



**AQY v OJM (Matrimonial Cause E008 of 2023)
[2024] KEHC 8547 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 8547 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE E008 OF 2023**

G MUTAI, J

MAY 2, 2024

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013

BETWEEN

AQY CLAIMANT

AND

OJM RESPONDENT

JUDGMENT

Introduction

1. This Judgment is in respect of the Originating Summons dated 20th July 2023 and filed by the Petitioner.
2. *Vide* the said Originating, the Claimant sought the following reliefs:-
 - a. A declaration that all the property being Motor Vehicle Registration Number KCZ1 62V and Trailer Registration No. ZG 3480 is matrimonial property;
 - b. An Order to the DCI Coast Province to impound the named truck and bring it back to the jurisdiction of this Court;
 - c. The Petitioner to pay zero percent out of out of the asset finance interest owed to NCBA Bank and the Respondent to settle the said interest in full;
 - d. Damages for mental distress due to frequent calls and follow-up in tracing the assets after the tracker was removed;
 - e. A declaration that the loan was taken by the Respondent.



3. The grounds upon which the Originating Summons is premised were stated in the Originating Summons and the Supporting Affidavit of AQY as follows:
 - a. The Applicant, on behalf of the Respondent, took asset finance from NCBA;
 - b. The Applicant was travelling out of the country to work in Dubai, so the Respondent took responsibility for the said trailer and truck and undertook to meet all the attendant obligations;
 - c. The parties agreed that the Respondent would meet the obligation to the bank by paying Kes.180,000 to the bank on a monthly basis;
 - d. Respondent only paid for a year and entered an agreement with one Kibet who undertook the purchase of the truck and offset the loan; and
 - e. The Respondent has failed to offset the facility.
4. The Originating Summons was opposed by the Respondent. He filed a Replying Affidavit dated 6th December 2023 vide which he denied the claims in the Originating Summons.

Evidence of the Petitioner

5. The Claimant testified in court and relied on her Supporting Affidavit and the Annexures.
6. It was her case that the Respondent was her husband, but that they had since divorced. They were married on 30th May 2015 but divorced on 13th January 2022.
7. She testified further that the loan she took was in her own name for the benefit of the family, as the Respondent would also benefit as they were still married.
8. Further, the Respondent was to pay Kes.180,000/- per month towards the loan repayment, but he defaulted. The motor vehicle was registered in her sole name.
9. It was her stated case that the truck would assist the family in generating income.
10. When cross-examined by counsel for the Respondent, the Claimant averred that the Respondent introduced a third party, Daniel Chesire. She further testified that there was an agreement for the sale of the said motor vehicle, but she had not signed it.
11. She testified that the Respondent and the purchaser failed to offset the facility, which forced her to file the instant cause.

The Respondent's Evidence

12. The Respondent also testified and relied on his Replying Affidavit dated 6th December 2023.
13. He testified that the truck was bought during the subsistence of the marriage but that his marriage to the Claimant had subsequently been dissolved.
14. It was his case that indeed the truck was in the name of the Claimant. That he was not a party to the agreement for the sale of the motor vehicle.
15. In cross examination, he testified that he made deposits in NCBA Bank from the transport business and the amounts were for loan repayment.
16. He conceded that he managed the truck and the trailer while the Claimant was away in Dubai.



The Petitioner's Submissions

17. The Claimant's counsel filed written submissions dated 15th March 2024.
18. It was submitted that Motor Vehicle Registration Number KCZ 162V and Trailer Registration No. ZG 3480 were matrimonial properties.
19. Counsel relied on Sections 6 and 14 of the *Matrimonial Property Act*, 2013 to submit that the truck was a movable property jointly owned by virtue of being acquired during the subsistence of the marriage.
20. It was urged that parties to a marriage were entitled to equal rights at the time of the marriage, during the marriage and after dissolution of the marriage. They cited Article 45(3) of the *Constitution* and the decision of the Supreme Court of Kenya in *JOO, FIDA-Kenya & Another vrs MBO* (2023)e KLR.
21. I was urged to allow the Originating Summons.

The Respondent's Written Submissions

22. The Respondent filed submissions dated 15th March 2024.
23. It was the submissions of the Respondent that the Claimant had not proved that the truck and the trailer were jointly owned by the Claimant and the Respondent as to be described as matrimonial properties.
24. It was also submitted that the loan was taken by the Claimant and the Respondent was not party to it.
25. I was urged to dismiss the Originating Summons.

Analysis and determination

26. I have perused the pleadings, the evidence adduced by the parties in support of their respective cases, and the submissions and authorities filed by the parties.
27. The issue before me for determination is whether the Motor Vehicle Registration Number KCZ 162V and Trailer Registration No. ZG 3480 are matrimonial properties, and if so, whether the liabilities that have accrued should be shared out between the parties as proposed in the Originating Summons.
28. Section 6(1)(c) of the *Matrimonial Property Act*, 2013 defines matrimonial property to include: any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
29. From the evidence adduced in court, it is clear to me that the Claimant and the Respondent solemnized their union under Islamic Law on 30th May 2015. The Claimant applied for the loan, and also the impugned motor vehicle was purchased, during the subsistence of the marriage. This brings their dispute within the framework of the *Matrimonial Property Act*, 2013.
30. In his Response, the Respondent deposed that the suit motor vehicle was purchased and registered solely in the name of the Petitioner and hence was not a matrimonial property. The foregoing notwithstanding the Respondent admitted that the motor vehicle was purchased in 2021, during the subsistence of their marriage, they divorced on 13th January 2022 and that while the Petitioner was away working in Dubai, the motor vehicle was under the Respondent's care and control and was used for generating income for the family.



31. Whereas the Respondent maintained that he was not a party to the loan that was used to acquire the motor vehicle, it does appear to me that the said loan was procured in furtherance of the family business. This is evidenced by the fact that he made part payments of the loan and effectively managed the truck and the trailer when the Claimant was working outside Kenya. The contribution that a spouse makes in a marriage can be either monetary or non-monetary.
32. In my view, managing a business and using the income accrued to pay off a loan is a form of non-monetary contribution. As owners of the two properties, the Claimant and the Respondent were entitled to both the assets and the liabilities.
33. I am alive to the fact that each case must be determined based on its own peculiar circumstances. Indeed, the Court of Appeal had this in mind in *TKM v SMW* [2020] eKLR where it is stated as follows:-

“We bear in mind the edict in *Muthembwa v. Muthembwa* (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.”

34. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the *Matrimonial Property Act*, 2013 in the following terms:

In this Act, unless the context otherwise requires—

“contribution” means 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.
35. It is clear to this court that the *Matrimonial Property Act* of 2013 recognizes and formalizes both the monetary and non-monetary contribution of parties in a marriage. Also clear is that while the Petitioner was away working in Dubai, the Respondent was in charge of their family property and possessions including the impugned motor vehicle. It is also not lost to this court that the impugned motor vehicle is traced to the Respondent at the moment and the Petitioner filed this suit to reclaim it. In *NWM v KNM* (2014)eKLR, the court stated that the court must give effect to both monetary and non-monetary contributions that both the Applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property. Similarly, the House of Lords in *White vs White* (200) UKHL 54 underscored the greater awareness of the value of non-financial contributions to the welfare of the family.
 36. It is my considered view that the non-monetary contribution often-times cannot be quantified. It is my finding therefore, that the Respondent made monetary and non-monetary contribution towards



acquiring the subject motor vehicle. I am fortified by Section 14 of the Matrimonial Property Act as follows: -

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.

37. The Petitioner proved that the motor vehicle was acquired during the pendency of the marriage. The burden was thus on the Respondent. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

38. I therefore find and hold that in the absence of rebuttal evidence from the Respondent, the motor vehicle described as Motor Vehicle Registration Number KCZ 162V and Trailer Registration No. ZG 3480 is matrimonial property within the meaning of Sections 6(1) and Section 14 of the Matrimonial Property Act. Having been acquired during the subsistence of the marriage between the Petitioner and the Respondent. Similarly, in the case of PWK vs JKG 2015 eKLR the Court stated as follows:-

“Where the disputed property is not so 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 while heeding the caution of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788.”

39. I also find and hold that, as matrimonial assets, the Claimant and Respondent have joint equal claims to them and, conversely, are equally liable to pay off the accrued liabilities.

Disposition

40. Having found and held that the two properties are matrimonial properties, the following orders commend themselves to me:-

- i. Motor Vehicle Registration Number KCZ 162V and Trailer Registration No. ZG 3480 are matrimonial properties;
- ii. The Claimant and Respondent own Motor Vehicle Registration Number KCZ 162V and Trailer Registration No. ZG 3480 in equal shares and, conversely, bear liabilities equally; and



iii. The Respondent is directed to produce Motor Vehicle Registration Number KCZ 162V and Trailer Registration No. ZG 3480 to the Claimant within 14 days of the date hereof. The same shall be valued and sold by public auction within 45 days of the date hereof.

41. As this is a matrimonial property matter, each party shall bear her/his own costs.

42. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 2ND DAY OF MAY 2024.

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Nyawira for the Petitioner;

No appearance for the Respondent; and

Arthur - Court Assistant.

