



**WEE v AMO (Matrimonial Cause E006 of 2023)
[2024] KEHC 2311 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE E006 OF 2023**

A. ONG'INJO, J

FEBRUARY 22, 2024

BETWEEN

WEE APPLICANT

AND

AMO RESPONDENT

JUDGMENT

1. On 6th October 2015, the Applicant and the Respondent celebrated their marriage under the [Marriage Act, 2014](#) before the Registrar of Marriages in Mombasa. The marriage was blessed with one child, SJ, a daughter born on 5th November 2009.
2. The said marriage irretrievably broke down prompting filing of divorce proceedings vide Kwale CMC Divorce Cause No. 1 of 2019 through which the marriage was formally dissolved on 7th September 2022 and a decree issued on 26th September 2022.
3. By Originating Summons dated 5th May 2023, the Applicant seeks the following orders: -
 - a. A declaration that the immovable property known as land parcel number Kwale/Diani Complex/1299 registered in the name of the Applicant and the Respondent, a permanent 2-bedroom house thereon and household goods hereinafter collectively referred to as 'the property' were acquired by the sole efforts and funds of the Applicant before marriage hence not matrimonial property.
 - b. That in the event that this honourable court declares that the property is not matrimonial property, the Deputy Registrar of this court be directed to execute all the necessary transfer instruments and all attendant documents to facilitate the transfer and registration of land parcel number Kwale/Diani Complex 1299 in favour of the Applicant.



- c. That in the event that this honourable court declares that the property is not matrimonial property, the Respondent be compelled to surrender to the Applicant the original title deed of land parcel number Kwale/Diani Complex/1299 that is in her possession.
- d. That in the event that this honourable court declares that the property is not matrimonial property, the Respondent be compelled to vacate immediately and keep away from that house and the whole parcel of land number Kwale/Diani Complex/1299 measuring approximately 0.10 hectares.
- e. That in the event that this honourable court declares that the property is matrimonial property, land parcel number Kwale/Diani Complex/1299 and a permanent 2-bedroom house thereon be sold and the Applicant to be awarded 90% of the proceeds of the sale and the respondent 10%.
- f. That in the event that this honourable court declares that the property is matrimonial property and upon the sale and division as in above, the Respondent be compelled to hand over to the Applicant the following personal and household goods: -
 - i. Applicant's personal tools, photographs and documents;
 - ii. A 5 by 6 bed with its mattress;
 - iii. Wooden round dining table and 4 chairs; and
 - iv. Towels branded Matuga Ocean View.

Applicant's Case

4. In the supporting affidavit, the Applicant averred that before the marriage, he was a co-owner of land parcel number Kwale/WAA/1538 registered in his name and in the name of one Joseph Ndunya Nduu who donated to him a Power of Attorney registered as No. 1369 and vide an agreement for sale dated 3rd September 2014 sold land parcel number Kwale/WAA/1538 to one Dipak Varia at a consideration of twelve million (Kshs. 12,000,000).
5. The Applicant averred that after the execution of the agreement dated 3rd September 2014, Dipak Varia paid him a deposit of Kshs. 1,200,000 and later as was indicated in his Barclays Bank Statements on 1st December 2014, the balance of Kshs. 10,800,000 was paid through his advocate Anita Shah whose legal fees of Kshs. 360,550 was deducted from the said balance and the Applicant retained Kshs. 10,439,450 which funds he used to buy another land on 30th January 2015 and built a permanent 2-bedroom house thereon and furnished it before the Respondent and him got married and moved in.
6. The Applicant deposed that on 30th January 2015, vide an agreement for sale, the Respondent and him purchased land parcel number Kwale/Diani Complex/1299 from one Moses Mutisya Ndunda at a consideration of Kenya Shillings one million eight hundred thousand (Kshs. 1,800,000). That even though the Respondent and him appear on the agreement for sale dated 30th January 2015 as co-purchasers of land parcel number Kwale/Diani Complex/1299, the Applicant solely financed the purchase from the proceeds of sale of his previous land parcel number Kwale/WAA/1538. That the Respondent only appeared in the agreement since the Applicant was a foreigner and at that time they were not married but only in a love affair.
7. That upon execution of the agreement dated 30th January 2015, the Applicant solely paid Kshs. 180,000 to the vendor's advocate as 10% deposit of the purchase price (1,800,000) and later in February



vide Barclays Bank cheques number 000002 and 000003, the Applicant paid the balance of Kshs. 1,620,000.

Respondent's Response

8. The Respondent in her replying affidavit sworn on 21st July 2023 and filed on 29th November 2023 averred that during the course of their relationship and marriage, they jointly invested in acquiring the property Kwale/Diani Complex/1299 which was acquired on 30th January 2015. That while the Applicant may have provided the direct financial contribution for the purchase, the Respondent significantly contributed indirectly to the acquisition, development and maintenance of the property. The Respondent stated that one of the key indirect contributions made was managing the household and family responsibilities which allowed the applicant to focus on his career and business ventures. That as a result of her dedication to managing the home and taking care of the family, the Applicant had the freedom and financial stability to invest financially in the said property.
9. According to the Respondent, she played an active role in the construction of the house in the said property from February to July 2015. That during the period in which they were constructing the house, they lived in Nyali and the Respondent dedicated her time and efforts crossing the ferry on a daily basis for 6 months until the house was completed. That she also managed the funds for the construction of the house in an accountable and transparent manner. That in addition to emotional and household contributions, she also indirectly contributed to the maintenance of the property. That in 2016, the Applicant travelled for a whole year and she was left to solely manage the property, and that she has been managing the property on her own with her own finances from 2019 when the Applicant moved out of the matrimonial home.
10. The Respondent stated that they acquired the property and jointly registered in their names as co-workers so that neither of them could dispose it off without the consent of the other. The Respondent affirmed that during the course of the marriage, they enjoyed equal possession of the property in question. The Respondent therefore objected to the Applicant's request for transfer of the property to his sole possession in the event that it is declared non-matrimonial property. Further, that an award of 10% of the proceeds would leave the Respondent at a disadvantaged position. The Respondent also prayed that costs are awarded in a fair and just manner.

Applicant's Submissions

11. The Applicant submitted on whether the property was matrimonial property that the property was bought on 30th January 2015 while they cohabited and before solemnizing their marriage on 6th October 2015. That the property is registered in both the Applicant's and Respondent's names and that they moved into the property and made it their home up until they separated in 2018 and subsequently divorced in the year 2022. That the Applicant acquired land parcel number Kwale/Diani Complex/1299 which was registered on 26th February 2015, built the 2-bedroom house thereon between 30th January 2015 and end of June 2015 while he was only in a love affair with the Respondent. That the said property cannot therefore be matrimonial property as the marriage existed from 6th October 2015.
12. The Applicant submitted on whether he solely acquired and developed the property that he used his hard earned life savings from Germany which he used to purchase land parcel number Kwale/WAA/1538 in 2005 before he met the Respondent. That the Applicant sold the said parcel of land and in the year 2014 while in a love affair with the Respondent and used the proceeds of the sale to acquire the subject property in this suit. That the Respondent fully depended on the Applicant while they were together including but not limited to buying a family car, paying the housemaid and the gardener



who took care of the house. That other than stating that she financially and substantially contributed to the acquisition, development and maintenance of the property, the Respondent failed to prove her allegations. That no proof of indirect contribution has been demonstrated by the Respondent.

13. The Applicant submitted on whether the Respondent is entitled to an equal share or such higher proportion of the property by relying on Section 7 of the Matrimonial Property Act which provides as follows: -

Subject to Section 6 (3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

14. The Applicant further submitted that an award of 10% of the proceeds of sale would be sufficient for the Respondent who neither directly nor indirectly contributed to the acquisition, development and maintenance of the property. The Applicant cited the Supreme Court Case of JOO v MBO (Petition 11 of 2020) (2023) KESC 4 (KLR) where the court discussed extensively the principle of equality in distribution of property upon dissolution of marriage, and that the Supreme Court at Paragraph 92 of its judgment cited the Court of Appeal Case of MEK v GLM (2018) KLR which defined equality as follows: -

Equality in marriage is not a principle to be applied blindly or is it intended to encourage dependency by one spouse. It is a situation where each party makes a contribution. In other words, it is not shifting the burden, but the sharing of responsibilities and benefits taking into account the gender limitations.

15. The Applicant submitted that there is no proof of the Respondent's deeds or actions that helped the Applicant in acquiring the property. That she neither contributed directly or indirectly to the acquisition, development and maintenance of the property. That she got married to the Applicant when he had already invested his life savings from Germany and proceeds of sale of his previous land parcel number Kwale/Waa/1538 in the subject property herein. That she must walk away with what she deserves which is nothing.

Respondents' Submissions

16. On whether the suit property constitutes matrimonial property, the Respondent submitted that in the Applicant's list of documents particularly the Western Union receipts showed evidence that the Applicant sent funds to the Respondent during construction of the house in the year 2016 where the funds were properly managed in construction of the house to its finalization.

17. The Respondent argued that the Applicant's testimony that the only reason that the Respondent was a co-owner was because the Applicant herein was a foreigner in Germany and therefore could not be registered as the sole owner of the property is misleading. The Respondent contended that at the time the property was purchased, the Applicant and the Respondent had been living together for 8 years and bought the property 8 months before they solemnized their union. That there was intent that the said property Kwale/Diani Complex/1299 was bought for the sole purpose of it being their matrimonial home.

18. On whether the Respondent contributed towards the acquisition of the parcel title Kwale/Diani Complex/1299, the Respondent cited the case of MW v AN (2021) eKLR as follows: -

"This other part of mothering, housekeeping and taking care of the family is more often than not given any value when it comes to sharing matrimonial property. It is easy for the spouse



working away from home and sending money to lay claim to the whole property purchased and developed with that money by the spouse staying at home and taking care of the children and the family. That spouse will be heard to say that the other one was not employed so they contributed nothing. That can no longer be a tenable argument as it is a fact that stay at home parents and in particular women because of our cultural connotations do much more work (house wives) due to the nature of the job... Hence for a woman in employment who has to balance child bearing and rearing this contribution must be considered. How do we put monetary value to that process where a woman bears the pregnancy, gives birth, and takes care of the babies and where after divorce or separation she takes care of the children single handedly without any help from the father of the children...”

19. The Respondent submitted that the court would visit a great injustice by ordering eviction of the Respondent from the property and if the Respondent is to be awarded only 10% of the share in the property. That the Respondent has added value to the matrimonial property by jointly developing it with the Applicant and maintaining the same from 2019 to date without any financial support from the Applicant.
20. On what orders should issue, the Respondent prayed that the status quo as to ownership of the matrimonial property Kwale/Diani Complex/1299 be maintained and that should the honourable court order the sale of the property, the proceeds of the sale should be shared on a 50-50 basis.

Analysis and Determination

21. This court has considered the pleadings and evidence on record. In determining whether the property herein is matrimonial property, the contribution of parties towards acquisition of the property and what shares parties are entitled to, this court relied on Section 6 of the *Matrimonial Property Act* defines ‘matrimonial property’ as: -
 - (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.
22. Section 6(7) of the *Matrimonial Property Act* states as follows: -

... ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its question, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
23. Further, Section 7 of that *Matrimonial Property Act* provides as follows: -

Ownership of the matrimonial property vests in the spouses according to the contribution of other spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
24. The property in question Plot No. Kwale/Diani Complex/1299 is shown in annexure WEE5 as having been bought jointly by the parties herein on 30th January 2015. Although the applicant has said that the joint ownership was because he was a foreigner, the Agreement for Sale made on 30th January 2015 does not indicate that the interest of the respondent was less than that of the applicant or that she was merely being used to help the applicant purchase the property as a foreigner.



25. This court therefore finds that the applicant and the respondent have equal rights to the property in question and it is hereby ordered that the Respondent transfers the applicant's share in the property to him within 6 months from the date hereof.

26. Parties to bear their own costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 22ND DAY OF FEBRUARY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Ms. Kemata Advocate H/B for Ms. Ogoti Advocate for the Applicant

Ms. Vata Advocate for the Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE

