



**SMK v TWM (Matrimonial Cause 33 of 2009)
[2024] KEHC 10921 (KLR) (Family) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE 33 OF 2009
MA ODERO, J
SEPTEMBER 20, 2024
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY ACT NO. 49 OF 2015
AND
IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY**

BETWEEN

SMK APPLICANT

AND

TWM RESPONDENT

JUDGMENT

1. Before this Court is the Originating Summons dated 5th February 2021, by which the Applicant SMK seeks the following orders:-
 - “1. That the property LR No. Kiambaa Kanunga/xxxx measuring approximately 0.5841 Ha be subdivided into equal portions between SMK and TWM.
 2. That the property LR No. Ndumberi/Riabai/xxxx Measuring approximately 0.120 acres be sold and the proceeds from the sale be shared equally.
 3. That the Respondent be condemned to pay the costs of this summons.”
2. The Summons which was premised upon Sections 2, 6, 7, 9, 12 and 14 of the *Matrimonial Property Act* No. 49 of 2013, Article 45 (3) of *the Constitution* of Kenya 2010 and the inherent powers of the court was supported by the Affidavit of even date sworn by the Applicant. In the Written submissions reference is made to a Further Affidavit dated 22nd September, 2021. However the said Further Affidavit is not in the file nor was it uploaded on the CTS thus this Court was unable to access the same.



3. The Respondent TWM filed a Replying Affidavit dated 6th July, 2021 in opposition to the summons. The matter was heard by way of Vive Voce evidence with each party giving evidence on their own behalf.

The Evidence

4. The Applicant told the court that he and the Respondent got married to each other on 12th May 1989. The couple bore two (2) children together and said children are now both adults.
5. The couple later divorced and their marriage was dissolved vide Divorce Cause No. 133 of 2009.
6. The Applicant avers that during the course of the marriage the couple acquired the following properties which are jointly owned:-
 - i. LR No. Kiambaa Kanunga/xxxx (hereinafter the “Kiambaa Property”) measuring approximately 0.5841 Ha.
 - ii. LR No. Ndumberi/Riabai/xxxx (hereinafter the “Ndumberi Property”) measuring approximately 0.120 acres.
7. The Applicant testified that the abovementioned properties are currently not being utilized either commercially or as agricultural land and that neither party is benefiting from the same. He prays that the said properties be divided to enable each party take up possession of his/her share and put the same to use as they deem fit.
8. The Applicant proposes that the two properties be divided in the following manner:-
 - a. Kiambaa Property be subdivided into two equal portions between the Applicant and the Respondent.
 - b. Ndumberi Property – be sold and the proceeds of sale be shared equally.
9. As stated earlier the summons was opposed. The Respondent confirmed that she got married to the Applicant in May 1989. The Respondent further confirms that the couple bore two (2) children together who are now both adults and further confirms That the parties got divorced in August 2012.
10. However, the Respondent avers in her Replying Affidavit that the Applicant has deliberately failed to list all the properties which the couple acquired during the subsistence of their marriage.
11. According to the Respondent she herself had initially filed an Originating Summons dated 1st October, 2009 seeking division of the following matrimonial properties:
 - (a) LR Ndumberi/Riabai/xxxx
 - (b) Mavoko Town Block 3/xxxx
 - (c) Mutira/Kaguyu/xxxx
 - (d) Kwale Diani/xxxx
 - (e) Two acres of land in Kirinyaga
 - (f) Shares in Terestam Properties Limited
 - (g) Shares in Standard Chartered Bank
 - (h) Old Mutual Unit trust for Kshs. Ten Million (10,000,000)



- (i) Funds in Account Number 2001829700 Standard Chartered Bank
 - (j) Funds in Account Number 23099830800 Standard Bank
 - (k) Funds in Account Number 1105089037, KCB Bank Githunguri Branch.
 - (l) Funds in Account Number 1100191832432 Equity Bank Kerugoya Branch.
 - (m) Fixed Deposit Account at HFCK Holdings Kenya Shillings One Million (Kshs. 1,000,000)
12. According to the Respondent the Applicant filed a Reply dated 21st October, 2009 to her Originating Summons. that her suit was never heard and still remains pending to date.
13. However, the Respondent did not appear to take issue with the hearing of the present suit filed by the Applicant. She only prayed that All the properties mentioned in her Replying Affidavit (which properties she asserts were concealed by the Applicant herein) be included and considered by the court in the distribution of the matrimonial properties.
14. Following the hearing of the evidence both parties were invited to file their written submissions. The Applicant filed the written submissions dated 6th June 2023, whilst the Respondent relied upon the written submissions dated 18th May 2023.

Analysis And Determination

15. I have carefully considered the Originating Summons dated 5th February 2021, the Reply filed thereto, the evidence adduced by both parties as well as the written submissions on record. Two main issues arises for determination in this matter as follows:-
- 1. Whether the properties cited by the parties constitute matrimonial properties.
 - 2. Whether the Applicant is entitled to the Orders prayed for in the summons.
16. It is common ground that the Applicant and the Respondent got married on 12th May 1989. It is also not in dispute that their union was dissolved by way of Decree Absolute issued on 10th August 2012. A copy of the Decree Absolute appears as Annexure “SMK ‘1’ to the Originating summons. I therefore find that the marriage having been legally dissolved the application seeking division of matrimonial property is properly before the court.
17. The Applicant and the Respondent herein are not in agreement over what constitutes the matrimonial properties available for distribution. The Applicant mentions only two (2) parcels of land whilst the Respondent includes several other parcels of land, shares in a company as well as funds held in various bank accounts.
18. Section 6 (1) of the [Matrimonial Property Act](#) 2013 defines matrimonial property as follows:-

“6

- (1) For the purpose of this Act, matrimonial Property means
 - (a) The matrimonial home or homes
 - (b) Household goods and effects in the Matrimonial home or homes



(c) Any other immovable and movable property jointly owned/and acquired during the subsistence of the marriage.”

19. The Applicant in his submissions has listed only two (2) properties as matrimonial property being:- BULLETS LR No. Kiambaa/Kanunga/xxxx LR No. Ndumberi/Riabai/xxxx
20. The Applicant has annexed to his Supporting Affidavit a copy of the Title Deed for LR No. Kiambaa/Kanunga/xxxx which indicates that the registered proprietors of the said property are SMK and TWM. This Title Deed was issued on 5th November 2008 which was ‘during the subsistence’ of the couple’s marriage.
21. Similarly, the Respondent has annexed a copy of a certificate of official search dated 3rd February 2021 in respect of the property known as LR No. Ndumberi/Riabai/xxxx. Once again the search indicates that the said property is registered in the joint names of the Applicant and the Respondent. The certificate of search also indicates that on 25th September 2009 the Respondent TWM placed a Caveat against any dealings with the said property.
22. In his written submissions the Applicant proposes that the Ndumberi Property be allocated to him in his entirety. He claims to have developed the said property on his own by constructing on it a recreation facility which he jointly owns with a partner.
23. It is trite law that parties are bound by their pleadings. Nowhere in his Originating Summons did the Applicant mention this construction of a recreation facility or the existence of a partner. These issues are only being raised in the written submissions when the Respondent has no opportunity to cross-examine on the same.
24. Neither did the Applicant mention the above matters in his evidence before court. Indeed at Paragraph (iv) of the Originating Summons the Applicant states that the said Ndumberi Plot “lays bare with no commercial, residential or agricultural activities being effected on them neither party benefitting from them”
25. The Applicant now through his written submissions seeks to sneak in new evidence. He cannot run away from his own pleadings. No amendments were made to the summons and in any event no evidence of this alleged construction or the existence of the alleged partner were tendered in court. I therefore reject these claims which have only been sneaked into the written submissions.
26. From the evidence availed by the Applicant it is quite clear that both the Kiambaa Property and the Ndumberi Property are registered in the joint names of the parties. The said properties were acquired during the subsistence of the marriage and as such I do find that both properties constitute matrimonial property and as such are available for distribution.
27. On her part the Respondent accused the Applicant of concealing other properties/assets acquired during the subsistence of the marriage and asserts that the said properties all constitute matrimonial property. The Respondent avers that she contributed towards the acquisition of the properties listed in para 5 of the Replying Affidavit dated 6th July 2021 and prays that the court make orders for the distribution of said properties/assets.
28. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* Cap 80 Laws of Kenya provides as follows:

“Burden of Proof



1. Whoever desires any court to give judgment as to any legal 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.”
29. The Respondent has asserted that all the properties/assets she has listed were acquired during the subsistence of her marriage to the Applicant and are therefore matrimonial property. that she contributed towards the acquisition of the same and as such is entitled to a share thereof.

Where is the proof of this?

30. Aside from the Kiambaa and Ndumberi Properties which this court has already found constitute matrimonial properties no documentation has been availed by the Respondent to prove the existence of the properties/assets she has listed much less that the same were acquired during the subsistence of the marriage nor that the Respondent contributed towards the acquisition of the said properties/assets. Indeed the Applicant in his evidence stated that he was not aware of some of the properties listed by the Respondent. Courts do not make orders in vain. Without evidence of the acquisition and/or mode of ownership of these properties the court will not make orders on their distribution.
31. The Respondent has made reference to certain properties owned and/or acquired using funds from company known as Terestam Properties Limited (hereinafter ‘the company’) which she states was a business partnership in which she and the Applicant held equal shares. No C12 form was produced by the Respondent to prove the identities of the Partners/shareholders of this company. The Applicant told the court that the said company was dissolved when problems arose between the couple.
32. A company is a separate entity with its own corporate identity separate and distinct from the shareholders [see *Salmon -vs- Salmon* 1897 AC 22]. Any properties/assets owned and/or acquired by a company belong to that company and cannot be made the subject of a suit for division of matrimonial property.
33. The Respondent did not make any application to enjoin the company in this suit. Indeed this anomaly was noted by the court in the Ruling delivered on 5th February 2009, where Hon. Lady Justice Nambuye (now retired) noted as follows:-

“Lastly, the court, is of the opinion that a procedural error was committed by this court when it endorsed the consent of 5th November 2009 bringing the Interested Party [Terestam Properties Limited] on board in that it failed to advise the Plaintiff/Applicant to amend her Originating Summons as well as her interim application to reflect that change. In the absence of such change having been made the participation of the company in these proceedings is irregular as the order alone cannot guarantee locus standi. The order simply granted leave, locus standi ought to have come from the amendment of the pleadings to bring the interested party on board and then invite it to participate in these proceedings through Order 50 Rule 16 CPR. In the absence of such a procedural step being taken it means that the said interested party cannot effectively agitate its rights independently of those of the Respondent.”

Despite this ruling the Respondent still took no steps to enjoin the company in this matter.



34. In the case of Nancy Wambui Ndichu -vs- Steve Ndichu Mwaura Nairobi Civil Suit No. 51 of 2012 (OS) Hon. Justice Lydia Achode (as she then was) stated as follows:-

“It is trite law that a company is a separate legal person/entity from its shareholders and directors as was espoused in the English case of Salmon -vs- Solomon (1887) AC 22. From the foregoing, I find that the said property in LR No. 12904 managed by Scientific Instrument Company Limited belongs to the Company and therefore the Applicant can only make a claim to the Company shares under the provision of the company Act.”

35. Similarly in AKK -VS- PKW [2018] eKLR, Hon. Lady Justice Muigai stated that:-

“it is crystal clear that division of matrimonial property by the Family Court does not/will not include shares/properties of a company, as the company is a separate legal person from the shareholders and/or directors. To safeguard one’s rights the right forum to ventilate and canvass the preservation of interests in shares and/or property in a company is the Commercial Division of the High Court.” [Own emphasis]

36. Therefore, any claim which the Respondent purports to have over company properties can only be prosecuted in a suit filed in the Commercial and Tax Division of the High Court. I therefore find that the properties/assets held or acquired by Terestam Properties do not constitute matrimonial property and are not available for distribution.

37. The Respondent has also sought the distribution of funds held in various banks accounts. Firstly, no documentary evidence was tendered to show in whose name or names the said accounts were held. Nor did the Respondent avail evidence of the mandates to the said accounts.

38. Secondly the Respondent has not tendered any evidence to show or prove that she contributed towards the funds held in the said accounts. No transfers by the Respondent in to the named accounts nor evidence of any credits (deposits) made by the respondent into the said accounts has been adduced.

39. In any event the funds held in the various accounts can only be distributed or paid out in accordance with the mandates indicated for each account. Accordingly, I find that the funds held in accounts does not constitute matrimonial properties and are not available for distribution.

40. Finally, reference is made by the Respondent a property known as Mutira/Kaguyu/xxxx (hereinafter ‘the Mutira Property’) which she alleges was gifted to the couple by the Applicant’s father that the couple built on the said land a huge home which the Respondent claims was constructed using funds from the Company. She claims the same as matrimonial property to which she is entitled to a share.

41. The Applicant however denies that the Mutira Property constitute matrimonial property. He asserts that the same was an inheritance from his father and that he holds the land in trust for himself and his siblings.

42. Firstly, the Respondent did not avail a copy of the Title document for this Mutira Property nor was a certificate of official search produced to enable the court determine in whose name the said property is registered.

43. Secondly the Respondent testified that the Mutira Property was developed using company funds. Under cross-examination the Respondent confirms that

“We built a huge house on the [Mutira] land which was constructed using Company money-----“ (Own emphasis). The Respondent goes on to state “Most of our assets were



purchased through the company.....” As I have indicated earlier all claims to company shares and/or assets cannot be ventilated in this matrimonial cause. I will therefore make no order in respect of the ‘Mutira Property’.

44. Finally based on the foregoing I find that the only properties which constitute matrimonial properties and are available for distribution are the Kiambaa and Ndumberi Properties.

45. Section 7 of the Act provides that:-

“Subject to section 6(3), ownership of matrimonial property vests in the spouse 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.”

46. In Federation of Women Lawyers Kenya (FIDA) -VS- 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 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.” [own emphasis]

47. In U MM -VS- IMM [2014] eKLR the court was of the view that:

“As far as I can see it is the provisions of Sections 2, 6 and 7 of the [Matrimonial Property Act](#), 2013 fleshes out the right provided by Article 45(3). By recognizing that both monetary and non-monetary contribution must be taken into account, it is congruent with the Constitutional provisions that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. that surely is oppressive to the spouse who makes the bigger contribution. that cannot be the sense of equality contemplated by Article 45(3).” [own emphasis]

48. This issue of how matrimonial properties should be divided was conclusively settled by the Supreme Court of Kenya in the case of Joseph Ombogi Ogentoto -vs- Martha Bosibori Ogentoto [Petition No. 11 of 2020](#) where it was held as follows:

“... we also find that Article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in [the constitution](#) do we find any suggestion that a marriage between parties automatically results in common ownership



or co-ownership of property (hence vesting of property rights) and Article 45(3) was not designed of the purpose of enabling this court to pass property rights from one spouse to another by fact of marriage only...

.....our view is that, while Article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married...

.....it is our finding that the stated quality under Article 45(3) means that the 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 that no party is unfairly given more than what he or she contributed...

...Therefore, 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 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 Tuiyot, 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.” [own emphasis]

49. Based on the above legal provisions and a plethora of other decided cases it is clear that despite the constitutional requirement that parties to a marital union shall have equal rights, each party must be able to prove either monetary or non-monetary contribution in order to merit entitlement to a share of matrimonial property.
50. Although the Respondent has not proved her financial contribution towards the acquisition of the two (2) parcels of land, it is not disputed that the same were acquired during the subsistence of her marriage to the Applicant. At the time the Respondent was a wife providing assistance and companionship to the Applicant. Undoubtedly she also bore the children and was their primary caregiver.
51. The Applicant has indicated his willingness to have the two properties divided between the parties equally. In my view this would be fair and equitable.

Conclusion

52. Finally I do allow the summons dated 5th February, 2021 and make the following orders:-

- (1) The properties known as:-

LR No. Kiambaa Kanunga/xxxx

LR. No. Ndumberi/Riabai/xxxx

are hereby declared to be matrimonial property.



- (2) The above properties to be divided equally between the Applicant and the Respondent on a 50:50 basis in the following manner:
- i. LR No. Kimbaa Kanunga/xxxx measuring approximately 0.5841 hectares to be subdivided into equal portions between SMK and TWM.
 - ii. LR No. Ndumberi/Riabai/xxx measuring approximately 0.120 acres to be sold and the proceeds of sale be shared equally between the Applicant and the Respondent.
3. This being a family matter each side to bear their own costs.

DATED IN NYERI THIS 20TH DAY OF SEPTEMBER, 2024.

.....

MAUREEN A. ODERO

JUDGE

