



**EMM v JWG (Matrimonial Cause E016 of 2021)
[2024] KEHC 10390 (KLR) (8 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E016 OF 2021
SM MOHOCHI, J
AUGUST 8, 2024
(IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013)**

BETWEEN

EMM APPLICANT

AND

JWG RESPONDENT

JUDGMENT

1. The Applicant vide Originating Summons dated 4th November, 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. That the parcel Dundori/Muguathi Block 1/2221 and matrimonial home therein though registered in the name of the respondent was jointly developed during the marriage with funds by both the applicant and respondent.
 - b. That plot no 12792/36 and developments therein though registered in the name of the respondent was jointly developed and revamped during the marriage with funds by both the applicant and respondent.
 - c. That the movable properties in the matrimonial home were acquired during the subsistence of the marriage and with the joint funds of both the applicant and respondent.
 - d. That the stock in Lee shop situated at Kiti estate within Nakuru County was jointly acquired during the subsistence of the marriage and with the funds of the applicant.
 - e. That the application herein be allowed in the interests of justice.



2. The Chamber Summons was predicated on the grounds in the Application and the Supporting Affidavit sworn by EMM. He stated that He got married to the respondent on 13th September 2017 under the *Marriage Act* 2014 and subsequently petitioned for divorce vide Nakuru Divorce cause no 1 of 2020, which divorce cause was heard and determined and judgement delivered on 26th March 2021 and the decree nisi was made absolute.
3. That the parcel Dundori/Muguathi Block 1/2221 and matrimonial home therein though registered in the name of the respondent was jointly developed during the marriage with funds by both the applicant and respondent.
4. That plot no 12792/36 and developments therein though registered in the name of the respondent was jointly developed and revamped during the marriage with funds by both the applicant and respondent.
5. That the movable properties in the matrimonial home were acquired during the subsistence of the marriage and with the joint funds of both the applicant and respondent.
6. That the stock in Lee shop situated at Kiti estate within Nakuru County was jointly acquired during the subsistence of the marriage and with the funds of the applicant.

Petitioner's case

7. The Petitioner Submitted on the following issues;

1. Whether the petitioner is entitled to lay claim to the movable properties acquired during subsistence of the marriage?

8. That, it was the Petitioner's evidence that was an accountant by profession having been previously employed by Medic Limited from January 2006 to February 2011 and J.B Drilling (Kenya) limited, and that, prior to his marriage to the respondent, he had purchased plot Kiambogo/miroreni Block 1/2872 (itherero) and developed it and sold it together with the development therein on 19th July 2017 at a consideration of Kshs 4,000,000/- as can be seen from a copy of sale agreement and application for funds transfer dated 19th July 2017 which documents were produced as exhibits at the trial of the suit. That the Respondent confirmed that even as they solemnized their marriage on 13th September 2017 the Petitioner was financially stable.
9. Evidence was led by the Respondent that the petitioner contributed towards acquisition of moveable properties specifically sofa sets and even a gas cylinder. It was also the Respondent's evidence that the Petitioner purchased motor vehicle registration number KCL 4432 without her financial assistance. The Petitioner indeed produced bank statements and motor vehicle sale agreement as proof of having purchased the subject motor vehicle single handedly at a consideration of Kshs 1,200,000/- from Rift Cars Motor Bazaar and withdrew Kshs 1,300,000 from his Barclays Bank account on 7th August 2017 where part of the money was meant to cater for settlement of insurance premiums which fact is not disputed by the Respondent.
10. That in view of the aforesaid agreement, it is now not in dispute the Petitioner was lawfully entitled to lay claim on moveable properties acquired during subsistence of the marriage. Article 45 (3) Constitution guarantees equality rights during the dissolution of a marriage.
11. The Petitioner submits that, article 45 (3) Constitution does not entitle a former spouse to 50% share of assets for the mere fact of marriage and that a spouse must prove contribution to enable a court determine the percentage available to him or her. Reliance is placed on the Supreme Court Petition



No 11 of 2020 Between Joseph Ogentoto (Appellant) and Martha Ogentoto (Respondent) Or JOO VS MBO (2023) KESC4 (KLR).

12. That, its clear Article 45 (3) of *the Constitution* was not designed for the purpose of enabling the court to pass 50% of the proprietary rights from one spouse to another simply because they were married. The court found that the guiding principle during the division of matrimonial property can only be by way of proof of direct or indirect contribution determined on a case to case basis.
13. That, evidence was led by the Petitioner that, they ran a shop by the name Lee shop with the Respondent, that having deposited Kshs 1,100,000/m in his Unaitas Sacco Account, he would withdraw monies severally in the month of November 2017 and hand over the money to the Respondent to enable her purchase merchandise or stock for the shop. The Petitioner produced financial statements from Unaitas Socco as exhibits in court. That, Evidence was led by the Respondent that, she closed the shop and opened a mini-supermarket when parties went their separate ways. It was her case that she ran the shop using funds from her late husband's pension from Germany. Surprisingly, the Respondent did not produce any financial records to support her claim because it is the petitioner who bankrolled the operation of the shop.
14. That, Section 107 *Evidence Act* provides a party asserting a fact has a duty to prove that fact in order for his or her claim to succeed in law. The Respondent did not discharge the burden of proving having bankrolled the shop singlehandedly and on a balance of probabilities pursuant to section 107 EvidenceAct
15. The Petitioner submit that he bankrolled running of Lee Shop explaining the many transactions done from his Unaitas Sacco account. In addition, the Respondent admitted in her testimony vide text message print out dated 5th October 2018 addressed to the Petitioner and produced as an exhibit that she took away all the Petitioner's monies. She admitted having indicated in the text message print out and will quote her "I took all your money". That was her admission. That the said statement was not written out of coercion.
16. The Petitioner submit that, the shop and/or now supermarket should be valued and sold and proceeds shared out among both parties. The Respondent never produced photos of the empty shop, thus Lee Shop at the time of her separation with the petitioner hence proof that the petitioner's funds are still running her shop and by extension now mini super market.
17. That, it was the petitioner's case that the Respondent sent him Kshs 2,000/- vide MPESA on 9th October 2022 out of the blues. The Respondent in her testimony admitted having sent the Petitioner Kshs 2,000/= which money the Petitioner refunded to her and lodged a complaint at Mwariki Police Station vide OB number 08/10/10/22 produced as an exhibit. That the Respondent sent the Petitioner that money out of a guilty conscience. Her intentions in the marriage were not pure hence guilty of having taken the Petitioner's monies, a fact admitted in her text message dated 5th October 2018. She never called any witness specifically "the petitioners" friend to support the claim that, he had advised her that the Petitioner was going through a rough patch and that her decision to send the Kshs 2,000/- was motivated by a guilty conscience.

2. Whether the petitioner is entitled to lay claim to the immovable properties?

18. That it was the petitioner's evidence that when he settled down, he found parcel title Dundori/ Muguathi Block 1/2221 and plot no. 12792/36 registered in the Respondent's name. It was his evidence that he assisted in refurbishing and renovating the house and rental units therein, a claim corroborated by the Respondent's text message dated 5th October 2018 where the Respondent admits that, she would bring a man by the name "Alex" to live in the Petitioner's house. She correctly refers



to the house Dundori/Muguathi Block 1/2221 as the Petitioner's house because of the renovations he undertook, and that, she would not have referred to the house in Dundori/Muguathi Block 1/2221 as the Petitioner's house if that were not so.

19. Further reference is made to the case *Joo Vs Mbo* (2023) KESC4 (KLR) the supremecourt of Kenya held that;

“the guiding principle in determining whether Article 45 (3) Constitution conferred proprietary rights is that apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution. Therefore, a party must prove contribution to enable a court to determine the percentage available to it at distribution”.

20. The petitioner submits that, he contributed immensely towards acquisition of both movable and immovable properties during subsistence of his marriage to the Respondent and even went ahead to produce bank statements to support his claim specifically from Barclays Bank and Unaitas Sacco. And that equality under Article 45 (3) Constitution means that courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring no party is unfairly given more than what he or she contributed. We do submit the Petitioner's contribution was indeed noted vide the Respondent's text message dated 5th October 2018 where she admits having taken away all the Petitioner's monies.
21. Lastly, the Petitioner urges the court to look at the totality of evidence presented before it and find the Petitioner has proved his case against the Respondent with unequivocal honesty and on a balance of probabilities to warrant grant of the reliefs sought in his originating summons dated 4th November 2021 with costs.

Respondents Case

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.



Analysis and determination

27. This is suit for division of matrimonial property uniquely anchored on a statement made on short messaging services by the Respondent to the Petitioner on the 5th October 2018 that, "I took all your money".
28. What is uniquely troubling this court is that, the parties met in vineyard hotel, marriage proposal made within fourteen (14) days and immediately thereafter a marriage on 30th September 2017, honey moon for ten (10) days in Mombasa and divorce within 12 months of the marriage on the . The background is a roller-coaster akin to a transactional arrangement by the parties which then ideally would entail a pre-nuptial agreement to fortify the expectations by the parties.
29. The Petitioner was expected to demonstrate either monetary or non-monetary contribution as a basis of his entire claim and at the conclusion of the hearing it narrowed down to whether the SMS message would be sufficient proof of contribution to acquisition of/or improvement to matrimonial as the basis of division and if such evidence is sufficient to enabler the court apportion any share?
30. In his Originating Summons the Petitioner sought inter alia a declaration that the following properties registered in the name of the Respondent, were acquired and developed through the joint efforts of the parties during their marriage and are jointly owned and subject to division.
- a. Parcel Dundori/Muguathi Block 1/2221 and matrimonial home therein;
 - b. Plot no 12792/36 and developments therein;
 - c. Movable properties in the matrimonial home;
 - d. Stock in Lee shop situated at Kiti estate within Nakuru County
31. It was the Petitioner's case that, properties in a), b), were acquired prior to the marriage but during the marriage he contributed to the acquisition of movable matrimonial property by purchasing a gas cooker and sofa seats. That further he withdrew cash from his bank account and handed over to the Respondent to purchase undisclosed stock for the shop hence his claim that the shop be valued and an order of sale be made with proceeds being shared out amongst the Petitioner and the Respondent on an undisclosed ratio. The Respondent refuted those claims on the basis that the Petitioner only nominally contributed to by purchasing an empty gas cylinder and contributed Kshs 10,000 towards the purchased of the Sofa seats worth Ksh 40,000/- and that the Petitioner had wasted his money and that the SMS dated 5th October 2018 was in response to the constant accusation by the Petitioner of wasting his money and that she was constantly being called by women and she was bitter hence the message that "I took all your money".
32. This court is persuaded by the standard enumerated in the case of *Levi Simiyu Makali vs. 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.”

33. 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. Who should bear the costs?

Whether the suit properties constitute matrimonial property?

34. 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
35. 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.”
36. 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.”
37. According to Nyakundi J. in T.M.V. vs 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.”
38. It is undisputed by the parties that, the properties Parcel Dundori/Muguathi Block 1/2221 and plot no 12792/36 enumerated are registered in the name of the Respondent and were purchased Prior their marriage.

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

39. 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”
40. 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.



41. 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...”

42. 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”.

43. The Petitioner had a burden of proof of demonstrating his monetary contribution towards the improvement on the aforesaid property. This court finds that no specific evidence has been adduced that the Petitioner made specific improvements on the aforesaid properties to qualify for division. Therefore, in the absence of proof of contribution, the properties Parcel Dundori/Muguathi Block 1/2221 and plot no 12792/36 cannot be deemed to be matrimonial property for purposes of this claim.

44. No specific evidence was led by the Petitioner to persuade the court that there was specific monetary contribution made towards re-stocking the Lee shop situated at Kiti estate within Nakuru County. The Court remains unaware on what stock was purchased, when this happened and the actual stock. The grocery store existed prior to the marriage, was closed down as the marriage was disintegrating and subsequently re-opened as a mini-supermarket. This court is of the view that the Petitioner has equally failed to avail persuasive evidence in this regard and as such the should does not constitute matrimonial property.

45. As regard the generic claim over all movable properties in the matrimonial home being acquired during the subsistence of the marriage and with the joint funds of both Parties, I am of the view that no evidence was presented save for the nominal contribution made of ksh 10,000/- towards the purchase of the Sofa and an undisclosed sum towards the purchase of an empty gas cylinder.

46. Taking into account the peculiarity of this petition it was apparent that the Petitioner had some money when they hurriedly rushed into a union of marriage fourteen days after meeting, a rational being would assume that the two parties were madly in love, caution was thrown into the wind and that when it later dawn on the Petitioner that the marriage was untenable he had squandered almost 3,600,000/- which he could not properly account for, owing to the bitter separation the Petitioner had his quest to recover as much as possible of the amount in question. While there was proof of a nominal contribution made of Kshs 10,000/ I decline to make any orders of refund, bearing in mind the Marriage the Petitioner went into was not transactional and that any his intention was obtaining a judicial pronouncement on the immovable properties as he did demonstrate his bankl accounts had money as he went in to the marriage.



47. This Petition was for the millions that went missing after the marriage and if the monetary contribution into the marriage was the central element of the petition then the petitioner was expected to adduce evidence in support. I accordingly find the Petition to be without merit.

48. In the upshot, this court finds

- i. Originating Summons dated 4th November, 2021 is hereby dismissed.
- ii. The Costs of the Petition are awarded to the Respondent.

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,

Mr, Gakinya Advocate, for Respondent- Absent

