



**MNM v DKM (Originating Summons E001 of 2023)
[2024] KEHC 12297 (KLR) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
ORIGINATING SUMMONS E001 OF 2023
GMA DULU, J
OCTOBER 14, 2024**

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013

BETWEEN

MNM APPLICANT

AND

DKM RESPONDENT

JUDGMENT

1. Before me is an Originating Summons filed by MNM, (also described in documents herein as MNM) against DKM dated 12th June 2023 under Section 12(3), and 17 of the *Matrimonial Property Act* (Cap.49) of 2013 and Article 45 (3) of the *Constitution*. The Originating Summons was filed with a Notice of Motion for interlocutory orders, which has been spent, and thus this present decision relates to the main suit, that is the Originating Summons.
2. The application has six (6) prayers, two of which have been spent as follows:-
 - i. (Spent).
 - ii. That the properties known as and listed in the cause and as below are matrimonial properties and the same to be divided equally between the applicant and respondent and/or this honourable court may deem fit:-
LR Number 1956/xxxx (her business premises);LR 16398 (South West of Voi) – Grant Number CRxxxxx (where she and the children live);Elburgon/Elburgon Block 4/xxx;Kwale Mashimoni Adj xxx; andLocation 1817/1 – xx Taita Taveta
 - iii. That the respondent be ordered to disclose any new property numbers of the properties located as below and the same be declared matrimonial properties and be divided equally between the applicant and the respondent.



- iv. That the respondent be ordered to disclose the monies in the bank accounts which the petitioner contributed directly into the business premises.
 - v. (Spent).
 - vi. That the costs of the application be in the cause.
3. The application has grounds on the face of the Originating Summons that the applicant and respondent were married and that the said marriage was dissolved in Milimani Divorce Cause No. E009 of 2023; that the applicant and respondent acquired the listed properties during the subsistence of their marriage; that the respondent is in occupation and control of most of the matrimonial properties and was receiving rental income and mining proceeds from some of the properties solely to the exclusion of the applicant; that since the marriage had already been dissolved there was need to have the matrimonial properties shared out equally and/or as per contribution or as the court may deem fit; and that it was in the interest of justice that the orders sought be granted.
 4. The application was filed with a supporting affidavit sworn on 12th June 2023 by the applicant MNM, in which it was deponed that after institution of the divorce cause there had been no communication between the applicant and respondent; that the respondent had taken advantage of the lack of communication to continue drawing financial benefits from some of the matrimonial properties alone without any involvement and/or participation of the applicant, and even tried to remove the applicant from her business premises in which she fends for the five (5) children; and that he had sought to forcefully evict them from the home which the applicant built after separation; and that it was fair that as their marriage had now been dissolved that the issue of matrimonial properties acquired during the subsistence of the marriage be dealt with once and for all.
 5. The Originating Summons was opposed through a replying affidavit sworn on 17th July 2023 by the respondent DKM, which was also an affidavit in response to a Notice of Motion dated 12th June 2023. It was deponed in the replying affidavit that the marriage between the parties had been dissolved due to the applicant's infidelity and abuse of the respondent's finances; that their marriage was characterised by a lot of issues and thus the respondent acquired properties on his own without the applicant's input; that in 2010 the respondent lost his business ventures and was unable to sustain his family needs and as a result the applicant physically abused him and chased him out of the house where they lived as husband and wife; and that on reporting the incidents to the police the applicant stated openly that she had found a man who could provide for her; that the applicant thus started afresh and that the two agreed at the police station to live separately; that notwithstanding the applicant went ahead to build a house on one of the respondent's properties LR No. 16398 South West of Voi Grant No. CR xxxxx; that the children lived therein and that the respondent was willing for the house to be declared as matrimonial property as the applicant built it; that in 2010 while the respondent had financial troubles and without notice the applicant began to encroach on the respondent's property LR No. 1956/xxxx and refused to stop renting the property and physically and verbally abused the respondent and threw stones at him prompting him to report the incident to the police; that though the applicant knew that the respondent bought the property the applicant started bullying him and demanded possession of the property after kicking the respondent out in 2022 and went ahead to source for buyers; that in 2022 on realizing that the respondent was trying to rebuild his life the applicant began to frustrate him using acquired finances and her new found influential police lover; that the respondent had been the owner of the property in question from 2007 and that the receipts provided in court by the applicant dated between July 2022 to December 2023 were just meant to mislead the court to erroneously find that the property is matrimonial property; that the said receipts were fabrications and that those receipts dated 10th and 19th December 2023 were futuristic; that the construction materials alleged by



the applicant were items which she found at the property which include a water tank, and blocks and gravel left there by a friend of the respondent Mr. Peter Shake whom the respondent allowed to use the premises for storage of Mr. Shake's construction materials in 2016 to 2018; that the invoices and sale agreements presented in court by the applicant were all signed by the applicant illegally after the two had separated; that the respondent had throughout provided for the five (5) children as he was aware that parental responsibility was a shared responsibility on 50:50 basis; that the applicant's allegation that the respondent wants to sell the matrimonial property was an effort to tarnish his name to gain sympathy and mislead the court; that the respondent had tried severally to resolve the matters between them informally but in vain as the applicant had taken a hard line position; that the respondent asks the court to declare that the respondent was sole owner of LR No. 1956/xxxx and Kwale Shimoni Adj/xxx which were not part of matrimonial property; that the respondent asks the court to prohibit the applicant from interfering with the respondent's right to quiet possession of property known as LR No. 1956/xxxx and issue an eviction order against the applicant and her tenants for trespassing in the said property; and that the Originating Summons be dismissed with costs.

6. The Originating Summons herein proceeded to hearing by way of tendering oral evidence. In this regard, after filing and serving witness statements, the applicant called only one witness, and the respondent also called only one witness, who are the parties herein in person.
7. Applicant's only witness was MNM the applicant, who relied on several documents which she had filed in this Originating Summons. She also adopted her written statement as her evidence.
8. It was her oral evidence that she got married to the respondent on 12th December 1998 at 25 years and that divorce proceedings had been filed but not concluded yet. She testified that the respondent left her on 25th November 2022 and went to live with a mistress. That they had five (5) children of both gender, the first of whom was born in 1999, and that she presently operated a car wash business in Voi town, and that they had other businesses together.
9. That in 2003, they started selling cosmetics and other items with the respondent in Voi town, then expanded to a studio business which she had been operating at Porters house.
10. According to her, they had separate businesses with the respondent, whose businesses included gemstones. She testified that the respondent's business outside the country collapsed. She stated that by 2005 they operated Jedama Studio which she ran though they operated a joint account with the respondent. According to her, that business generated good income, but by 2017 when mobile phones became popular and photos could be taken through phones, the studio business was negatively affected.
11. It was her evidence that 2018 was the hardest year of their lives, and the children were schooling, thus she then tried to bring tea from Mombasa to sell at home to survive. Then they started the car wash business with her husband the respondent, but in 2018 they were so pressed that church elders sympathised with them and intervened and conducted a fund raising to help them.
12. That she then went to their plot in Voi town, which had been encroached by boda boda (motor bike) operators, cleared bushes and asked the boda boda operators to pay rent. That she faced a confrontation, and they reported the incident with the respondent to the police.
13. It was her further evidence that initially she did not have funds to operate the car wash business, and that she talked to a friend of the respondent one Muthama, who donated to her an old machine free of charge.



14. She relied upon an application she made to County Government of Taita Taveta for the business and letter from Kenya Power Company Limited for electricity supply. It was her evidence that on the first day of business, she earned only Kshs. 350/= which she thought was good income at that time.
15. According to her, the husband (respondent) did not want to bring himself down to operate the car business, as he felt ashamed. According to her also, when electricity was connected, the plot became valuable and so she brought tenants, the first one being Simon Kamau Munyari. She relied on the tenancy document dated 15th April 2020 which had her name as the land lady, but added that when she received the initial rent of Kshs. 2,000/= she passed on the whole amount to the husband (respondent) in front of the children. She added that other tenants also paid rent and she gave the money to the respondent.
16. It was her further evidence, that some tenants initially built temporary structures, but thereafter she started building shops on the plot after they obtained materials from Mount Carmel Shop, but her husband unexpectedly filed for divorce, and that when she received divorce documents she was shocked.
17. It was her evidence that by 2018 she had noticed that the husband (respondent) was intimate with Wamboi and had become violent. It was her evidence that when they ultimately disagreed with the respondent, he came with the police and took away original documents in the brief case including the applicant's and children documents, and that she then went to Mount Carmel Shop to get other documents on materials purchases therefrom, which she had used in this case. She admitted however that the respondent also procured materials from Mount Carmel Shop.
18. It was her evidence also that in the letter from the respondent dated 11th April 2023 that she had trespassed on the Voi town plot, the respondent actually admitted therein through the said letter that she had built kiosks on the plot. It was also her evidence that the family were residential tenants of Magistrate Wahome at Kariokor.
19. It was her further evidence that the respondent left her with outstanding debts on 25th November 2022, and that she thus decided to build a residential house on their plot near Vacani hotel, as the landlord Mr. Wahome had told her not to stay in his residential house. It was her evidence that she was helped by friends to build a residence in a period of one (1) month, and that she shifted therein with the children on 31st January 2023, and that they still resided there.
20. It was her evidence also that she had now come to court because the respondent had gone to her business and threatened her and the children by saying that he would break their legs, and that all the wealth would now be owned by Wamboi. She testified that she was 50 years old and had used all her energy to acquire the properties herein.
21. With specific regard to the Elburgon, Kwale and Taita Taveta plots, she stated that these were matrimonial assets, and that there were two other plots at Kitengela and two mining plots which were also matrimonial properties.
22. She stated that they had one bank account with the respondent for Jedama Studio business and that they acquired the properties herein together. It was her evidence that since the respondent left the family, he had transferred one child from one school to another, after she was called to school and informed that the child had issues. According to her, the respondent said that she was the problem and that it was the Children Officer who recommended that the child be transferred from the school.
23. The applicant thus asked for this court favourable orders to be issued to her, and to be given by the court her share of the matrimonial property.



24. The applicant also testified to several incidences in which she made reports to the police on visits and threats made to her by the respondent, and specifically on 27th March 2021, 24th August 2021, 26th November 2022 and 11th April 2023, and even after these proceedings were filed.
25. In cross-examination, she stated that though between 2009 and 2010 the respondent had financial problems, he left the home in 2023. She confirmed that the respondent made reports to the police from 2021 and thereafter, and that there was no such reports made to the police in 2010 or 2015.
26. She maintained that her husband the respondent did not do anything at Jedama Studio, but that she reported all difficult situations to him to attend to. She also stated that at Jedama Studio they had a motor cycle, but maintained that the motor cycle belonged to her brother.
27. She stated that between 2010 and 2022, she operated business together with her brother, and that her brother's job brought more income than her. She maintained that they did not have any secret activities with her brother, though her brother operated the bank accounts. She stated that she could only confirm the detailed position of transactions at Jedama Studio, if she gets a chance to check back and confirm such activities.
28. On the Taveta plot, she stated that she was present when it was bought but did not know the price, nor whether it was paid for by instalments. On the Kwale Shimoni plot, she stated that it was sold by Mathias, and that what she knew was that it was a family purchase.
29. She further stated that the respondent did not prevent or deny her occupation of any plot, but maintained that the respondent sold some assets such as a plot in Nakuru and spent the money, though she could not specify the moneys involved and the respective sources.
30. She confirmed that, at the time the respondent left the house on 25th November 2022, he had come from the police station. She denied going to the police station on 24th November 2022. She stated however, that the respondent went to the police station, and that the police phoned her, and on her part she told a specific policeman to protect her, and that the police told the respondent not to come to the house. She stated that it was then that the respondent was escorted home by the police, and that at that point she produced all his clothes, though the respondent rode away on a motor bike with the briefcase containing documents.
31. She confirmed that the car wash business was registered in her own name, and that she solely applied for electricity connection in her name, but indicated that she was wife to Kuria.
32. On the tenants on the Voi town plot, she stated that Simon defaulted in rent payment and she thus issued him with notice to vacate. She also stated that she did not disclose the role of Benard K. Mukele to her husband the respondent, though some tenants still paid rent to Benard, who asked her to allow him to receive rent.
33. She stated that she did not have receipts for all rents received, and that some receipts had wrong dates for 2023, which should have been 2022. She stated that genuine receipts could only be obtained from the persons who issued the receipts to her.
34. She stated also that some receipts were for materials for putting up buildings on the plots, though they bought the Voi town plot with pre-existing two rooms thereon. She added that Kuria the respondent, had not approved the plans for the constructions, though he was the custodian of family documents.
35. She stated that the respondent ran away with the medical examination report, (P3) form, and all her documents, but agreed that the respondent paid school fees for the children, except he refused to pay



- school fees for the last child. She stated also that she started the residential house building project (where she lives) at the end of 2018.
36. She maintained that from 2022 to date, the respondent took all the rents, and agreed that a police officer called Rwaria was her friend, and added that he used to be the DCI at Voi and that he helped her remove the boda boda operators from the Voi town plot. She stated that she was thankful to God that he assisted her, and agreed that there was a time that he took the children for swimming.
 37. She maintained that all the properties mentioned herein, were acquired during the marriage and that there was no inherited property. She maintained also that she reported to the police the instances when the respondent created disturbances at the business, but could not give specific dates.
 38. In re-examination, she confirmed the entries in the certificate of marriage which the parties celebrated on 12th December 1998. That was the evidence of the applicant.
 39. On his part, the respondent DKM stated that he was a gemstone broker in Kenya and abroad, and lived at Voi town, and that he was brought to court herein by his wife MNM.
 40. He adopted his witness statement dated 16th October 2023 as his evidence in chief, and stated that he had heard what the applicant MNM had stated in evidence in court.
 41. With regard to the properties in question, he testified that when they got married, he removed his wife the applicant from Nakuru to Voi. At that time, he already operated a kiosk selling cosmetics. Through the applicant took over running of the kiosk, from the then employee, it did not flourish and collapsed.
 42. It was his evidence that thereafter, he got a gemstones order and travelled to Bangkok, but this business also failed. Then he travelled to South African and brought his wife, the applicant, feminine items like hand bags for sale, but this business also failed.
 43. He then got insight and opened Gedana Stores a gemstones and studio shop, but his wife said that it was not her dream and it collapsed.
 44. According to him, he then started investing alone in deposits and, land and that was how he acquired his properties. He stated that the applicant had her own separate properties and that he did not call upon her to make contributions for acquisition of assets.
 45. He stated further that the applicant had powerful influence from the police at Voi, as she had a friend who worked with the police, the details of which were contained in his witness statement which he adopted as evidence. He further added that the particulars of acquisition of assets were also explained in the statement.
 46. In cross-examination, he confirmed that the two were married in 1998 with five (5) children, and the last born in 2010. He stated that he saw a red flag from the beginning but that he still takes care of his children.
 47. He stated also that he did not inherit anything from his father, but that people could easily kill in order to inherit. He denied losing all businesses in 2010, and stated that he was in the gemstones business, which they did with his wife the applicant.
 48. He clarified that loss of all business described in his witness statement, meant loss of only one business the gemstone business. He stated that on 24th November 2022 his wife chased him from the residential home in Voi town, and for which he paid rent, though had not produced any receipts for rent payment in court.



49. He stated further, that in 2010 he lost about Kshs. 40,000,000/= and as a consequence sold his property in Nakuru. He also stated that it was by God's grace, that he recovered financially, though after 2010 he had not purchased any additional property. However, he stated that he owned a plot in Voi town, where initially he intended to put up a storey building, but allowed people to construct kiosks from which he was paid rent.
50. He agreed that Mr. Shake was his friend who built a house next to the Voi town plot, but stored materials on the respondent's plot, and left behind a site house and a 10,000litres water tank between 2016 – 2017. He agreed further that his friends built kiosks on the plot. He denied knowledge of the rent receipts produced by the applicant, and insisted that he had tenant agreements, but which he did not produce in court.
51. He agreed that he had lived in Mr. Wahome's residential house as a tenant, and added that on the day he was chased by his wife the applicant, his daughter opened for him, and his wife lifted a metal rod to hit him, and uttered words that he would either die, be imprisoned, or crippled. He then decided to go away to avoid those threatened consequences, and instead reported the incident to the police.
52. He stated that he talked to a policeman called Kamau, and the police then escorted him to the house where he picked his clothes in order to travel. He agreed that the police and himself took the box or brief case containing documents.
53. He maintained that his wife the applicant only built one shop on the Voi town plot, using building blocks belonging to Mr. Shake, but then changed and stated that his wife built one shop, and a car wash building behind it. He stated that they did not have any agreement with the applicant on property.
54. In re-examination, he maintained that he was not privy to any agreements relied upon by MNM the applicant. He stated that Mr. Shake was a neighbour, and added that his wife (applicant) built forcefully on the Voi town plot, which was the reason he sent her a demand letter. He maintained that the applicant owned separate property which she had not disclosed to court, and also maintained that they did not have any agreement on property with the applicant. That was the respondent's evidence.
55. After the closure of the oral testimonies for the applicant and respondent, the parties counsel Kishagha Katema Advocates for the applicant, and Agoi Kilima & Company Advocates for the respondent filed written submissions, which I have perused and considered.
56. I note that in the submissions, the applicant through counsel avers that she contributed substantially to the acquisition of all the properties listed herein, which are basically land assets and associated business and residential premises. The respondent through counsel, on his part, submitted that the respondent solely acquired all the land properties in question, and that the applicant (wife) precipitated a difficult family situation resulting in separation, and in the meantime also partly developed one plot with car wash business, and another plot by building on residential house where she presently resided with the children of the marriage.
57. The first issue is whether the applicant and the respondent were married, or put another away, were husband and wife.
58. This issue is not in contest. Both parties agree in pleadings and evidence that they were married in 1998 and have five (5) living children. They agree that at the time that these present proceedings were filed, the respondent had already commenced divorce proceedings in the Chief Magistrate's court at Voi E009 of 2023, and that divorce decree had now been issued by the court.
59. I find that the parties herein were married and are now divorced, and that they bore five (5) children of the marriage.



60. The second issue is whether the listed properties in contest, were acquired during the subsistence of the marriage.
61. From the evidence tendered by both the parties in court, there is no indication or suggestion that any of the listed assets, that is LR Number 1956/xxxx and business premises thereon in Voi town; LR 16398 (South West of Voi) – Grant Number CR xxxxx where the applicant currently lives with the children; Elburgon/Elburgon Block 4/xxx; Kwale Mashimoni Adj; xxx, and Location 1817/1 – 10 Taita Taveta, were acquired before marriage. In effect, all the above listed properties were acquired during the marriage of the parties herein, thus they were acquired during the subsistence of the marriage.
62. I thus find that all the properties listed herein were acquired during the subsistence of the marriage.
63. The next and third issue is whether each of the parties contributed to the acquisition, development or improvement of the assets.
64. Contribution to acquisition, improvement, and development of assets in a marriage, is defined under Section 7 of the *Matrimonial Property Act* – No. 49 of 2013. Such contribution can either be direct or indirect, but it has to be supported by evidence. It includes direct contribution such as providing funds for the purchase or improvement of the asset. It can also be indirect non monetary contribution such as domestic work and management of the family affairs, child care, companionship, management of the family business or property; and farm work.
65. In the present case, no evidence was tendered to show or demonstrate that the applicant contributed to the acquisition or improvement of Elburgon/Elburgon Block 4/xxx and Kwale Mashimoni Adj xxx; and Location 1817/1 – 10 Taita Taveta. Thus I find that the applicant did not contribute to the acquisition or improvement of these assets.
66. As for LR Number 1956/xxxx in Voi town, and LR 1639 (South West of Voi) – Grant Number CR xxxxx, there is clear evidence on record that the respondent registered these assets in his name with the knowledge and support and physical activities and financial expenditure of the applicant, and that these two assets were in fact part of the family life activities of both spouses, which included actions by both the applicant and the respondent in protecting, improving, developing, and doing business on the properties.
67. These activities in particular, included the applicant's efforts to remove squatters from LR 1956/xxxx Voi town and also to put up car wash business thereon, and also leasing a section of the same plot to tenants. With regard to plot LR 16398 (South West of Voi) – Grant Number CR xxxxx, the applicant put up a residential house where she presently lives with the children.
68. In my view therefore, the applicant contributed both directly and indirectly to the development and management of these two assets. Thus, these two assets are clearly matrimonial property.
69. I now turn to the issue as to whether the assets listed herein should be shared equally between the parties, or to what extent they be shared. On this issue, the starting point is the *Constitution*, Article 45(3) which provides that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage, and at the dissolution of the marriage.
70. Courts have severally dealt with the meaning of the above Article 45(3) of the *Constitution*. In particular in the case of *JOO =versus= MBO* (2023) KESC4 (KLR) cited by counsel for the applicant herein, the Supreme Court underscored the duty of courts to ensure that there is equality and fairness to all spouses in determining marital property disputes, as all parties have the same and equal rights at the dissolution of a marriage based on their contribution to the acquisition, management and improvement of assets.



71. In the present case, there is no evidence tendered on the existence of or a presumption of a matrimonial home, as the parties lived in rented premises before the applicant put up a residential house on LR 16398 (South West of Voi), where she presently lives with the children. At that time, they had already apparently started living separately with the respondent.
72. I note also, that the respondent has proposed that the house put up by the applicant where she and the children presently live be treated as matrimonial property and be given to the applicant.
73. In the circumstances of this case and evidence on record, and doing the best that I can to dispense justice to all parties on the principle of equality, equity and fairness, in my view plot LR Number 1956/xxxx – Voi town and Plot LR 16398 (South West of Voi) – Grant Number CR xxxxx, as matrimonial properties, are for equal division between the parties in contest herein, who have been wife and husband, subject to specific conditions which this court will give hereafter, as the two properties were acquired during marriage, and each of the spouses contributed significantly to the acquisition, management and improvement of the same. The other listed assets in my view were acquired by the sole efforts of one spouse and are not for division among the parties herein.
74. On the request by the applicant for the respondent to disclose bank accounts and other assets, in my view this court cannot issue such a blanket order for disclosure against any of the parties herein, in view of the constitutional protection of privacy of every person under Article 31, and the right to silence under Article 50(2)(1) of the Constitution. The request is declined.
75. I will only add here that this determination, being on property claims between the parties who were wife and husband herein, the issue of parental responsibility for the children is a totally different issue, and is not for determination herein.
76. Coming now to the issue of who bears the costs of these proceedings, these being in the nature of family proceedings, I will order that parties bear their respective costs of these proceedings.
77. Consequently, and for the above reasons, this Originating Summons is partly successful. The orders of this court are as follows:-
 - a. LR Number 1956/xxxx – Voi Town will be and is hereby divided equally between the applicant and the respondent. The portion of the applicant will include the car wash business premises, or part of it, if those car wash premises extend to more than half of the plot.
 - b. LR 16398 (South West of Voi) – Grant Number CR xxxxx will be and is hereby divided equally between the applicant and the respondent. The portion of the applicant will include the residential house or premises where the applicant currently resides with the children.
 - c. The other listed land assets in these proceedings, belong to the respondent, and this court will not divide them between the parties herein.
 - d. I decline to issue orders for disclosure of bank accounts or other assets.
 - e. This being a family litigation, parties will bear their respective costs of the proceedings.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF OCTOBER 2024 AT VOI IN OPEN COURT HYBRID (PHYSICAL AND VIRTUAL).

GEORGE DULU

JUDGE

In the presence of:-



Maina – Court Assistant

Ms. Katema for applicant – virtual

Mr. Kilima for respondent – virtual

Applicant – physical

Respondent – virtual

