



REPUBLIC OF KENYA



KENYA LAW
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**Funk v Jira (Family Originating Summons E012 of 2023)
[2024] KEHC 17012 (KLR) (7 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY ORIGINATING SUMMONS E012 OF 2023**

G MUTAI, J

AUGUST 7, 2024

BETWEEN

JACQUELINE KANGA FUNK CLAIMANT

AND

SAMUEL MWACHIRO JIRA RESPONDENT

JUDGMENT

1. Before the court is the Originating Summons dated 31st July 2023, seeking the following orders:-
 - a. That a declaration that the property known as Plot No. MN/II/1XXX5, with all the buildings, developments thereon, were acquired during the subsistence of their marriage by the funds of the Claimant and registered in the name of the Respondent, is owned by the Claimant;
 - b. That a declaration that the property known as Plot No. MN/II/10XX6 with all the buildings, developments thereon acquired during the subsistence of their marriage by the funds of the Claimant and registered in the name of the Respondent is owned by the Claimant;
 - c. That a declaration that the property known as Plot No. MN/II/10XX5 with all the buildings, developments thereon acquired during the subsistence of their marriage by the funds of the Respondent and registered in the name of the Respondent is owned by the Applicant which was given to her by the Respondent as a gift;
 - d. That a declaration do issue that property known as Plot No. 10XX2 (Orig. No. 632/77) at Lake View Phase 4 Bamburi with all buildings and developments thereon were acquired by the funds of the Claimant and joint efforts of the Claimant and the Respondent during their marriage and registered in the name of the Respondent or in the possession of the Respondent are owned jointly by the Applicant and the Respondent;



- e. That an order of injunction to issue restraining the Respondent, her servants and /or agents from alienating, wasting, damaging and/or otherwise interfering with the above mentioned properties pending the hearing and determination of the Originating Summons;
 - f. That the division to separate the interest in the properties be done within 90 days from the date of the judgement at the Respondent's cost;
 - g. That the Respondent be ordered to transfer the Claimant's share in the properties to her within 60 days from the date of division;
 - h. That in default, the Registrar High Court of Kenya be authorised to sign any transfer documents in place of the Respondent or any other person holding any title on behalf of the Claimant to effect all the orders of this court in favour of the Applicant;
 - i. That an order does issue declaring that the Respondent is accountable to the Applicant on respect of all the income derived from the said properties;
 - j. That this honourable court be pleased to order that the properties and the income from the same be settled in proportions aforesaid or as the court may order;
 - k. That the court be pleased to issue any other orders that it deems fit and just to the parties; and
 - l. That the cost of this application and incidentals thereto be borne by the respondent.
2. The summons is based on the grounds stated therein and the supporting affidavit of the Claimant sworn on 31st July 2023 vide which she stated that she got married to Respondent on 19th December 2009 at ACK Cathedral Church. At the time they got married the parties worked as transport managers. That their marriage irretrievably broke down and was dissolved on 3rd December 2015 vide Mombasa CMC Divorce Cause No. 43 of 2013.
 3. The Claimant stated that during the subsistence of their marriage, they acquired several properties, which they then improved continually, namely, Plot No. MN/II/1XXX5, in respect of which she contributed Kes.1,000,000/-, through her mother, and which property is registered in the Respondent's name; Plot No. MN/II/10XX6 in respect of which she contributed Kes.1,000,000/-, through her mother, and which property is registered in the Respondent's name; Plot No. MN/II/10XX5, which the Respondent acquired but gave to her as a gift; and, Plot No.10XX2 (Orig No.632/77) Lake View, Bamburi, where, through her brother, she contributed Kes.2,800,000/- while the respondent contributed Kes. 1,500,000/-.
 4. She stated that the said properties are matrimonial properties as they were acquired during the subsistence of their marriage and through her contribution amounting to Kes.4,800,000/- and the joint efforts of the Respondent and herself towards the improvements and developments thereon. Furthermore, she also made non-monetary contributions by providing companionship to the Respondent, supporting him through decision-making and problem-solving, and financially and emotionally supporting him through compassion and sympathy during difficult emotional times.
 5. The Claimant averred that the Respondent has been collecting rent and enjoying the proceeds from Plot No.10XX2 since 2014, all by himself, without giving her any share.
 6. She urged the court to allow the summons as prayed and distribute the properties according to each person's contribution.
 7. In response, the respondent filed a replying affidavit sworn on 25th January, 2024, vide which he stated that Plot No.MN/II/1XXX5 was acquired by him with no contribution from the Claimant.



- He averred that all payments, including those for stamp duty, the advocate's fees, erecting a fence, employing a caretaker, and development, were made by him. Regarding Plot No. MN/11/1XXX6, he averred that it was acquired through contributions made by the Claimant's mother who gave him Kes.1,000,000/- to purchase the said property and that the purchase price was Kes.500,000/-. Kes.250,000/- was spent on opening up a boutique for the Claimant's sister, leaving a balance of Kes.156,420/-.
8. He stated Plot No. He acquired MN/II/10XX5 with no contribution from the Claimant. He further stated that the same was not a gift to the Claimant; the reason why it was registered in the Claimant's name was because the other two were under his name. He averred that he paid caretaker's expenses, utility bills, the cost of erecting structures and developments on the plots and the installation of gates on the three plots, all amounting to Kes. 1,693,000/-.
 9. On Plot No. 10XX2 (Original No.632/77), Lake View Phase 4, Bamburi, he stated that the same was their matrimonial home and that it was acquired jointly, with the Claimant contributing Kes.2,800,000/- borrowed from her brother and himself Kes.1,700,000/-. He conceded that he rented the property out, though there were times when the property stayed without a tenant, and all that time, he made a total income of Kes.1,425,000/- and incurred expenses of Kes.974,348/-, leaving a surplus of Kes.450,652/-.
 10. He urged the court to order that Plot No. MN/II/1XXX5, together with all the developments, be registered in his name, as well as Plot No. MN/II/10XX5. Plot No. MN/II/10XX6 be transferred to the Claimant and Plot No.10XX2 be sold and proceeds shared according to each party's contribution, after refund of Kes.225,326/- by the Respondent for the income received from 2014. Finally he also sought for an order for compensation of Kes.846,500/- expended towards maintenance, utility bills, structures, gate purchase, installation and hiring a caretaker for all the suit properties.
 11. The claimant filed a supplementary affidavit sworn on 26th February 2024, vide which she reiterated the position in the supporting affidavit. She averred that she was never consulted on the issue of hiring a caretaker and that she was not aware of any costs of repairs alleged by the Respondent.
 12. She stated that they bought Plot No. MN/II/12362 Wema Centre, which she later learnt was sold in 2013 without her knowledge or consent.
 13. She therefore urged the court to grant the orders sought in the suit.
 14. The Claim was canvassed through viva voce evidence. I shall give a summary of the evidence below.
 15. The Claimant adopted her affidavits as evidence in chief. She testified that during the subsistence of their marriage, she worked at Spedag Enterprises as the Customer Relations Manager. At the same time, the Respondent was the Transport Manager in the said company. Her mother gave the Respondent Kes.1,100,000/- to purchase plots in Utange. It was her evidence that the Respondent had not paid back the said money. Her brother helped them purchase their matrimonial home; however, before they could complete it, they broke up. She testified that she was claiming Kes.3,900,000/- and not Kes.4,800,000/-.
 16. It was her evidence that the Respondent sold the property in Wema Centre without her knowledge and that the same was purchased in 2010 at Kes.900,000/- out of which she contributed Kes.300,000/-, with a loan from her Sacco.
 17. She urged the court to distribute the property accordingly.
 18. In his evidence, the Respondent adopted his replying affidavit as his evidence in chief and told the court that he acquired Plot No.10735 in 2010 without any contribution from the claimant. He erected a



- perimeter wall on the same and put up a structure for the caretaker. He prayed that the same remain in his name.
19. According to him Plot No 10736 was purchased with Kes.1,000,000/- received from the Claimant's mother. A balance of what was given was used to open a boutique for the Claimant's sister. He averred that he erected a fence, paid utility bills and continues to maintain the property. He urged that the same be transferred to the Claimant since she contributed.
 20. It was his evidence that he purchased Plot No 10705 without the Claimant's contribution. He averred that the same was registered in the Claimant's name since the other two were already in his name. He prayed that the same ought to be transferred to him.
 21. The Respondent testified that Plot No. 10XX2 was acquired in 2012 at Kes.4,500,000/- and that it was registered in his name. He testified that he contributed Kes.1,700,000/-, while the Claimant paid Kes.2,800,000/-. He testified that when the Claimant left, he had been renting it out since 2014, and that he made a surplus of Kes.450,000/-, as the house is an old house that was built on a swampy area, forcing him to carry out maintenance every year. He stated that the surplus can be shared equally, the house can be sold and the proceeds shared equally, and the Claimant be ordered to pay 50% of the expenses he has incurred on maintenance.
 22. Regarding Plot No.MN/I/12362, Wema Centre, he told the court that he acquired the same in 2008 before he got married to the Claimant and sold it in 2013, and thus the same does not form part of matrimonial property.
 23. At the conclusion of the hearing, the parties were directed to file written submissions. I will, in like manner, set out the synopsis of the parties' written submissions.
 24. The Claimant, through her advocates, Lawrence Obonyo Legal Advocates, filed written submissions dated 27th May 2024. Counsel submitted on three issues: whether the suit properties constitute matrimonial property; whether the applicant contributed towards the acquisition and development of the matrimonial properties; whether the applicant is entitled to an equal share or a higher proportion of the matrimonial properties; and who should bear the costs of the suit.
 25. On the first issue, counsel relied on Section 6 of the *Matrimonial Property Act* and submitted that all the listed suit properties were acquired during the subsistence of marriage and therefore constitute matrimonial property.
 26. On the second issue, counsel relied on Sections 2, 9 and 14 of the *Matrimonial Property Act* and submitted that the Claimant had tendered sufficient evidence to prove her monetary and non-monetary contribution towards the acquisition and development of the suit properties.
 27. On the third issue, counsel relied on Article 45 of *the Constitution* and Sections 7 and 9 of the *Matrimonial Property Act*, submitting that the share of each party is pegged to their contribution.
 28. On the fourth issue, counsel submitted that the same should be awarded to the Claimant and urged the court to allow the suit with costs.
 29. The Respondent, on the other hand, through his advocates, Orende & Associates Advocates, filed his written submissions dated 14th June 2024. Counsel submitted on three issues, namely: whether the suit properties constitute matrimonial property; whether the Claimant contributed towards the acquisition and the development of the matrimonial properties; and whether the parties are entitled to the proportions of the matrimonial properties stated in their pleadings.



30. In response to the first issue, the Respondent's counsel relied on Sections 6 and 9 of the *Matrimonial Property Act* and submitted that all four properties are matrimonial properties, except for Plot No. MN/I/12362, Wema Centre, which is not.
31. Regarding the second issue, counsel relied on Sections 2 and 7 of the *Matrimonial Property Act* and submitted that both parties made monetary contributions towards the acquisition of the suit properties; however, the Respondent also made a non-monetary contribution by managing all the properties for eleven years.
32. On the third issue, counsel submitted that Plot No.MN/II/1XXX5, together with all the developments therein, was acquired during the subsistence of the marriage by the Respondent, using his funds. For that reason, it ought to remain registered in the Respondent's name. He urged that Plot No. MN/II/10XX6 be transferred to the Claimant's name. He prayed that Plot No. MN/II/10XX5, together with all the developments therein, be transferred from the Claimant to the Respondent. The Respondent urged that Plot No.10XX2 be sold and that the proceeds be shared according to each party's contribution after refund of Kes.225,326/- by the Respondent for the income received from 2014 and that an order for compensation to the Respondent of Kes.846,500/-, expended by the Respondent from 2011 towards maintenance, utility bills, structures, gate purchase, installation and hiring of a caretaker for all the suit properties be made.
33. I have considered the pleadings of the parties, the evidence adduced, and the submissions made by their counsels. This court is called upon to divide properties between former spouses. Has the Claimant made a case for such a cause of action? To consider the matter, I must first set out the legal position.
34. Section 6(1) of the *Matrimonial Property Act* defines matrimonial property in the following terms: -
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.
 3. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
 4. A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.
35. The court in the case of TMW vs FMC [2018] KEHC 2482 (KLR) stated that: -
- “Turning to the provisions of the *Matrimonial Property Act*, Section 6 of the *Matrimonial Property Act*, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Basically 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.”

36. Section 14(a) of the said 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 a rebuttable presumption that their beneficial interests in the matrimonial property are equal.

37. Section 2 of the *Matrimonial Property Act*, 2013 defines contribution as follows;

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.

38. Further, Section 7 of the *Matrimonial Property Act* is clear in its terms that: -

“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.”

39. The court in the case of MNH vs FHM [2018] KEHC 1183 (KLR) stated: -

“What the *Matrimonial Property Act* of 2013 does is formalize and make provision for giving due consideration to both the monetary and non-monetary contribution of parties in a marriage as is evident from the clauses cited in the antecedent paragraphs. This position has been cemented by the Courts in different instances. For starters, in NWM v KNM (2014) eKLR it was stated that the court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.”

40. Further, the court in the case of EKTm vs ECC [2021] KEHC 1359 (KLR) stated:-

“It follows from the foregoing that despite the constitutional requirement that parties in a marriage have equal rights, each party must be able to prove either contribution was monetary or non-monetary lest a party will not be entitled to any share in the matrimonial property. The onus squarely falls on the party who alleges contribution to prove such contribution in the acquisition of the subject property, be it monetary or non-monetary contribution.”



41. The evidence adduced is clear that all the properties stated in the Originating Summons were acquired during coverture. Based on my understanding of the statutory law and also the case law, it is my finding that all the properties are therefore matrimonial properties.
42. Having set out what I consider to be applicable statutory provisions, it is important to state that the mere fact that a property was acquired during coverture and is matrimonial property does not give a spouse an automatic entitlement to a 50% share thereof. A spouse must still prove contribution, for it is what one brought in that he/she takes away at the time of the dissolution of the marriage.
43. The foregoing was eloquently stated by Kiage, JA of the Court of Appeal in PNN vs ZWN [2017] eKLR as follows:-

“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 than 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.”

44. To answer the foregoing question, I will look at each of the properties in turn.
45. As has been established, Plot Nos. MN/II/1XXX5 and MN/II/1XXX5 were acquired during coverture. The Respondent averred that he acquired the former with his funds. He conceded that the latter was purchased with the funds provided by the Claimant’s mother. In my view, both parties made contributions towards the purchase of both properties. The exact contribution of each party is unascertainable. In the circumstances, I find and hold that they are owned by the parties hereto on a 50:50 basis, as such division accords with the equitable maxim that equality is equity.
46. In arriving at the foregoing decision, I am guided by the persuasive authority of the court in PWK vs JKG 2015 eKLR the Court said;

“Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in *Gissing vs Gissing* [1970] 2All ER 780 Page 788.”

47. The Respondent bought Plot No MN/II/10XX5. The same is now registered in the name of the Claimant. Although conceding that the Respondent bought it, the Claimant averred that it was a gift from him to her. Section 15 of the *Matrimonial Property Act* provides that:-

“Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient.”

48. Although the Respondent claimed that the property wasn’t a gift, he failed to produce cogent evidence to rebut the presumption that the property was intended to belong absolutely to the Claimant. I note that the property is registered in the name of the Claimant.



49. What amounts to a gift is well settled. Halsbury's law of England 3rd Edition volume 18, a gift is defined as:-

“ the transfer of any property from one person to another it is an act where something is voluntarily transferred from the true possessor to another person with the full intention that they shall not return to the donor and with the full intention on the part of the receiver to retain the thing entirely as his own without returning it to the giver”.

50. In re Estate of The Late Gedion Manthi Nzioka (Deceased) [2015] KEHC 944 (KLR) it was held that:-

“where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce on the promise. A promise made by deed is however binding even though it is made without consideration. If a gift is to be valid, the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do”.

51. The property, as I have stated, was transferred to the Claimant and is in her name. Respondent had the duty of rebutting the presumption that property belonged to the Claimant absolutely. He did not rebut the said presumption. In the circumstances, I find and hold that the said property belongs absolutely to the Claimant and is not a matrimonial property.

52. Both parties agree that Plot No. 10XX2, Lake View Phase 4, Bamburi, is the matrimonial home. The Claimant and the Respondent made contributions towards the purchase and development of the same. Although most of the funds were provided by the Claimant, the Respondent has been managing it, for the period the Claimant has been out of the country. In the circumstances, I find, hold and declare that the same is owned on a 50:50 basis by the parties hereto.

53. Plot No. MN/II/12362 Wema Centre wasn't pleaded in the Originating Summons and was mentioned in the supplementary affidavit. This appears to be an afterthought. It appears to have been bought before coverture. In the circumstances, I find and hold that it isn't a matrimonial property.

54. I direct that the matrimonial properties I have identified be valued within 60 days of the date hereof and sold by public auction within 90 days thereafter if the parties are unable to agree on how to share them. The net proceeds shall be shared in the ratios I have identified.

55. In the interest of justice, I direct that the statement of account for the Lakeview property be provided. This is necessary to establish the amount of rental income received by the Respondent and the expenses incurred. This is so that the proceeds of the disposal of the property can be divided fairly, taking into account all the antecedent facts. The accounts are to be provided within 60 days of the date of this order.

56. As this matter concerns former spouses, I order that the parties bear their own costs.

It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 7TH DAY OF AUGUST 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI



JUDGE

