



**KM v NM (Matrimonial Cause E002 of 2022)  
[2024] KEHC 3618 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3618 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MATRIMONIAL CAUSE E002 OF 2022**

**MW MUIGAI, J**

**MARCH 7, 2024**

**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY  
AND  
IN THE MATTER OF MATRIMONIAL PROPERTY ACT, 2013**

**BETWEEN**

**KM ..... APPLICANT**

**AND**

**NM ..... RESPONDENT**

**JUDGMENT**

**Originating Summons**

1. This suit has been initiated by Originating Summons dated 10.09.2022 brought under section 2,4,6,7,9,2,14 & 17 of the Matrimonial Property Act, Section 1A, 1B and 3A of the Civil Procedure Act seeking the following orders that;
  - a. Spent
  - b. A declaration be issued that there exists a joint interest in immovable matrimonial property land title number 55459 situate in Athi River and the property should be divide equally between the parties.
  - c. A declaration be issued that the land measuring 4 acres or thereabouts in Mua Hills Kitanga Plot 40 and land title number Machakos/Kitanga/300 were acquired by the sole effort of the Applicant and the Respondent has not acquired a beneficial interest to the property and thus should be registered in the sole name of the Applicant
  - d. This court be pleased to grant such further or other reliefs as it may deem just and fit.



- e. Costs of this application be provided for.
2. The Summons are supported by an affidavit deposed by KM , the Applicant on 10.09.2022 in which she stated that she and the Respondent solemnized their marriage on 24.03.2001 at Nairobi Baptist Church and were blessed with two children. During the subsistence of their marriage, she contends that they acquired;
  - a. LR 55459 in Athi River ,
  - b. Mua Hills Kitanga Plot 40 measuring 4 acres and
  - c. Land Title No Machakos/Kitanga/300.
3. It was contended that the parties went through divorce proceedings and a decree absolute issued on 9.9.2021. She claimed 50% of LR 55459 in Athi River as it was a gift after their wedding in 2021.
4. The Applicant stated that Land Title No Machakos /Kitanga/300 was gifted to her by her parents when her marriage was facing tribulations and is where they built her a home. The Applicant further contends that even though the title is registered in their joint names, the Respondent had no claim nor had he acquired beneficial interest over the property since he has never contributed to the acquisition, construction or management or maintenance of the house nor supported the children or herself.
5. The Applicant deposed that she solely contributed to acquisition of Mua Hills Kitanga Plot 40 measuring 4 acres thus entitled to 100% stake. She indicated that she has been supporting herself and the children and in order to maintain the lifestyle they are accustomed to she sought to have her share of the matrimonial properties. She also indicated that the Respondent started interfering with the matrimonial property.
6. The Respondent did not enter appearance despite service.

### **Hearing**

7. The Applicant testified on 14.6.2023 and stated that she got married to the Respondent in 2001 and they acquired properties during the subsistence of their marriage;
  - a. LR 55459 in Athi River
  - b. Mua Hills Kitanga Plot which she bought
  - c. Land Title No Machakos/Kitanga/300 which her father bought for her
8. It was her testimony that they divorced on 9.9.2021 and she was proposing the land in Athi River to be divided between her and her ex-husband. She said she takes care of the kids and all expenses of the house and she contributed to acquisition of the property.
9. She said she had bank statements to show for property Kitanga/300. She said she manages LR 55459 –Athi River . The 1<sup>st</sup> born is 21 years old and the 2<sup>nd</sup> born 16 years old. She said that she was facing challenges as her son is in university and daughter is in high school and she needs to prepare funds.

### **Submissions**

10. The Applicant filed submissions dated 17.07.2023 and submitted while relying on the case of RCL v MXXX [2022] KEHC 10719 (KLR), NWM vs KNM, White vs White (200) UKL 54 reiterated the contents of the supporting affidavit and submitted that she had produced sale agreements of various portions between 2005 and 2007, bank statements showing how she made deposits of the purchase



price to the Seller one Ngoya Kanyigi. She contended that her evidence was uncontroverted and the Respondent did not prove his contribution thus urged the Court to grant the orders as prayed.

### Determination

11. This Court has considered the Originating Summons, the affidavit in support of the Originating Summons, the evidence on record and the submissions on record and find that the main issue for determination are;
  - a. Whether Mua Hills Kitanga Plot 40 and land title number Machakos/Kitanga/300 should be registered in the sole name of the Applicant.
  - b. Whether matrimonial property land title number 55459 situate in Athi River should be divided equally between the parties.
12. It is not in dispute that the Applicant and the Respondent were married and divorced on 9.9.2021 and had two issues from the union. The Respondent failed to enter appearance nor file a defence despite being served with the pleadings. The evidence as is remains uncontroverted as a result however the law places the burden of proof on the person raising allegations, in this case the Applicant. Section 107 and 109 of the *Evidence Act* essentially talk about the burden of proof. In civil cases that standard is on a balance of probability.
13. Section 107 of the *Evidence Act* provides that;

“ whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
14. Section 109 of the same Act stipulates that ;

“ The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.”
15. Section 45 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.”
16. Section 2 of the *Matrimonial Property Act* defines matrimonial property as that which has the meaning assigned to it in section 6;
17. Section 6 of the Act provides as follows;
  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.



18. Section 7 of Matrimonial Property 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.

19. It is not in contest that LR 55459 in Athi River , Mua Hills Kitanga Plot 40 measuring 4 acres and Land Title No Machakos/ Kitanga/300 were acquired during the subsistence of the marriage. What is disputed is the contribution towards purchase of the same. Section 2 of the same 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

20. The Court stated in the case of PNN vs ZWN (2017) eKLR stated that;

“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 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.”

21. It is trite law that parties are bound by their pleadings, in this case, the Applicant has sought for equal distribution of LR 55459 in Athi River as it was a gift after their wedding in 2021. The court has seen an official search certificate dated 14.09.2022 which indicates that transfer of this property was done on 01.02.2005 to the parties herein. There being no other evidence to controvert the position, this court will grant the order as prayed.

22. In this case, the Applicant has said she is taking care of the children and contributed to the purchase of various properties alone. Besides the names of both parties on the title deed, there is no other



evidence of the Respondent's contribution. He therefore did not acquire any beneficial interest in the properties.

23. More specifically, as regards in Mua Hills Kitanga Plot 40, the Applicant has attached agreements that show that money was received from Mr. NM And Mrs KM. The bank statements indicate that Kshs 341,875 and Kshs 185,938 were deposited in Ngoya Kanyingi's account from the Applicant's account. This Court is not satisfied that there is enough evidence to show that the Applicant solely contributed to the purchase of this property as the statements are not specific as to whether it went to the seller of the property and the seller acknowledges payment from both parties.
24. Land Title Number Machakos/Kitanga/300, the Applicant has produced a title deed issued on 17.01.2022 in the name of both parties. No other evidence has been produced to show that the property was not a gift to the couple by the parties. As such the court is inclined to rule in favour of the Applicant.
25. Lastly, the Court has noted that there are children in this home whose interests must be taken care of as well.

### **Disposition**

26. In the premises, the following orders are issued under Section 17 of matrimonial Properties Act;
  - a. A declaration is hereby issued that there exists a joint interest in immovable matrimonial property land Title Number 55459 situate in Athi River between the Applicant and the Respondent.
  - b. A declaration is hereby issued that the land measuring 4 acres or thereabouts in Mua Hills Kitanga Plot 40 and land Title Number Machakos/Kitanga/300 are owned jointly by the Applicant and the Respondent.
  - c. There shall be no orders as to costs.

It is so ordered.

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN Machakos ON 7<sup>TH</sup> MARCH, 2024 (VIRTUAL/ PHYSICAL CONFERENCE).**

**M.W.MUIGAI**

**JUDGE**

In the presence/absence of:

Mr. Musyimi - For The Applicant

No Appearance - For The Respondent

Mr. Geoffrey/patrick - Court Assistant(s)

(Judge Bereaved)

**JUDGMENT RELEASED TO REGISTRY ON 26/3/2024.**

**M.W.MUIGAI**

**JUDGE**

