



TNI v AN (Originating Summons 1 of 2018) [2024] KEHC 8540 (KLR) (9 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
ORIGINATING SUMMONS 1 OF 2018**

LW GITARI, J

JULY 9, 2024

BETWEEN

TNI APPLICANT

AND

AN RESPONDENT

JUDGMENT

The Plaintiff's Case

1. The Applicant moved the court vide the originating summons dated 16th July, 2018 seeking for the determination of the following questions:
 - i. Whether the Applicant and the respondent contracted a statutory marriage (*African Christian marriage and Divorce Act*) on 11th November 1991?
 - ii. Whether as between the applicant and the respondent four issues of marriage were born namely, AMI, CMI, Loyford Mawaira Ileri and Dorry Kanana Ileri?
 - iii. Whether the marriage between the applicant and the respondent was dissolved and a decree nisi issued to that end courtesy of Chuka Divorce Cause Number 11 of 2017.
 - iv. Whether the applicant has been and still a nurse?
 - v. Whether the applicant and the respondent during the subsistence of their marriage used and applied their income unsparingly towards their acquisition and development of their acquired matrimonial properties?
 - vi. Whether the applicant and the respondent were gifted by the parents the following properties LR Karingani/Mariani/5113, LR Karingani/Muiru/1253 and plot No. 106 Kaanwa Market.
 - vii. Whether during the subsistence of marriage between the applicant and the respondent the applicant and the respondent acquired the following properties:



- i) LR Muthambi/Karimba/1093 0.30 acres
 - ii) LR Karingani/Mariani/4326 0.08 Ha
 - iii) LR Karingani/Mariani/3452 0.54 Ha
 - iv) LR Karingani/Mariani/3592 0.15 Ha
 - v) LR Karingani/Mariani/4598 0.70 Ha
 - vi) Plot no 57 (s) Kaanwa market 10 feet by 15 feet
 - vii) Plot no 59 (s) Kaanwa market 10 feet by 15 feet
 - viii) Plot no 46 (a) Kaanwa market 20 feet by 80 feet
 - ix) Plot no 28 (a) Kaanwa market 16 feet by 80 feet
 - x) Plot no 19 (b) Kaanwa market 20 feet by 120 feet
- viii. Whether the applicant has contributed and to what extent to the acquisition of all the aforepleaded matrimonial properties.
 - ix. Whether the applicant has actually contributed more than the respondent in acquisition of matrimonial properties aforepleaded.
 - x. Whether the applicant is entitled to be given half of all the matrimonial properties acquired jointly between the applicant and the respondent despite the respondent being registered with all the aforepleaded matrimonial properties.?
 - xi. Whether the court should order and direct that all the matrimonial properties acquired by the applicant and the respondent during the subsistence of the marriage between the applicant and the respondent should be distributed equally between the applicant and the respondent now that their marriage has been dissolved by the court.
 - xii. Who should pay the costs of the originating summons.
2. The summons is supported by the evidence and facts set out in the Affidavit of TNI, the applicant herein, in which he deposed that on or around 11th November, 1991 the respondent and her contracted a statutory marriage under the *African Christian Marriage and Divorce Act* Cap 151 Laws of Kenya at ACK Kaanwa church and a Certificate of Marriage was issued to that end. That as between her and the respondent four issues were born namely AMI, CMI, LMI and DKI and she annexed Certificates of Birth of the issues marked TNI 1 a, b, c and d.
 3. The Applicant states that the marriage was dissolved courtesy of Chuka Divorce Cause Number 11 of 2017 and she annexed a copy of judgement in Chuka divorce Cause Number 11 of 2017 marked TN1 3. The Applicant further states that she has been a nurse by profession even at the time he married the respondent.
 4. The Applicant deponed that she and the respondent during the subsistence of their marriage used their incomes unsparingly towards acquisition and development of the acquired matrimonial properties and which income was from her income as a nurse and the business that they undertook at Kaanwa market.
 5. The Applicant further deponed that when she realized that the respondent was not with good intentions in as far as their matrimonial properties were concerned, she placed cautions against all matrimonial properties registered with the respondent.



6. The applicant states that during the subsistence of their marriage they acquired the following matrimonial properties,
 - i. LR Muthambi/L. Karimba/1093 0.30 acres
 - ii. LR Karingani/Mariani/4326 0.08 Ha
 - iii. LR Karingani/Mariani/3452 0.54 Ha
 - iv. LR. Karingani/Mariani/3592 0.15 Ha
 - v. LR Karingani/Mariani/4598 0.70 Ha
 - vi. Plot No.57 (S) Kaanwa market 10 feet by 15 feet.
 - vii. Plot No. 46 (A) Kaanwa market 20 feet by 80 feet
 - viii. Plot No.28 (A) Kaanwa market 16 feet by 80 feet.
 - ix. Plot No.19 (B) Kaanwa Market 20 feet by 120 feet.
7. The Applicant further avers that during the subsistence of marriage they were gifted by their parents the following matrimonial properties;
 - i. LR Karingani/Mariani 5113.
 - ii. LR Karingani/Muiru/1253
 - iii. Plot No. 106 Kaanwa market
8. The Applicant avers that in support of her averments in paragraph 9 and 10 she attached the official searches of land parcels and receipts for payment for proof of ownership of the plots marked TN1 4.
9. The Applicant further avers that she has invested her time, energy and salary in acquiring the matrimonial properties that they have acquired and developed. That she is of the view that she is entitled to be given half of all the matrimonial properties acquired jointly between her and the respondent despite the respondent being registered with all the aforedeponed. Matrimonial properties.
10. The Applicant pleaded that her contribution to the acquisition of the matrimonial properties is bigger than that of the respondent. The Applicant further states that she is advised by her counsel on record that the court should order and direct that all the matrimonial properties acquired by her and the respondent during the subsistence of the marriage should be distributed equally between her and the respondent now that their marriage has been dissolved by the court.
11. At the hearing TNI the applicant testified as PW1. She was cross-examined and re-examined. She stated that she comes from Kahawa sublocation and she is a nurse. She testified that she trained as a nurse after she finished Form 4 and she started working in 1987. The applicant further testified that the respondent was her husband but they divorced. It is the applicant testimony, that they got married in Church in 1991.
12. It was the applicant's further evidence that their marriage had irretrievably broken and she went to court wherein a decree of divorce was issued. She produced the decree as evidence.
13. The applicant avers that they have four (4) children with the respondent and she had 3 Birth Certificates but one for CMI is not there since he was abroad. The other Birth Certificates are for the others children namely DKI, LMI and ATMI. The applicant produced the Birth Certificates as exhibits marked 2 a, b and c



14. The Applicant testified that after they got married they established their matrimonial home at Kanwa Market. The Applicant further testified that they acquired many properties and she had certificates of official search for 5113 Karingani/Mariani/,Karingani/Mariani/4326,3452,3592 and 4598,Muthambi Lower Karimba/1093 and Karimba/1093, Karingani/Muiru/1253.
15. The Applicant states that the properties were acquired from 1998 up to 2005 or thereabouts. That the titles were issued when the president came to issue the title deeds. The Applicant further states that they were living together when they acquired the properties. The applicant produced certificates of official search marked exhibits 3a-g. The Applicant testified that they also acquired plots with the respondent and she produced receipts which she obtained from the County shown. The Applicant further testified that the receipts prove that the properties are owned by the respondent. It was her evidence that she paid for six plots KShs. 9,000/= and she only obtained receipts for plots 19B, Kanwa Market, No. 28A Kaanwa Market, 106 Kaanwa Market, 46 A, Kaanwa Market stall No. 595 at Kaanwa market and another No.575.
16. The Applicant avers that the officer said he could not give her the documents to prove ownership after she had paid. The Applicant produced receipts marked exhibit 4 which are six receipts. The Applicant further testified that in 1999 she was a Nurse at Kangu Dispensary and she was earning.
17. The Applicant further avers that they started a business and it was doing well and she left employment and she opened a dispensary which was doing so well in which they had agreed with the respondent.
18. The Applicant testified that they were close with the respondent and they lived in harmony. That in 1992 they were attacked by thugs. That they had a watchman who opened the gate for the thugs wherein the respondent was injured severely and after that he became less productive.
19. It is the applicant testimony, that the respondent was admitted in hospital and after being discharged he was on clutches and he became epileptic and he could not do anything since he was ordered to rest for six months.
20. The Applicant testified that she took care of the respondent and she was doing business. That they had a shop and she was operating the Clinic. That she was the one who was involved in the business before the respondent was attacked since he was operating a *matatu* business from Chuka to Kaanwa.
21. The Applicant avers that she is claiming a share of the matrimonial properties. That they acquired the properties together and she greatly contributed to acquire them. The Applicant testified that she prays that the court orders that they share the properties equally. That they had sat down twice with his parents and her parents. That in October 2020 they met and agreed and she filed the consent in court.
22. The Applicant testified that the matrimonial property she will get will be for her and her children and the respondent share will be his share exclusively.
23. The Applicant states that they met again in December and entered a consent and he was not forced. That she was with Salome Kiburi and Charles Kiburi from his clan because her parents are deceased. The Applicant further avers that CM Karaya, the respondent's father, Mbae his uncle and Kennedy Mucheni his brother they all signed the agreement and she prayed that the court orders distribution as she has requested or the consent.
24. PW2 was CKM. He stated that he comes from Nyeri and works at Tharaka Nithi at Kahawa with his wife NN. PW2 testified that the plaintiff TN was married to his son AI and therefore the applicant is her daughter in law. That she left Tharaka Nithi after the death of her wife but he could not remember the date. That he used to visit his children from time to time and he used to live with Anderson and Ncheni.



25. PW2 testified that she is aware that they have properties and they acquired land in their own. PW2 adopted his witness statement dated 4th October, 2007 as his evidence in chief.
26. PW2 states that he was aware that Anderson was attacked by thugs while at Kaanwa and he was injured, he was incapacitated and had to be assisted. That during that time he could not do anything on his own. That he was being assisted by his wife Teresia and at that time the applicant had a wholesale shop and a clinic and they were based at Kaanwa.
27. PW2 further states that the respondent used to operate a *matatu* before he was involved in the accident. PW2 testified that the applicant and respondent used to quarrel from time to time. That the problem was with the respondent was he used to drink and was not supporting the family with money. PW2 further states that the respondent used to carry foods in his vehicle to the supermarket. That the children did not lack fees as they had a shop and a clinic. That the applicant used to contribute more to the family from the shop and the clinic.
28. PW2 testified that they gave the applicant and respondent pieces of land and they owned other properties which they bought. That majority of the properties are the ones he gave them and further he could not tell all the properties. It was PW2's evidence that he supports the claim by the Applicant because she contributed more to the acquisition of the properties. That they had sat down and agreed to distribute the properties. That he distributed to Ncheni, Anderson and the other children. That he distributed all the properties equally.
29. PW2 contended that respondent was not forced, he signed willingly. That he was aware he opposed the agreement in court. That they were sent back to court and he prays that what was agreed on 4th October, 2019 be agreed and further prayed that the agreement remains.
30. PW2 was cross examined by learned counsel Ms. Kijaru. He acknowledged that he knew the Applicant and Anderson is his son, not biologically but through tradition or customary law as the mother was her wife. That the father of Anderson passed away. PW2 testified that he got married to the mother of Anderson in 1980 and he knew all the children she had namely Ileri, Mugambi, Kagendo, Micheni and the late Wanja.
31. PW2 further testified that he did not know the date Anderson got married but it was in 1992. That he could not recall when they separated because they used to separate now and then until they were separated by the court. PW2 states that he knew the respondent and applicant properties and they had about five plots and he could not tell the numbers of the parcels off head. PW2 further states that he could not tell when they were acquired.
32. PW2 reiterated that there was a time the respondent was attacked by thugs around 2000. That the Applicant used to operate a shop and she is the one who was at the shop most of the time. That Anderson used to carry foods to bring to the shops and they used to go together. PW2 states that they tried to settle their disputes in 2019. PW2 further states that he knew the parents of the Applicant. That both of them are deceased. That the meeting was held by the family members and some of them are Mbae, Njeru and many others.
33. PW2 testified that there were family members from the side of his wife and some are still alive. PW2 further testified that plot No.19 Kaanwa is registered in joint names of the parties. That plot No. 19B and plot No 18 Kaanwa which he gave to the respondent but he could not recall the parcel number. That Karingani/Mairu/1253 is among the land he gave them.
34. PW2 was re examined wherein he states that whenever the Applicant and the respondent had a dispute they used to go to his house. He further reiterated he could not remember the date they separated but



- he was given the order from the court when they divorced. PW2 reiterated further that he knew where the plots are and they gave each child his or her property and the respondent was given his property and he did not hold in trust or to represent the family.
35. PW2 states that they were seven when they had a family meeting to try and resolve the dispute and they met twice over the issue. PW2 reiterated that the Applicant contributed more towards acquisition of the property since she had a clinic and used to sell medicine which Ireri did not know.
 36. PW3 was IM PW3 was cross examined and re-examined and she averred that she lives in Kanwa and she is a farmer and she knew both the Applicant and respondent since she worked in their house as a maid. PW3 testified that they had a big wholesale shop and they were living behind the shop. PW3 testified that the Applicant is the one that used to be in the shop most of the time. That she used to assist the Applicant when she was done with her house chores.
 37. PW3 stated that the respondent used to operate a *matatu* and he used to come home for lunch and later in the evening. That the Applicant had a clinic nearby which she operated.
 38. PW3 testified that she became aware that the respondent was attacked by thugs and he was incapacitated due to the injuries he sustained. That for about one and a half year the respondent used to drink a lot and they used to fight with his wife and at one time the Applicant sustained a broken hand. PW3 adopted her witness statement as her evidence in chief.
 39. PW3 was cross examined and she testified that she was born in 1979 and she was their neighbor. She further testified that she started working for them in 1998. PW3 states that the quarrels stated in 2002 when the respondent started drinking and by the time she left they had separated. PW3 reiterated that the respondent used to contribute to the family since he had a vehicle he was using to earn a living.
 40. PW3 testified that the applicant and respondent owned properties and some they bought together because they used to live together. That the ones that they bought when she lived there are 19B, 28A and 159F. PW3 further testified that one land parcel was at Kagoti and another at Karimba and the other one at Kiangumo.
 41. PW3 was re examined and she testified that when she left the home of the parties they had about eight parcels of land which she knew. That she used to go to the parcels of land to cultivate in 2007.
 42. PW4 was ALM who testified that she comes from Kanwa Tharaka Nithi County. That the plaintiff is her mother and the defendant is her father. That they are four children and she is the first born. That MM and K are her siblings. That her parents are currently separated and formerly lived all together as a family. That in 2007 or 2008, the parents were separated.
 43. PW4 testified that their mother used to do most of the work and she had a whole sale shop business and also operated a clinic which had two employees. That his father was doing *matatu* business and her mother used to pay school fees as she had more money from the shop. PW4 states that her mother is the one who used to pay fees. That further one time her father and mother took her to see the farms that they owned and it was around 2000 and she could not remember their numbers.
 44. PW4 testified that in 2009 her parents separated and in 2009 they showed her some plots which some have been sold. PW4 adopted her witness statement dated 25th September, 2019 as her evidence in chief.
 45. PW4 was cross examined wherein she testified that his father used to give little help to their mother. PW4 testified that she was born in 1988 and she found the whole sale shop operating and she did not know how it was started.



46. PW4 reiterated that his parents took her to see the farms in 2006 before she finished High School. PW4 states that one was at Kogeti, another at Kanwa where they have the family home, Tungu and another at Karingithu. That she remembers the plots and one is where they lived and where they were born at Kanwa market. That the children were left at the plot when her mother was chased away.
47. PW4 states that land was sold to take her to school and pay her school. PW4 testified that she was aware that her father was one time attacked by thugs in 1992 and he stayed at home for five years. Because he had an injury on the head. It was her evidence that the respondent stayed in hospital for a long time and then he stayed home after he was discharged.
48. PW4 testified that their grandfather gave his children their inheritance which included parcels of land. That his father was the first born and she was unaware whether they were given title deeds but they were given each his portion.
49. It was PW4's evidence that she was shown parcels of land which they acquired together. That further her mother is the one who used to contribute more in the acquisition of the property but registered in the names of her father.
50. PW4 testified that there was a dispute over the family home since their father tried to sell. Their father stated that the parcels of land be registered by both of them.

The Respondent's Case

51. The respondent filed a Replying affidavit sworn by AIN, on the 14th September, 2018. He has deposed that he confirms that he was married to the applicant herein until a decree was issued separating them. That from the said marriage they were blessed with four issues namely ALM, CM, LMI and DKI.
52. The respondent avers that the applicant has been a thorn in his flesh since the time they were married until they divorced. That he works as a *matatu* and lorry driver and as a business man selling tobacco and he equally used to run a shop. That the applicant completely ran down his whole business single handedly when she took over its operations and shared its proceeds with different men. That he used his resources so that the applicant could be employed as a Nurse but since her employment she has never contributed towards the development of his family.
53. The respondent contends that contrary to the allegations by the applicant it is her mother who gave her the ticked properties in Mugo's application. That during the subsistence of marriage, the applicant illegally transferred herself the following plots of land that he was gifted by her mother"-
 - a. Kaanwa Market plot No. 29 'B'
 - b. Two market stalls located at Kaanwa market
54. The respondent avers that the applicant has never contributed towards the purchase or acquisitions of any property as alleged and in fact the applicant is guilty of disposing off his plots of land irregularly and illegally without his consent. That she wished to put the applicant into strict proof of the allegations of contributions that she alleges. That it is his contention that the applicant has never made any contribution whether monetary or otherwise towards the development of his family and or towards the purchase of any of the listed property.
55. AIN testified as DW1. He adopted his witness statement dated 16th May, 2019 as his evidence-in-chief. DW1 was cross-examined and re-examined.
56. The respondent testified that he does *matatu* business and he lives at Kaanwa. He testified further that she knew the applicant TN and she used to be her wife.



57. The respondent stated that he never signed a consent to share the property with her wife. That he did not sign the consent dated 3rd September, 2019.
58. The respondent was cross examined by learned counsel Mr. Mugo wherein he reiterated that he knew the applicant and they separated in court. That he knew Christopher Karaya and he is his father. That his father filed Succession Cause.
59. The respondent stated that his father had married her mother. The respondent further stated that M is her child and IM used to be her employee. It was the respondent's evidence that his step father did not lie to the court and further her daughter AM did not cheat the court that she testified the truth.
60. It is the respondent evidence that IM never used to assist the applicant in his shop. That the wholesale shop was his and he used to close the shop to go and buy foods to sell in the shop and he used to send Waweru.
61. The respondent stated that the applicant used to operate a whole sale shop. The respondent further stated that the properties he bought were more. The respondent testified that money from the wholesale shop and the clinic was used to educate the children.
62. The respondent testified that in 2019 he injured his leg. The respondent further testified that on 4th October, 2019 he did not delay the case. That they had a sitting on 4th October, 2019 outside court. That they did not file a consent and the one that was filed in court, he did not see it nor sign it. That the signature was not his and he has not seen the consent so he did not report to the police.
63. The respondent stated that he told the court that it was not his. The respondent further stated that they had a sitting with the plaintiff and the parents. The respondent reiterated that he did not agree that they enter a consent as per the agreement. of 4th October, 2019. The respondent avers that the signatures can be examined by an expert and if found to be authentic he be punished for misleading the court.
64. The respondent testified that before they separated he is the one who had bought the parcels of land and further the applicant has her properties which are in her name which he gave to her. That he used to give the applicant land after he purchased it. That one land is at Kaanwa. That he was registered the owner of lands which he bought himself.
65. The respondent states that there was some land which were registered jointly and he had bought them. That the lands before 2013 and in 2013 he obtained the title deeds. The respondent states that they bought together and he owned the land before they got married.
66. It was the respondent evidence that he had four parcels of land before they got married. That they were in the Lands office waiting for the title deeds. That they got married in 1991 in the Anglican Church.
67. The respondent testified that he was attacked by thugs at home and he was in a coma for one week. That he stayed for six months in hospital at Agha Khan Hospital and he did not leave the hospital in clutches and he could not talk. That when he gained consciousness it was her mother who was visiting him.
68. The respondent stated that after they separated he has bought two parcels of land, one at Kiribu and another at Mwimbi. That the evidence is at the Lands office. The respondent further stated that there is only one plot which his mother gave them and it is in Kaanwa and he was the one who was given the plot. That the plot her mother gave them is in the applicant's name.
69. The respondent was re examined and he reiterated that there was no plot that he was given together with the applicant. That the plot her mother gave him was developed and is where they resided. The



- plot belonged to her mother. That the applicant and Karaya had a document they told him to sign. That the plot was in her will and it was given after she died.
70. The respondent states that they had other land at Kanwa and Mairu and the plots were at Kariba and Mariani. That the other land is at Mwanyali in Mariani. The respondent further states that the land at Kiegumo was his.
71. The respondent testified that the land parcels her mother gave her are at Marianyi, one at Kiribu and the other is at Muthambi 1093.
72. It is the respondent evidence that there are parcels they were registered jointly and can be distributed equally, that is Karingani/Muiru 4746 and there are two parcels he bought before they got married, they were two but he sold it to pay school fees which are now in other people's name.
73. The respondent reiterated that there is no consent he signed in the presence of their parents saying he had no objection to giving the applicant her properties. That the lands which he said he got later and they had no title deeds. He had not married the Applicant then.
74. The applicant filed her submissions dated 21st October, 2022 through the firm of M/s I C Mugo & Co while the respondent filed her submissions dated 21st November, 2022 which were duly filed by both parties and which I have read and considered and I need not reproduce herein.

Analysis and Determination

75. This court has carefully considered the pleadings, the evidence and the submissions filed by the parties to buttress their assertions. In my view, the issue for determination is whether the Applicant is entitled to half distribution of matrimonial property.
76. This case revolves around the application of Article 45(3) of the *Constitution* as read with Section 7 of the *Matrimonial Property Act*, 2013. The former provides that:
- Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
77. What I understand by this provision is that parties to a marriage enjoy equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
78. Section 6 of the *Matrimonial Property Act* defines 'matrimonial property' as:
- (a) the matrimonial home or homes;
 - (b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
79. Under Section 2 of the *Act*, 'Matrimonial home' has been defined as:-
- any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.



80. In the case of *T.M.V. v F.M.C* (2018) eKLR, Nyakundi J. formed the view that:-
- “...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”
81. Similarly, in the case of *Paul Kagwa v Jackline Muteteri* (Matrimonial Cause-2005/23) [2006] UGHK 17 (18 May 2006) while citing Bossa, J in *John Tom Kintu Mwanga v Myllious Gafafusa Kintu* (Divorce Appeal No. 135 of 1997) (unreported) Mwangusywa J expressed himself as hereunder:-
- “On the last issue of whether the petitioner is entitled to matrimonial property, I clearly believe that she does and I so hold. Matrimonial property is understood differently by different people. There is always that property which the couple chose to call home. There may be property which may be acquired separately by each spouse before and after marriage.... The property to which each spouse is entitled is that property which the parties choose to call home and which they jointly contribute to.”
82. In the instant case, the Applicant pleaded that on or around 11th November, 1991 the respondent and her contracted a statutory marriage under the *African Christian Marriage and Divorce Act* Cap 151 Laws of Kenya at ACK Kaanwa church and a certificate of marriage was issued to that end. That as between her and the respondent four issues were born namely AMI, CMI, LMI and DKI and she annexed certificates of birth of the issues marked TNI 1 a, b, c and d. The Applicant pleaded that the marriage was dissolved in Chuka Divorce Cause Number 11 of 2017. That the Applicant further states that she has been a nurse by profession even at the time he married the respondent. That she and the respondent during the subsistence of their marriage used their incomes unsparingly towards acquisition and development of the acquired matrimonial properties and which income was from her income as a nurse and the business that they undertook at Kaanwa market.
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84. The Applicant avers further that during the subsistence of marriage they were gifted by their parents the following matrimonial properties;
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- iii. Plot No. 106 Kaanwa market
85. The Applicant avers that she has invested her time, energy and salary in acquiring the matrimonial properties that they have acquired and developed. That she is of the view that she is entitled to be given half of all the matrimonial properties acquired jointly between her and the respondent despite the respondent being registered as the owner.
86. The Applicant pleaded that her contribution to the acquisition of the matrimonial properties is bigger than that of the respondent.
87. In *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR (Echaria) a five-judge bench of the Court of Appeal held that where the property in dispute is registered in the name of one spouse, the beneficial interest of each spouse would depend on the financial contribution by each spouse, either directly or indirectly. The court held:

“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 by Lord Pearson in *Gissing v Gissing (supra)* at page 788 paragraph c that:

“No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing”.

88. The finding in *Echaria*, was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse to a specific share of the property. Furthermore, the position taken by our courts following *Echaria* is that as much as section 17 of the *Married Womens Property Act* gave courts discretion to do what is just and fair under the varying circumstances before them, it did not entitle a court to make an order which is contrary to any well-established principle of law on proprietary interests or ownership of property.

The Court of Appeal in this regard held:

“The decision of the House of Lords in *Pettitt v Pettitt* that section 17 of 1882 Act is a procedural section and did not entitle the court to vary the existing proprietary rights of the parties has often been misunderstood. All that the House said, in simple language, was that if a spouse indisputably owns property alone before the dispute reaches the court, section 17 of the 1882 Act did not give the courts discretion to take that property right away and allocate it to the other spouse. The House did not say that after the ascertainment of a property dispute between husband and wife, the court did not have any power to make appropriate orders as would give effect to its decision.”



89. In the Supreme court case *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 court gave clarity on the issue that:

In the above context, we note that equality of parties to a marriage has largely been interpreted and construed in two ways. On the one hand, an interpretation of article 45(3) of the *Constitution* has been construed to mean a division of matrimonial property down the middle through the literal application of the 50:50 division ratio. Proponents of this argument largely opine that since non-monetary contribution cannot be quantified but is equally important, a split right in the middle would be more appropriate. The second approach, supported by the respondent, is that ‘equal’ as provided for under article 45(3), means that a party obtains an equivalent of what one contributes, monetarily or otherwise. We have partly resolved this dichotomy above but we now need to address the 50/50 question squarely.

Further the court held:

Article 45(3) of the *Constitution* underscored the concept of equality as one that ensured that there was equality and fairness to both spouses. Equality and fairness were therefore one and intertwined. Equality also underscored the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, each party’s contribution to the acquisition of matrimonial property could not have been done on an equal basis as a party could have significantly contributed more in acquiring property financially as opposed to the other party. “

90. The Court of Appeal in *MEK v GLM* [2018] eKLR further espoused the meaning of equality 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 contributes. In other words it is not shifting the burden, but the sharing of responsibilities and benefits taking into account the gender limitations.”

91. It is imperative that a court recognizes that each party’s contribution to the acquisition of matrimonial property may not have been done in an equal basis as a party may have significantly contributed more in acquiring property financially as opposed to the other party.
92. Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property.
93. I place reliance in the case of case *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (supra)* as held:

“Article 45(3) of the *Constitution* acted as a means of providing for equality as at the time of dissolution of marriage but such equality could only mean that each party was entitled to their fair share of matrimonial property and no more. Nowhere in the *Constitution* was there any suggestion that a marriage between parties automatically resulted in common ownership



or co-ownership of property (hence vesting of property rights) and article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.

The guiding principle should be that apportionment and division of matrimonial property could only be done where parties fulfilled their obligation of proving what they were entitled to by way of contribution. The respondent provided evidence to prove direct financial contribution during the subsistence of the marriage and that aligned with the finding that a party had to prove contribution to enable a court determine the percentage available to it at distribution and furthermore safeguarded against a blanket expectation that the principle of equality would be applied generally in the division of matrimonial property irrespective of contribution. The test to be applied to determine the extent of contribution was ultimately one of a case to case basis.”

94. I have considered the provisions of the [Constitution](#) on Article 45(3) as well. This article provides that:

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage”

95. Although this provision grants equal rights to parties to a marriage as stipulated, this does not mean that a party to a marriage is entitled to equal share of the property acquired during marriage unless his or her contribution is ascertained to have been equal to that of the other spouse. However, the article guides the courts in determining the rights of parties to a marriage in respect to subdivision of matrimonial property.

96. This view, that the provisions of Article 45(3) of the [Constitution](#) does not entitle parties to equal distribution of matrimonial property, was taken by the Court of Appeal (Kiage, JA) in [PNN v ZWN](#) [2017] eKLR where the good judge has this to say:

“Thus, it is that the [Constitution](#), thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the [Matrimonial Property Act](#), 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.”

97. The share of each party to a marriage is pegged on the contribution made by each party. That is the law as it is and as applied in various decisions.

98. In determining the percentage of the contribution made by each party, I have carefully scrutinized the evidence of each party. The Applicant in an effort to convince the court of her monetary contribution towards the acquisition of the matrimonial properties.

99. In the present case the Applicant testified that she was employed as a Nurse and she was equally involved in the wholesale business wherein she contributed to the purchase of matrimonial properties together with the respondent. The Applicant produced receipts to that effect.

100. The Applicant states that the properties were acquired from 1998 up to 2005 or thereabouts. That the titles were issued when the president came to issue the title deeds. The Applicant further states that they were living together when they acquired the properties.

101. It was her further evidence that in 1992 they were attacked by thugs. That they had a watchman who opened the gate for the thugs wherein the respondent was injured severely and after that he became



less productive. It is the applicant testimony, that the respondent was admitted in hospital and after being discharged he was on clutches and he became epileptic and he could not do anything since he was ordered to rest for six months. The Applicant testified that she took care of the respondent and she was doing business.

102. The Applicant testified that she had to support the family fully since her husband was hospitalized for long and was not able to work.
103. I do note that the property at Kaanwa market an ancestral and that belonged to the respondent's mother who bequeathed it to the respondent and as such that does not form part of matrimonial property. Further I have observed that plot Nos 57S & 59S Kaanwa market were jointly purchased by the parties but the respondent has alleged that he had already disposed the same and they belong to different owners. In the result they do not form part of matrimonial properties.
104. I opine that the Applicant has proved equal contribution of the matrimonial property a fact that was corroborated by PW2, PW3 and PW4 and it is only fair that the court grants 50:50 of the matrimonial property.
105. The totality of my analysis of the evidence presented before me is that the Applicant made substantial monetary contribution towards acquiring the matrimonial properties. She also made substantial non-monetary contribution, which cannot be quantified in monetary terms. I am therefore satisfied that, basing my decision on the peculiar circumstances of this case, I am satisfied on a balance of probabilities that the Applicant has proved her case to the required standard.
106. Consequently, I find for the Applicant and allow this Originating Summons. I grant the following specific orders:
 1. That a declaration is hereby issued that 50% proportion of the properties listed below and held jointly by the Applicant and the Respondent, or held by the Respondent as the case may be, is for the beneficial interest of the Applicant.

That is to say:

The distribution is guided by the consent which the parties had entered dated 4/10/2019 and is as follows:

1. LR. Karingani/muiru/1243- TNI
2. LR. Karingani/muiru/3592- TNI
3. Plot No.19b Kaanwa Market- TNI
4. LR Karingani/mariani/4326 – ANI
5. LR Karingani/mariani/2253 - AIN
6. Plot No. 46 Kaanwa Market- AIN
7. Plot No. 29 Kaanwa Market- AIN
8. Plot No. 28 Kaanwa Market- AIN
9. Market Store No.57(s) And 59(s) Kaanwa Market to go to AIN
10. LR. Karingani/mariani/3452 – CMI
11. LR Karingani/mariani/5113 – LMI



12. LR. Muthambi/karimba/1093 – LMI
 13. LR Karingani/mariani/4598 – DKI And AMI- Jointly
- Each party to bear its own costs.

107. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF JULY 2024

L. W. GITARI

JUDGE.

