



**MMK v JMN (Originating Summons 3 of 2018)  
[2023] KEHC 1487 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1487 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
ORIGINATING SUMMONS 3 OF 2018**

**MW MUIGAI, J**

**MARCH 2, 2023**

**BETWEEN**

**MMK ..... APPLICANT**

**AND**

**JMN ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Applicant Vide Originating Summons dated February 27, 2018 and filed in Court on February 27, 2018 pursuant to article 45 (3) of the *Constitution of Kenya 2010*, section 4, 6,(1), 7, 17(1) 17(2) (a) of the *Matrimonial Property Act* No 49 of 2013 for the determination of the following questions:-
  - i. Whether plot Number Five Athi River and the improvements thereon is matrimonial property.
  - ii. Whether the Applicant contributed towards acquisition and development of Plot Number Five Athi River
  - iii. Whether all that property known as Plot Number Five Athi River together with the improvements thereon should be distributed equally between the parties herein.
  - iv. Whether the respondent should meet the cost of the suit.

**Supporting Affidavit**

2. The application was supported by affidavit of MKM dated and filed on February 27, 2018, in which she deposed that she has been married to the Respondent since 1997 and have lived with the Respondent in their matrimonial home located on Plot number 5 Athi River from the year 2002.



3. The Applicant deposed they purchased the said property on November 11, 1999 from one John Ndunda Kaidi; that on March 28, 2011 through a company she incorporated with the Respondent they took a loan of Kshs 6,000,000 from Cooperative Bank and developed eight (8) residential flats on the said matrimonial property. The Applicant annexed Copies of the Loan Agreement and Building Approval fees marked as MMK 2a & 2b respectively.
4. She further deposed that there is a petition for divorce at Mavoko Law Courts for dissolution of marriage since the same cannot be salvaged due to irreconcilable differences.; that the Respondent has fraudulently processed the ownership documents of the said property; that registering the said plot Number 5 Athi River in his sole name deprives her the benefit of the said matrimonial property. The Applicant deposed that the plot together with the developments thereon be declared as matrimonial property with each party having equal rights to it. She prayed that the Honorable Court proceeds to distribute the said property equally between them.

### **Respondents's Replying Affidavit**

5. The Respondents filed Replying Affidavit sworn by JMN dated March 16, 2018 and filed on March 19, 2018 in which he replied deposing that he solely made the financial payments to the purchase of Plot No 5 Athi River and financed construction of the eight residential flats taking the loan of Kshs 6,000,000 from Cooperative Bank to finish the apartments; that he involved the applicant in the process and purchase of the said plot out of love and affection despite the Applicant making no financial contribution to the said property since the Applicant was fresh from college and unemployed. The Respondent deposed that he has not fraudulently processed ownership documents of Plot No. 5; that distribution of matrimonial property can be determined after marriage has been dissolved hence the application herein is premature, ill motivated and an abuse of court process and should be dismissed.

### **Hearing**

6. On 8/6/2022 PW1 MMK testified that she wished to rely on Supporting Affidavit to the Originating Summons filed. In a nutshell, the Applicant produced a bundle of documents namely;
  - a. Sale Agreement
  - b. Transfer Form
  - c. Loan Agreement
  - d. Authority Integrated Financial Operations Management Systems
  - e. Letter of Allotment
7. The Applicant sought determination of the division of matrimonial property which was acquired while she was married.
8. In cross examination, The Applicant stated she sold a car and that money was put towards payment for the property. No evidence was adduced to confirm this position.

The Applicant stated that the Abweys Company Ltd where both the Applicant and Respondent were Directors jointly obtained a loan of Ksh 6,000,000/- to build 8 flats on Plot No 5 Athi River.

The Applicant did not provide evidence of repayments of the loan made by her. The Applicant confirmed that at the time she was working and contributed to development of the property.

Both the Sale Agreement & Transfer Form were in both their names.



9. The Respondent relied and adopted the Replying Affidavit of 19/3/2018 filed in reply to the Originating Summons and produced Bank Statement from Cooperative Bank -August 2017 and duly executed Terms & Conditions.
10. In a nutshell the Respondent stated he purchased Plot No 5 Athi River with Savings of Ksh 450,000/- from employment with UDV.  
He also added the gratuity he was paid on leaving employment with UDV. He signed the Sale Agreement and later added the Applicant out of persuasion and compassion.
11. In cross examination, the Respondent stated that when he was employed by Oserian Co Ltd he made savings and begun construction of the Flats on the property. Later , he opted to leave employment and was paid gratuity and then took a loan of Ksh 6,000,000/- through the Company formed with the Applicant. He repaid the loan and produced Bank Statement to prove the same.
12. The Plaintiff/Applicant was unemployed, he opened a Secretarial College/Cyber Café for her and paid for her to study at USIU in 2003.
13. The Respondent reiterated that he bought and developed Plot No 5 Athi River by building the 8 flats singlehandedly. He was employed briefly by Finlays Ltd 2015-2016 and with savings finished the Flats. He lives on the property with the children to date.
14. The Originating Summons & Replying Affidavit application were disposed of by way of written submissions.

### **Applicant's Submissions**

15. Applicant's submission was filed on September 19, 2022 in which submitted that they will deal with the issues as listed in the Originating Summons in which the first issue was Whether plot Number Five Athi river and the improvements thereon is matrimonial property. They submitted on what constitute a Matrimonial property. Reliance was made in High Court in Matrimonial Cause Number 49 of 2019 [AWM v JGK](#) (attached to their submissions) stated

On what constitutes matrimonial property, Section 6 of the [Matrimonial Property Act](#) that defines matrimonial property.

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 before the Registrar in 2015. This brings their dispute within the framework of the [Matrimonial Property Act, 2013](#). This [Act](#) commenced on January 16, 2014. Both parties agree that they bought their matrimonial home in 2015 after they solemnized their marriage. They moved in their home immediately and made it their home up until they separated and subsequently divorce. They said that the property is registered in both their names. As far as the two parcels of land in MN are concerned, both applicants are in agreement that the same was bought during the subsistence of their marriage but the same were registered in the name of the Respondent. It is the Applicant's contention that they bought the same together with the intention of the land being part of their matrimonial property. The Respondent does not refute the contribution towards purchasing the matrimonial home and M parcels by both parties, his only contention being that the contribution by the Applicant does not amount to half of the purchase price of the said properties.



They contended that from the evidence of the parties herein Plot Number 5 together with all developments on it is matrimonial property for the reason that the applicant together with the Respondent incorporated company (Abweys Ltd) and took out a loan of Kshs 6,000,000 to develop eight residential flats on the said property. It was further submitted that sale agreement was signed between the vendor and the parties herein as purchasers. further that the only document that was in the sole name of the Respondent was the allotment letter

It was submitted that documents produced by the applicant touching on the property herein is a clear indication that the Plot No 5 Athi River is Matrimonial property.

16. As to the issue of Whether the applicant contributed towards acquisition and development of Plot Number Five Athi River, reliance was placed on Article 45 (3) of the [Constitution of Kenya, 2010](#) provides as follows;

“45(3) 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”

17. They further made reference to High Court at Busia Civil Suit No 39 of 2012 [UMM v IMM](#) the court stated :-

“The Legislation hoped for by the Court of Appeal is The [Matrimonial Property Act, 2013](#) which received assent on December 24, 2013 and commenced on January 16, 2014. That is an important development in the law of Matrimonial Property for this country. Section 7 is of paramount significance.

Contribution is defined by Section 2 of the [Act](#) to mean monetary and non-monetary contribution.

18. They further quoted the following authorities of [Muthembwa v Muthembwa](#), Matrimonial Cause No 39 of 2019 [AWM v JGK](#) buttress their submissions And further contended that the absence of any evidence by any party displacing the evidence produced above and and proof of monetary contribution by sny sole party towards the purchase and development of matrimonial property is an indication that both parties contributed towards said property.
19. On the issue of Whether all that property known as Plot Number Five Athi River together with the improvements thereon should be distributed, it was submitted that no party produced evidence to show that either of the parties contributed more than the other toward the acquisition of the property and further that the development to the property was done through a bank loan applied for by both parties to be paid through the proceeds of the said developments made on the matrimonial property.
20. It was submitted that Court should distribute the matrimonial property equally between the parties as no party proved contribution above the other. Further reference was made to a ruling of this Hon Court of 9/10/218 in which the defendant was ordered to render to the court detailed account of the rental proceeds received by him from the said matrimonial property and as to the date of hearing Defendant confirmed that he had not complied with the orders of the court which orders have not been set or vacated.
21. Finally in their submission they urged the court Applicant is entitled to equal share and the court should find the same.

### **Respondent's Submissions**

22. Respondent filed the submissions on October 19, 2022 in which they raised two issues:



- a. Whether the applicant contributed towards acquisition and development of Plot Number Five Athi River?
  - b. Whether the property known as Plot Number Five Athi River together with the improvements thereon should be distributed equally between the parties?
23. As on the first issue of whether the applicant contributed towards acquisition and development of Plot Number Five Athi River? They submitted inter alia that the Respondent was fresh from college hence was unable to put the deposit as alleged. Further that all financial contributions towards the acquisition of Plot No. 5 and development of the flats therein were made by the Respondent. Reliance was made to the case of *AIN v IMM* Originating Summons No 12 of 2017 where the learned Judge made the following sentiments while delivering his judgment

“This Court is a Court of evidence and any decision made by the Court must be based on evidence. It is a settled principle of law that he who alleges must prove. This principle is firmly embedded in Section 107 of the *Evidence Act* which stipulates.

- 1) Whoever desires any court to give judgment as to any legal right 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.

The Applicant did desire this Court to make a decision in her favor regarding her legal rights in respect of the 2 properties. She was required in law to place before the Court sufficient material as proof to persuade the Court to grant to her the orders sought. She however failed to discharge the burden of proof that was squarely upon her”

24. In the forgoing, they averred that the above case has a glaring similarities to the present case, in that the Applicant claimed that she sold her house and took out a loan to contribute financially to acquire the matrimonial property but has failed to prove in support of the same. Further that the Applicant failed to prove her claims that the Respondent fraudulently processed the title document to the property to his name.
25. On the 2<sup>nd</sup> issue of whether the property known as Plot Number Five Athi River together with the improvements thereon should be distributed equally between the parties? It was submitted that the Applicant did not make any Contribution towards the Acquisition of the said property; the Applicant was unemployed at the time they purchased the property hence would not have been able to make any financial contribution and is not entitled to equal contribution. The Respondent further refuted non-monetary contribution as he would ensure that a domestic help was hired at all times which was not rebutted by the Applicant. Reliance was placed in the case of *RNM v FM* Civil Suit No 64 of 2018 in which the learned judge while referring to the case of *PNN v ZWN*

“...in determining the distribution of matrimonial property at the dissolution of a marriage the trial court ought to dispassionately scrutinize the direct and indirect contribution of each party to the marriage in the acquisition and/or development of the suit property

26. The Applicant submits that that article 45 (3) of the *Constitution of Kenya* provides 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”



27. It was in their submission that the Applicant is not entitled to an equal share of the matrimonial property as she failed to prove her contribution towards the Acquisition and development of the Matrimonial Property; that considering the share of property due to each spouse more emphasis is laid on equity rather than equality.
28. As to the ruling and order by this Honorable court of 9/10/2018 it was submitted that the said orders were renewed to the effect that Respondent deposits the rent proceeds in court less the amount paid for children's upkeep. Further that all rental proceeds are used for the upkeep of children as the interest of the children come first.
29. They submitted that court take into account that the Respondent made much high contribution towards acquisition and development of matrimonial property.

### **Analysis/ Determination**

30. The Court considered the pleadings and oral evidence adduced during Court proceedings and written Submissions by Parties through their respective Counsel.

The issues that emerge for analysis and determination are;

- a. Does Plot Number 5 Athi River constitute matrimonial Property?
- b. What was the contribution of each party Applicant and Respondent to the acquisition and development of Plot 5 Athi River?
- c. What is the division of matrimonial Property between the Applicant & Respondent.

### **The Law**

31. Section 6(1), (3) and (4) of the [Act](#) provides

Meaning of matrimonial property

- (1) For the purposes of this Act, matrimonial property means—
  - (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
- (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
- (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determined that the agreement was influenced by fraud, coercion or is manifestly unjust. (This are referred to as Prenuptial Agreements)

#### Section 2

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property



“family business” means a business run for the benefit of the family and which generates income or other resources for the benefit of the family; non-monetary contribution 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;

“Family business” means any business which-

- a) is run for the benefit of the family by both spouses or either spouse; and
- b) generates income or other resources wholly or part of which are for the benefit of the family;”

#### Ownership of matrimonial property

“7. 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.”

32. The undisputed facts of this matter are that the parties were married in 1997 and moved to the subject property Plot 5 Athi River in 2003. The marriage had 2 issues daughters born in 1998 & 2002 respectively. The Respondent was in gainful employment while the Applicant was unemployed and pursued studies paid for by the Respondent and he opened a cyber café for her to run. By both parties being Directors to Adwell Company they obtained a loan of Kshs 600,000/-.
33. The disputed facts are that the Applicant was employed in/by KCB and she sold her car and contributed the proceeds to the purchase of the suit property Plot 5 Athi River.No documentary evidence was presented to fortify this position.
34. The Respondent alluded to the fact that he was working with UDV, Osarian & Finlay Companies at different times during the marriage and he used savings and gratuity from the Companies to purchase the property Plot 5 Athi River. No documentary evidence was presented to confirm these facts. The Respondent confirmed repayment of the Loan of Ksh 600,000/- from Cooperative bank by the produced Bank Statement that indicated loan repayments deducted from his Account.
35. From these facts, this court finds that both parties were married from 1997 -2018during which time at least during the early years of marriage enjoyed companionship from and to each other. Since the Applicant was unemployed at the time of marriage, the Applicant engaged in homemaking, domestic work and home management. The Applicant made non-monetary contribution while the Respondent made monetary contribution in acquisition and development of Plot 5 Athi River from 1999 when the purchase was made.



36. In the case of *TMV v FMC* (2018) eKLR, R Nyakundi, J opined that:-

“...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”

37. It is not disputed that there are 2 children of the marriage and from conception carrying the pregnancies to term, the Applicant contributed to child care of the 2 children. Being one of the resident parents, she nurtured the children, washed, fed, clothed and looked after the children of the marriage. The Respondent alluded to hiring of house-helpers although however, this Court finds that house-help help and not take over the full mandate of raising the children where the mother is alive and well and able to take care of the children. Secondly, house helps carry out selfless service to/in a home but they are not in throughout, and do not substitute the mother unless in exceptional circumstances, therefore, the mother of the children stepped in from time to time and took care of the children. No evidence was adduced to the contrary.

38. Incidentally Kwach JA in *Nderitu v Nderitu* Civil Appeal No 203 of 1997 (unreported), while agreeing with the opinion of Omolo Ag JA in *Kivuitu v Kivuitu* [1991] 2 KAR 241 that the wife’s non-monetary contribution should be taken into account and also considered bearing children as a form of contribution

“A wife’s contribution and more particularly a Kenya African wife, will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution. It is incumbent therefore upon a trial judge hearing an application under section 17 of the Act to take into account this form of contribution in determining the wife’s interest in the assets under consideration”.

Recently, the Supreme Court in *Petition 11 of 2020 JOO vs MO & FIDA & LSK* pronounced its position on division of matrimonial property which partly reads as follows;

It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. The learned Judge having appreciated the appellant and the respondent were married for 18 years, and 15 of those years the appellant was in gainful employment; she constantly took loans, having found the only property that was acquired with joint efforts was the matrimonial home where the appellant was residing; the fact that upon separation the respondent was able to purchase another home where he settled. For those reasons, we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired beneficial interests therein; we also find for the same reasons the learned Judge erred by awarding the appellant a share of 30% of the house she has been in occupation and a mere 20% of the rental units which are in the same premises.”

39. Considering the totality of the evidence on record and the application of the law and case-law outlined above this Court considers that both Applicant and Respondent were married and later dissolved their marriage. During the subsistence of the marriage in 1997, Plot 5 Athi River was acquired in 1999 and developed overtime as explained by the Respondent. During, the marriage, the Applicant worked at secretarial College/Cyber Café and helped in the Family business which-for the benefit of the family



and generated income or other resources wholly or part of which were for the benefit of the family. The Respondent made financial contribution, while the Applicant made various forms of non-monetary contribution to acquisition and development and long occupation in the matrimonial home Plot 5 Athi River.

40. In Nakuru High Court in *MW v AN* [2021] eKLR by Justice Teresia Matheka, the learned judge opined that housewife is a full time job worthy of compensation. The Learned Judge stated that:-

“That was his contribution to the upkeep of the family as the plaintiff was home taking care of the children. This other part of mothering, housekeeping and taking care of the family is more often than not given any value when it comes to sharing matrimonial property. It is easy for the spouse working away from home and sending money to lay claim to the whole property purchased and developed with that money by the spouse staying at home and taking care of the children and the family. That spouse will be heard to say that the other one was not employed so they contributed nothing. That can no longer be a tenable argument as it is a fact that stay at home parents and in particular women because of our cultural connotations do much more work (house wives) due to the nature of the job.”

41. For these reasons, this Court finds that Plot 5 Athi River is matrimonial property acquired and developed during subsistence of the marriage, both applicant and Respondent contributed; Respondent financially and Applicant through non-monetary contribution in various forms alluded to hereinabove.
42. The Court notes with concern that Applicant moved out, was hounded out or left the matrimonial home after the marriage broke down and left personal items furniture wherewithal and the Respondent resides in the said home to date. Despite Court orders of Hon DK Kemei, J of 9/10/2018 & 18/12/2019 that rent proceeds from 8 flats be deposited in Court and Accounts to be furnished by the Respondent, the Respondent has over the years enjoyed solely the rental income and occupation of the property to the disadvantage of the Applicant.

### **Disposition**

43. For these reasons, the Court finds that Plot 5 Athi River constitutes matrimonial property and Plot 5 Athi River shall be divided equally into 4 flats each with an option of valuation and buyout at current market rate by one party of the other.
44. In the meantime, each may occupy any of the 4 flats and/or collect rent.
45. Each Party to bear own costs.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 2<sup>ND</sup> MARCH, 2023  
(VIRTUAL/PHYSICAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

