



**SAO v AAA (Matrimonial Case E004 of 2024)
[2024] KEHC 10690 (KLR) (6 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CASE E004 OF 2024**

G MUTAI, J

SEPTEMBER 6, 2024

BETWEEN

SAO CLAIMANT

AND

AAA RESPONDENT

JUDGMENT

Introduction

1. The claimant filed the Originating Summons dated 14th June 2022 in the Civil Division of the High Court. Vide the said Summons, she sought the following orders:-
 1. Spent;
 2. Spent;
 3. That it be declared that Plot on Title Number Mombasa/Vyemani Scheme/XXX (the matrimonial home) registered in the name of the Respondent is jointly owned by the Applicant and the Respondent;
 4. Spent;
 5. That the honourable court be pleased to order the division and or apportionment of the same between the parties;
 6. That it be declared that the property being Title Number Mombasa/Vyemani Scheme/XXX registered in the names of the Respondent is jointly owned (by the Respondent) and the Applicant;
 7. That an order that the Respondent does execute all documents where necessary to transfer the Applicant’s portion in the absence of properties or in default the same be executed by the



Chief Registrar, Deputy Registrar or Registrar of Titles or in the alternative, the said property be valued;

8. That the Respondent be compelled to render full and frank disclosure to the Applicant with regard to the suit property;
 9. That the suit property is excluding the school Izza Academy, that is privately owned by the Applicant; and
 10. That all costs of the suit be awarded to the Applicant.
2. The Originating Summons is supported by the affidavit of the claimant, sworn on 15th June 2022, in which she deposed that she got married to the respondent “sometimes” in the year 2000. Their marriage was blessed with two issues, AAA and AAA.
 3. She averred that during the subsistence of the marriage, she and the respondent purchased the suit property, Title Number Mombasa/Vyemani Scheme/XXX. The parties divorced at the instigation of the respondent on 26th September 2019, after which she was forced to leave the matrimonial home. The claimant stated that she contributed to the purchase of the property by “providing some of the payments in acquiring the property”.
 4. The claimant deposed that she put up the school known as Izza Academy on the property with the consent of the respondent but without his input. The respondent occupies the matrimonial home on the suit property.
 5. In support of her case, the claimant produced birth certificates of the children and a certificate of divorce issued on 27th September 2019 by Muslim Marriage Office Ustadh Mwinyi Juma Mbwana.
 6. The respondent filed a Replying Affidavit sworn on 24th April 2023. The Respondent denied that he had ever been married to the Claimant. He, however, admitted that they lived together and that their relationship had been blessed with two issues. The Respondent denied that Title Number Mombasa/Vyemani Scheme/XXX was purchased jointly by him and the Claimant. He averred that he solely purchased the property with his funds. He averred that he had been an employee of Telkom Kenya from 1988 until 30th January 2007, when he was retrenched and paid terminal dues. It is with some of the said dues that he purchased the subject property on 2nd April 2007 from Mwalimu S. Kadenge for Kes.60,000.00. He constructed a three-bedroom house and a 4 room extension on the suit property. He obtained title to the said property on 7th July 2017.
 7. He thus stated that he acquired the property solely, and the claimant made no contribution whatsoever. He stated that the claimant provided no proof of contribution. The respondent further stated that he got a pension of Kes.300,000.00 to renovate the 4-room structure on the suit property, which was later converted into a school. He stated that the school is currently under the control of the claimant pursuant to the orders issued by the Magistrate Court in CMCC No. 2075 of 2021. The respondent contended that the Claimant was a teacher in his school earning a salary and not the owner.
 8. The respondent produced a Telkom Kenya pay slip, certificate of service, cash withdrawal slip, title deed and handwritten workings of what he said were his expenses in constructing and or renovating the buildings on the suit premises.
 9. The respondent urged that Originating Summons has no merit and should be dismissed with costs.
 10. On 2nd November 2023, this matter was transferred to the Family Division of the High Court pursuant to the orders of Lady Justice Florence Wangari.



11. This matter was heard on 13th March 2024. Both the claimant and the respondent testified.

Evidence of the Claimant

12. The claimant testified that she is an ECD teacher at Izza Academy, a school she claimed to own. She stated that she got married to the respondent and that their union was blessed with two living children. The suit property has a three-bedroom house and an extension with four rooms at the back, which is used as a school. She testified that she carried out most of the improvement therein and that she has been running the school since 2017. She averred that with her income, she educated their children. The 1st born is in college. She stated that she improved the house with the help of her mother and brother. Although the respondent got paid terminal and pension dues, she didn't know how he used the money, save that he bought a TukTuk at some point.
13. When cross-examined, the claimant testified that she had been married to the respondent and that it wouldn't have been possible for them to stay together if they were not married. The claimant averred that the materials used to improve the property were paid for by her through the respondent.

Evidence of the Respondent

14. The respondent testified that he used to work for Telkom Kenya. Upon retrenchment, he got Kes.953,484.70. Of this amount, he used Kes.60,000.00 to buy the suit land from Mwalimu S Kadenge, and after that, he started building. He got the title for the suit property in 2017. He built a 3-bedroom house in which he lived with his wife and children. There were also four rooms which were leased.
15. The respondent testified that he worked as a security guard, possessed a sewing machine, and could sew. He got Kes.600,000.00 from Telkom Kenya as a pension. Of this amount, he withdrew Kes.300,000.00, with which he renovated the 4 rooms, which were then converted into a school covering 90% of the land.
16. The respondent stated that he and the claimant were not married and averred that the divorce certificate produced in Court was fake.
17. When cross-examined, he admitted that he lived with the claimant from 2001 to 2019 and that they had three children together, one of whom is deceased. He conceded that he took the claimant to college and that she was a teacher of Islam at Izza Academy. The respondent admitted that there was no evidence that he owned the school or that he was a registered teacher. He testified that he used Kes.300,000.00 from his pension to buy a Tuk Tuk and Kes.300,000.00 to renovate the school. He stated that the claimant's contribution was minimal.

Written Submissions of the Parties

18. Upon the conclusion of the hearing, the court directed the parties to file Written Submissions. Although the respondent averred that he filed Written Submissions, this Court has been unable to get a copy of them, either in the CTS or the Court file.
19. The claimant submitted that the suit property is registered in the respondent's name. On the other hand, she is a teacher and the owner of Izza Academy, a school erected on the suit premises.
20. The claimant urged that the suit property was a matrimonial property, which should be distributed per the contribution under section 7 of the Act. It was submitted that under section 2 of the said Act, "contribution" includes monetary and non-monetary contributions. Non-monetary contributions



include domestic work, management of the matrimonial home, child care and companionship and management of the family business or property and farm work. Under section 14 of the Act, there was a rebuttable presumption that where matrimonial property was acquired in the name of one spouse, there was a rebuttable presumption that the property is held in trust for the other spouse.

21. I was referred to the decision of the Court in ENK vs JNK [2015]eKLR and, in particular, to the holding that:-

“When parties get into marriage, they usually intend the arrangement to be for life. Divorce is not in their minds. This is the position regardless of the system of law under which the parties contract the marriage. Indeed, that is the conception of marriage in Hyde vs Hyde and Woodmanse (1866) 1 LRIP & D 1230. The parties to the marriage thereafter live their lives according to the concept of permanence of their marriage. This then creates the presumption that whatever property is acquired must have been intended to be for the benefit of the family.”

22. It was urged, relying on the cases of Karanja vs Karanja [1976]eKLR, Kivuitu vs Kivuitu [1988-1992]KAR, James Kamore Njomo vs Phoebe Wangui Kamore and Peter Mburu Echaria vs Priscillah Njeri Echaria [2007]eKLR that I should share out the property equally between the parties.

23. I have not had the benefit of reading the submissions of the Respondent.

Analysis of the Facts and the Law

24. In my view, the issues in this matter are 3. These are: -

1. Whether the Claimant was married to the Respondent;
2. Whether the suit property is matrimonial property and
3. If so, what orders ought to be issued?

Was the Claimant the Wife of the Respondent?

25. The parties hereto are Muslims. It is common ground that the parties cohabited together from 2001 up to 2019, a period of 18 years. The claimant produced a certificate of Divorce issued on 27th September 2019, registering a divorce issued on 26th September 2019 upon pronouncement of 3 talakas by the respondent.

26. Although the respondent dismissed the document as “fake”, he didn’t seriously challenge its authenticity. He could have done so by providing evidence showing that the document was invalid under Muslim law or that a recognized officer didn’t issue it. In my view, the fact that there was a divorce is evidence of the existence of the marriage, for there cannot logically be a divorce in respect of a non-existing marriage.

27. Even if, which I do not accept, no formal evidence of the marriage exists, the conduct of the parties over the 18 years they lived together created a presumption of marriage. I am guided by the decision of the Supreme Court of Kenya in MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) [2023] KESC 2 (KLR). In the said case, the apex court set out the strict parameters of the doctrine of presumption of marriage in paragraph 64 of the judgment by stating that: -

“We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:



1. The parties must have lived together for a long period of time;
 2. The parties must have the legal right or capacity to marry.
 3. The parties must have intended to marry.
 4. There must be consent by both parties.
 5. The parties must have held themselves out to the outside world as being a married couple.
 6. The onus of proving the presumption is on the party who alleges it.
 7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
 8. The standard of proof is on a balance of probabilities.”
28. In my view there are enough grounds to conclude that the parties hereto lived together as mutual spouses and that they must be presumed to have been married even if no evidence of formal marriage existed.
29. In the circumstances of his matter, I find and hold that there was a marriage between the claimant and the respondent, which was dissolved on 26th September 2019.

Is the Suit Property a Matrimonial Property?

30. For a property to be considered as being matrimonial property, it must have been acquired during coverture. A matrimonial property is liable for division based on the parties’ respective contributions.
31. In this matter, there is no doubt that Title Number Mombasa/Vyemani Scheme/XXX was purchased with funds provided by the respondent from his retrenchment package.
32. Since being acquired, the property has been developed with a 3-bedroom house and 4-room extension used as a school. Did the claimant contribute anything towards the development?
33. In my view, she did. I say so for the following reasons: -
1. She took care of the home;
 2. She took care of the children and paid their school fees;
 3. She provided the Respondent with companionship and peace at home; and
 4. She managed the family business, Izza School, and was a teacher at the said school.
34. By his own admission, the respondent had, since receiving his pension, not been in active income-generating activities apart from engaging in the Tuk Tuk business, which didn’t thrive, and sewing. In my view, the substantial family income came from the claimant.
35. The property, having been acquired during coverture, is a matrimonial property. Although it is registered in the name of the respondent, there is a rebuttable presumption that it belongs to both parties equally. Section 14 of the *Matrimonial Property Act*, 2013 states 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 rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

36. The respondent hasn't shown any reason why the presumption should not hold in this case.

How Should the Property Divided?

37. In my view, the contributions made by the claimant and the respondent are equal. The purchase price of the property would appear to me to be comparable to that of the value of the improvements. In the absence of accounts, that would enable me to determine the exact quantum of contribution by each party, I must hold that equality is equity.

Disposition

38. I find and hold that the claimant and the respondent were married under Islamic law. Their union was dissolved on 27th September 2019, having subsisted from 2001, or thereabouts.

39. The suit property was acquired during coverture. In my view, Title Mombasa/Vyemani Scheme/XXX, including all the improvements therein, is a matrimonial property.

40. Although the respondent made a direct contribution to the acquisition of the property, it is my view that the claimant made an indirect/nonmonetary contribution of equal value.

41. In the circumstances, I find and hold that Title No Mombasa/Vyemani Scheme/XXX is a matrimonial owned on a 50:50 basis by the claimant & the respondent.

42. I direct that the same be valued within 60 days of today by the Government Valuer, Mombasa.

43. Parties are at liberty to buy each other out. If they are unable, within 30 days of receipt of the valuation report, I direct that Title No Mombasa/Vyemani Scheme/XXX, be sold by public auction and proceeds divided equally by the parties hereto.

44. I make no orders as to costs as this is a family matter.

45. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF SEPTEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Oduor for the Claimant;

Mr Abubakar Ahmed Adam (Respondent) (pro se litigant); and

Arthur - Court Assistant.

