



**ASS v PMM (Matrimonial Cause 22 of 2020)
[2024] KEHC 13635 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 13635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MATRIMONIAL CAUSE 22 OF 2020
SN MUTUKU, J
SEPTEMBER 19, 2024**

BETWEEN

ASS APPLICANT

AND

PMM RESPONDENT

JUDGMENT

Originating Summons

1. The Applicant herein filed an Originating Summons 16th September 2020 under various provisions of the law as stated on the face of the Originating Summons. She is seeking the following reliefs:
 - a. That an order of injunction do issue stopping and/or restraining the Respondent from selling, charging, disposing, dealing in any manner, or alienating of the whole or any part of LR No. xxxx Olchore Onyore, which is the matrimonial property located within Kajiado County.
 - b. That in the alternative, this Honourable Court do issue a conservatory order preserving the property LR. No. xxxx Olchore Onyore located within Kajiado County which is the matrimonial property of the Applicant and the Respondent until the hearing and determination of the Originating Summons filed herein.
 - c. That a declaration do issue that the property LR. No. xxxx Olchore Onyore which is currently numbered and registered in the name of the Respondent is jointly owned by the Applicant and the Respondent and the property is held by the Respondent in trust of the Applicant.
 - d. That a declaration do issue and the Honourable Court be pleased to assess the Applicant’s share of the parcel of land as 50% in light of her contribution and development of the property.



- e. That a declaration and order do issue by the Honourable Court directing that the property LR. No. xxxx Olchore Onyore be subdivided into two portions and be shared equally between the Applicant and the Respondent.
 - f. That a declaration do issue that the total ownership and possession of the property LR No. xxxx Olchore Onyore is the Applicant's and the Respondent's first matrimonial home.
 - g. That costs of this Application be borne by the Respondent.
2. The Applicant has supported the Originating Summons with grounds that she is legally married to the Respondent and that they are blessed with three children: PRM born on 8th April 2003, MMM born on 14th December 2011 and LMM born on 23rd January 2016; that she and the Respondent have been living together as husband and wife in the property named above as their matrimonial home; that she made great contributions towards improvement of the matrimonial home and that in 2017, the Respondent started mistreating her prompting her to relocate from the matrimonial home in 2019. together with the children.
 3. She has stated that she placed a caution on the property to preserve it from being sold by the Respondent; that the Respondent has attempted to remove the caution on several occasions and that she is apprehensive that the Respondent might charge the property or sell it rendering her and the children homeless.
 4. The Respondent did not defend the Origination Summons. On 6th May 2024, I allowed the Applicant, after confirming that the Respondent had been duly served with all the documents and had failed to respond, to compromise the Notice of Motion dated 15th April 2024 and proceed with adducing evidence in support of her Originating Summons.

Applicant's evidence

5. She was the only witness in support of her case. She relied on her pleadings. She reiterated her pleadings that she married the Respondent under the African Christian Marriage and Divorce Act on 6th April 2002 and were blessed with three children as contained in this judgment. She testified that she works with an NGO called MPIDO and that she acquired two loans from the employer to assist in developing the matrimonial home situated on LR No. xxxx Olchore Onyore; that the property was bought by the Respondent and that it was undeveloped; that it was registered in the name of the Respondent.
6. She testified that they constructed a 5-bedroom maisonette on the property and lived there as their matrimonial home. She stated that she contributed 90-95% of development through the loans and her salary; that they moved into the property in February 2013 and lived on that property; that they also ran a dairy business on the property and constructed a cattle shed through another loan she obtained; that she would get money and give it to the Respondent to utilize for the developments.
7. She testified that she also educated the children and provided food and medical bills. She testified that she moved out after the Respondent became violent and cautioned the property. She produced marriage certificate, birth certificates of the three children, proceedings in Ngong No. 57 of 2021 filed by the Respondent to remove the caution but was dismissed, Letters to the Land Registry in respect of the Caution and official search for the property.

Applicant's submissions

8. The Applicant also filed submissions in which she submitted that there was a valid marriage between her and the Respondent. She submitted that the property is matrimonial property as defined under



sections 2 and 6 of the *Matrimonial Property Act*. She relied on *AWM v JGK* [2021] eKLR and *TMW v FMC* [2018] eKLR to support her evidence that the property in issue is matrimonial property.

9. She submitted that her contribution to the development of the property is 50%; that she made monetary contributions towards the development of the property through loans acquired from MPIDO, her employer, maintained the children by paying school fees and basic needs. She seeks 50% contribution. She relied on section 2 of the *Matrimonial Property Act* on what constitutes matrimonial property.

Analysis and Determination

10. I have taken time to read the pleadings and the evidence and I have understood the case for the Applicant. In my considered view, the issues arising from this OS are:
- a. whether the Applicant and the Respondent are legally married;
 - b. whether LR No. xxxx Olchore Onyore is matrimonial property;
 - c. what contribution did each party make;
 - d. what share should each party get.
11. This court harbours no doubts that the Applicant and the Respondent are married. A certificate of marriage has been produced in evidence showing that the two married under the *African Christian Marriage and Divorce Act* on 6th April 2002. There is evidence that they sired three children. I have seen birth certificates and I do not have any evidence controverting that evidence. the Applicant has proved on a balance of probabilities that she is married to the Respondent.
12. They are not living together but there is no evidence that they underwent any divorce proceedings. As far as the law is concerned, they are still husband and wife.
13. The Applicant has testified that Kajiado/Olchore-Onyore/xxxx is matrimonial property, bought by the Respondent during the subsistence of their marriage and registered in his name. I have noted that the property was registered in the name of the Respondent on 26th October 2010 during the subsistence of the marriage.
14. Section 107 of the *Evidence Act* is clear that (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.
15. The burden of proof lies with the Applicant to prove her contribution towards the development of the property. Section 2 of the *Matrimonial Property Act* defines “contribution” to mean monetary and non-monetary contribution including:
- (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.
16. The same Act under section 6(1) defines matrimonial property as follows:



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.

17. The Applicant has stated that she contributed to the development of the matrimonial property through monetary and non-monetary means. She said she was working for MPIDO. She however forgot to adduce evidence to prove that she was employed by MPIDO. She has also not availed evidence to prove that she sought and obtained a loan from her employer. This is a court of law and the word of mouth alone may not be sufficient unless admitted by the other party. The Applicant ought to have adduced evidence showing that she was employed by MPIDO and that they advanced her a loan the number of times she claims they did.
18. This was crucial for the reason that this court, in deciding what contribution each party made towards either acquiring or developing property they seek the court to declare matrimonial property, must be guided by tangible evidence to that fact. She claims 50% of the property. She must at least provide evidence to demonstrate her share of contribution. It is trite that both monetary and non-monetary contributions are recognized by the law. But there must be tangible evidence to that contribution.
19. This court, in [AWM V JGK](#) [2021] eKLR, states that:
- “It is clear to this court that the [Matrimonial Property Act](#) of 2013 recognizes and formalizes both the monetary and non-monetary contribution of parties in a marriage. The same position is captured in authorities including *NWM v KNM* (2014) eKLR where 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. The same position was held by the House of Lords in *White v White* (200) UKHL 54 where the Court alluded to the greater awareness of the value of non-financial contributions to the welfare of the family.
20. This court is also aware that it is not easy to quantify non-monetary contribution. Monetary contribution is easier as all it takes is for the party claiming so to present before the court evidence to support that claim. In this case I do not have bank statements, receipts, mpesa transactions or any other form of evidence to show that the Applicant received so much money as loan from her employer or bought this or that materials for the development of the property, or how much she was earning from her employer. For non-monetary contribution, it was stated in the same case, [AWM v JGK](#) that:
- “It is my considered view that the non-monetary contribution often-times cannot be quantified. If that contribution were to be reduced to monetary terms I am sure that a woman’s non-monetary contribution in the home would amount to a higher amount compared to that of the man. It is my finding therefore that the Applicant made monetary and non-monetary contribution towards acquiring the matrimonial property and that her non-monetary contribution is higher than that of the Respondent.”
21. The difference between that case and this one, is that in that case, the Applicant tendered evidence to prove her monetary contribution to the matrimonial property. In this case, that is not the position.



22. The Applicant and the Respondent have three children together. I am alive that those children require education, medical care, clothing, food, shelter and daily care. I live in this society and I am aware that a mother has a bigger stake when it comes to taking care of the children. In this matter, the Applicant has stated that the Respondent abandoned her and the children and that she was the one paying school fees and feeding the children. I do not want to doubt her in respect of managing the home and taking care of the children.
23. While this court may not have evidence to support the actual amount of contribution made by the Applicant in monetary terms, it is my finding that there is persuasive evidence that she made non-monetary contribution in managing the home and taking care of the children. The challenge I am facing is that the claim for the amount each party contributed to and share each party is entitled to is premature. Section 7 of the *Matrimonial Act* provides 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.
24. It is only after the dissolution of the marriage that this court can determine the share each party deserves and then divide the property between the two. It is for the above reason that the Applicant may not get all the reliefs she is seeking. To my mind, at this stage of these proceedings, this court can only grant some but not all the prayers in the OS.
25. Consequently, after giving this matter consideration, I grant the following orders:
- a. That an injunction is hereby issued restraining the Respondent from selling, charging, disposing, dealing in any manner or alienating any part of or the whole of Kajiado/Olchore-Onyore/xxxx .
 - b. That Kajiado/Olchore-Onyore/xxxx is declared matrimonial property to the extent of each party's contribution. The share that each party should get shall be determined at the appropriate time.
 - c. That the Applicant shall bear own costs in respect of this Originating Summons.
26. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED ON 19TH SEPTEMBER 2024.

S. N. MUTUKU

JUDGE

