



**RAA v TOO (Matrimonial Cause E010 of 2022)  
[2024] KEHC 8503 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 8503 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MATRIMONIAL CAUSE E010 OF 2022**

**G MUTAI, J**

**MAY 2, 2024**

**MATRIMONIAL CAUSE NO. E.010 OF 2022(OS)  
IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT, 2013**

**BETWEEN**

**RAA ..... CLAIMANT**

**AND**

**TOO ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed the Originating Summons dated July 22, 2022, seeking various reliefs against the Respondent. The Respondent opposed the said Summons and filed a Counterclaim with her responses to the Originating Summons. When the matter came up for hearing on September 28, 2023, Mr Orange, learned counsel for the Claimant, withdrew his client’s Claim. The Respondent, however, proceeded with his Counterclaim. This Judgment is, therefore, in respect of the Counterclaim dated September 9, 2022, filed on September 12, 2022.

**The Claimant’s Claim**

- 2. The withdrawn Originating summons sought the following reliefs:-
  - a. A declaration that the immovable property L.R No. MN/1/1077 Nyali Mombasa and the developments thereon are matrimonial property acquired by the joint efforts of the Claimant and the Respondent during marriage;
  - b. The said property be sold, and the proceeds shared equally between the Claimant and Respondent;



- c. Alternatively, the Claimant be compensated for her share in property L.R No. MN/1/1077 Nyali Mombasa; and
- d. The Respondent to bear the costs.

### **The Respondent's Counterclaim**

3. In his Counterclaim, the Respondent admitted the existence of marriage and subsequent divorce but denied the contents of the Originating Summons and also counterclaimed against the Claimant as follows:-
  - a. The Claimant earned salary and operated businesses, the proceeds of which he deposited in various banks and which constituted matrimonial property;
  - b. The Claimant held Safaricom shares purchased by and in trust for the Defendant during the marriage. The shares should be sold, and the proceeds paid to the Respondent;
  - c. The Claimant renders statements of the bank accounts in her name and also provides financial records of the bank accounts; and
  - d. The house standing on L.R No. MN/1/1077 Nyali Mombasa is property of the Defendant and not matrimonial property.
4. The Respondent's counterclaim proceeded for hearing.

### **Evidence of the Respondent**

5. The Respondent, Tom Odhiambo Ojee, testified in court and relied on his Counterclaim, witness statement, Replying Affidavit and the bundle of documents filed in Court on September 12, 2022. He also relied on his Supplementary Affidavit dated February 21, 2023. The documents were adopted as his evidence in chief.
6. In cross-examination, it was his case that the L.R No. MN/1/1077 Nyali Mombasa was purchased in 2004 for Kes.4,700,000/-.
7. He also testified that he stayed with and paid school fees for the 4 children he has with the Claimant.
8. Further, his case was that the suit property was acquired during their marriage with the Claimant.
9. In reexamination, it was his case that he filed and obtained a divorce and had produced the proceedings in his evidence.

### **The Respondent's Submissions**

10. The Respondent filed submissions dated 27<sup>th</sup> October 2023.
11. It was submitted that the Respondent's testimony on the counterclaim was not controverted, and the counterclaim ought to be allowed as such.
12. The Respondent relied on the case of *Chispine Otieno Caleb v Attorney General* [2014] eKLR and on the case of *Karuru Munyororo v Joseph Ndumia* HCCC No. 95 of 1988 to submit that the evidence of the Defendant remained uncontroverted and unchallenged and therefore credible.
13. The learned counsel for the Respondent submitted that the Respondent solely acquired L.R No. MN/1/1077 Nyali Mombasa. The same is in his name and was not a matrimonial property. Reliance was placed on sections 2, 6, 7, 10, 12, 13, 14 and 17 of the *Matrimonial Property Act*, 2013.



14. Counsel further submitted that from the Counterclaim, what comes out clearly from the Respondent's case is that L.R No. MN/1/1077 Nyali Mombasa was acquired solely by Respondent and through his own effort, and this fact was not controverted by Claimant, who, instead of adducing evidence to support her case, opted to withdraw it.
15. Reliance was also placed on *Joseph Ombogi Ongetoto v Martha Bosibori Ogentoto* [2023]eKLR to submit that equality under article 45 of the Constitution did not entitle the court to vary existing propriety rights of parties by taking what belongs to a spouse and awarding half of it to the other spouse.
16. Counsel also relied on *EGM v BMM* [2020]eKLR to submit that article 45 of the Constitution meant that a party would be entitled to equal share according to their contribution and not a blanket 50:50 basis. In the said case, the Court of Appeal stated as follows:-

With great respect, we find the learned judge's interpretation of Article 45 (3) to be textually and contextually untenable. He failed to appreciate that the sub-Article simply deals with equality of the fundamental rights and freedoms of spouses during and after the dissolution of marriage.

There was no basis for reading into the provision what the text does not ordain. Equality of spouses does not involve the re-distribution of property rights at the dissolution of marriage. The learned judge missed the mark on his interpretation of spousal equality as enshrined in that sub- Article. This Court espoused the meaning of that equality in *MEK v GLM* [2018] eKLR as follows;

“Equality in marriage is not a principle to be applied blindly nor 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.

17. It was submitted that the shares held at Safaricom were the property of the Respondent. Reliance was placed on section 7 of the Matrimonial Property Act to support the said submission.
18. The Claimant does not appear to have filed submissions.

### **Analysis and determination**

19. I have perused the pleadings, evidence as well as the submissions and authorities filed in court by the parties in support and opposition to their respective cases.
20. The issues before me for determination are is whether the properties disclosed in this suit are matrimonial properties acquired during the subsistence of the marriage and so sharable between the Claimant and the Respondent.
21. In my view, marriage is anchored, among other things, on love, affection and sympathy and exists like a rolling wheel gathering property rights traceable to the spouses individually or collegially, after a stall. This view was also contextualized in the thoughts of Margaret Puxon, in her Article *Ownership of the Matrimonial Home* (1963), 107 Sol. J. 204, thus:-

“Marriage is a partnership of love, affection and sympathy which should come to an end when these perish. When the parties wed, the husband and wife vow in the wedding ceremony, "with all my worldly goods I thee endow," and the joint ownership should be jealously guarded both by written law and by popular sentiments. Consequently, when the husband



and wife part, there should be a separation not only of heart and hand, but of goods as well, and unless there is such a separation, there should be no divorce.”

22. 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.

23. Under Section 7 of the *Matrimonial Property Act*, it is provided as follows:

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 ...

24. From the evidence available in court, it is clear and indeed not in dispute that the properties were acquired during the subsistence of the marriage between the parties. The marriage was dissolved on 10<sup>th</sup> July 2018. This brings their dispute within the framework of the *Matrimonial Property Act*, 2013. The Claimant withdraw her case against the Respondent, and this judgment is therefore in respect of the Respondent’s counterclaim against the Claimant. The Respondent submitted that the pleadings and evidence produced by the Defendant in court were uncontroverted. In the case of *Kerai Ghanshyam v James Wambua Muendo* [2021] eKLR, the court stated as follows: -

14. I am alive to the Court of Appeal’s position in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR that espouses the correct legal position that:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

25. However, in the case of *Janet Kaphiphe Ouma & another v Maries Stopes International (Kenya)*, Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga through *Stanley Muriga v Nathaniel D. Schulter*, Civil Appeal No. 23 of 1997 that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”

16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony.”

26. The law on the division of the property acquired during coverture in Kenya appears to be anchored on the proof of a party’s claim on the matrimonial property and considers monetary and nonmonetary contributions. A party to a matrimonial dispute cannot base his or her claim on the matrimonial



property on a 50:50 basis without demonstrating how their respective claims are arrived at. It is not an automatic entitlement conferred by virtue of the marriage.

27. The objective of this court is to do justice to the parties. As such, the parties must not only state their case but also lead evidence to prove the averments therein. The question of matrimonial property and the contribution of the spouses towards the acquisition thereof is a matter of fact and must be proved by evidence to arrive at a fair and equitable division of the matrimonial property acquired coverture, guided by the provisions of article 45(3) of the [Constitution](#) and the [Matrimonial Property Act](#). Whereas the Respondent led evidence in support of his case, the Claimant did not. As a matter of fact she withdrew her Claim in toto. The court cannot find contribution without evidence.
28. In the case of *Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* [2023]e KLR, the Supreme Court stated inter alia as follows:-

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.

29. Consequently, on my perusal of the pleadings and evidence filed by the Respondent, I note that L.R No. MN/1/1077 Nyalı Mombasa was acquired by and registered in the name of the Respondent. It was incumbent on the Claimant to prove her contribution, whether monetary or nonmonetary, but which she failed. Therefore, to the extent and in the circumstances of this case, the evidence produced by the Respondent in support of his counterclaim was not rebutted. Consequently, I find and hold that Plot No. MN/1/1077 Nyalı Mombasa solely belongs to the Respondent, and the Claimant made no contributions towards its acquisition.
30. I am alive to the fact that each case must be determined based on its own peculiar circumstances and based on the evidence presented. 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.”

31. 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.

32. It is clear to this court that the Matrimonial Property Act of 2013 recognises both monetary and non-monetary contributions, as can be demonstrated from the circumstances of a given set of facts and evidence. In NWM v KNM (2014) eKLR, it was stated that the court must give effect to both monetary and non-monetary contributions that both the Claimant and the Respondent made during the currency of the marriage to acquire the matrimonial property. Similarly, the House of Lords in White v White (200) UKHL 54 underscored the greater awareness of the value of non-financial contributions to the family's welfare.

33. It is my view that the non-monetary contribution often-times cannot be quantified. In my analysis and as earlier established, Plot No. MN/1/1077 was acquired solely by the Respondent. I am persuaded by the uncontroverted evidence of the Respondent that the shares in Safaricom Limited were purchased during coverture and registered in the names of the Claimant. Therefore, I find that the said shares are matrimonial property. It is, however, my considered view that the said shares ought to be shared equally between the parties, in the absence of contrary evidence. 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.

34. Similarly, in the case of PWK v 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 v Gissing [1970] 2All ER 780 Page 788.”

35. I am unable to grant the orders the Respondent sought for disclosure of all bank account statements, finances and business incomes of the Claimant as they lack specificity. In my view issuance of such orders would be oppressive and one sided, and no similar obligation is required of the Respondent.

36. The upshot of the foregoing is that Counterclaim substantially succeeds.

### **Disposition**

37. The orders that commend themselves to me therefore are as follows:-

- i. I find, hold and declare that Plot No. MN/1/1077 Nyali, Mombasa solely belongs to the Respondent and the Claimant made no contribution towards its acquisition;



- ii. I find, hold and declare that shares in Safaricom PLC, purchased during coverture and registered in the name of the Claimant, are matrimonial property. I order that the same be sold and the proceeds shared equally by the Claimant and the Respondent; and
- iii. I decline to grant the rest of the prayers in the Counterclaim.

38. As this is a family matter I make no orders as to costs.

39. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 2<sup>ND</sup> DAY OF MAY 2024. JUDGEMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

No appearance for the Claimant;

Ms Osino for the Respondent; and

Arthur – Court Assistant

