS/4843.

Did the Applicant Contribute Towards the Purchase of the Matrimonial Properties?

43. I have looked at the evidence adduced by the Applicant in her supporting affidavit as well as the supplementary affidavit. It is clear that the applicant expended immense resources in the acquisition of the matrimonial properties I have set out above. The applicant was categorical that the Respondent



made no contribution. As her evidence wasn't challenged, I find and hold that the Applicant solely purchased the matrimonial properties.

Is the Applicant entitled to 100% beneficial interest in the suit properties?

44. The Supreme Court in *Joseph Ombogi Ongentoto versus Martha Bosibori Ogentoto* [2023]eKLR stated, in agreeing with what Tuiyott J (as he then was) said in *UMM versus IMM* [2014]eKLR as follows:-

“we find the above opinion and findings persuasive, and it is our finding that the stated equity under Article 45(3) means that the Courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed”.

45. I am bound by the above decision. Section 2 of the *Matrimonial Property Act* defines contribution as:-

“... 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”

46. “Family business” is defined as “any business which

- a. Is run for the benefit of the family by both spouses or either spouses; and
- b. Generates income or other resources wholly or part of which are for the benefit of the family.”

47. The Court in *AWM versus JGK* [2021]eKLR held that

“in respect of non-monetary contribution, I take the view that the Applicant made her contribution in the manner defined under section 2 or the *Matrimonial Property Act*. I have considered the argument by the Respondent that the Applicant had domestic workers and did not do household chores. However, a mother's contribution to a home cannot be quantified in monetary terms. Even where there is domestic help in most cases it is the duty of the mother to ensure that the home runs smoothly and that all the needs of the children and the husband are catered for. Even where she is gainfully employed as claimed in this matter, her duties once she gets home do not end until all is well at home. This is what the Applicant is claiming. She also provided companionship to the Respondent. The Respondent argues that companionship does not constitute a contribution towards matrimonial property. Section 2 of the *Matrimonial Property Act* defines the contribution to include companionship”.

48. I agree wholeheartedly with the holding above. Thus, in this case, not only must I consider what each contributed monetarily, but I must also bear in mind non-monetary contributions. As the Respondent



didn't enter an appearance, I am unable to determine if he made any contribution and, therefore, find and hold that the applicant is entitled to full ownership of the matrimonial properties.

49. The applicant not only purchased the matrimonial properties, but she also supports the children of the respondent and provides them with a home and succour.

Is Respondent accountable to the Applicant in respect of all the income derived from the matrimonial properties?

50. The Respondent has possession of the matrimonial properties. These properties have been under his control since the time of the respective purchases. In my view, the Respondent has been holding these properties in trust for the Applicant. As a trustee, he has the obligation to account to the Applicant

Should the Applicant be granted the prayers sought?

51. In my view the Originating Summons is merited. The evidence of the Applicant was not controverted. She provided documentary evidence which proved her case. In the circumstances this Court finds and holds that she is entitled to most of the prayers that she sought.

Disposition

52. I have found merit in the Originating Summons. The same is allowed as follows:-

1. A declaration is hereby issued that:-
 - a. Title No Kilifi/Mtwapa/7518;
 - b. Tuk-tuk registration number(particulars withheld);
 - c. Title No. Kilifi/Mtwapa/6524;
 - d. Motor vehicle registration Number (particulars withheld)Toyota Vitz; and
 - e. Title No. Kwale/Diani SS/4843 are jointly and or individually owned and or individually operated by the Respondent and are held beneficially and or in trust for the Applicant;
2. The Respondent is hereby ordered to transfer his interests in:-
 - a. Title No Kilifi/Mtwapa/7518;
 - b. Tuk-tuk registration number(particulars withheld);
 - c. Title No. Kilifi/Mtwapa/6524;
 - d. Motor vehicle registration Number (particulars withheld)Toyota Vitz; and
 - e. Title No. Kwale/Diani SS/4843 to the Applicant within 60 days of the date of this judgment, failing which the Deputy Registrar of this Court shall execute the relevant transfer documents in favour of the Applicant;
3. The Respondent is hereby ordered to provide statement of account of all the incomes that accrued from the said properties, from the time of acquisition up to date the same are handed over to the Applicant; and
4. The applicant is awarded the costs of the suit.

Orders accordingly.



DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY 2024 AT MOMBASA VIA MICROSOFT TEAMS.

.....

GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Kamande holding brief for Ms. Osore for the Applicant;

No appearance for the Respondent; and

Arthur – Court Assistant

