



REPUBLIC OF KENYA



**RMK v DKK (Civil Suit 19 of 2008)  
[2024] KEHC 11673 (KLR) (Family) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 11673 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**CIVIL SUIT 19 OF 2008**

**PM NYAUNDI, J**

**JULY 19, 2024**

**BETWEEN**

**RMK ..... APPLICANT**

**AND**

**DKK ..... RESPONDENT**

**JUDGMENT**

1. The Applicant herein, RMK took out Originating Summons dated 30<sup>th</sup> May 2008 against the Respondent seeking the following:
  1. That it be declared that the properties listed herein with all buildings and developments thereon acquired and/or developed by the joint funds and efforts of the Applicant and the Respondent during their marriage and all registered in the name of the Respondent, are owned jointly by the Applicant and the Respondent: -
    - a. L.R No. Muguga/Muguga/xxxx approximately 2 acres.
    - b. Plot No. xxxx/Residential Noon Kopir Trading Centre.
    - c. Mtwapa Property- 1 acre.
    - d. Motor Vehicle Registration Number KBA xxx C- Toyota Noah.
    - e. Motor Vehicle Registration Number KAY xxx U-Toyota Noah.
    - f. 20 shares from Muguga Pyrethrum Growers Co-operative Society Limited.
    - g. Household goods and items.



2. That an order does issue declaring that 50% or such other or higher proportion of the properties aforesaid, is held by the Respondent in trust and for the beneficial interest of the Applicant.
  3. That the joint ownership in respect of the following properties be severed and the said properties be severed and the same be held by the parties herein as tenants in common;-
    - a. Plot No. xx(workshop) Noon Kopir Trading Centre comprising of six plots.
    - b. L.R No. Ngong/Ngong/xxxx/xxx.
    - c. Kajiado/Kaputei North/xxxxx.
    - d. Kajiado/Kaputei North/xxxxx.
    - e. Kajiado/Kaputei North/xxxxx.
    - f. Kajiado/Kaputei North/xxxxx.
  4. That the said properties be sold and the proceeds be shared between the parties herein in accordance with their contribution.
  5. That Motor Vehicle Registration Number KAC xxx X, Pajero jointly owned by the parties herein be sold and the proceeds thereof be shared between the parties herein in accordance with their contribution.
  6. That this Honourable Court be pleased to order that the properties aforesaid be settled and/or partitioned in proportions aforesaid or as the court may order.
  7. That the Respondent be condemned to provide the costs of the Summons.
2. The Summons was supported by the grounds on the face of the same and by the Affidavit of even date sworn by the Applicant. Her case was that she and the Respondent got married on 16<sup>th</sup> June 2001 at Lowell, Massachusetts in the United States of America. Their marriage was not blessed with any children but they adopted twins in 2005 who are now adults. Their marriage was dissolved on 28<sup>th</sup> February 2019 vide Divorce Cause No. 109 of 2018.
  3. She worked as a nurse in Boston Massachusetts while the Respondent worked as a Nurse Aid. She bought food, clothing, household furniture, paid medical bills and met all other needs with her salary while the Respondent made little contribution. She also contributed directly and indirectly to the properties listed in the originating summons. She sold a house she acquired while she was a spinster to commence a real estate business, bought a cheaper matrimonial home and sent 50,000 US Dollars to the Respondent's brother to build condominiums in Muguga/Muguga/xxxx which the Respondent inherited from his father.
  4. She took a loan of 32,392.59 US Dollars (Kshs. 1,950,000) from Beneficiary; Finance Bank to complete the condominiums in December 2007. The condominiums have been occupied since January 2008 and the Respondent receives rental income of approximately Kshs. 110,000 per month to her exclusion. She bought property known as Plot No. xx /Workshop-Noonkopir Trading Centre for Kshs. 170,000 on 17<sup>th</sup> April 1997 before she got married to the Respondent. She later included his name and a transfer was effected.
  5. Together with the Respondent, they purchased property known as L.R No. Ngong/Ngong/xxxx on 4<sup>th</sup> March 2003 for Kshs. 410,000/=. The property is registered in their joint names. They bought a family car, KAC xxx X, Pajero registered in their joint names in 2004. On 7<sup>th</sup> April 2005, she bought



- a car, KAY xxxU, Noah Townace using her savings but was registered in the name of the Respondent. The Respondent's brother purchased land known as Plot No. xxxx/Residential Noonkopir Trading Centre on their behalf for Kshs. 170,000. The property was registered in the Respondent's name.
6. In 2005, they bought L.R No. Kajiado/Kaputei North/19590, L.R No. Kajiado/Kaputei North/xxxx, LR No. Kajiado/Kaputei North/xxxx and L.R No. Kajiado/Kaputei North/xxxxx which are all registered in their joint names.
  7. On 5<sup>th</sup> January 2006, the respondent bought 20 shares from Muguga Pyrethrum Growers Co-operative Society Limited registered in his name. In December 2007, she bought a Toyota Noah, KBA xxx C from her savings and had it registered in the Respondent's name. while working and residing in the United States of America, she started a business of buying and selling hair products in 2000. Over a period of five years, she collected 940 boxes of hair products worth Kshs. 20,000,000. The Respondent withheld her hair products and has refused to release the same. She argued that the Respondent is in control of the vehicles forcing her to hire a private vehicle which is expensive. That the Respondent is also in control of all the properties and may dispose them. She assessed her contribution at 80%.
  8. She told the court that when they lived in the US, she would travel to Kenya to supervise the construction of the homes. That the Respondent enjoys the benefits of their home (s) to her exclusion.
  9. During cross-examination, she stated that her contribution towards Excellent was 100%. She purchased Plot No. xx (workshop) Noon Kopir Trading Centre with her father in 1997 before she met the Respondent. The respondent did not pay the balance for this property. The property in Muguga is registered in the name of Excellent Developers and Contractors Limited. She built the home while the Respondent was in the US. She sent USD 50,000 towards the construction of the building through Western Union. She also took a loan of USD 32,000 towards the construction. she made payments for the shares in Muguga Co-operative Society on behalf of the Respondent. She and the Respondents jointly bought one acre in Mtwapa. The title deed is in possession of the Respondent.
  10. On his part the Respondent filed a Replying Affidavit sworn on 6<sup>th</sup> October 2008. His case was that he and the applicant got married on 3<sup>rd</sup> April 2001. While living with the applicant in the United States, they both contributed equally to the costs of maintaining their common house. He invested back home before he married the applicant. He assisted the applicant financially to purchase her first home which was registered in her name. The applicant had made partial payment for Plot No. xx/ Workshop-Noonkopir Trading Centre. He helped her clear the remaining amount and the property was thereafter registered in their joint names. He solely paid for the purchase of land known as Ngong/ Ngong/xxxx but had it registered in their joint names.
  11. Muguga/Muguga/xxxx was an inheritance from his father. Together with his siblings, they developed the property and had it registered under the name of Excellent Developers and Contractors Limited, a joint family company. He argued that the applicant does not have an interest in this property. He solely purchased motor vehicle registration numbers KAC xxx X and KAY xxx U which are registered in his name. He solely purchased Plot No. xxxx/Residential-Noonkopir Trading Centre and Kajiado/ Kaputei North/xxxx which are registered in his name.
  12. He and the applicant jointly contributed towards the purchase of Kajiado/Kaputei North/xxxxx, Kajiado/Kaputei North/19592 and Kajiado/Kaputei North/xxxxx. He solely purchased a land in Mombasa which is registered in his name. He inherited shares in Muguga Pyrethrum Growers Co-operative Society Limited from his parents which accrued interest allowing him to purchase additional shares registered in his name.



13. He stated that he was not aware of the existence of motor vehicle registration number KBA xxx C. Jointly with the applicant, they started a hair shop known as Bridge Side Variety & Gift Shop in Kenya. However, the applicant has denied him access to the shop, book of accounts and business record. She also refused to account for the profits made in the business. They also have a joint account at Family Bank which the applicant has been withdrawing money by forging his signature. He argued that the applicant is a US citizen who is not allowed to own immovable property of an agricultural nature in Kenya.
14. His evidence was that Muguga/Muguga/xxxx is owned by Excellent Developers and is not a family house. The applicant did not in any way contribute towards the development of that property. He solely bought and developed Plot No. xxxx. He contributed towards the purchase of Plot No. xx (workshop) Noon Kopir Trading Centre which is registered jointly in their names. Ngong/Ngong /444480/xxx was jointly acquired with the applicant but the transfer is yet to be effected. He was not aware of any property in Mtwapa. He solely initiated the purchase and paid for Kajiado/Kaputei North xxxxx,xxxx,1953 and xxxxx without the applicant's input. He sent money to his cousin for the purchase of motor vehicle registration number KBA xxx C and KAY xxx U while he was in the US. He told the court that the applicant did not purchase or contribute for the purchase of motor vehicle registration number KAC xxx X. He inherited shares from his parents in Muguga Pyrethrum Growers; the applicant did not contribute towards the purchase. He asked the court to dismiss the applicant's originating summons.
15. During cross- examination, he stated that the only property acquired during the subsistence of their marriage are the Kitengela plots. Excellent Developers was registered in 2007. Muguga/Muguga/xxxx was initially registered in his father's name before it was transferred to his name in 1995 then transferred to Excellent Developers. Excellent Developers has five directors. He acquired the property in Mtwapa between 2000 and 2006 and sold it in 2008.
16. By the time the Originating Summons was filed, he had disposed motor vehicle registration numbers KBA xxx C and KAY xxx U. Plot No. xx was going for between Kshs. 300,000-Kshs. 500,000. He made a contribution through a bankers cheque. The applicant did not make any contribution towards the purchase of the plots in Kajiado but he had them registered in their joint names. He sold Plot No. xxxx/Residential Noon Kopir Trading Centre. He argued that the properties registered in his name were held in trust. For the properties owned and registered jointly, he made more contributions than the applicant. of the shares in
17. Both parties filed written submissions. The Applicant's submissions are dated 5<sup>th</sup> April 2024 while the Respondent's submissions are dated 30<sup>th</sup> May 2024.

### **Applicant's Submissions.**

18. The applicant framed the following as the issues to be determined by this court;
  - a. Whether the properties herein were acquired and/or developed during the marriage of the parties herein.
  - b. How the properties should be distributed.
19. The applicant submitted that her marriage to the Respondent was celebrated on 16<sup>th</sup> June 2001. The marriage was dissolved in 2019. Whether the properties were acquired and developed during the subsistence of the marriage and whether she contributed towards the development and purchase, she reproduced the evidence she gave in open court.



20. On how the property should be distributed, she urged the court to award her 60% while the Respondent should be awarded 40% in the property known as Muguga/Muguga/xxxx. She based her argument on the fact that the Respondent has benefited more from these properties as compared to her. She sought to rely on the Court of Appeal decision of James Kamore Njomo v Phoebe Wangui Kamore & Anor C.A No. 63 of 1998.
21. On the properties jointly registered in both their names, she urged the court to share the properties equally between her and the Respondent. She asked the court to be guided by the decisions in Kivuitu v Kivuitu, James Kamore Njomo v Phoebe Wangui Kamore & Anor C.A No. 63 of 19998, Essa v Mohamed Alibhai Essa C.A No. 101 of 1995 and Virginia Wanjiku Njoroge Civil Case No. 2125 of 2000.
22. On the properties acquired during the subsistence of the marriage and registered in the name of the Respondent, she argued that there is a rebuttal presumption that the parties hold the properties in equal shares and therefore, the properties should be shared equally between her and the Respondent. She relied on the decisions of Charles Philip Mason v Venessa Kahaki Mason, High Court (MSA) Civil Case No. 11 of 2006 and Muthembwa v Muthembwa 2002 KLR P. 91.

### **Respondent's Submissions.**

23. The Respondent framed the following as the issues to be determined by this court;
  - a. Whether the suit properties amount to matrimonial property and whether the applicant contributed towards the acquisition and development of the matrimonial property.
  - b. Whether the applicant is entitled to an equal share of the matrimonial properties.
  - c. Is there property not disclosed?
  - d. Was there misappropriation of funds?
24. On the first issue, the Respondent relied on his evidence in court concerning each property. He urged the court to consider each property individually depending on the contribution and ownership. He argued that Muguga/Muguga/xxxx does not fall within the definition of Matrimonial Property under Section 2 and 6 of the *Matrimonial Property Act* 2013. That the property is not matrimonial property but ancestral land held in trust for his siblings. He relied on the decisions in Paul Kagwa vs. Jackline Muteteri (Matrimonial Cause-2005/23) [2006] UGHC 17(18 May 2006), M v M, Civil Appeal No. 74 of 2002 (2008) 1KLR,247 where the courts held that inherited property and gifted property should be retained by the person who inherited it or was gifted.
25. On whether the applicant is entitled to an equal share of the matrimonial properties, it was his argument that although Article 45(3) of *the Constitution* provides that parties are entitled to equal rights at the time of marriage, during and after marriage, this does not translate to equal shares. He sought to rely on the decision of PNN v ZWN [ 2017] eKLR. He submitted that contribution towards acquisition should be in accordance to the contribution of each party even though the properties are jointly registered in the names of both spouses. He relied on the decisions in Francis Njoroge v Virginia Wanjiku Njoroge, Nairobi Civil Appeal No. 179 of 2009, TKM v SWM [2020] KLR, AW V MVC MAWM [2018] eKLR, EGM v BMM [2020] eKLR and MEK v GLM[2018] eKLR.
26. He argued that the applicant has failed to prove her contribution either monetary or non-monetary on the properties registered in the name of the Respondent and she is therefore not entitled to the same.



27. The Respondent submitted that the Applicant in her further replying affidavit acknowledged existence of Bridge Side Variety & Gift Shop and a business in Gillfillan House in Nairobi and failed to include them in the Originating Summons. That the applicant should account for funds in their joint account at Family Bank.

### **Analysis and Determination**

28. Having considered the pleadings filed herein and the rival submissions, I discern the following to be the following issues for determination
- a. Which of the subject properties constitute matrimonial property?
  - b. What if any is the Petitioner's share of the identified share of the identified matrimonial properties?
29. On the 1<sup>st</sup> issue, the parties are agreed that the relevant law is the Married Women's Property Act, 1882 and that as held by the Supreme Court in *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment)*, the principles in *Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR* are good law and remained the basis within which matrimonial property should be distributed for matters filed before the commencement of the *Matrimonial property Act, 2013*.
30. The Supreme Court enunciated further that as much as Section 17 of the Married Women's Property gave courts the discretion to do what was just and fair under the varying circumstances, it did not entitle a court to make an order which was contrary to any well- established principle of law on proprietary interests or ownership of property.
31. The law as set down in the Echaria Case is that for one to be entitled to a share, the party had to demonstrate contribution and that contribution could be either be financial or non-financial as was well enunciated in the celebrated decision of *Mary Ann Kivuitu vs Samuel Mutua Kivuitu Civil Appeal No 26 of 1985 (unreported)*
32. Whilst acknowledging that the special nature of the relationship between husband and wife gives rise to difficulties of proof when marriage breaks down and questions of ownership of property have to be decided as it is not expected that the transaction will be evidenced in the same way as an ordinary commercial transaction, it must be observed that this does not absolve the party alleging a proprietary interest from the requirements of Section 107(1) of the *Evidence Act* which 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.'
33. The Petitioner has enumerated the following assets as being jointly owned –
- a. L.R. No. Muguga/ Muguga/xxxx approximately 2 acres
  - b. Plot No. xxxx/ Residential Noon Kopir Trading Centre
  - c. Mtwapa Property I acre
  - d. Motor Vehicle Registration Number KBA xxx C- Toyota Noah
  - e. Motor Vehicle Registration Number KAY xxx U- Toyota Noah
  - f. 20 shares from Muguga Pyrethrum Growers Co-operative Society Limited
  - g. Household goods and items



- h. Plot No. xx (Workshop) Noon Kopir Trading Centre comprising 6 plots
  - i. LR No. Ngong / Ngong/ xxxx/ xxx
  - j. Kajiado/ Kaputei North/xxxxx
  - k. Kajiado/ Kaputei North/xxxxx
  - l. Kajiado/ Kaputei North/xxxxx
  - m. Kajiado/ Kaputei North/xxxxx
  - n. Motor vehicle KAC xxx X- Pajero
34. It is common ground that the parties were married between 2001 and subsequently divorced following decree of the court issued on 28<sup>th</sup> February 2019 on Petition filed by the Petitioner in Divorce Cause No. 109 of 2008. It is the Petitioner's case that during the pendency of the marriage the above listed assets were jointly acquired and developed.
35. Both parties are agreed that LR No. Muguga/ Muguga/xxxx is ancestral land and acquired by the Respondent from his father prior to the marriage between the two. It is also agreed that the property is registered in the name of Excellent Developers a limited liability company. The Petitioner's claim is that she contributed to the development of the condominiums that have since been erected on the parcel of land and are generating rental income. The Petitioner is aggrieved that she is not accessing the rental income notwithstanding that she made a substantial contribution to the development of the condominiums.
36. The contribution by the petitioner towards the development of the condominiums is said to have been channeled through a joint account at Family Bank and cash transfers to a brother of the Respondent. The petitioner has not submitted any evidence in support of the transfer of the money to the brother of the respondent by western union as alleged. This was a substantial amount of USD 50,000.
37. Looking at the statements presented of the joint account at family bank there is no evidence of deposits of the lump sum alluded to by the Petitioner, neither do the withdrawals add up to the figures she says she contributed. I am therefore unable to find that the property comprises matrimonial property and that the Petitioner made any contribution towards the developments thereon.
38. 20 Shares from Muguga Pyrethrum Growers Co-operative Society Ltd. The Petitioner contends that they were acquired during the pendency of the marriage and that she contributed to their purchase. The Respondent counters this and asserts that he inherited the shares in Muguga Pyrethrum Growers Cooperative Society Limited from his parents and that he ploughed back the interest acquired from these shares to purchase additional shares. I am not persuaded that shares constitute matrimonial assets and that the Petitioner contributed towards the purchase of shares as alleged.
39. Mtwapa property 1 acre – no evidence was presented to Court to establish the identity of this plot and its ownership. Accordingly, I find that it is not sufficiently identified to necessitate this court inquiring whether or not it comprises matrimonial property.
40. The parties are agreed that the following properties are registered in their joint names-
- a. Plot No. xx (workshop) Noon Kopir Trading Center
  - b. Ngong/ Ngong/xxxx
  - c. Kajiado/ Kaputei North/xxxxx



- d. Kajiado/ Kaputei North/xxxxx
  - e. Kajiado/ Kaputei North/xxxxx
41. I determine therefore that the said properties comprise matrimonial property.
42. Plot No. xxxx/ Residential Noon Kopi Trading Centre and Plot No. LR No. Kajiado/ Kaputei North/xxxxx. The Petitioner in her originating summons refers to Kajiado/ Kaputei North/xxxxx but in evidence lays claim to Kajiado/ Kaputei /xxxxxx. These are two different parcels of land. I find that she has not proved her claim to Kajiado/ Kaputei/xxxxx as pleaded in the Originating Summons and dismiss her claim to Kajiado/ Kaputei/xxxxx on the basis that it was not pleaded.
43. With regards to Plot No. xxxx/ Residential Noon Kopi Trading Centre, the same was acquired during the pendency of the marriage and will deem it to be matrimonial property.
44. The Petitioner also lays claim to motor vehicles that were purchased during the pendency of the marriage. These are motor vehicles KBA xxx C, KAY xxx U and motor vehicle KAC xxx X. The Respondent counters these allegations and states that he solely purchased the vehicles, the first two to sale and the last one as his personal vehicle. The Petitioner has not persuaded me that the vehicles were used as family vehicles accordingly I find that they are not matrimonial property.
45. As relates to the household goods and items. The plaintiff has not identified these or their location. Any order with regards to this item will be speculative as the same have not been identified to the court.
46. Having determined which assets are matrimonial property the issue for determination is the respective shares.
47. From the evidence before me I observe that each party sought to carry their own weight in matters finance. In the absence of clear cut evidence of what their actual contribution was I hold that equal sharing of the same is what would be fair in the circumstances.
48. Accordingly, I find that the parties hold the following properties in equal shares
- a. Plot No. xx (workshop) Noon Kopir Trading Center
  - b. Ngong/ Ngong/xxxx
  - c. Kajiado/ Kaputei North/xxxxx
  - d. Kajiado/ Kaputei North/xxxxx
  - e. Kajiado/ Kaputei North/xxxxx
49. I find further that the respondent holds Plot No. xxxx/ Residential Noon Kopi Trading Centre in trust for the Petitioner and that she is entitled to 50 per cent share of the land.
50. Having regard to the following these are the final orders-
- a. The following assets do not compromise matrimonial property
    - i. L.R. No. Muguga/ Muguga/xxxx
    - ii. Kajiado/ Kaputei North/xxxxx
    - iii. Mtwapa Property
    - iv. 20 shares from Muguga Pyrethrum Growers Co-operative Society Limited



- v. Motor Vehicle Registration Number KBA xxx C
  - vi. Motor Vehicle Registration Number KAY xxx U
  - vii. Motor Vehicle Registration Number KAC xxx X
- b. The Following assets comprise Matrimonial property and the parties are entitled to equal shares in each of the properties
- i. Plot No. xxxx/Residential Noon Kopir Trading Centre
  - ii. L.R No. Ngong/Ngong/xxxx/xxx.
  - iii. Plot No. xx(workshop) Noon Kopir Trading Centre comprising of six plots.
  - iv. Kajiado/Kaputei North/xxxxx.
  - v. Kajiado/Kaputei North/xxxxx.
  - vi. Kajiado/Kaputei North/xxxxx.
- c. Counsel for the parties herein shall appoint a joint valuer/ estate agent within 30 days. In the event the Counsel are unable to agree Counsel for the Applicant shall appoint a valuer/ agent within 21 days from the date of default. Provided that the fees for the valuer/ estate agent shall be shared equally between the Applicant and the Respondent
- d. The Valuer/ Estate Agent will submit their report within 14 days of receipt of the instructions
- e. The Respondent shall have the 1<sup>st</sup> option of buying out the Applicant within 90 days of the offer being made. In the event that the Respondent declines or fails to buy out the Applicant, the properties shall be disposed off in the open market by the appointed valuer/ Estate agent and the proceeds shared equally between them less the costs of the transaction.
- f. Matter be mentioned on 27<sup>th</sup> November 2024 to confirm compliance and take further directions
- g. Each party will bear their own costs

**DELIVERED ON THE VIRTUAL PLATFORM, DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JULY, 2024.**

**PATRICIA NYAUNDI**

**JUDGE**

In the presence of:

Fardosa Court Assistant

