



REPUBLIC OF KENYA



KENYA LAW
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**JOP v AKM (Originating Summons 5 of 2019)
[2023] KEHC 17597 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 5 OF 2019**

JN ONYIEGO, J

MAY 12, 2023

BETWEEN

JOP APPLICANT

AND

AKM RESPONDENT

JUDGMENT

1. Vide an originating summons dated 23rd May, 2019 and filed on 28th May 2019 pursuant to Sections 6,7,9,13,14, and 17 of the [matrimonial Property Act](#), the applicant herein sought for orders as hereunder;
 1. That the honourable court be pleased to issue a declaration that the following properties are jointly owned by the applicant and the respondent;
 - i. Title number Kilifi/Roka/15XX which is in the name of the respondent only.
 - ii. Title Sub-Division Number 77XX(original Number 1482/4XX) CR.34035 which is in the names of both the applicant and the respondent
 - iii. Title subdivision Number 77XX(Original Number 1483/4XX) CR.33362 which is in the names of both the applicant and the respondent
 2. That the honourable court be pleased to order the sale of properties ii and iii above situated in kiambeni, Mombasa and apportionment of the proceeds between the applicant and the respondent be in the share percentage of which each party contributed to towards the purchase and development of the said properties.
 3. That the court be pleased to order that the property title number Kilifi/Roka/15XX situated in Kilifi County is held in trust by the respondent for the applicant.



4. That the honourable court be pleased to order that the respondent executes all documents where necessary to transfer the property title number Kilifi/Roka/15XX to the applicant herein, and in the absence or in default, the same be executed by the deputy registrar, lands registrar or registrar of titles in order to effect the transfer.
 5. That further and in the alternative and in the event that title and ownership in any way of the suit properties has/have already been transferred in favour of any third party, an order that the respondent does account for the proceeds and the same be divided between the applicant and respondent in the manner stated above.
 6. That the respondent be compelled to disclose and produce all original documents of title in the respondent's possession.
 7. That a temporary injunction be issued restraining the respondent, her servants and / or agents from selling, transferring, alienating, wasting, damaging and /or otherwise adversely interfering with the said properties pending the hearing and determination of the originating summons herein.
 8. That the honourable court be pleased to grant such further or other relief/ orders as may be just in the circumstances.
 9. That the respondent be condemned to pay costs of this suit.
2. The summons is supported by an affidavit sworn by the applicant an American national on 23rd May 2019 wherein he stated that he got married to the respondent a Kenyan national on 12th November 2002 before the Registrar of Marriages in Mombasa and that their marriage was not blessed with any living issues save for the two adopted children who are now adults.
 3. It is the applicant's case that during the subsistence of their marriage, he solely acquired the subject properties without any financial support from the respondent. He averred that despite causing LR No Kilifi/ Roka/15XX registered in the name of the respondent as the sole proprietor and plot numbers 77XX and 77XX/II/MN registered as joint owners, the respondent did not contribute a single cent towards their acquisition. To support his position, he attached copies of bankers' cheques bearing his names and drawn in the name of Omondi Waweru Advocates being the purchase price for purposes of acquiring the said properties (see annexure JOP-3).
 4. He further averred that sometime the year 2014, he and the respondent left for the USA a fact that necessitated his surrender of the ownership documents of the subject property to one Charity Gathuri the respondent's sister for safe custody. That after his divorce with the respondent before the circuit court of Dane county in the USA the year 2018, he demanded for the surrender of his land ownership documents from Charity but in vain hence the prayer to compel surrender of the said documents to him.
 5. It is the applicant's claim that the respondent has since leased out the two properties in Kiembeni to strangers who are paying rent to her for her benefit and exclusive use. He went further to state that he single-handedly made numerous developments on the property in which he stays whenever in the country and his intended resting home during his last days of his life. In conclusion, he sought orders declaring him as the sole owner of the properties in question and that if the court is inclined to give a share to the respondent, the same be proportionate to her contribution.
 6. In response, the respondent filed a replying affidavit sworn on 15th December 2020 in which she stated that she solely acquired the properties in question and that out of love and compassion, she decided



- to include the applicant as a co-owner. She termed the suit herein as part of the applicant's scheme to take away her property.
7. She denied leasing Kiembeni properties to 3rd parties as alleged by the applicant and instead claimed that the two properties (77XX & 77XX) have been invaded by squatters and a portion of the same turned to a dump site which actions she is fighting without any support from the applicant.
 8. Regarding the applicant's occupation on the Kilifi property, it was the respondent's averment that she voluntarily allowed the applicant to stay on the said property a fact or position that she does not intend to change any time soon. She claimed that she will stand to suffer if the orders sought are granted.
 9. When the matter came for directions, the court directed for the matter to be heard viva voce. During the hearing, the applicant adopted the content contained in his witness statement dated 7th March 2022 and list of documents which is a replica of the averments contained in the affidavit in support of the summons and the annexures thereof. Basically, he reiterated the position that he solely acquired the properties in question and all supporting documents including original title deeds and sale agreements are with the respondent.
 10. He told the court that he spent about 3M shillings to develop the kilifi property and that he bought the two Kiembeni plots at Kshs 800 each.
 11. On her part, she also adopted her witness statement dated 23rd Feb.2021 in which she reiterated the content in her replying affidavit. She told the court that after she got married to the applicant, they relocated to the USA where she got a job from which earnings she took care of her family. She further stated that besides the Kenyan property, she single-handedly serviced a house mortgage in the USA which was given to her after their divorce.
 12. It was her evidence that, after their marriage, they bought a property at Mtwapa which the applicant sold and later bought Kilifi/Roka/15XX. That she gave the applicant money to buy the property because he was free. Regarding the two Kiembeni property, she told the court that the applicant only contributed ¼ of the purchase price.
 13. After close of the case, counsel agreed to file submissions. Unfortunately, the respondent did not file hers. The applicant filed his on 17th October 2022.

Applicant's Submissions

14. Through the firm of CM advocates LLP, the applicant filed his submissions on 17th October 2022. For starters, it was counsel's submission that the summons herein is not opposed as the replying affidavit is incompetent on grounds that the same is not dated nor signed. Learned counsel flagged three issues for determination as follows; whether the suit properties herein are matrimonial properties; who between the parties contributed towards the purchase and development of the suit properties and, whether the applicant is entitled to the orders sought.
15. Regarding the first issue, counsel submitted that the three properties having been acquired during the subsistence of marriage, they are automatically matrimonial property.
16. Touching on the issue of contribution, counsel contended that the applicant had submitted sufficient evidence by way of production of cheques to prove his contribution towards the purchase of the three properties and development of Kilifi property. In counsel's view, the respondent had failed to submit sufficient evidence to prove that she had contributed financially towards the acquisition of the three properties. To support that position, the court was referred to the case of *PWK v JKG* (2015) eKLR



where it was held that where property is registered in the name of one spouse, the beneficial share of each spouse will depend on the parties' proven respective proportions of financial contribution.

17. Concerning the 3rd issue on whether the applicant is entitled to the orders sought, counsel relied on Section 7 of the *matrimonial property Act* thus submitting that the two Kiembeni plots be sold and the sale proceeds be shared between the parties in accordance with their share of contribution preferably 99% to 1% in favour of the applicant. That the Kilifi property be given to the applicant absolutely.
18. In that regard, counsel referred the court to the holding in civil appeal No 559 of 2019 between *Edward Ng'ang'a Kairu v Mary Njoki Ndiba Ng'ang'a* where the court of appeal set aside high court 50:50 share and substituted it with 90:10 ratio on grounds that the respondent had not established on a balance of probability that she had contributed 50% to deserve equal share. In conclusion therefore, the applicant urged the court to grant the orders sought.

Analysis and Determination.

19. I have considered the summons herein, response thereof, oral testimony by both parties and rival submissions together with the applicant's list of authorities. Issues that emerge for determination are;
 - a. Whether the subject properties herein constitute matrimonial property
 - b. If the answer to the above is in the affirmative, who contributed what
 - c. Whether the reliefs sought can issue
20. Before I endeavor to determine the real issues in controversy, I wish to state that the replying affidavit of the respondent to the summons is dated and signed contrary to the applicant's claim.
21. There is no dispute that the parties herein contracted their marriage under the *Marriage Act* (now repealed) before the registrar of marriages on 12th November 2002. They later divorced before an American court on 28th February 2018. It is worth noting that Kilifi/Roka/15XX was acquired and registered in the respondent's name on 22nd May 2013 which period fall within the subsistence of the marriage. Equally, parties were in agreement that plot numbers 77XX & 77XX Kiembeni were acquired during the subsistence of their marriage.
22. The question that begs for an answer is whether the above quoted properties qualify to be matrimonial property under Section 6 of the *matrimonial property Act* which defines Matrimonial property to mean;
 - a. 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.
23. From the above definition, the subject properties having been acquired during the subsistence of the marriage between the two, they qualify to be matrimonial property. See Civil Appeal No 261 /2019 C.A Nairobi between *Esther Wanjiku Mwaura v Mwaura Ole Mashua (defendant) and Anna Njeri Mwaura (1st interested party) and John Tombo Mashua (2nd interested party)* where the court stated that;

“ the question is what amounts to matrimonial property. This question is well settled as under Section 6 (1) of the *matrimonial property Act*, matrimonial property is defined to include



matrimonial home, or homes, household goods and effects in the matrimonial home or homes or any other movable and immovable property jointly owned or acquired during the subsistence of the marriage”

24. Having found that the three properties constitute matrimonial property, what was the respective party’s contribution. From the pleadings and oral testimony by both parties, each is claiming to have solely acquired the three properties without any contribution from the other. What then did each party contribute towards the acquisition of the said properties whether direct or indirect.
25. Under Section 7 of the *matrimonial property Act*, ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between spouses if they divorce or their marriage is otherwise dissolved. Section 2 of the said Act goes further to state that contribution means; monetary and non-monetary contribution which includes;
 - a. Domestic work and management of the matrimonial house
 - b. Child care
 - c. Companionship
 - d. Management of family business or property; and
 - e. farm work
26. In the case of *Esther Wanjiku Mwaura v Mwaura Ole Mashua (supra)*, the court of appeal emphasized on the point that matrimonial property is all about contribution be it monetary or non-monetary. See also *R.M.M v T.S.M*(2015) eKLR where the court held the position that each party’s contribution ought to be assessed and the same ought to form the basis for Division.
27. The court in *Echaria v Echaria*(2007) eKLR set out clear principles on what constitutes contribution in a matrimonial dispute by stating as follows;

“Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “equality is equity” while heeding the caution by lord Pearson in *Gissing v Gissing*...”
28. However, section 14 of the *matrimonial property Act* does recognize that a spouse can be registered as the sole owner of property but hold in trust of the other spouse. For avoidance of doubt, Section 14 does provide as follows;

Where matrimonial property is acquired during marriage;

 - a. In the name of the 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 a rebuttable presumption that their beneficial interest in the matrimonial property are equal.
29. In the case of *PWK v JKG (supra)*, the court had this to say;

“We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50;50 would have been appropriate. This would not be on account of any



compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five judge bench of this court in *Echaria v Echaria*(supra).

“where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proved respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maximum equality is equity while holding the caution of lord Pearson in *Gissing v Gissing* (1970 2 All ER 780 page 788”.

30. It therefore follows that; contribution is not about direct financial contribution alone but also non-monetary contribution. A spouse should therefore not be disqualified from getting his or her rightful share on the ground that he or she was not contributing directly to the acquisition of the property. It is worth noting that, there are other indirect roles recognized in law as forms of contribution towards property acquisition inter alia; companionship, child care or rendering domestic work or managing the house or development. See *JWC v PBW* (2015) eKLR and *NWM v KNM* (2014) eKLR.
31. Similar position was held in *Joseph Ombogi Ogentoto v Martha Ogentoto and The federation of women lawyers (FIDA kenya) (1st Amicus curiae) and Law society of Kenya (2nd amicus curiae)* SC petition No 11 of 2020 where the court held at par.94 that;

“Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property”
32. In the circumstances of this case, each party is claiming absolute ownership to the exclusion of the other. It is incumbent upon a party asserting a certain fact to prove the same. It is upon the parties herein to prove their respective contribution towards the acquisition of the properties in question. It not enough to allege a right yet tender no proof of entitlement through contribution whether direct or indirect.
33. With regard to the two plots in Kiembeni being plot number 77XX and 77XX, the applicant claimed that he bought the two through his own effort at Kshs 800,000 for each. The respondent made similar claim. None of the two tendered evidence of financial contribution. There was no sale agreement tendered to show who bought the land, from who and at how much. The parties are merely asserting claims without any proof of financial contribution.
34. In the absence of any ascertainable proof of individual monetary contribution and taking into account that the two parties are registered jointly, equity will demand that the property be deemed to have been acquired through equal joint effort hence share equally at 50% to 50%. support.
35. Concerning Kilifi/Roka/15XX, the applicant stated that he bought the property and spent Kshs 3 million to develop the same. Equally, the respondent asserted that she acquired the property alone and without any financial support from the respondent. The property is registered in the name of the respondent alone. The applicant argued that he decided to have the property registered in the name of the respondent for safety purposes.



36. Unfortunately, none of the parties produced a sale agreement to show how and when the property was bought, from who and how much. Although the applicant attached some cheques drawn in the advocates name amounting to about 3 million, there was no proof as to how much he spent on development of the plot. Since the respondent did not adduce any evidence of any monetary or non-monetary contribution towards the acquisition of the plot, I will find that the plot was 100 % acquired by the applicant registration of the respondent as the sole owner notwithstanding.
37. Regarding development, none of them tendered evidence to show the extent of contribution whether monetary or non-monetary. In view of that, I will again apply the maxim that equality is equity hence share the value of the development done equally. To that extent, the property shall be valued by a mutually agreed valuer, sold and the sale proceeds shared out in two categories inter alia; value of the plot to the applicant absolutely at 100% and value of the developments thereon to be shared between the two equally with the option of either party buying the beneficial interest of the other in the whole property.
38. Having held as above, the following are the orders of the court;
- a. That plot numbers Kilifi/Roka/15XX; Title subdivision number 77XX(original number 1482/4XX) CR.34035) and title number 77XX(Original number 1483/4XX) CR.3362 be and are hereby declared as matrimonial property.
 - b. That plot number 77XX and 77XX named in (a) above be and are hereby shared out equally between the parties herein.
 - c. That the value of plot number Kilifi/Roka/15XX minus development is awarded to the applicant at 100%.
 - d. That the value of developments done on plot number Kilifi/Roka/15XX shall upon valuation by a mutually agreed valuer, be shared out equally between the parties herein.
 - e. In the event the properties are not physically divisible, the same can be valued by a mutually agreed valuer, sold and the sale proceeds shared out in the manner stated above and either party shall be at liberty to buy out the beneficial interest of the other. On those properties.
 - f. Each family to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MAY, 2023

J. N. ONYIEGO

JUDGE

