



REPUBLIC OF KENYA



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**Indech v Waruingi (Civil Suit E011 of 2023)
[2024] KEHC 11672 (KLR) (Family) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT E011 OF 2023
PM NYAUNDI, J
SEPTEMBER 20, 2024**

BETWEEN

FLORA AYUMA INDECHE APPLICANT

AND

NICHOLAS KANG'ETHE WARUINGI RESPONDENT

JUDGMENT

1. The Applicant herein, took out Originating Summons dated 10th February 2023 against the Respondent seeking declaration of the following:
 1. That it be declared that the properties known as Unit No. E13 on LR No. 209/18393, Unit No. 17 on LR No. 8699/42 and ¼ Acre Plot On LR. No. 2376/185 together with the developments thereon registered in the parties' joint names are the sole properties of the Applicant.
 2. That the Respondent does execute all documents and do all such acts as are necessary to transfer to the Applicant's equitable portions of the properties, as are due to her within fourteen (14) days from the date of judgment and in default, the Registrar of the High Court or such officer authorized to execute all such documents to effect the transfer to the Applicant.
 3. That it be declared that the properties known as Flat No.A7 on L.R NO.209/12760 and Flat No. 5 Block7 on L.R NO. 209/9661/3 together with the developments thereon and registered in the Applicant's name are the sole properties of the Applicant.
 4. That it be declared that the Motor Vehicle known as KCE 987 U Toyota Ipsum registered in the Applicant's name are the sole properties of the Applicant.



5. That the Respondent be condemned to pay costs of this Summons and incidental thereto, in any event.
6. That the court be pleased to grant such further relief as may be just in the circumstances.
2. The Summons was supported by the grounds on the face of the same and by the Affidavit of even date sworn by the Applicant.
3. The Respondent entered appearance in the matter and filed a Replying Affidavit sworn on 19th June 2023.
4. The Applicant states briefly that she and the Respondent lived as husband and wife from 2003 to 2020. Their marriage was dissolved on 16th October 2020. During the subsistence of their marriage, she acquired properties known as Unit No. E13 on LR No. 209/18393, Unit No. 17 on LR No. 8699/42, ¼ Acre Plot On LR. No. 2376/185, Flat No. A7 on L.R NO.209/12760 and Flat No. 5 Block 7 on L.R No. 209/9661/3 and KCE 987 U Toyota Ipsum. She averred that she solely acquired the properties known as Unit No. E13 on LR No. 209/18393, Unit No. 17 on LR No. 8699/42 and ¼ acre Plot on LR. No. 2376/186 but they are jointly registered in her name and that of the Respondent. She acquired Flat No. A7 on LR No. 209/12760, Flat No. 5 Block 7 on L.R No. 29/9661/3 and Motor vehicle Registration No. KCE 987 U- Toyota Ipsum solely these are registered in her name.
5. She averred that she took out loans from CFC Stanbic Bank, Housing Finance Company to purchase the above properties. She entered into an agreement with the Respondent to help her offset the loans and have the properties jointly registered in their names but she ended up repaying the loans alone. She attached documents showing ownership of the properties. She asked the court to declare her as the sole owner of the properties.
6. The Respondent opposed the Originating Summons. In his Replying Affidavit dated 19th June 2023, he deponed that he made substantial payment towards the purchase of Unit No 17 on LR. No 8699/42 , ¼ acre plot on L.R No. 2376/185 and Flat No. A7 on L.R No. 209/12760 by depositing money with the Applicant to facilitate acquisition. As regards Unit No. E13 on LR No. 209/18393, he averred that the Applicant made substantive payment towards its acquisition, he did not contribute towards the purchase because he was jobless. The Applicant single handedly purchased Flat No. 5 Block 7 on LR No. 209/961/3. He argued that his contribution on Flat No. 5 Block 7 was on maintenance and managing the property. He traded his motor vehicle registration number KAX 931 V for the purchase of motor vehicle registration number KCE 987 U. The Applicant only paid Kshs. 700,000 towards it's purchase. He attached Mpesa statements, minutes and email correspondence, log book, indemnity and sale agreement.
7. The Respondent deponed he made both monetary and non-monetary contribution towards the acquisition of the said properties. He maintained and improved the properties, catered for household needs and took care of the children when the Applicant was away on job travels and holidays with her friends. He urged the court to share the properties equally between them.
8. The summons was disposed off by way of viva voce evidence. The Respondent did not testify.

Evidence.

9. The Respondent relied on her Originating Summons dated 10/2/2023, her supporting affidavit sworn on 10/2/2023, her further affidavit sworn on 18/7/2023 as her evidence in chief.
10. She and the respondent got married on 20/12/2003. Their union was blessed with three children. During the pendency of their marriage, they acquired the following properties; Unit No. E13 on LR



No. 209/18393, Unit No. 17 on LR No. 8699/42, ¼ Acre Plot On LR. No. 2376/185, Flat No. A7 on L.R No.209/12760 and Flat No. 5 Block 7 on L.R NO. 209/9661/3 and KCE 987 U Toyota Ipsum.

11. She told the court that she acquired Unit No. E13 on LR No. 209/18393 also known as South C Apartment in 2008 for a consideration of Kshs.7 million. Although the property is registered in both their names, she paid initial deposit and took out a mortgage to facilitate the purchase. She entered into an agreement with the Respondent to help her repay the loan but she ended up paying the loan alone. She completed payment of the loan in 2022.
12. She purchased Unit 17, Amagoro Farm, Trans Nzoia in 2010 for a consideration of Kshs.1 million. She took out a loan of Kshs. 3.7 million from Kimisitu Sacco and used it to construct their home. She repaid the loan over a period of 6 years from her salary and commission. The property is registered in both their names. The Respondent did not contribute towards its purchase. He was only present during the ground breaking. She did the interior and furnishing of the house after the marriage had been dissolved.
13. On ¼ acre plot LR No. 2376/185, she testified that she paid Kshs. 200,000 towards its purchase. The property is registered in the Respondent's name. She purchased Flat No. 5 for Kshs. 3.5 million. She paid a deposit of Kshs.919,000 and took a loan of Kshs. 2.5 million from Kenya Revenue. She also purchased Castle Rock , Kilimani in 2011 for Kshs. 12 million which is registered in her name. She used the South C property to secure Kshs. 2.4 which was used as deposit. She took a further loan from Standard Chartered Bank. She told the court that she purchased motor vehicle registration number KCE 987 U, Toyota Ipsum in 2015. The vehicle is registered in her name but is in possession of the Respondent.
14. According to her, the Respondent did not make any contribution to the maintenance of the house and the children. Through a friend, she helped the Respondent secure a job but he later resigned. Picking and dropping children was a shared responsibility between her and the Respondent. She also hired two nannies to help her run the house and take care of the children. She denied that the Respondent sent her money for developing the house. There was a court order against the Respondent in the children's court on maintenance which has never been complied with. She pays school fees for all her children. She urged the court to transfer the properties owned jointly into her name and the properties registered in her name be declared as hers.

Applicant's Submissions.

15. The Applicant's submissions are dated 17th May 2024. The Applicant submitted that although the said properties were acquired during the subsistence of their marriage, she purchased and developed them alone and the same should be declared as her properties. According to her, the Respondent did not contribute any monetary or non-monetary contribution towards the purchase of the said properties.
16. She submitted that this court should be guided by the respective contribution of each party on how the properties should be apportioned. She relied on the decisions in JOO v MBO, Federation of Women Lawyers (FIDA Kenya) & another (Amicus curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR), AWM v JGK [2021] eKLR, EKT v ECC [2021] eKLR. According to her, the Respondent did not prove his contribution.

Analysis And Determination.

17. The main issues arising for determination are;
 - i. Whether the properties herein amount to matrimonial property.



- ii. Whether the Respondent contributed towards the acquisition of matrimonial properties.
- iii. What share if any is each party entitled to.

Whether the properties herein amount to matrimonial property.

18. On what constitutes matrimonial property, I am guided by Section 6 of the *Matrimonial Property Act* that defines matrimonial property as:
 - “(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.”
19. Basically, for property to qualify as matrimonial property, it must meet the definition in Section 6 quoted above. From the evidence available in court, it is clear to me that the Applicant and the Respondent solemnized their union on 20th December 2003 at Holy Trinity Church under Consolata Catholic Church- Nairobi. Both parties agree that the properties were acquired after they solemnized their marriage. Unit No. 13 on LR No. 209/18393, Unit No. 17 on LR No. 8699/42 and LR No. 2376/185 are registered in the name of the Applicant and the Respondent. The Applicant argues that she made immense contribution towards the purchase of the property whereas the Applicant did not make any contribution. The Applicant argues that she took loans to purchase the property and serviced the loans alone. The Respondent on the other hand argues that he made contributions by sending the Applicant payment through Mpesa.
20. In regards to Flat No. A7 on LR No. 209/12760, Flat No. 5 Block 7 on LR No. 209/9661/3 and motor vehicle registration number KCE 987 U, both parties agree that they were acquired during the subsistence of the marriage. The properties are registered in the name of the Applicant. The Respondent argues that he made a substantial contribution by sending money to the Respondent via Mpesa. He argued that he traded his vehicle for the Applicant’s vehicle and she only topped up Kshs. 700,000/= towards its purchase.
21. It is therefore clear that the parties are in agreement that all the properties listed were acquired during the subsistence of the marriage.
22. In my considered view therefore, after considering all the evidence by both parties, the properties listed in this matter are matrimonial property in the meaning of Section 6 of the *Matrimonial Property Act* and I so find.

Whether the Respondent contributed towards the acquisition and development of the matrimonial properties

23. I have considered the Applicant’s arguments on the issue of contribution towards acquisition of matrimonial property. I have read the authorities cited by the Applicant. Although the Respondent did not testify or file any submissions, I have looked at the annexures attached to the Respondent’s Replying Affidavit sworn on 19th June 2023. I am alive to the fact that each case must be determined



based on its own peculiar circumstances. Indeed, the Court of Appeal had this in mind 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.”

24. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the *Matrimonial Property Act*, 2013 in the following terms:

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.

Properties Purchased In The Joint Names of The Applicant And The Respondent.

25. The Applicant denied monetary contribution by the Respondent. From the evidence on record, Unit No. 13 on LR No. 209/18393, Unit No. 17 on LR No. 8699/42 and LR No. 2376/185 were acquired jointly in the name of the Applicant and the Respondent. The Applicant argues that she made immense contribution towards the purchase of the apartment. For Unit 13 on LR No. 209/18393, she made a deposit of Kshs. 500,000 and applied a mortgage of Kshs. 6,500,000 from CFC Stanbic Bank. Due to high interest rates, she transferred the loan to Housing Finance Company of Kenya Limited and later to Standard Chartered Bank. She finished repaying the loan in 2022. She attached copies of bank statements from CFC Stanbic, Standard Chartered Bank, mortgage account statements from HFC Bank.
26. In regards to Unit NO. 17 on LR No. 8699/42, Amagoro Park, the evidence on record shows that the property was purchased in the name of the Applicant and the Respondent. She told the court that she solely paid the full purchase price of the property. She attached copies of RTGS and payment receipts in support. She stated that she took a loan of Kshs. 3,700,000 from Kimisitu Sacco Limited and constructed a home. She has since then been maintaining the property without the assistance of the Respondent. She also furnished the home alone. She told the court that as at 6th February 2023, the outstanding loan was Kshs. 2,265,962. She attached copies of RTGS, payment receipts, a loan statement from Kimisitu Sacco.
27. For ¼ acre on Plot No. LR No. 2376/185, the evidence on record shows that the property was purchased in the name of the Applicant and the Respondent. The Applicant argued that she made payments alone. She attached copies of payment receipts issued by the vendor in support.

Properties Purchased in the name of the Applicant Alone.

28. The Applicant told the court that she purchased Flat No. 5 on LR No. 209/9661/3 without the Respondent’s input. She made an initial deposit of Kshs. 919,334 and took a loan of Kshs. 2,580,666



from Kenya Reinsurance Corporation Limited. She later charged the property to Standard Chartered Bank for Kshs. 3,900,000 and had a balance of Kshs. 2,562,391 as at the time of filing this suit. She attached copies of lease documents, letter of offer, bankers cheque, copies of payment, receipts and loan statements in support.

29. She later entered into a sale agreement for the purchase of Flat No. 7 on LR No. 207/12760 for a consideration of Kshs.12 million. She made a deposit of Kshs. 2,400,000 from the loan secured from Standard Chartered Bank. To facilitate payment of the balance, she applied for a mortgage from Standard Chartered Bank. As at 7/11/2022, she had an outstanding balance of Kshs.5,176,233.81 which she has been repaying without the Respondent's input. She attached copies of sale agreement, charge document, loan statement from Standard Chartered Bank in support.
30. For Motor Vehicle Registration Number KCE 987 U, her evidence was that she purchased it at Kshs. 1.8 million without the assistance of the Respondent. She attached a copy of the log book of the said vehicle to prove ownership.
31. The Respondent in his replying affidavit sworn on 19th June 2023 argued that he made monetary contribution towards the purchase of all the properties. He also stated that he helped the Applicant to furnish and maintain various properties. He attached copies of Mpesa statements to support his case. He also stated that he made non- monetary contribution by maintaining the home and taking care of the children when the applicant was away. The Mpesa statements attached by the Respondent do not show money sent to the Applicant or payment of services or goods relating to the properties in dispute. It is my finding that the Applicant made immense financial contribution towards the properties as compared to the Respondent.

What share if any is each party entitled to.

32. 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.”
33. I have considered the provisions of *the Constitution* on Article 45(3) as well. This article 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”
34. Although this provision grants equal rights to parties to a marriage as stipulated, this does not mean that a party to a marriage is entitled to equal share of the property acquired during marriage unless his or her contribution is ascertained to have been equal to that of the other spouse. However, the article guides the courts in determining the rights of parties to a marriage in respect to subdivision of matrimonial property. This view, that the provisions of Article 45(3) of *the Constitution* does not entitle parties to equal distribution of matrimonial property, was taken by the Court of Appeal (Kiage, JA) in PNN v ZWN [2017] eKLR where the good judge has this to say:

“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 that 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.”



35. The share of each party to a marriage is pegged on the contribution made by each party. That is the law as it is and as applied in various decisions.
36. Section 14(b) of the *Matrimonial Property Act* provides that:-
Where matrimonial property is acquired during marriage—
(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.
37. Parties seeking division of the matrimonial property are under an obligation to prove their contribution towards acquisition and development of the matrimonial property. In this context, either party is required under section 107 of the *Evidence Act* required to prove his/her contribution to the acquisition and development of the matrimonial property.
38. Under Section 2 of the Act, ‘Contribution’ has been defined to mean both monetary and non-monetary contribution. It will be noted that monetary contribution has not been defined under the Act but under the Black’s Law Dictionary Free Online 2nd Edition, monetary is that which relates to money. Regarding, non-monetary contribution, the Act has defined it to include: Domestic work and management of the matrimonial home; Child care; Management of family business or property; and Farm work.
39. Section 7 of the 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.”
40. In *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* [2018]eKLR the court stated that:-
“The law recognizes equal worth and equal importance of the parties in marriage. Thus, the beneficial share of each spouse as the law on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. First, the Act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.”
41. In determining the percentage of the contribution made by each party, I have carefully scrutinized the evidence. The Applicant has produced bank statements, mortgage statements, sale agreements and leases. She further submitted that through her employment, she acquired loans and monies that she contributed towards the acquisition of matrimonial properties.
42. The totality of my analysis of the evidence presented before me is that the Applicant made substantial monetary contribution towards acquiring, the matrimonial properties especially the matrimonial home. I am therefore satisfied that, basing my decision on the peculiar circumstances of this case, I am satisfied on a balance of probabilities that the Applicant has proved her case to the required standard. I will therefore assess the combined monetary and non-monetary contribution of the Respondent to the suit properties at 5%. The Respondent will have 95% of the suit properties.
43. Consequently, I find for the Applicant and allow the Originating Summons in the following terms;



- i. That a declaration is hereby issued that the Applicant is entitled to 95% of the properties listed below and held jointly by the Applicant and the Respondent, or held by the Applicant solely.
 - a. Unit No. E13 on LR No. 209/18393.
 - b. Unit No. 17 on LR No. 8699/42.
 - c. ¼ ACRE PLOT ON LR. No. 2376/185.
 - d. Flat No. A7 on L.R No.209/12760.
 - e. Flat No. 5 Block 7 on L.R No. 209/9661/3.
 - f. KCE 987 U Toyota Ipsum
- ii. That the properties be valued by a valuer to be nominated by the Counsels for the parties within 14 days. In the event that the parties are unable to agree on a valuer, the Applicant's Counsel shall nominate a valuer within 7 days.
- iii. The valuer so appointed to furnish report within 21 days. The Applicant will have the 1st option to buy out the Respondent's share in all the properties, within 60 days of the offer being made.
- iv. That the Respondent shall execute all the documents to facilitate the transfer within 21 days of delivery to the Applicant, in default the Deputy Registrar Family Division will execute the same.
- v. All furniture and fittings in the properties are solely owned by the Applicant.
- vi. That each party shall bear own costs in respect to this Originating Summons.

It is so ordered

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

.....

P. NYAUNDI
JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

