



**Ndutire v Kariuki (Originating Summons E032 of 2023)  
[2024] KEHC 12900 (KLR) (Civ) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12900 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**ORIGINATING SUMMONS E032 OF 2023**

**PM NYAUNDI, J**

**OCTOBER 18, 2024**

**BETWEEN**

**RUTH NJERI NDUTIRE ..... APPLICANT**

**AND**

**SAMUEL KARIUKI ..... RESPONDENT**

**JUDGMENT**

1. The Originating Summons dated 30<sup>th</sup> March 2023 is brought pursuant to Article 45 (3) of *the Constitution* of Kenya 2010, Section 4, 6(1), 7, 17(1), 17(2)(a) of the Law of *Matrimonial Property Act* No. 49 of 2013 and other enabling provisions of the law. In it, RNN seeks against SK, the Respondent the following declarations;
  1. Whether Plot Number FB/2000 Mihang'o and the developments thereon is Matrimonial Property.
  2. Whether the Applicant contributed towards acquisition and development of Plot Number FB/2000 Mihang'o.
  3. Whether all that property known as Plot Number FB/2000 Mihang'o together with the improvements thereon should be distributed equitably between the parties herein.
  4. Whether the Respondent should meet costs of the suit.
2. The Summons was supported by an Affidavit of even date sworn by the Applicant.
3. The Respondent was served with the summons but he did not participate in these proceedings. This matter therefore, proceeded undefended.



4. The Applicant states briefly that she and the Respondent were married under Kikuyu Customary Law from 2010 until 2021. During the subsistence of their marriage, they jointly acquired property known as PLOT FB/2000 situate in Mihang'o Utawala. They bought it from Karagita (E.A) Limited for a consideration of Kshs. 700,000. She attached a share certificate dated 29/1/2014 issued in their joint names and a copy of clearance certificate. She averred that she contributed Kshs. 400,000 towards its purchase. She then took out a loan of Kshs. 279,000 from Mihang'o Tumaini Group to begin construction of their matrimonial home. She produced loan statements marked as RN-2 to prove this. She helped the Respondent construct the second floor of the building where she spent Kshs. 6,469,900. She produced photos of the matrimonial home and bank statements marked as RN-3A and RN-3B. In 2018, she disposed her property known as Kayole Matopeni Plot Number B-558 for a consideration of Kshs. 1,550,000 to aid in completion of the remaining part of the construction. She produced copies of sale agreement and bank statements marked as RN-4A and RN-4B.
5. Further, that she contributed non-monetary contribution in the form of child care, companionship and management of the matrimonial home and properties. She asked the court to declare the property as matrimonial property and that each party to have rights over it in the proportion of their contribution towards the acquisition and development of the said property.
6. The summons was disposed of by way of viva voce evidence. The Respondent did not testify or file submissions and stated that the property should be sold and the amount to be shared according to their respective contributions.

#### **Applicant's Submissions.**

7. The Applicant filed written submissions dated 23<sup>rd</sup> August 2024. She relied on section 6 of the *Matrimonial Property Act* which defines what a matrimonial property is and submitted that PLOT NO. FB/2000 MIHANG'O was matrimonial property as it was acquired during the subsistence of their marriage. She sought to rely on the decision in T.M V vs F.M.C [2018] eKLR.
8. She submitted that the fact the property was acquired during the subsistence of their marriage, there was express intention that the same was to be matrimonial property and that rights would accrue to each party were equal on accounts of Article 45 of *the Constitution*. She relied on Section 14 (b) of the *Matrimonial Property Act* which provides for equal beneficial interests in matrimonial property.
9. According to the applicant, she had demonstrated her contribution towards the purchase of the property pursuant to Section 7 of the *Matrimonial Property Act*. She asked the court to divide the property in the ratio of 75% to 25%. That she initially paid Kshs. 400,000 towards the purchase of the property. Construction cost her Kshs. 6,469,900 for the ground floor and a further Kshs. 1,550,000 for the construction of the first floor. She told the court that she contributed Kshs. 4,919,900 towards the development of the said property. That the Respondent was unemployed during that time and therefore, her contribution should be more than 50%. She relied on the decisions in EGM v BMM [2020] eKLR, and AWN vs FMN [2018] eKLR .

#### **Analysis and Determination.**

10. The main issues arising for determination are;
  - i. Whether the property herein amounts to matrimonial property.
  - ii. Whether the property should be distributed in the ratio of 75% to 25%.



**Whether the properties herein amount to matrimonial property.**

11. 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.
12. 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 got married under Kikuyu Customary Law in 2010. The Applicant stated that they both contributed towards the purchase of the property. A share certificate and a clearance certificate from Karagita E.A Limited was issued in both their names. It is therefore clear that the property listed here is matrimonial property as defined and the same having been acquired during subsistence of their marriage. In my considered view therefore, after considering the evidence by the Applicant, the property listed in this matter is matrimonial property in the meaning of Section 6 of the *Matrimonial Property Act* and I so find.

**Whether the property should be divided in the ratio of 75% to 25%.**

13. 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. She argued that the property should be divided in the ratio of 75% to 25%.
14. 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.”
15. 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 v 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 that Article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyot, J (as he then was) has explained why above.

16. 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]
17. Based on the above cited case law 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.
18. 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.

19. The Applicant adduced evidence that she contributed Kshs. 400,000 towards the purchase of the property. She also told the court that she took out a loan to construct the property. She stated that she spent Kshs. 6, 6,469,900 for the construction of the ground floor and a further Kshs. 1,550,000 for the construction of the first floor. She told the court that she contributed Kshs. 4,919, 900 towards the development of the property.
20. 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.”



21. 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”
22. 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.”
23. 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.
24. 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.
25. 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.
26. 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.”
27. In determining the percentage of the contribution made by each party, I have carefully scrutinized the evidence. The Applicant has produced bank statements, and sale agreements. She further submitted that she acquired loans and monies that she contributed towards the acquisition of matrimonial property.
28. The totality of my analysis of the evidence presented before me is that the Applicant made substantial monetary contribution towards acquiring, the matrimonial property. 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 Applicant to the suit property at 75%. The Respondent will have 25% of the suit property.

29. Consequently, I find for the Applicant and allow the Originating Summons in the following terms;
- i. That Plot Number FB/2000 MIHANG'O and the developments thereon is Matrimonial Property.
  - ii. THAT a declaration is hereby issued that the Applicant is entitled to 75% of the value of Plot Number FB/2000
  - iii. That the property be valued by a valuer to be nominated by the Applicant and the Respondent within 14 days. In the event the parties are unable to agree on a valuer the Applicant shall appoint a valuer within 7 days.
  - iv. The valuer so appointed to furnish report within 21 days. The Applicant will have the 1<sup>st</sup> option to buy out the Respondent's share in the property within 60 days of the offer being made.
  - v. 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.
  - vi. In default of the either party buying out the other the property shall be sold and the proceeds shared in the proportion of 75:25 to the Applicant.
  - vii. That each party shall bear own costs in respect to this Originating Summons.

**DELIVERED ON THE VIRTUAL PLATFORM, DATED AND SIGNED AT NAIROBI THIS 18<sup>th</sup> DAY OF OCTOBER, 2024.**

**PATRICIA NYAUNDI**

**JUDGE**

In the Presence of:

Court Assistant Fardosa

