



BMM v EMM; BNM (Interested Party) (Matrimonial Cause 8 of 2020) [2024] KEHC 5774 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MATRIMONIAL CAUSE 8 OF 2020**

**MW MUIGAI, J
MAY 16, 2024**

BETWEEN

BMM PLAINTIFF

AND

EMM DEFENDANT

AND

BNM INTERESTED PARTY

JUDGMENT

1. From the Court Records is a Chamber Summons and Supporting Affidavit under Certificate of Urgency, dated 17th March,2020 wherein, the Applicant sought inter alia orders that:
 - a. A temporary injunction do issue restraining the Respondent from selling, leasing, charging, alienating, transferring or completing any conveyance in the property that is the subject of this suit pending hearing and determination of this application.
 - b. A temporary injunction do issue restraining the Respondent from selling, letting, charging, alienating, transferring or completing any conveyance in the property that is the subject of this suit pending hearing and determination of the suit.
2. This court vide its orders issued on 26th March,2020 granted orders in terms of prayer (a).
3. The said application was opposed vide a Replying Affidavit dated and filed in court on 2nd November,2020, wherein the Respondent denied all the contents of the Application, terming it a gross abuse of the court process. The Applicant filed a further affidavit in response to the Replying Affidavit.
4. The matter was canvassed by written submissions.



Court Ruling

5. The Court in its Ruling dated 22nd September,2020 found that the Applicant's application dated 17/3/2020 had merit and allowed the same noting that the application was not opposed by the Respondent. Court further directed the parties to proceed to set down the main suit for hearing on priority basis.

The Amended Originating Summons

6. Vide an Amended Originating Summons dated 26th May,2021 and filed in court on 2nd June,2021, wherein the applicant sought the following orders that:
 1. The declaration do issue that all property known as Machakos/Mua Hills/1X7 SITUATE at Mua was acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and all registered in the name of or in the possession of the Respondent are owned jointly by the Applicant and the Respondent.
 2. A declaration do issue that the Applicant is entitled to eighty-five percent (85%) share of the property known as Machakos/Mua Hills/1X7 having contributed greatly to its purchase development or any other share that the Court deems fit.
 3. A declaration be made that the Respondent holds the said property in trust for the Applicant.
 4. The property be settled for the benefit of the Applicant in such manner as this Honorable Court deems fit and just.
 5. The Respondent himself, his agents, servants and or employees be restrained from alienating, encumbering or in any manner whatsoever disposing and or dealing with the said property in whatsoever manner to the detriment of the Applicant.
 6. An order for survey and sub-division do issue once the issue of ownership is determined.
 7. An order do issue directing the Respondent to execute the transfer documents or any other documents required for effective transfer of the Applicant's portion in her name and in default, the Deputy Registrar Machakos High Court to sign the same.
 8. An order do issue directing the Lands Registrar, Machakos to issue a title deed in the name of the Applicant for her share in the suit property.
7. The Respondent be condemned to pay the costs of this summons and other incidental thereto.
8. The grounds upon which the summons is/was premised are in the body of the said summons.

Supporting Affidavit

9. The summons was supported by an affidavit dated 26th May,2021, sworn by BMM, the Applicant herein, wherein, she deposed that she was the legal wife of the Respondent having solemnized their union in church on 9th August,1975. (annexed and marked copy of the Marriage Certificate). Deposing that they have since divorced. (annexed and marked copy of decree nisi, and that she is a trained teacher by profession having employed from 1974-2004. She deposed that immediately after their wedding in 1975, they decided to buy a piece of land where they would establish their permanent home and bring up their children. Lamenting that they identified Plot No. 1X7 located in Mua Hills and measuring approximately thirteen point eight acres (13.8) or thereabouts; that they agreed she



- would finish making the payments since her husband had gone back to school and his salary had been suspended and she was now the sole breadwinner.
9. Deposing further that she informed her employer, Teachers Service Commission to deduct the sum of Kenya Shillings two hundred shillings monthly from her salary from 1/11/1976 until payment in full. (annexed and marked copy of the said letter), and further that the said deductions were made from 1/11/1976 to 3/1/1984. (annexed and marked copy of letter dated 3rd January,1984).
 10. The Applicant lamented that in total she paid the sum of Kshs. 19,800/= for plot No.1X7.
 11. The Applicant deposed that their marriage with Respondent was blessed with 4 issues namely
 - a. OM
 - b. JMM
 - c. RNM
 - d. LMM
 12. She deposed that during the subsistence of their marriage they acquired Plot No. 1X7 now known as Machakos/Mua Hills/1X7 and she separated in 1999 when her husband started having an extra marital affair and moved out of their matrimonial home and started living with his new wife in Machakos town.
 13. She opined that although she was deducted money from her salary as purchase price for the Plot, the property was registered in the name of the Respondent but was intended to be for her use and benefit and the rest of the family.
 14. Sometimes in 2017, the Respondent sold five acres of the same to one Boniface M. Masila. The Applicant deposed that her efforts to stop the said sale were futile as the Respondent had already been paid the sum of Kenya Shillings eight million (8,000,000) (annexed and marked copy of the letter to the Respondent), deposing that the Respondent already has buyers and is in the process of selling the remainder of the land.
 15. The Applicant is/was advised by her advocate on record that she is entitled to an eighty-five percent (85%) share of the matrimonial property since she largely contributed to its purchase and development and that she is advised by her advocate on record that unless this court restrains the respondent, he is likely to dispose and transfer the property.

Replying Affidavit

16. The application was opposed vide Replying Affidavit dated 25th May,2021 and filed in Court on 31st May, 2021, sworn by EMM, the Respondent herein, wherein, he deposed that he is a retiree having been once a P1 teacher on 1st May,1974 within the County of Mombasa working in a special needs school for the deaf. This was in Ziwani in Machakos County and thereafter qualified as an S1 teacher which was equivalent to a Diploma in education. He deposed that he met one Mr. Ngolya Ndua in the year 1974 and that time he was looking for a parcel of land in Mua Hills. According to the affiant, he was directed to the Ministry of Lands Office within Machakos County in which he was duly informed to ensure that once he got/found Mr. Ngolya, he should return to the offices of lands.
17. He deposed further that TM his brother in law together with 2 others being Mr. Kasia and Mr. Musie directed him to Mr. Ngolya Ndua who was an old man at the time, Musei was working with the then County Council. Further that once they met with Mr. Ngolya Ndua, they agreed on the terms of the



purchase of the parcel of land which was identified as Plot Number 1X7 situated in Mua Hills and that the terms of the agreement were as follows:

- a. That at the time the Ministry of Lands Office was to be paid the sum of Kshs. Four thousand (4,000/=) which Mr. Ngolya had been unable to pay for the purchase price for the parcel of land.
 - b. That he was to undertake to pay a loan in the tune of Kenya shillings two thousand (Kshs. 2,000) which Mr. Ngolya had taken from the settlement fund trustee for Agricultural Development and Improvement.
18. Lamenting that upon agreeing on the above mentioned terms of the purchase of the parcel of land known as Plot Number 1X7, he immediately began paying the Ministry of Lands Settlement Funds Trustee in the same year of 1974. Once he the finalized on the payment of the purchase price of the aforementioned parcel of land as well as the outstanding loan, the allottee Mr. Ngolya granted him the Power of Attorney to effect the transfer of the suit property to himself. (annexed and marked copy of the title deed as well as the search showing that the suit property being properly registered under his name).
19. The Respondent deposed that he then proceeded to build a home on the said parcel of land thus providing a stable place for his then wife as well as their children. He lamented further that the Applicant has alleged and claimed in her application that he was holding the suit property in trust for her, stating that this is quite surprising owing to the very fact that it was him who bought the parcel of land currently identified as Machakos/ Mua Hills/1X7, and further that no instance came from the Applicant who availed a registered Trust to evidence her claim that the property was being held under trust by him.
20. He deponed that it is within the knowledge of the Applicant that a family meeting had been held on 8th August,2020, in which, the Applicant, himself, their children- JMM, OMM, LMM, RMM & RMM and Reverend BMW. The agenda of which was, i) the instant court matter and ii) family bonding.
21. That the Applicant had availed a copy of her intended application for the withdrawal of the court but the same was not followed through with. That the children were against having their parents suing each other in a court of law (annexed and marked copy of the family minutes).
22. The Respondent deposed that it is vital that the suit property be handled in line with the [Matrimonial Property Act](#) No. 49 of 2013, as was/is advised by his advocates that under Section 7 it states 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 delivered between the spouses if they divorce or their marriage is otherwise dissolved.
23. The Respondent opined that the marriage that existed as between the Applicant and him was irretrievably broken down due to irreconcilable differences between them, thus they are no longer on the same page and having nothing tying any of them down to one another. (annexed and marked copy of the certificate of making the decree nisi), that the Applicant's instant application is a mere witch hunt aimed at snatching from him property that he had lawfully and rightfully acquired as demonstrated herein.

Further Affidavit

24. Vide a Further Affidavit dated 2nd August,2021 and filed in court on 4th August,2021, sworn by sworn by EMM, the Respondent herein, wherein, he deposed that he made payment of Kshs. 4,000 towards clearing the loan for the parcel of land known as Plot No. 1X7 situated in Mua Hills (annexed



- and marked copy of receipt number 152485). Deposing that Mr. Ngolya did issue him with the documentation for showing ownership of the abovementioned parcel of land, in which, he had acquired as the then allottee of the suit land. He was given the Certificate of Outright Purchase, which clearly stated that Ngolya Ndua as the owner as deemed by the Mua Hills Settlement Scheme. (annexed and marked copy of the certificate reference number LO/289/1X7/11 and dated 11th June,1984).
25. That on 21st August,1998 the then Director of Land Adjudication & Settlement one Rachel W. Mugo did give directions that he be assisted in the transferring of the suit. Opining that this was owing to the fact that Mr. Ngolya has passed away and upon the confirmation that the parcel of land was to go to him. (annexed and marked copy of the letter dated 21st August,1998). That the suit parcel of land was thereafter transferred to him from Mr. Ngolya Ndua on 22nd October,1998. In which, he had made a payment of Kshs. 4,000 to him so as to ensure that he had rightfully and legally acquired the suit land and cleared further loan taken by Ngolya for the sum Kshs. 2,000/-. That this was/is exclusive of the personal payments made to Ngolya. (annexed and marked copy of the transfer).
26. He deposed that despite the Applicant instituting the instant legal proceedings against him. He had endeavored that make sure that she has her own parcel of land, whereby, at the time being a family visited the same. (annexed and marked copy of a photo evidencing the same). That the Applicant had not taken steps towards the contribution of acquisition of the suit land. Opining that being the absolute and lawful registered owner of the parcel of land currently identified as Title Number: Machakos/ Mua Hills/1X7, he did engage in sale in sale of portion of the suit land. All this, with the full knowledge that he was the legal owner of the suit land (annexed and marked copy of the Agreement for Sale dated 4th May,2016), that due to the abovementioned sale to one Boniface M. Masila, he had to proceed to the Environment and Land Court at Machakos under ELC No. 41 of 2019 in which he was fighting for his right as the absolute owner and proprietor of the parcel of land known as Title Number Machakos/Mua Hills/1X7. (annexed and marked copy is the orders by the Honorable Justice O. Angote in his favour).

Hearing

The Applicant's Hearing

27. PW1 was BMM. She testified that she knows EMM, who was her husband. Testifying that she wrote her statement attached to list of witnesses of 15/6/2021 filed on 14/10/2021. She told court that they were married and lived in Mua Hills, that they were married in Christian marriage. She stated that they had four children 2 daughters and 2 sons. It was PW1' s testimony that during their marriage they bought properties/plots in Mua Hills from Ministry of Lands and Settlement Plot 1X7.
28. Statement of documents - 14/10/2021- EXHI, BMM – ID 29XXX91. Testifying that they paid for Plot 1X7 together with him in 1976. Lamenting that she was married in 1975 and that she had a young child. According to PW1, the repayment fund Kshs. 400/-. the Respondent took her to Lands Office where she filled in Statutory Irrevocable order as a teacher she filled in and she was deducted from her salary. PW1 had the letter in court. she further referred to list of documents – 14/10/2021 as EXH-2, which had the letter of TSC of 11/10/1976- Kshs 200/- and that in 1976-1984 January she paid for the plot. She produced letter to TSC of 3/1/1984 as EXH-3. Testifying that her husband and herself did not have an encumbrances and that they farmed the land. PW1 did not take a bank loan she paid the balance for the shamba. Testifying that there was a dispute the children of the earlier owner took them to court and her husband took them to court and the court decided the land was theirs and not for the children of Ngoliani. PW1 testified further that the court order to evict the children of Ngoliani and Title Deed was issued in the man's name her husband's name.



29. PW1 left the shamba in 1999 as villagers rioted and the houses were demolished and her husband was injured. Testifying that going back on the land was a problem. Accordingly in 2016 she was not aware that the shamba was sold she not know who bought it. PW1 had the Sale Agreement to Boniface, the interested party. PW1 did not know how many acres were sold and about the proceeds of sale, she heard it was Kshs 8-10 million. PW1 did not get anything. PW1 and the husband do not live together. She filed divorce and obtained decree nisi. EXH-4. PW1 asked the court to give her, her right. That the children are on the farm and the buyer got the land. PW1 wanted the court to determine her share. She had the pay slip of the deductions made from her salary- EXH 5 December 1981 Supplementary List of Documents- of 14/10/2021. PW1 did not agree to the sale as she not there and was not part of the sale.
30. In cross-examination, it was the testimony of PW1 that she was being deducted Kshs. 200/= for the land purchase testifying that Statutory Irrevocable Order of Kshs.200/- 1976-1984. She told court that pay slips and receipts she gave the Respondent. She did not have them. Stating that the TSC did not mention to her that they would deduct Kshs. 200/= but they did. Testifying that she had nothing in court to show/prove if there was demolitions. Further that the letter of 3/1/1984 for Ministry of Settlement, there was no signature but a stamp and there was/is a copy and there was the original. Testifying that the letter of 3/1/1984 was/is not signed but only stamped.
31. In re-examination, it was her testimony that in the letter of 1/11/1976 has her signature and that the letter of 3/1/1984 has no signature but stamp. Further that Kshs. 200/- was deducted from 1/11/1976 to 3/1/1984.

The Respondent's Hearing

32. DW1 was EMM. He testified that the Plot 1X7 and that he bought from allottee Ngolia Ndua. DW1 relied on documents "EMM6" Power of Attorney of 5/11/1976 to the Further Affidavit, the letter of 21/8/1998 from Ministry of Lands and Settlement marked "EMM9". Testifying that there was/is Certificate of Outright Purchase of 11/6/1994 in the name of Ngolya Ndua "EMM8", attached to the Further Affidavit. DW1 told Court that transfer to EMM, marked "EMM10" amended to Further Affidavit. He told court further that he has suffered a lot because of the lady and he requested this case be dismissed.
33. In cross examination, it was his testimony that they were married on 9/8/1985 and that they lived in Iveti Hills after marriage. Testifying that they did live in Mua Hills in all his life Plot 1X7 and he started constructing the house on Mua Hills. DW1 was doing business; he purchased other properties. Opining that he had so many things he was doing. He did not have another property, it was a long time ago, that the Certificate of Outright Purchase "EMM8" dated 11/6/1984, the letter of B 3/1/1984 heading was/is Statutory Irrevocable Order. According to DW1, 5 months later Ngolya was issued with Certificate of Outright Purchase. They had a court case between him and the children of Ngolya Ndua and the judgment was delivered on 8/10/1998- 493/1995. DW1 produced judgment and court order marked "EMM11". The Title Deed, attached to the Replying Affidavit on 13/10 1998. That the Applicant left in 1998 after he was allocated and she was part of the problem. DW1 sold 5 acres in the sale Applicant had no business in the land and she did not give consent and that the Applicant had had no business on the land. DW1 was paid on the 10 month. He gave all his children money. That he paid the Plaintiff and he stated that he has a document which document he did not file. Testifying that on 16/5/2021 the Matrimonial home was there until Boniface the purchaser went in the Matrimonial home was demolished by interested party/purchaser Boniface Masila and others.
34. Testifying that the extract "EMM21", the document does not have the name/stamp of the police station. DW1 told court he initiated criminal proceedings. DW1 reported her and he relied on the



evidence of Boniface who recorded a statement with CID. According to DW1, he never divorced her, that she divorced him at seventy (70) years old after she used him. Further he testified that the Matrimonial Cause 8 of 2020 was/is not divorce contrary to the ruling of 27/7/2020.

35. The matter was canvassed by written submissions.

Submissions

Applicant's Submissions

36. The Applicant's in his submissions dated 7th July,2023 and filed in court on 27th July,2023, wherein counsel raised the following issues which he submitted on sequentially.
37. On whether Machakos/Mua Hills/1X7 is a matrimonial property, counsel placed his reliance on Section 6 of the *Matrimonial Property Act* which gives the definitions of the matrimonial property, and submitted that it is not in dispute that the Applicant and Respondent were married to each other as proved by the Marriage Certificate which was produced by the Applicant as exhibit.
38. Contending that from the evidence of both parties, Machakos/Mua Hills/1X7 was acquired after they celebrated their marriage and was the only property that they acquired. Opining that the matrimonial home and the house hold goods therein are long gone save the land. Counsel argued that Machakos/Mua Hills/1X7 is indeed matrimonial property having been acquired during the subsistence of the marriage between the Applicant and the Respondent.
39. Regarding whether Machakos/Mua Hills/1X7 was acquired from the funds deducted from the Applicant's salary, it was submitted by counsel on behalf the Applicant that it was the Applicant's testimony which was again confirmed by the Respondent that they took over the payment of Machakos/Mua Hills/1X7 from the original allottee, one Ngolya Ndua who had been unable to pay.
40. Averring that the Applicant produced as exhibit 2 a letter addressed to the Secretary TSC dated 11/10/1976. Contending that the letter was authored by the Applicant herself to the effect that a deduction of Kenya shillings two hundred (200) was to be made on her salary with effect from 1/11/1976.
41. Submitting that it was the testimony of the Applicant that the Respondent had only paid the initial sum of Kenya shillings four hundred (400) as she took over payment of the suit property after the Respondent's salary was stopped as he went back to school. Averring that the Applicant's exhibit 3 was a letter addressed to TSC from the District Settlement Officer dated 3/1/1984 directing that the standing order on her salary be revoked as she had fully paid all the debts outstanding against Plot No. 1X7 Mua Hills, opining that the said letter was/is signed by one P.K Njoroge for the District Settlement Officer and his name was/is fixed in italics as a signature on the said letter.
42. It was the case of the Applicant that in deed deductions were made on her salary the Applicant produced Exhibit 6, a copy of her slip for December 1981 and that from the pay slip, the deductions made on the Applicant's salary were Kshs. 200/= for agricultural land bank, union dues of Kshs. 15/= and PAYE of Kshs.174/=. Averring that the pay slip produced by the Applicant undoubtedly proves that she indeed paid for the land now known as Machakos/Mua Hills/1X7. To buttress this point counsel relied on Section 7 of the *Matrimonial Property Act*, and submitted that where the contribution towards the acquisition of matrimonial property can be identified in the event of divorce or dissolution of the marriage, the said property will be divided between the spouses in accordance with their respective contribution towards the acquisition.



43. Submitting that the Respondent claimed that he singlehandedly paid for the suit property yet he only produced a receipt for the payment of KShs. 400. That the Respondent did not produce any evidence in court that would lead to an inference that he paid for the suit property using funds obtained elsewhere.
44. Counsel relied on the cases of Awn Vs FMN [2018] eKLR, PNN Vs ZWN [2017] eKLR to buttress the case.
45. Whether the registration of Machakos/Mua Hills/1X7 is in the name of the Respondent conferred exclusive ownership rights to him, Counsel submitted that Machakos/Mua Hills/1X7 is registered in the name of the Respondent as evidenced by a copy of search that was produced as Respondent's exhibit EMM 18 in the further affidavit dated 2nd August, 2021.
46. Counsel relied on Section 14 of the *Matrimonial Property Act* 2013 which espouses on the presumptions as to property acquired during marriage, further, credence was placed on the cases of F.S Vs F.Z [2016] eKLR and MW Vs AN [2021] eKLR, to cement his case on presumptions as to property acquired during marriage and submitted that registration of the suit property in the name of the Respondent did not confer exclusive ownership rights on him as he held the property in trust for the Applicant and he could not deal with it as singlehandedly as he wished.
47. On what share of Machakos/Mua Hills/1X7 is the Applicant entitled to, it was submitted that the sale was illegal, null and void ab initio and the same ought to be cancelled as Machakos/Mua Hills/1X7 constitutes matrimonial property and spousal consent was not obtained at the time of the suit property.
48. To bolster this limb counsel relied on Section 12 (1) of the *Matrimonial Property Act* and the case of Mugo Muiro Investment Ltd Vs EWB & 2 Others [2017] eKLR. Further credence was made on Sections 28 (a) of Land Registrations Act on spousal right over matrimonial property as overriding interest and Section 93 of Land Registrations Act.
49. Counsel submitted that it was already established that Machakos/Mua Hills/1X7 was/is a matrimonial property urged the court to find that the Plaintiff by virtue of her contribution through her toil and sweat resolutely established her matrimonial entitlement to the suit land. Opining that the Applicant's consent was thus required and the purported sale was therefore illegal and null and ab initio and the Applicant shall be pursuing redress at the appropriate forum. Urging that the Honorable find the Applicant's Originating Summons merited and allow the same as prayed.

Respondent's Submissions

50. The Respondent in his submissions dated 19th October, 2023 and filed in court on 24th October, 2023, wherein, Counsel for the Respondent submitted that the Respondent did build a house on the suit land for himself, the Applicant as well as for their children. This was all with the aim of living a life of peace and serenity. A photo of the house was annexed and marked as "EMM16".
51. It was contended by Counsel that due to the sale to one Boniface M. Masila, the Respondent had to proceed to the Environment and Land Court at Machakos Under ELC No. 41 of 2019 in which he was fighting for his right as the absolute owner and proprietor of the parcel of land known as Title Number Machakos/Mua Hills/1X7. Copy of the orders by the Honorable Justice O. Angote in his favour is annexed and marked "EMM17". Opining that the Respondent has always been there in the life of their children as compared to the Applicant.
52. It was the case of the Respondent that the Applicant proceeded to produce a supposed Standing Irrevocable Order dated 11th October, 1976 addressed to the Secretary of the TSC. Averring that the Applicant has at no time provided a document acknowledged by way of being stamped and responded



to by the TSC officially acknowledging her request and the estimated time frame if any. That her provision of her pay slip indicating a loan is not clear cut what she took the loan for.

53. Submitting that the Applicant has further produced a letter from the Ministry of Lands & Settlement dated 3rd January,1984 which she claimed to have been from one P.K Njoroge who is a holder of a Public Office in Government.
54. Counsel relied on Sections 19 (1) (2) and (3), 24 (a)& (b), 25 (1), 26 (1), 30 (3) and 35 (1) of the Land Registration Act. Further counsel relied on the case of Willy Kipsongok Morogo Vs Albert K. Morogo [2017] eKLR, Evans Kafusi Mcharo Vs Permanent Secretary Ministry of Roads, Public Works and Housing & Another [2013] eKLR, Federation of Women Lawyers Kenya (FIDA) Vs Attorney General & Another [2018] eKLR and CON Vs NMS [2022] eKLR, to bolster his case and prayed that his Replying Affidavit dated 25th May,2021 and further Affidavit dated 2nd August,2021 be considered inclusive of the admission of the evidence given by the Respondent herein.

Interested Party's Submissions

55. Interested Party in his submissions dated 21st November,2023 and filed in court on 24th November,2023, wherein, he submitted that from evidence of the Applicant she was not able to demonstrate how much was the cost of the land the subject matter and how much was deducted from her salary to clear the full purchase price.
56. Averring that the Applicant has not shown the total she paid as purchase price of the land. The Applicant has not shown how much she contributed as her share in constructing the matrimonial home. Contending that on the other hand the Respondent has shown the price of the parcel of land all that was paid as purchase price. Arguing that Applicant did not contribute any money to the purchase of the land, further that the Respondent has succeeded in showing that this parcel of land was not a family property but property acquired by himself.
57. It was the Interested Party's case that according to the Applicant marriage was contracted on 9/8/1975. That the parties stayed together up to 1999 and the parties had stayed together for a period of 24 years. Opining that from 1999 to date of divorce 2021, is a period of 22 years. Averring that the Matrimonial Property Act was to operate from 2013 forward and the parties lived together up to 1999 and thereafter never acquired property which could be called Matrimonial Property.
58. It was contended that the property acquired before 1999 is not affected by the Matrimonial Property Act of 2013. Arguing that the property was bought on 22/10/1998 at Kshs. 4,000/=. Submitting that the Applicant had a chance to get all payment receipts she allegedly gave to her husband Respondent and the court file is available and could have made efforts to get the receipts. Submitting further that there was/is no sufficient effort to support her contribution and therefore the Applicant has no share in the property.
59. It was the submitted that the Interested Party bought the part of the land in 2016. Hence he was an innocent purchaser of the plot and since the property was acquired by the Applicant on 22/10/1998 and this being not a matrimonial property no consent was required from the Applicant and to sell the property.
60. Averring that since the property was acquired in 1998 by the Applicant, Matrimonial Property Act does not apply in this. counsel opined that the Applicant has not proved her case and should be dismissed with costs.



Determination/Analysis

61. I have considered the respective parties' positions as elucidated in their verbal testimonies, the affidavit evidence as well as their submissions., there are two substantial issues for consideration.
62. The first is whether the suit property Machakos/Mua Hills/1X7 constitutes matrimonial property.
63. The second is whether in the circumstances the applicant is entitled to the orders prayed for.
64. The question of what constitutes matrimonial property is now well settled in law. Section 6(1) of the *Matrimonial Property Act* No. 49 of 2013 defines matrimonial property as- the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
65. It is not in dispute that indeed the parties were married in 1975 and that their union was blessed with four children who are now adults and they lived together upto 1999 and separated and the Applicant filed for divorce which was granted in 2021, the parties are now since divorced.
66. The Applicant produced during the hearing, Marriage Certificate (African Christian *Marriage Act* now repealed) that they married in 1975 and both Applicant and Respondent admit that the subject suit property Machakos Mua Hills 1X7 was acquired/purchased during the subsistence of their marriage. Although each party has a different version of how the sale/purchase of the said property was acquired/purchased. Therefore it is matrimonial property within the meaning of the Act.
67. The issue that brings dispute is whether the property known as Machakos/Mua Hills/1X7 was acquired by joint efforts and funds of the parties during the subsistence of their marriage or by sole effort of only one party to the marriage.
68. It was the Applicant's case that after their wedding, they identified the property which was then being sold because the owner was unable to pay for the same. That in 1976, the Applicant produced the Letter to TSC dated 11/10/1976 – Exhibit 2 indicating statutory deduction of her salary as a Teacher towards purchase of the subject property Machakos/Mua Hills/1X7.
69. The Respondent went back for further studies and his salary was suspended. It was then that the Respondent asked the Applicant to take over the payment of the suit property which prompted the Applicant to write to the Teachers Service Commission (Exhibit 2) to be deducting a sum of Kshs 200 until the loan was repaid in full. PW1 paid the purchase price of the suit property from 1976-1984
70. The Applicant also produced Letter to TSC dated 3/1/1984 Exhibit 3 from District Settlement Officer Machakos addressed to the Applicant's former employer (TSC) which indicates as follows;

Please refer to the above irrevocable order and note that Mrs BEM used to be deducted Ksh 200 w.e.f 1/11/1976. According to our records she has fully paid all the debt outstanding against Plot 1X7 Mua Hills. indicating payment for the said property

Would you please now revoke the order and stop deducting her the amount.

(P.K.Njoroge)

For District Settlement Officer
71. The Respondent on the other hand testified that he solely paid for the suit property and that the applicant did not contribute anything towards acquisition. The respondent in his replying affidavit stated that they agreed on the terms of the agreement with one Mr Ndua in which he was to pay kshs 4000 to the Ministry of Lands and kshs 2000 a loan which Mr Ndua had taken from the Settlement



fund trustee for agricultural development and improvement and upon finalizing payment the transfer was done to him and he proceeded to build a home on the said parcel of land. The Respondent claimed to have started payment of Mr Ndua's loan in 1974. However, no evidence of payment was produced in Court, except Receipt No 152485 marked EMM7 for Ksh 400.

72. The Respondent produced documents of transfer and ownership of the property Machakos/Mua Hills/1X7 from Mr Ndua to himself and the unfolding dispute that culminated with ELC No. 41 of 2019 where he was found to be the registered owner of the property on purchase from the said Mr. Ndua. He had the title document in his name as absolute proprietor EMM1 and by virtue of Sections 24, 25 & 26 of *Land Registration Act* 2012 as owner he sold 5 acres to the interested party who thereafter demolished their matrimonial home.

73. The Applicant reiterated that she gave the Respondent copies of receipts as evidence of purchase and payment in the said matter.

Under Section 2 of the *Matrimonial Property Act* No. 49 of 2013, Contribution is defined to mean both monetary and non-monetary contribution. Non-monetary contribution includes: Domestic work and management of the matrimonial home; Child care; Management of family business or property; and Farm work.

74. PW1 Applicant herein contributed both in monetary terms and non-monetary terms; her payments through check off system of her salary through her employer TSC vindicates her position. Admittedly, they have 4 adult children and PW1 must have contributed to their well being through nurturing and at some point when the Respondent went to further his studies PW1 was the sole breadwinner. Therefore, while the Respondent is registered owner of the suit property PW1's evidence of both monetary and non-monetary contribution is not controverted.

75. Section 7 of the same Act stipulates that ownership of Matrimonial Property depends on each spouses' contribution to wit: -

“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.”

76. Section 14 of the 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.”

77. Section 14 of the *Matrimonial Property Act* No. 49 of 2013 seemingly gave effect to the Court's position Njoroge -V- Ngari [1985] KLR, 480, where the court stated that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property.



78. In the case of PWK vs JKG 2015 eKLR the Court stated;

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.”

79. To convince the court of her monetary contribution towards the acquisition of the matrimonial property, the Applicant produced two letters dated 11/10/1976 and 3/1/1984. The letter from the District Settlement Officer Machakos dated 3/1/1984 addressed to the applicant’s former employer TSC stating that she had fully settled the outstanding debts against the Plot 1X7 Mua Hills. I am therefore convinced, on the basis of the evidence before me and on a balance of probability, that the Applicant’s contribution was monetary in nature.

80. It is also imperative to establish whether the applicant made a non-monetary contribution, if any. Non-monetary contribution includes: Domestic work and management of the matrimonial home; Child care; Management of family business or property; and Farm work. The union has been blessed with four issues, who from the evidence are now adults. This is clear evidence of child care. The gist of the foregoing is that, on the balance of probability, the applicant indeed made substantial non-monetary contributions in the course of the coverture. She would, in my opinion, be entitled to a portion of the matrimonial property upon dissolution of the marriage which was proved by production of decree nisi.

81. In P.O.M vs. M.N.K (2017) eKLR the Court stated that:

“This is a suit for division of matrimonial property. The legal regime governing such endeavor is the *Matrimonial Property Act*, Act No. 49 of 2013. The relevant provisions are to be found in Part III thereof. According to those provisions, in particular section 7, such property is to be divided upon divorce or dissolution of the marriage. The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made. A party, who moves the court for orders relating to division of matrimonial property, or declarations thereon, must strive to bring his case within the prerequisites stated above.”

82. In the case of Njoroge vs. Ngari [1985] KLR, 480, the Court held that if matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property.

83. In the premises, this courts finds that the property Machakos/Mua Hills/1X7 although registered in the names of the Respondent is matrimonial property as it was acquired during the subsistence of the marriage.

84. Although the Respondent sold 5 acres to the interested party as registered owner without knowledge or consent of PW1 who made both monetary and non -monetary contribution, there is no evidence that the purchase price proceeds were shared with PW1.



85. The Respondent claimed that PW1 had another property but it was clearly set out which property this was where it was if developed or not whether gifted to her or how she came to be in possession of the same and more importantly if it was/is matrimonial property.
86. Therefore, this Court finds that Machakos/Mua Hills/1X7 was acquired/purchased developed during the subsistence of the marriage between Applicant and Respondent.
87. Each of the parties made contribution to the purchase acquisition and development of the said property Machakos/Mua Hills/1X7.

Disposition

88.

1. In the absence of cogent and tangible evidence of how much each contributed to purchase acquisition and development of the said property the Applicant and the Respondent are entitled to a share on the basis of 50.50.
2. The Respondent sold 5 acres and therefore sold his portion. In the absence of evidence that he shared the proceeds with the 1st Family, Applicant and children, the remaining portion although registered in his names by virtue of Section 14 of *Matrimonial Property Act* there is a rebuttable presumption based on evidence on record that the Applicant contributed in monetary and non-monetary terms to acquiring the property. The remaining portion is for PW1 Applicant and children of their marriage as the property was acquired during subsistence of their marriage.
3. The Court order granted on 22/9/2020 remain in force. The respondent, his agents, servants and or employees are thus hereby restrained from dealing with the said property in any manner whatsoever to the detriment of the Applicant.

JUDGMENT DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 16/5/2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

No Appearance- for the Plaintiff

EM – Defendant - Present

Ms. Kaloki for the Interested Party

Patrick - Court Assistant

