



REPUBLIC OF KENYA



**BWK v SMM (Matrimonial Cause E008 of 2021)
[2024] KEHC 10489 (KLR) (8 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E008 OF 2021
SM MOHOCHI, J
AUGUST 8, 2024
(IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013)**

BETWEEN

BWK PETITIONER

AND

SMM RESPONDENT

JUDGMENT

1. The Petitioner vide Originating Summons dated 31st May, 2021, brought under Sections 17 of the *Matrimonial Property Act*, Order 37 Rule (1) (a) and (g), of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act* and moved this Court seeking the following:
 - a. Spent
 - b. That, this Honourable Court be pleased to a declaration that the following properties were acquired by joint funds and efforts of the parties herein and are therefore jointly owned by the said parties.
 - i. Plot No 20 exercised from LR No 4730/xxx
 - ii. Plot No 31 exercised from LR No 4730/xxx
 - iii. Plot 10 Naivasha/Ol-Jorai Phase 11/xxxx,
 - iv. Parcel measuring (35ftx70ft) to be exercised from LR No 14246/x
 - v. Plot No 21 Parcel measuring (50x100ft) to be exercised from LR No 4730/xxx



- c. That, this Honourable court be pleased to order that the said properties be shared equally between the Applicant and Respondent and if any of the properties have been sold the Applicant be compensated to the extent of her due share.
 - d. That, the respondent be restrained from alienating, selling, leasing, disposing, wasting, transferring or in any way interfering with any of properties owned jointly by the Applicant and the Respondent being the subject of this suit.
 - e. That, this Honourable court be pleased to make a declaration that the Respondent held 50% of the properties in trust for the beneficial use of the Applicant.
2. The Notice of Motion was predicated on the grounds in the Application and the Supporting Affidavit sworn by BWK. She stated that she got married to the Respondent on 2005 under the Kikuyu Customary marriage and blessed with two children. They are separated and not divorced.
 3. That, she made substantial contribution toward acquisition of the above stated matrimonial properties and aver that the same were jointly acquired by both of them during curvatures and that they are yet to be issued with title deeds in respect to the above-mentioned properties.
 4. That she has been employed as a primary school teacher since 2002 which has enabled her make monetary contribution toward purchase of the said properties.
 5. That, she also took several loans from Cosmopolitan Sacco to facilitate purchase of the said properties.
 6. That, prior to the marriage, the Respondent did not own any property other than personal effects.
 7. That, around August 2020 she left her matrimonial home due to the Respondent constantly threatening her life and assaulting her without any provocations whatsoever.
 8. That, she has since learnt that her husband is on the verge of selling some of their matrimonial properties without consulting her.
 9. That, when she confronted him on the same he became abusive and claimed he can dispose of the properties as he wished.
 10. That, the actions perpetrated by the respondent herein are in blatant disrespect of matrimonial properties despite the fact that I am entitled to a share of the same.
 11. That, she does not intend to continue being the respondent's wife and I swear this affidavit in support of the application to grant me access to the share of the matrimonial properties due to me at the dissolution of the marriage.
 12. The Petitioner further testified on oath that, the Respondent had no immovable properties when they went into their union of marriage and that in 2007 she supported the respondent in setting up the LPG and Mpesa business by contributing her savings and working in the business and that in 2008 she supported the Respondent in Starting a Restaurant by contributing her savings and working in the business.
 13. That, in 2010 they jointly acquired Plot No 20 exercised from LR No 4730/xxx for Kshs 860,000/- and later Plot No 31 exercised from LR No 4730/xxx.
 14. She further testified that the Respondent has in 2008 been given lamnid by her mother which they sold and added income from their business to acquire Plot No 20 and Plot No 21. And that Plot No 31 exercised from LR No 4730/xxx was jointly acquired from the same source for Kshs 1,000,000/- in November 2011.



15. That, Plot 10 Naivasha/Ol-Jorai Phase 11/xxxx, was jointly acquired for Kshs 150,000/- the funds coming from the business and that the Respondent added like Kshs 50,000/-.
16. As for Parcel measuring (35ftx70ft) to be exercised from LR No 14246/2 it was the Petitioner's testimony that they jointly acquired the same with her making significant contribution of Kshs 900,000/- and the Respondent contributing the Balance.
17. That she separated with the Respondent in august 2020 owing to domestic violence and failed reconciliations at the family level and at the department of gender.
18. The petitioner further testified that the Respondent had agreed to give her Plot 20 and they had executed an agreement in this regard.
19. She finally indicated that they had been blessed with two issues that she has been taking care of before the separation and currently and urged that the matrimonial property be divided as per her originating summons.

Respondents Case

20. The Respondent testified adopting his trial bundle including his written statement dated 3rd January 2022 urging that he single handedly acquired Plots 20 and 31 from proceeds of his inheritance which he enumerated as sales of Kshs 1,000,000/- of two plots in Mitimongi, and that the Petitioner never contributed.
21. As for the Plot 10 Naivasha/Ol-Jorai Phase 11/xxxx, it was his evidence that, he single-handedly acquired the same with proceeds he had sold a plot in "mzee Wanyama" for kshs 600,000/-. And as for Plot No 21 Parcel measuring (50x100ft) to be exercised from LR No 4730/xxx, it was his testimony that he single-handedly acquired it from proceeds of a sale of a plot at "mitimongi" for kshs 450,000/- and that the Respondent never contributed. He admitted to the Respondent's contribution of Kshs 900,000/- for Parcel measuring (35ftx70ft) to be exercised from LR No 14246/x
22. In a brief one-and-a-half-page written submissions, the Respondent contends that, she was married to the Petitioner for one year. They stayed together at her home for that period which was on and off. That the Petitioner's contribution to this marriage according to him was buying a car which they have already sold and shared the proceeds, a gas cylinder and he contributed Kshs 10,000 to buy a sofa set.
23. That, at the beginning of their relationship the Petitioner claims to have had Kshs 4,000,000 in his bank account which money he is not able to account for. At the time of dissolution of the marriage he had no money and hence the misconception that he should get a share of the Respondent's property.
24. The Respondent submits that, it's paramount to note that the Petitioner left the marriage and that he also had expressed during the subsistence of the marriage that he was a student paying fee and he had to eat and take care of some bills in the house. This does not entitle him to any share of the Respondent's wealth which was acquired way before he came in to her life.
25. The Respondent finally submits that, for Orders sought to be granted, the Petitioner must prove that the property in question was acquired during the continuation of the marriage and that he/she contributed directly or indirectly to the acquisition of the property.
26. That, in the instance case, the Petitioner has not been able to prove any contribution to the properties owned by the Respondent and as such this application must fail and must fail with costs.
27. The Respondent refined the issues for consideration into two;



- i. Whether the property was acquired jointly and what was the contribution of the parties?
 - ii. Whether matrimonial property can be shared during the subsistence of the marriage?
28. The Petitioner deponed in the supporting affidavit sworn on 31.5.2021 that she married the Respondent in 2005 under Kikuyu Customary Law and that during the subsistence of their marriage, they acquired the following properties: -
- i. Plot No 20 excised from LR No 4730/xxx situated within Nakuru County
 - ii. Plot No 31 excised from LR No 4730/xxx situated within Nakuru County
 - iii. Naivasha/Ol Jorai Phase 11/xxxx Plot 10
 - iv. Parcel measuring 35ft x 70ft to be excised from LR No 12246/x situated within Nakuru County
 - v. Parcel measuring 50 x 100ft to be excised from LR No 4730/xxx situated within Nakuru County.
29. That the Petitioner annexed copies of sale agreements. Among the agreements she availed one in joint names for Parties herein. The agreement dated 10.12.2018 for Naivasha/Ol Jorai Phase 11/xxxx PLOT No 10 shows that the plot was purchased for Kshs 150,000/-, and that the other agreements are all in the Respondent's name.
30. That, the Petitioner did not provide evidence of her direct contribution in the acquisition of the said property except for a contribution of Kshs 950,000/- for the purchase of LR 14246/2.
31. That, Section 107 of the Evidence Act provides as follows:-
- a) 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.
 - b) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
32. That, the Petitioner asserts that the property was acquired jointly. The Respondent denied the assertion except for LR 14246/x. It follows that the Petitioner has the burden of proving what she alleged.
33. That, with regard to LR 14246/x in the sale agreement dated 4.11.2016, the Petitioner stated that the Purchase price of the property was Kshs 1,200,000/= out of which she contributed Kshs 900,000/= through a loan from her sacco and the Respondent contributed Kshs 300,000/-. The Respondent admitted that the Petitioner paid the said amount for that property.
34. It thus follows that, the plot measuring 35ft x 70ft to be excised from LR No 14246/x is matrimonial property. The Respondent urges the court to apportion the contribution at 75: 25% in favour of the Petitioner.
35. As for plot No 10 in Naivasha/Ol jorai phase II/ xxxx there is no evidence of what the Petitioner contributed. The Respondent stated that he paid the full purchase price and the Petitioner did not make any contribution. And that all the other assets were acquired through sales of his inheritance from his father's estate.



36. That, the Respondent produced sale agreements for various plots that he sold to enable him raise money to purchase plots No 20 and 31 in LR No 4730/xxx. He stated that he sold his inheritance to enable him purchase the said property.
37. That, this position was not contested seriously by the Petitioner. The question is whether inheritance property comprises matrimonial property.
38. The *Matrimonial Property Act* Section 6 defines matrimonial property as follows:
- (1) For the purposes of this Act, matrimonial property means-
 - 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.
 - (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
39. Section 5 of the Matrimonial Property provides: -
- “Rights and liabilities of a person subject to section 6 the interests of any person in any immovable or movable property acquired or inherited”
40. It was the duty of the Petitioner to show that the Respondent acquired the inheritance during the subsistence of his marriage with the Respondent. No such evidence is before the court and the court cannot rule in Petitioner's favour.
41. That, the Petitioner needed to adduce evidence to show that at the time the Respondent received his father's share of estate, she was married to the Respondent.
42. That Furthermore, she still had a duty to prove what her contribution was in that property if indeed the same compromises matrimonial property.
- B. Whether matrimonial property can be shared during the subsistence of the marriage.
43. That, the evidence before the court is that, the parties herein are still married. No divorce proceedings have been commenced.
44. Section 7 of the *matrimonial Property Act* provides as follows: - Ownership of matrimonial property
- “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.”
45. The Respondent submits that, there cannot be division of matrimonial property when spouses are still married. This happens to be the case in this suit and urge the court to dismiss that prayer.
46. The Respondent urge the court to dismiss the summons save for the portion that has been admitted by the Defendant.



Analysis and determination

47. This court is persuaded by the standard enumerated in the case of *Levi Simiyu Makali v Koyi John Waluke & 2 others* (2018) Bungoma Election Petition No 4 of 2017 eKLR. that, the principles in law relating to the legal burden of proof and the evidential burden of proof remain constant.

“(i) The legal burden of proof: -

23. The legal basis for the legal burden of proof is provided in Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya. The said section states as follows: -

- (1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

24. The onus is therefore upon a Petitioner who seeks the annulment of an election ‘on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds ‘to the satisfaction of the court’. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.....’ (See paragraph 131 of ‘the 2017 majority judgment’).

25. That is the legal burden of proof.

(ii) The evidential burden of proof: -

26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.”

48. The Court has considered the Pleadings on record, the testimonies of the witnesses and the rival submissions of the parties. the issues for determination in this regard are:-

- i. Whether the suit properties constitute matrimonial property?
- ii. Whether the Petitioner contributed towards acquisition and development of the properties?



- iii. What reliefs are available
- iv. Who should bear the costs?

Whether the suit properties constitute matrimonial property?

49. For a property to qualify as a matrimonial property, it must meet the definition under Section 6 of the Act. For the purposes of this case, Section 6(1) of the Act provides that:-

Meaning of matrimonial property

1. For the purposes of this Act, matrimonial property means—
 - 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

50. 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.”

51. 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.”

52. According to Nyakundi J. in *T.M.V. v F.M.C* (2018) eKLR, the Court stated 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.”

53. It is undisputed by the parties that, the properties Plot No 20 exercised from LR No 4730/xxx, Plot No 31 exercised from LR No 4730/xxx, Plot 10 Naivasha/Ol-Jorai Phase 11/xxxx, Parcel measuring (35ftx70ft) to be exercised from LR No 14246/x and Plot No 21 Parcel measuring (50x100ft) to be exercised from LR No 4730/xxx enumerated are registered in the name of the Respondent and were acquired during the coverture of marriage, it thus follows that the presumption of the laws automatically applies unless there is an agreement by the parties to the contrary.



Whether the Petitioner contributed towards acquisition and development of the properties.

54. 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”

55. The principle behind this is that, division of matrimonial property between spouses is based their respective contribution to the acquisition. Contribution is defined under Section 2 of the Act to be monetary and non-monetary. Section 2 of the Act defines contribution towards the acquisition of matrimonial property as:

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.

56. This case must be dealt with on the basis of its peculiar facts as enumerated by Court of Appeal 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...”

57. This court is bound by the Supreme Court holding in the case of *JOO v MBO* (2023) KESC 4 (KLR) held that;

“the guiding principle in determining whether Article 45 (3) conferred proprietary rights is that apportionment and division of matrimonial property may only be done where parties fulfil their obligation of proving what they are entitled to by way of contribution. The Court stated that, the status of the marriage does not solely entitle a spouse to a beneficial interest in the property registered in the name of the other, nor is the performance of domestic duties, or the fact that the wife was economical in spending on housekeeping. Therefore, a party must prove contribution to enable a Court to determine the percentage available to it at distribution. This safeguards a blanket expectation that the principle of equality will be applied generally in the division of matrimonial property, irrespective of contribution”.

58. The Petitioner had a burden of proof of demonstrating her monetary contribution towards the acquisition the aforesaid properties. This court is very much alive to the fact that the parties herein are still married and that whereas there has been proof of monetary contribution by the Petitioner towards the acquisition of one asset out of five this court is careful in appreciating that this marriage



was a genuine marriage and not a commercial or transactional marriage and that acquisitions during marriage are for the union and the importance of determining contribution becomes an important issue on division.

59. As for the subtle argument by the Respondent that, Inheritance is not subject to division as matrimonial property, I respectively disagree and contend that, inheritance during coverture of marriage would constitute matrimonial property save that the inheritor shall thus have a significant share thereof
60. In this instance the contribution by the parties becomes a moot question until a divorce absolute is issued and as such this court shall not go into the nitty-gritty of determining contribution by the parties.
61. As for the Reliefs available, this court is persuaded that in light of the parties being separated and not divorced, declaratory proclamations as to whether the assets constitute matrimonial properties shall suffice.
62. A Declaration is hereby made that following properties constitute matrimonial property;
- i. Plot No 20 exercised from LR No 4730/xxx
 - ii. Plot No 31 exercised from LR No 4730/xxx
 - iii. Plot 10 Naivasha/Ol-Jorai Phase 11/xxxx,
 - iv. Parcel measuring (35ftx70ft) to be exercised from LR No 14246/x
 - v. Plot No 21 Parcel measuring (50x100ft) to be exercised from LR No 4730/xxx
63. A Restraining Order, is hereby issued against the Respondent prohibiting him from alienating, selling, leasing, disposing, wasting, transferring or in any way interfering with any of the following properties owned jointly by the Applicant and the Respondent being the subject of this suit;
- i. Plot No 20 exercised from LR No 4730/xxx
 - ii. Plot No 31 exercised from LR No 4730/xxx
 - iii. Plot 10 Naivasha/Ol-Jorai Phase 11/xxxx,
 - iv. Parcel measuring (35ftx70ft) to be exercised from LR No 14246/x
 - v. Plot No 21 Parcel measuring (50x100ft) to be exercised from LR No 4730/xxx
64. All the other Reliefs sought are dismissed for being premature and moot.
65. In the upshot, this court finds
- i. Originating Summons dated 4th November, 2021 is hereby Partially.
 - ii. The Costs of the Petition are awarded to the Petitioner.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 8TH DAY OF AUGUST 2024.

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MOHOCHI S. M.

JUDGE



Quorum

Mr. Maina Advocate Holding Brief for Kairu for the Petitioner,

Ms. Wangare Holding Brief for Mr. Waiganjo Advocate, for Respondent-Absent

