



SS v APB (Civil Suit 23 of 2019) [2024] KEHC 540 (KLR) (Civ) (24 January 2024) (Judgment)

Neutral citation: [2024] KEHC 540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 23 OF 2019

SN RIECHI, J

JANUARY 24, 2024

BETWEEN

SS APPLICANT

AND

APB RESPONDENT

JUDGMENT

1. The Plaintiff/Applicant SS married the Respondent APB on 4.4.2009 at Shree Visa Oshwal Community in Nairobi and were issued with a Marriage Certificate No 1XXXX9. Due to differences in marriage the Plaintiff filed Milimani Divorce cause no. 558/2018 and divorce granted on 16.1.2019 seeking the following orders:
 1. THAT an Order do issue declaring that 50% or such other or higher proportion of the under listed properties, held jointly by the Applicant and the Respondent is for the beneficial interest of the Applicant.
 - i. Flat Number 4, [particulars withheld] Road Apartments, Parklands held jointly by the Applicant and the Respondent.
 - ii. Apartment No. XXXX, Athi View Estate, Syokimau
 - iii. Rental income collected from Apartment No. XXXX, Athi View Estate, Syokimau from November 2016 to date.
 - iv. Monies held for the benefit of the Applicant held in fixed deposit account(s) by the Respondent.
2. The application is supported by the affidavit of the applicant sworn on 17th April 2019 stating that they jointly acquired the properties during the subsistence of the marriage. She depones that



- she contributed Ksh.30 million towards purchase of Flat No. XXXX Star Residence Apartments, Ksh.2.14million towards Apartment No. XXXX Athi View Estate Syokimau. She further depones that besides the direct monetary contribution she made indirect contribution in child care, domestic work and management of Matrimonial home and offered companionship to the Respondent.
3. The Defendant/Respondent opposed the application. He filed a Replying Affidavit sworn on 27.8.2019. He depones that Flat No. XXXX at Star Residence is jointly owned by Applicant and himself and he paid Ksh.15million and the applicant paid Ksh.4.5million. He therefore deponed that his share in the property is 73% inclusive of repairs he paid for. He depones that the Rental income from the property is Ksh.120,000/- and as the Plaintiff stays there she is to pay his Ksh.760,000/- monthly.
 4. In respect of the Apartment No. XXXX Athi view he deponed that he paid the full price of Ksh.4.6million, 96,040 legal fees and rental income of Ksh.20,000/- is used to pay arrears of Ksh. 389,000 Service Charge on the issue of fixed deposit. He averred that he paid Ksh.2.5million and the applicant did not make any contribution. On Kengen bond he averred that he paid Ksh.250,000 and the applicant contributed Ksh.250,000/- and should therefore be divided equally. Finally he averred that he invested in gold nuggets worth Ksh.5million to be held in trust by his mother R behalf of his two sons which was placed in GT Bank Locker AXXXX3 held jointly by his mother and applicant but the applicant took away the gold which she should return to R his mother.
 5. On 15.12.2022 by Consent of Counsel for the parties the originating summons were to proceed by way of written submissions. Both Counsel have filed their respective submissions. Mr. Mwangambo for the applicant submitted that the issue for determination in this matter are:
 6. On the issue of whether the properties in the Originating Summons were matrimonial property, he submits that Flat No. XXXX Star Residency is in the joint names of the parties and so is Apartment No. XXXX Athi View Estate Syokimau. He submits that this fact is not disputed by the Respondent. In respect of British American money market. Both the Applicant and Respondent invested 250,000/- each during the subsistence of the marriage.
 7. On whether the applicant contributed to the acquisition of the properties, counsel submits the following:
 1. Apartment No. XXXX Star Residency – Parklands counsel submits that the purchase of the property was from a loan advanced by applicant’s parent of USD200,000 after the respondent had requested USD72,000. The applicant’s father NJS transferred USD72,000 equivalent to Ksh.5,579,750/-. When demand for the loan was made, the applicant repaid half of the amount USD 100,000/-. It is therefore clear that the amount loaned by applicant’s father was used to purchase the property; This is where the applicant is currently staying.
 2. On Apartment No. XXXX Athi View Syokimau the applicant contributed Ksh.2.14million towards the purchase as evidenced by the applicant bank statement dated 1.10.2009 and 1.4.2014 showing transfer of funds from her account to the joint account.
 3. British-American Money Market Bond of Ksh.250,000/-. Counsel submits that this was a joint venture and both contributed to the investment and the applicant even if she did not contributestill was a share being property acquired during the substitution of the marriage as per section 14 of the *Matrimonial Property Act*
 4. Counsel submits that the applicant also gave non-monetary contribution more specifically in child care, domestic work and management of Matrimonial home and companionship of the Respondent.



8. Whether the applicant is entitled to equal share of the matrimonial property, Counsel refers this Court to the provisions of Article 45 of *the Constitution* and section 7 of the *Matrimonial Property Act* and urged the Court to award 50% of the share of the Matrimonial Property.
9. Counsel for the Respondent filed submissions dated 16.3.2013. He identified the issue for determination as:
- a. Whether the properties are matrimonial properties;
 - b. The applicable law in the division of matrimonial properties;
 - c. The proprietary rights of the spouses under *the Constitution* and the basis for apportionment and division of matrimonial properties with reference to their respective contributions and proof of such contributions;
 - d. The proportion of each spouse's contribution towards purchase of the properties;
 - e. Whether the Applicant is entitled to an equal or higher proportion of the matrimonial properties;
 - f. Whether the registration of the two properties in the joint names of the spouses entitles the Respondent to exclusive possession of the same;
 - g. Whether there is a rebuttable presumption on the part of the Respondent that though the properties are registered in the joint names of the Applicant and the Respondent, the Respondent made the bulk of the monetary contribution and therefore should not be subject to joint proprietary interest in the properties.
10. Counsel Submits that it is not contested that the Property subject of the Originating Summons were all acquired during the subsistence of the marriage. He also submits that the respondent bought the property with his own money but registered the property jointly during their marriage.
1. Flat No. XXXX Star Residency Parklands
The purchase price was paid by the Respondent in the following manner.
The purchase price of the said Flat was Kenya Shillings Fifteen Million (Kshs.15,000,000/-)
The Respondent paid to the Vendor following amounts:
 - i. 29th January 2014 - Kshs.1,500, 000/=
 - ii. 15th January 2015 - Kshs.12,500, 000/=
 - iii. 23rd February 2016 - Kshs. 500 000/=
 - iv. 24th February 2016 - Kshs. 500 000/=Total Kshs.15,000,000/-
The Respondent also paid legal fees and Stamp duty on the said Flat as follows: -
 - a. Stamp Duty - Kshs.720 000/=
 - b. Legal fees - Kshs.310 980/=Total Kshs.16,031,020/-
It is the Respondent who paid the amount of Ksh.16,031,020/- for the said flat. Annexed hereto and marked "AB 3" are copies of bank transfer details and particulars



11. Counsel submits that the purchase of Ksh15million was partly financed by a loan of the USD72,000 (equivalent to Ksh.6,579,750) from the applicant's father Ksh.2,000,000 towards the repayment of the loan. Respondent submitted that he received the loan from the applicant's father after he had paid part of the purchase price.

2. Apartment No. A3 Athi View Estate Syokimau

12. Counsel submitted that the purchase price was 4,600,000/- Respondent paid the full purchase price and stamp duty of Ksh.96,040 and registered the property in the joint names. He annexed copies of Bank Transfer.

13. Upon perusing the pleadings and submissions, I find that the following issues not in dispute

- a. That the applicant and the Respondent married onand divorced onand decree absolute issued.
- b. That the Property is registered in the joint names of the Applicant and Respondent.
- c. That the applicant is occupying one of the properties Flat No. XXXX Star Residency
- d. That Apartment No XXXX Syokimau is rented out as Ksh.20,000/- and respondent receives the rent.

14. From the pleadings and submissions the issues distilled for determination are:

1. Whether the Property named in the Originating Summons are Matrimonial properties,
2. Whether the applicant contributed to the acquisition of the property.
3. What is the effect of the property being registered in the joint names.
4. What share of property if any is the applicant's and respondent entitled to.

15. On whether the property is matrimonial property. The applicant must show that the property was acquired during the subsistence of the marriage. Unless otherwise agreed that it should not be part of the matrimonial property. Section 6 of the *matrimonial property Act* No. 49 of 2013 provisions.

Rights and liabilities of a person

16. Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property.

17. Specifically excluded for theis trust including property held in trust under customary law.

18. This would include ancestral land held in trust for the future generations and which the person did not acquire as a purchase.

19. From the pleadings and submissions it is common ground that flat No. XXXX Star Residency, Apartment No. XXXX Athi View Estate were all acquired during the subsistence of marriage. The respondent and Applicant do admit that the Property is registered in their joint names. I am therefore satisfied that the property Flat No. XXXX Star Residency and Apartment No. XXXX Athi View Syokimau is Matrimonial Property within the Matrimonial Properties Act.

20. As noted above the two properties are registered in the joint names of the applicant and the Respondent. What is the effect of such registration? The applicant in her submissions contends that such registration entitles her to 50:50 share in the property. The Respondent submits that although



the property is jointly registered, he is the one who paid for their purchase and willingly registered them in the joint names. He therefore urges the court to find that the property is his.

21. This issue is resolved by the provision of Section 14 of the [Matrimonial Property Act](#) which provides:

22. Presumptions as to property acquired during marriage

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.

23. From these provisions the fact that the property is registered in the names of spouses jointly. It does not necessary imply that the interests in the property is equal.

24. Article 45 of the custodian provides for the right within marriages.

- a. Article 45 (1) (3) of [the Constitution](#) provides:

“Parties a marriage are entitled to equal rights at the time of the marriage, during the marriage and al the dissolution of the marriage.”

We wish to rely on T M W v F M C [2018] eKLR where the Honourable Judge made reference to the case of PNN vs ZWN (2017..) eKLR, where it was stated,

“One of the earliest opportunities to interpret the provisions of Article 45 (3) came one year after the promulgation in the case of Agnes Nanjala William vs Jacob Petrus Nicolas Vander Goes, (Civil Appeal No. 127 of 2011) where this Court stated as follows:

“Article 45 (3) of [the Constitution](#) 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. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article s 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day.”

- b. The Honourable Judge went further to state that 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 7 997 (unreported), *Kamore vs. Kamore* (supra); *Muthembwa vs. Muthembwa*, Civil Appeal No. 74 of 2007 and *Mereka Vs Mereka* Civil Appeal No. 236 of 2007 (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 contribution as equal to that of the husband." "a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in *Lock Yeng Fun vs Chua Hock Chye* [2007] SGCA 33; "It is axiomatic that the division of matrimonial property under Section 12 of the Act is not - and, by its very nature cannot be - a precise mathematical exercise."

- c. In *T M W v F M C* [201 8] eKLR the Honourable Judge stated that the nub the judicial precedence is that the Trial Court is mandated to scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties so as to inform the division of matrimonial properties after dissolution of the marriage. It's not in dispute as of now the court of appeal decision embodies that When applying the principle of equal ownership share the courts shall take into account a range of factors with no single consideration bearing a greater weight than the other in a case requiring the halving step formulae.
25. The Supreme Court in *JOO Vs NBO* (Petition No.11/2020 KESC 4 KLR in respect to application of Article 45 on distribution of property stated.
- a. We are persuaded by the above reasoning and should only add that the equality provision in article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that article 40(1) and (2) of *the Constitution* which protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC's language.
 - b. 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.
 - c. 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. We thus approve the finding in *Echaria* that, as the case law currently shows, the status of the marriage does not solely entitle a spouse to a beneficial interest in the property registered in the name of the other, nor is the performance of domestic duties. Even the fact that the wife was economical in spending on house keeping will not do.



It is now settled that the issue of division of property Act 2013 Section 14 where an application seeks orders for sharing of the Matrimonial Property he can approach the court in four options:

1. That he or she contributed financially directly to the acquisition of the Property. In this case the applicant will tender evidence of financial contribution to the purchase of acquisition of property. Such evidence will include payment mode, mortgage taken or expenses incurred.
2. The applicant can show that though he did not make direct financial contribution he/she made, direct financial contribution to the household or took financial responsibilities which could otherwise be taken by the respondent therefore enabling the respondent to accumulate resources for purchase of the property. This can be established for instance payment to rent, payment of house workers, purchase of food or payment of fees.
3. The applicant made indirect non-financial contribution such as taking care of home, children, companionship and comfort to the respondent.

26. In this case, the applicant avers that she made direct financial contribution to the acquisition of the properties.

Flat No. 4 Star Residency Apartments

27. The applicant deponed that they obtained a loan from her father NJS of USD.200,000 towards the purchase of the property. The Respondent requested a further USD 72,000/-(Equivalent to Ksh.6,579,750). This loan is yet to be paid to applicant's father and he has made a demand forof USD 180,000. Annexure NS- 03 is the demand letter from applicant. Applicant contends that the loan from her father was utilized towards acquisition of the Matrimonial home.

28. The Respondent on his part avers that purchase price was Ksh.150,000. He paid the vendor as follows:

9.1.2014 - 1.5million

15.1.2015 - 12.5million

23.2.2016 - 500,000

24.2.2016 - 500,000

29. He also paid legal fees and stamp duty. He attached copies of transfer He deponed that he paid from his gainful employment and savings. He also confirms that he received a loan of USD 72,000 from the applicant's father and has repaid Ksh.2,000,000 and there is a balance to be paid. He had paid the deposit of USD 127,655 to the development as deposit and only handed USD72,000.

30. It is not in dispute that the purchase price for Flat No. 4 Residency was Ksh.15million. There is evidence that the respondent borrowed USD.72,000 towards the payment of the purchase price from the applicant's father which loan is outstanding. The applicant if I understand her correctly is stating that since the applicant's father provided the loan to them, then she has made a contribution. She has not shown any evidence that she repaid or took over the repayment of so much of the loan from her father and therefore that is her contribution. Indeed there is evidence of demand of the loan by the applicant's father which means that the same is outstanding. In the circumstances, I am unable to find that the applicant's direct financial contribution to the purchase of the property Flat No. XXXX Residency.



31. Apartment No. XXXX Athi View Estate Syokimau. The applicant averred that she paid Ksh.2.14 million towards the purchase of the property which is held jointly by the applicant and the respondent. Applicant stated that she made bank transfers on:
- 1.10.2009
 - 2.10.2009
 - 1.01.2010
 - 1.10.2013
 - 1.4.2014
32. She however does not state how much she transferred to the respondent on those dates. The document annexed marked '2' only shows transactions on
- 22.7.2009
 - 24.8.2009
 - 14.9.2009
 - 15.10.2009
 - 6.2.2014
 - 22.7.2009
 - 24.8.2009
 - 15.10.2009
 - 10.12.2014
 - 14.1.2015
33. The document marked '2' is clearly not in support of the contents that she made transfers to the respondent on 1.10.2029, 2.10.2009, 1.01.2010, 1.10.2013 and 1.4.2014.
34. The Respondent avers that the property was purchased at price of Ksh4,600,000/- He also paid the legal fees and stamp duty. He tabulated the payment as hereunder:
- a. Deposit vide GT Banker's Cheque
Number 0XXXXX6 - Kshs.920,000/-
 - b. Further amount vide I&M Bank
Account Number 00XXXXX10 - Kshs.3,680,000/-
 - c. Cost of legal fees and stamp duty paid
from my personal account as (b) above - Kshs. 96,040/-
Kshs. 4,696,040/-
34. The respondent has annexed thereto the payment documents the whole purchase price. The applicant though she contends that she paid Ksh.2.4million towards the purchase has not tendered evidence to establish so. I therefore find that the applicant did not make any direct financial contribution to the acquisition of Apartment A3 Athi View estate Syokimau.



35. Investment in British-American money market filed for Ksh.2,500,000. The applicant avers that the Applicant and Respondent jointly invested Ksh.2,500,000 in money market on 6.2.2013. This was done during the subsistence of the marriage and was registered in joint names. The respondent avers that he solely paid for the same from his Account No. 00XXXXX10 and annexed copy of Bank transfer marked AB 10 for the said amount. The applicant has not annexed any document showing her contribution to the Ksh.2,500,000 paid for the British-American Money Market. I therefore find no evidence of the applicant's direct financial contribution to the acquisition of the money market at British American.

36. It is common ground that all these properties were registered in the joint names of Applicant and Respondent. Section 7 of the Matrimonial Property Act which deals with ownership of Matrimonial provides:

Ownership of matrimonial property

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.

Whereas in this case property is registered in the joint names section 14 provides:

Where matrimonial property is acquired during marriage—

- c. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- d. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

37. It is now settled that neither the article 45(3) of the constitution nor the matrimonial act provides that matrimonial property acquired during marriage the beneficial interest of the spouses is on 50:50. Indeed theof that application was stated clearly by Tuiyot J. In UMM –Vs-IMM (2014) eKRL where he stated:

I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the courts should give it effect. But to hold that article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage- sit back without making any monetary or non- monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by article 45(3).

We find the above opinions and findings persuasive and it is our finding that the stated equality 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.

38. Echoing the same position the Supreme Court in J500 –V-MBO



In agreeing with the above decisions, we must note that, in a marriage, the general assumption is that both spouses share everything, and on the face of it, both parties contribute towards the home or family, in one way or another. to whichever extent, however big or small. Again, and further to this, both spouses may also work and earn income, which inevitably, at most instances, always ends up being spent on the family unit. It may be the whole income, or a substantial part of it, but ultimately, a percentage of it goes into the family. This is the essence of section 14 of the *Matrimonial Property Act*, 2013.

104. Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of *the Constitution*. To hold that article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution. proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property, That could not have been the intention of our law on the subject.
39. As stated above the property was registered in the joint names of the Applicant and Respondent. Section 13 provides the prescription in such cases. Section 14 (2) provides:
- 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.
40. When the matter falls under section 14 (2) it is upon the Respondent to adduce evidence to rebut that presumption. Such evidence shall be evidence that though the property is registered in joint names he is the only one who made financial contribution or that the other party only made such percentage of contribution to the acquisition. Considering the evidence of the acquisition of the property, I am satisfied that by evidence the Respondent has proved that he paid for that acquisition and that the applicant did not make any direct financial contribution. He has therefore satisfactorily rebutted the presumption in section 14 (2) of *Matrimonial Property Act*.

Non monetary contribution by the Applicant.

41. The applicant submits that in addition to monetary contribution, she also contributed by catering for the welfare of the children, by handling expenses relating to children by providing food, clothing, grooming and entertainment. She also would take them to the doctor and attend children school's parent meetings. She also submits that she did domestic work and managed matrimonial home by handling most of the household chores maintaining the home in good and proper hygiene. Finally she avers that she offered companionship to respondent by extending to his extended family offering compassion and empathy and assisted him in decision making.
42. There is evidence that the Respondent was the wife of the Applicant has not tendered.....has not tendered evidence if monetary contribution to any of the properties was acquired during the marriage. I am however prepared to find that she did provide non-monetary contribution by way of taking care



of the matrimonial house. I therefore assign her contribution in the matrimonial home Apartment XXXX star residency parklands only at 20%. The rest of the property belong to the Applicant at 100%.

DATED AT NAIROBI THIS 24TH DAY OF JANUARY 2024

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S. N. RIECHI

JUDGE

