



**FMB v MBM (Originating Summons 11 of 2022)  
[2024] KEHC 10709 (KLR) (2 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10709 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
ORIGINATING SUMMONS 11 OF 2022  
G MUTAI, J  
SEPTEMBER 2, 2024**

**BETWEEN**

**FMB ..... CLAIMANT**

**AND**

**MBM ..... RESPONDENT**

**JUDGMENT**

1. The Claimant and the Respondent got married on March 7, 2019. Prior to the celebration of the marriage, the Claimant had cohabited with the Respondent. The couple is blessed with two issues, both boys: GM, born on November 27, 2007, and EJ, born on May 24, 2020.
2. The union has been unhappy. Vide a petition for divorce filed on 19 August 2022. The Claimant sought to divorce the Respondent on the grounds of cruelty and adultery. As at the date of this judgment, no decision has been made in the said cause.
3. Vide the Originating Summons dated March 11, 2024, the Claimant seeks declaratory reliefs regarding properties that she avers were acquired during the subsistence of the marriage.

**The Originating Summons dated March 11, 2024**

4. The said Summons seeks the following orders:-
  1. That a declaration be made that the Applicant is the owner of motor vehicle registration number KBS xxxx;
  2. That an order does issues from this Court instructing the officer commanding Bumula Police Station to release the said motor vehicle Registration Number KBS xxxx to the Applicant;



3. That an order does issue declaring that the unregistered piece of land where the parties matrimonial home is situated in Bungoma County currently occupied by the Respondent is for the beneficial interest of the Applicant; and
4. That the costs of this application be in the cause.
5. The Originating Summons was supported by an affidavit sworn by the Claimant on March 11, 2024 vide which she averred that she married the Respondent on March 7, 2019 at the Attorney General's Chambers, Mombasa and that their union was blessed with two children whose details have been provided. During coverture, she purchased a motor vehicle registration number KBS xxxx Toyota DBA N2E 1X1 through a loan. She averred that the Respondent took the said motor vehicle to Bungoma in June 2022 and failed to return it to her, leaving her stranded and unable to attend efficiently to her work and home duties. She prayed that the car, presently detained in Bumula Police Post, be released to her. She also prayed for an order restraining the Respondent from selling the unregistered land upon which is erected the matrimonial home.
6. Despite being served, the Respondent neither appeared nor filed a response to the Originating Summons. The said Summons was therefore unopposed.

### **Hearing of the Originating Summons**

7. The Originating Summons were heard on April 30, 2024. The Claimant adopted her affidavit as her evidence in chief and produced the documents attached as exhibits. I will not rehash the same here as I have already summarized its contents. She added that she was the one who bought the land in Bungoma.

### **Analysis**

8. I have considered the Originating Summons, the Claimant's oral evidence, and the submissions by the Claimant's counsels. It is now my duty to determine what orders should be issued based on the evidence and the law.
9. In my view, marriage is anchored, among other things, on love, affection and sympathy. It exists like a rolling wheel gathering property rights traceable to the spouses individually or collegially, after a stall. This view was contextualized in the thoughts of Margaret Puxon in her article *Ownership of the Matrimonial Home* (1963), 107 Sol. J. 204, thus:-

“Marriage is a partnership of love, affection and sympathy which should come to an end when these perish. When the parties wed, the husband and wife vow in the wedding ceremony, "with all my worldly goods I thee endow," and the joint ownership should be jealously guarded both by written law and by popular sentiments. Consequently, when the husband and wife part, there should be a separation not only of heart and hand, but of goods as well, and unless there is such a separation, there should be no divorce.”
10. The *Constitution* of Kenya 2010 under Article 45(3) 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.”



11. In the case of *Joseph Ombogi Ogentoto Vs Martha Bosibori Ogentoto* [2023] eKLR, the Supreme Court stated inter alia as follows:-

“In the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of Article 45(3) of the *Constitution*. To hold that Article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non- monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.”

12. As stated earlier, as of this judgment’s date, the union between the Claimant and the Respondent has not been dissolved. In light of that, this Court has no jurisdiction to divide the properties, if any, found to be matrimonial properties. This is so because of what section 7 of the *Matrimonial Properties Act*, 2013 states. The said section provides as follows:-

“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.”

13. The only thing that this Court may do is to make declarations in respect of each party’s share of the matrimonial properties, if any, pursuant to section 17 of the *Act*, which states as follows:-

- “(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
- (2) An application under subsection (1)—
- (a) shall be made in accordance with such procedure as may be prescribed;
  - (b) may be made as part of a petition in a matrimonial cause; and
  - (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

14. It follows, therefore, that I may only make declarations in respect of the suit motor vehicle and land but not divide them. I will, however, only be able to make a declaration if I am satisfied that the two properties are matrimonial properties acquired during coverture.

15. Section 6 of the *Act* defines “matrimonial property” as being:-

- “(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.”
16. I have perused the log book of the motor vehicle registration number KBS xxxx and the loan approval letter dated September 18, 2019. It is evident that the motor vehicle was acquired solely by the Claimant at the consideration of Kes.900,000.00, her employer financed the purchase, and her salary is subject to a monthly deduction of Kes.31,176.53. I have not seen any evidence of contribution by the Respondent.
17. In any event the Respondent provided no evidence to rebut the averments of the Claimant.
18. Regarding the land in Bungoma, the claimant’s evidence was not challenged. In the circumstances, I am inclined to believe her account that she bought the unregistered land in Bungoma.

### **Determination**

19. The upshot of the foregoing is that I am satisfied that the motor vehicle KBS xxxx was bought solely by the Claimant. In the circumstances, I declare that the said motor vehicle was solely purchased by her and that she is entitled to use it solely, without let or hindrance.
20. I, therefore, direct the Officer in Charge of Bumula Police Station to forthwith release motor vehicle registration number KBS xxxx Toyota DBA N2E 1X1 to the Claimant.
21. I declare and hold that the matrimonial home in Bungoma is owned jointly by the Claimant and the Respondent. I order that the same shall not be sold without leave of Court.
22. This being a family matter, I make no orders regarding costs.
23. Orders accordingly.

**DATED AND SIGNED THIS 2<sup>ND</sup> DAY OF SEPTEMBER 2024 AT MOMBASA. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

No appearance for the Claimant

No appearance for the Respondent

Arthur - Court Assistant.

