



**MTH v MAM (Originating Summons 10 of 2017)
[2023] KEHC 17473 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 10 OF 2017**

JN ONYIEGO, J

MAY 12, 2023

BETWEEN

MTH APPLICANT

AND

MAM RESPONDENT

JUDGMENT

Background

1. Through an originating summons dated and filed on 11th October 2017 and amended on 7th July 2020, the applicant herein is seeking orders as hereunder;
 1. That the honourable court be pleased to issue a declaration that the following properties registered in the name of the respondent are owned jointly by the applicant and the respondent or owned solely by the applicant by virtue of the applicant having solely contributed for the said properties; Kwale/Diani Beach xxxx; kwale /Diani S.S./xxxx; MV registration.No. KAT xxx and KAM xxx
 2. That the honourable court be pleased to issue a declaration that the property known as Kwale/ Diani Beach/xxxx registered in the name of Mwanaisha Abedi Ntete is held in trust by the registered owner for and on behalf of the applicant and the respondent
 3. That the honourable court to declare that the above named properties were acquired solely by the applicant without any contribution from the respondent.
 4. That the honourable court be pleased to order the division of the said properties and apportionment of the same between the applicant and respondent in respect of their specific contributions to the said properties.



5. That the honorable court be pleased to issue an order that Kwale/Diani Beach/xxxx be registered in the names of the applicant and the respondent in line with their respective division as the court may deem fit.
 6. That the honourable court be pleased to order that in the alternative Kwale/Diani Beach/xxxx be registered prior to the division of the said property in respect of the applicant and the respondent's contribution.
 7. 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 the respondent according to their respective shares.
 8. That the applicant be allowed to buy the respondent's share, if any, of the said properties.
 9. That the honorable court be pleased to order that the respondent executes all documents where necessary to transfer the applicant's portion, and in the absence or in default the same be executed by the deputy registrar, lands registrar or registrar of titles, or in the alternative the aforesaid matrimonial properties be valued by a qualified and reputable valuer, and the applicant be granted the first option to buy out the respondent.
 10. That costs of transferring the aforesaid properties and paying the surveyor and any other attendant costs be borne by the applicant and the respondent equally.
 11. That the respondent be compelled to disclose and produce all original documents of title deed, certificate of incorporation and any other original document in the respondent's possession.
 12. That a temporary injunction to issue restraining the respondent, his 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.
 13. That the honorable court be pleased to grant any other or further relief as may be just in the circumstances.
 14. That the respondent be compelled to pay of this summons.
2. The application is supported by an affidavit in support sworn by the applicant on 11th October 2017 wherein she stated that she met and started cohabiting with the respondent on 29th December 2007 and finally formalized their marriage at the Attorney General's office on 29th December 2010. That during the subsistence of their marriage, she acquired the subject properties without any support from the respondent.
 3. It was averred that ¼ plot to be excised out of LR number Kwale/Diani/xxxx registered in the name of mwanaisha (the seller) was bought on 21st October 2009 at a price of Kshs 600,000 which amount the applicant claimed to have fully contributed. That she solely financed the development of the said plot.
 4. Concerning plot No.Kwale/Diani S.S./xxxx, the same was allegedly purchased on 25th July 2013 and a title deed issued in the name of the respondent the same day. She deponed that she bought motor-vehicle Registration No. KAM xxx on 1ST February 2014. That motor-vehicle Registration No.KAT xxx Toyota is her personal car which she uses whenever in the country.



5. It was the applicant's averment that she raised her funds in Germany where she could occasionally retreat to for work as a waitress in restaurants and then remit any funds earned to the respondent for development of the said properties.
6. That owing to the persistent acts of violence meted against her by the respondent, their marriage hit a rock leading to their separation and later divorce the year 2019. She therefore sought for the court to grant her absolute ownership of the properties and in the alternative share it out in accordance with one's share.
7. In response, the respondent filed his replying affidavit on 6th December 2017 thus admitting that he was married to the applicant and that during the subsistence of the marriage, they acquired the properties listed by the applicant. He however added an extra property a Toyota Truck KBJ xxx which the applicant had allegedly omitted. That the properties in question were acquired through their joint effort and that some are in his name as they were acquired while the applicant was out of the country.
8. Regarding development of plot number K/D/xxxx, the applicant averred that he contributed through direct financial contribution and by providing skilled manpower in building their matrimonial home. He attached bank statements for the period 2013 and 2014. He further stated that plot No.K/D/S.S/xxxx and Motor-vehicle Registration number KAT xxx was acquired through joint effort.
9. Besides, the respondent deposed that as a carpenter and curio seller, he was able to raise funds from his businesses which money he injected towards developing their matrimonial home erected on plot No.K/D/xxxx. To prove that he was operating business, he attached his customer bank account statement (annexture MAM-6).
10. It is his position that the properties in question were obtained through their joint effort hence should be utilized for the benefit of the two in equal share. Concerning the claim that he was cruel to the applicant, he denied the same and put the applicant to task as to why he had not been charged.
11. He deponed that the applicant having obtained orders restraining him from accessing their matrimonial home, he has been rendered destitute hence an embarrassment in the village. He urged the court to order the applicant to account for the rental income collected from the rental property and that the property be valued and sold and the proceeds be shared equally.

Hearing

12. During the hearing, pw1 Mwanaisha Abdi told the court that she is the registered owner of plot no. Kwale /Diani Beach/xxxx. She stated that she did sell ¼ an acre to the applicant and respondent wife and husband respectively at Kshs 600,000. She identified a sale agreement in that respect (p.ex.2) and a transfer she executed in favour of the two (p.ex.3). She however stated that before she could transfer the said plot, the respondent lodged a caution thus stopping the transfer transaction.
13. Pw2 MT the applicant herein adopted her witness statement dated 8th June 2021 and a list of documents filed on 5th march 2021. She reiterated the content of her averments contained in the affidavit in support of the summons. She however stated that she bought plot No.Kwale/Diani/xxxx before they got married but the respondent had it registered in his name without her consent. That the three MVs in question were all bought before they got married. She stated that she used to go to Germany to work between the months of March and October during which time she could send money to the applicant.



14. She however stated that she bought plot No.Kwale/Diani/xxxx the year 2009 at 1.9 million. Pw3 Dick Chikoba also adopted his statement dated 5th March 2020. He simply stated that he was a neighbor to the applicant and respondent having bought ½ an acre out of plot No.K/D/xxxx.
15. Dw1, the respondent herein adopted his replying affidavit to the summons, a replying affidavit of 28th May 2019 and the documents in support. He stated that he was a businessman dealing with sale of curios and carpentry. That when the applicant joined him, she was not working and that they wholly depended on his income from the said businesses.
16. He told the court that whenever the applicant went back to Germany, he could send her curios to sell and then send money back to Kenya for development of their property. He claimed that he bought plot no K/D S.S./xxxx on his own without the support of the applicant. He further claimed that as a carpenter and mason, he did much of their house construction works alone.
17. Dw2 HA told the court how he sold the respondent plot no.xxxx in the presence of his wife (applicant) and that it was the respondent who paid him. Dw3 SB told the court that they sold MAM a beach plot with a house where he is staying. Dw4 KM a brother to the respondent simply told the court that the applicant was a wife to the respondent.
18. Dw5 RG adopted his witness statement dated 4th April 2018. He told the court that his brother(respondent) was a businessman operating a curios shop as well as a carpentry workshop and timber yard. He claimed that while staying with his brother, he assisted in the construction works of his brother's house. Dw6, JM a friend to MAM corroborated his testimony that he was a businessman and that he was working in his curios shop. He stated that it was MAM who cut trees from the bush with his help to construct their house.
19. Upon close of the case, parties agreed to file submissions.

Applicant's Submissions

20. Through the firm of Okata and company advocates, the applicant filed her submissions dated 26th October 2022 thus submitting on three issues namely; whether the subject properties are matrimonial properties acquired during coverture; whether the applicant contributed solely towards the acquisition of the subject properties and therefore absolutely and exclusively entitled to the benefit of the same and; who pays costs.
21. It was counsel's submission that the undisputed properties acquired during coverture and therefore constituting matrimonial property are ¼ an acre to be excised out of K/D/xxxx; K/D/S.S./xxxx; MV Registration No.KAT xxx and KAMxxx.
22. On the issue of contribution, learned counsel took the court through the relevant provisions governing distribution of matrimonial property under the [Matrimonial Property Act](#). Counsel reiterated the position expressed by the applicant in her pleadings to the effect that the applicant solely acquired the properties in question.
23. According to learned counsel, all the monies reflected in the relevant bank accounts were deposited by the applicant after working in Germany before returning to Kenya. That there were no deposits made in their bank accounts during the period the applicant was in Germany implying that the respondent was not engaged in income generating activity. Counsel contended that the respondent did not prove the source of his income through production of business permits; VAT payment; KRA remittances or annual returns. To that extent, he denied the claim by the respondent that he contributed directly and indirectly towards the acquisition of the property in question.



24. In support of the position that the principle of equality under the constitution Art 45(3) does not apply blindly nor is it intended to encourage dependency upon one spouse, the court was referred to the holding in the case of CACA No.559 of 2019 ENK v MNNN(2021) eKLR, EGM v BMM (2020) eKLR, MEK v GLM (2018) eKLR and HHCCC NO. E001 of 2021 EKTM v ECC (2021) eKLR.
25. In conclusion, counsel urged that the applicant be registered as the sole owner of the subject landed properties and that the two motor vehicles be sold and proceeds given to the applicant.

Respondent's Submissions

26. The respondent appearing in person filed his submissions on 1st November 2022 thus reiterating the content contained in his replying affidavit and the annexures thereof. He maintained the position that when he started cohabiting with the applicant, he was operating a shop dealing with curios as well as curving wooden goods. That the applicant a house wife who had just moved out of her abusive marriage had nothing to contribute. He submitted that anything bearing his name is his alone. He submitted that the applicant had falsified the employment documents and amount earned from her employer in Germany.
27. He maintained the stand that monies remitted to their joint or his account by the applicant while in Germany was out of the sales of curios sent to the applicant and not earnings from her employment. The applicant went ahead to demonstrate through documentary evidence how he contributed towards the purchase of Motor-vehicle No. KAT xxx.
28. In her rejoinder, the applicant filed a reply to the respondent's submissions on 2nd February 2023 contending that the respondent had not proved his monetary contribution towards the acquisition of the properties in issue. That the respondent had failed to establish that he had sold or sent any artworks to Germany.

Analysis and Determination

29. I have considered the summons herein, response thereof, oral testimony by both parties and rival submissions together with the respondent'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
 - d. Who bears the costs of the suit?
30. There is no dispute that the parties herein contracted their marriage under the Marriage Act (now repealed) before the Registrar of marriages on 29th December 2010. They later divorced before the chief magistrate's court in 2019. It is admitted by both parties that the properties listed in the amended summons was acquired during coverture.
31. 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.
32. 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”
33. 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.
34. 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
35. 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.
36. 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 ...*”
37. 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.
38. 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 Gissin* (19700 2 All ER 780 page 788”.

39. It therefore follows that; contribution is not about direct financial contribution alone but also non-monetary contribution. A party should therefore not be disqualified from getting his or her rightful share on the ground that he or she did not contribute directly towards 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.
40. 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”

41. In the circumstances of this case, parties have taken divergent positions each claiming to have solely contributed towards the acquisition of the properties in question. However, the applicant softened his position thereby offering to share equally despite one plot being registered in his name alone.
42. Before I endeavor to address the issue of contribution, I wish to clarify the position that the property referred to as K/D/xxxx is registered in the name of Mwanaisha (Pw1) pending formal transfer of ¼ an acre to either the applicant or respondent or both. It is therefore not proper to refer the entire K/D/



xxxx as belonging to the parties herein. Since Mwanaisha has no problem transferring that portion, the beneficial interest at stake for distribution is $\frac{1}{4}$ an acre and not the entire land comprising that title.

43. Parties are in agreement that the said property was bought jointly during the subsistence of the marriage. However, during the time the property was bought, none of them specifically pointed out the source of the Kshs 600,000 paid for the same. The same position applies to plot no K/D S.S./xxxx. The applicant attached several documents showing various financial remittances as exhibited in her list of documents reflecting employment letters in Germany and monies remitted to the accounts held either jointly or in the respondent's name.
44. The respondent does not deny the fact that the respondent did send him some monies. He however disputes the source. Instead, he attaches the source of these finances to the sale of his curios and other artworks in Germany through the applicant. I have carefully looked at the responses by the respondent. There is no evidence suggesting that he ever transacted business abroad in respect of curios or artworks. It is trite that he who alleges must prove. See *Alice Wanjiru Rubiu v Messiac Assembly of Yabwe* (2021) eKLR where it was held that whoever lays a claim before the court against another has the burden to prove it.
45. In view of the fact that the respondent has failed to prove that the monies he received from Germany was out of sale of his curios, the applicant's position shall prevail to the extent that a big sum of monies sent to the applicant's account was out of the applicant's earnings. However, the respondent was able to demonstrate that he was not an idler but a hardworking man who was not wholly dependent on his wife. Indeed, even the applicant admitted that when they met, the respondent was selling curios and operating a workshop. His testimony was corroborated by Dw2 to Dw6 who knew the respondent even before he met with the applicant.
46. He produced bank statements with a mixture of credit entries some of which he associated with his earnings from his businesses besides those from the applicant. On xx-examination, the applicant admitted that when she met the respondent and started staying together, she was a house wife who had no source of income at that moment. This therefore implies that she was dependent upon the respondent until she got a job. With this admission, I cannot dismiss the applicant as someone who totally did not make any contribution.
47. The applicant stated that she used to send money to the respondent's account or their joint account. She also stated that she could go to Germany for casual jobs between March and October of every year. The impression I get is that, during her absence, the respondent was taking charge of their home and even supervising construction as corroborated by Dw2-Dw6. With this in mind, I am satisfied that the respondent did make both indirect and to some extent direct monetary contribution.
48. Since it is obvious from the frequency and large sums of money sent by the applicant to the respondent's account, it will be fair to conclude that the applicant did make a bigger contribution towards the acquisition of the matrimonial property in question. I am alive to the fact that parties cannot with mathematical precision prove their contribution. As stated in *Joseph Ogentoto case* (*supra*), the guiding principle in apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution.
49. Taking everything into consideration and further taking into account that the applicant did contribute more in acquiring the two landed properties and two Motor-vehicles listed in the summons, I am inclined to share the properties in the ratio of 60 % to 40% in favour of the applicant.



50. As regards motor –vehicle KYH xxx and Toyota KBJ xxx , the applicant denied knowledge of the same and made no claim over them. The respondent did not adduce any evidence to prove their existence. To that extent I have nothing to distribute.

51. In conclusion therefore, am inclined to make the following orders;

- a. That LR No. Kwale/Diani/xxxx and Kwale/Diani S.S./ xxxx be and are hereby declared matrimonial properties acquired during coverture hence to be shared in the ratio of 60: to 40 in favour of the applicant
- b. Mvs Registration number KAT xxx and KAM xxx be and are hereby declared matrimonial property and the same to be sold and the sale proceeds shared out in the ratio of 60:40 in favour of the applicant.
- c. That parties shall be at liberty to sell the same after valuation by a mutually agreed valuer and the proceeds be shared out in the ratio stated above.
- d. This being a family related matter, each party to bear own costs.

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

J. N. ONYIEGO

JUDGE

