



REPUBLIC OF KENYA



**GWM v SMN (Matrimonial Cause E003 of 2020)
[2023] KEHC 18483 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E003 OF 2020**

HK CHEMITEI, J

JUNE 15, 2023

**IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY
ACT AND ORDER 37 RULE 1(G) OF THE CIVIL PROCEDURE RULES**

BETWEEN

GWM APPLICANT

AND

SMN RESPONDENT

JUDGMENT

1. The matter before this court is a matrimonial cause brought by way of an Originating Summons dated 12th October 2020 relating to distribution of matrimonial property.
2. The applicant herein seeks determination of the following questions;
 - a. Whether plot Nos.xxx & xxx excised from Parcel of land Title No. Nakuru Municipality block xx/xxx, Parcel of Land Reference No. IR No. xxxxx with all the buildings and other developments thereon and Motor Vehicle Registration No. KBU xxxC, Two Grain stores hereinafter referred to as the said (matrimonial properties) forms part of the matrimonial property and were acquired by the joint contribution of the Applicant and the Respondent during their marriage and registered in their joint names or in the name of the respondent alone.
 - b. Whether the respondent holds Plot No. xxx excised from Parcel of land Title No. Nakuru Municipality block xx/xxx in trust for the Applicant.
 - c. That Upon finding the aforesated properties are matrimonial properties and that the Respondent holds Plot No. xxx in trust for the Applicant, whether the Applicant herein is entitled to whole share of the said matrimonial properties or in such other just and equitable



manner as this Honourable Court may deem fit and should the Respondent be directed to execute transfer instruments in favour of the Applicant for the portion granted.

- d. That the Respondent be restrained by himself, his agents, servants and or employees from alienating, disposing off, encumbering, charging or in any other manner interfering with the said properties until this matter is heard and determined.
 - e. That the costs of the Application be borne by the Respondent.
3. The originating summons was supported by the grounds on the face of it and the applicant's affidavit filed on 28th October 2020.
 4. The respondent filed his replying affidavit sworn on 23rd June 2021 and the applicant rebutted by her further affidavit sworn on 12th July 2021.
 5. When the matter came up for directions the court ordered the same be heard by way of viva voce evidence. The respective affidavits therefore were converted into plaint and defence respectively.
 6. At the hearing of the case the applicant testified as PW1. She testified that the respondent was her husband but they had divorced vide a decree dated 18th June 2020. That she wanted the properties listed in her application dated 13th October 2020 to be shared out as the same had been procured during the subsistence of the marriage. Further that other vehicles had been sold during the divorce and the only ones remaining were KBU xxxU and KBT xxxP. Additionally, that she was not aware of the bank where the said vehicles had been charged and that they had bought the same together.
 7. The applicant testified further that they had a grain store in Nakuru and had bought plots xxx and xxx vide an agreement dated 5th March 2010 and she lived there since 1997. That she had paid a deposit of Kshs. 280,000/= for plot 187 and she had the bank deposit slip but the same was in the defendant's name. Further, that she had paid 1,500,000/= and had produced the bank slips for the same and the defendant had never been involved in the payment at all. She added that plot 186 was in both their names and she also paid for the said plot but the deposit was paid by Nancy. That the said plot had been charged and there was a balance of Kshs. 35,000/= yet to be paid and she prayed that she be given the same.
 8. PW1 as well prayed to retain the 18 units which were the ones that had been educating their children and had never been charged to date. That there was a property in Timau- Nanyuki; Nanyuki West Timau Block x/xxxx (Mutirithia) which belonged to a group and was later subdivided and sold as per the receipts dated 9th February 2013.
 9. She said that there was also plot number xx/xxx but the said properties were not matrimonial property for division and that motor vehicle registration number KCQ xxxA was purchased after the divorce. She added that she wanted the house where she was staying, the developed property for school fees and she was not asking for any money.
 10. She produced the following documents in support of her case namely; decree nisi dated 18th June 2020, bank deposit slip for deposit payment for plot no. xxx, letter from NHC dated 28th September 2020, bank slip for Kshs. 500,000/=, plot no.xxx title, receipts dated 9th February 2013, NHC agreement dated 25th November 2013, a letter for change of ownership dated 24th June 2014 and bank slips for KCQ xxxA. The same were marked as Pexh 1, Pexh 2, Pexh 3, Pexh 4, Pexh 5, Pexh 6, Pexh 7(a), (b) and Pexh 8 respectively.
 11. On cross examination, she confirmed that she assisted in the purchase of the motor vehicles despite them being purchased by the defendant vide loans. That the same were repossessed but he sold to



someone else by the time of the divorce and that motor vehicle registration number KCF 429P was bought on loan from Equity bank which they paid in full. She stated further that KBD xxxB was never repossessed as the defendant had it in Nairobi and KAB xxxZ was sold to pay off some debt. Additionally, that KBJ xxxJ was never repossessed by the bank and that KBU xxxC, KBD xxxP had no loans and she was not aware if they had loans but they formed part of the matrimonial properties.

12. She stated further that plot xxx was in the name of the defendant but he was holding in trust for the family and she had paid for the said plot after they were to be evicted from their home. She confirmed that plot no. xxx was in both their names and that the Free area property which had 18 units was in the name of the defendant but the rent collected was channelled towards school fees payment.
13. She added that the said plot did not have a loan of kshs,15 million and that both plot xxx and xxx could be divided but the court to decide on how the same could be done.
14. The respondent testified as DW1. He adopted his replying affidavit dated 24th July 2021 as his evidence in chief. He testified that his marriage to the plaintiff was dissolve and that they had vehicles registration numbers KCH xxxT, KCF xxxE and others but he had not bought them together with the plaintiff. That the said vehicles were attached by the bank and for the land Nakuru Municipality Block xx/xxx, plots xxx and xxx he bought them when they were husband and wife. Further, that plot xxx was in his name but plot xxx was in both their names and it was his proposal that the applicant takes the plot xxx which had no debts.
15. He testified further that the house was in both plots and he had no other house so they should share the same. He went on to testify that the 18 units in Free area was in his name and he proposed that the children take 7 units and the applicant 5 and him 6 units. It was his testimony that they had 5 children, 3 of whom were with them and that the cereal stores had already been shared.
16. He said that he had no issue with the household items and the applicant could take them. He added that no case had been file against him for being violent.
17. On cross examination, he confirmed that the applicant was his wife and that they did business together and that he bought the vehicles while they were married. He stated that he had the bank documents to show the vehicles had been attached by the bank. He confirmed further that he lived in their house and he had paid the loan but it was the applicant who had paid the deposit of the loan. He also stated that he build the 18 house units during their marriage.
18. Upon re-examination, he testified that the lorries were attached and he had bank statements indicating the same. That the applicant did not offset the loan to avoid attachment. He testified further that since plot no. xxx had a loan, he prayed that he be given the same and the applicant to take the one without a loan.
19. The court directed that the parties file written submission which they have complied.

Applicant's Submissions

20. The applicant in her submissions identified three issues for determination namely; whether the suit properties constituted matrimonial properties, whether the applicant contributed towards acquisition and development of the matrimonial property and whether the applicant was entitled to a share in the matrimonial property.
21. On the first issue, she cited Section 6 of the *Matrimonial Property Act* which defines what a matrimonial property is. She submitted that the properties listed in this cause were acquired during the



pendency of their marriage through their joint efforts and the same constituted matrimonial properties pursuant to the provision of Section 6 of the Act.

22. On the second issue, the applicant placed reliance on Section 2 of the *Matrimonial Act* which defined contribution towards acquisition of matrimonial property and the case of *TKM V SMW* [2020] eKLR which cited the case of *Muthembwa v Muthembwa* [2002] 1 EA 186.
23. She submitted that land parcel no. xx/xxx, plot no. xxx and 187 where their matrimonial home was; LR No. IR No. xxxxx situated in Free area comprising of 18 units of rental houses and motor vehicle registration no. KBU 344C had been purchased by their joint efforts. She submitted that she also paid all the rates, utility bills even the receipts were in the respondent's name and also she had bought the home essentials like electronics, furniture, equipment and appliances necessary for home use.
24. On the last issue, the applicant place reliance on Article 45(3) of the Kenya of *Constitution* which states that parties to a marriage were entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. She also placed reliance on the case of *MNH v FHM* [2018] eKLR, and submitted that though most of the matrimonial properties were in the name of the respondent, they were acquired by their joint efforts and the respondent herein was holding them in trust.
25. The applicant further cited Petition No.10 of 2020; *Joseph Ombogi Ogentoto V Martha Ogentoto* [2023] where the Supreme Court held that each partner should leave the marriage with the property equivalent to their individual contribution in the union. She went on to submit that both of them had contributed to the matrimonial property hence both were entitled to a share of it as stipulated under the law.

Respondent's Written Submissions

26. The respondent in his submissions reiterated the contents of the pleadings filed by the parties herein and the oral evidence adduced in court. He also went on to submit that his submission on distribution of the properties were in line with the evidence he had tendered. That plot no. xxx be given to the applicant and him plot xxx so he could continue to pay the outstanding loan arrears and/or the said plot be sold and the proceeds be shared equally. Further, that in respect to land parcel reference No. 1R No. xxxxx situated in Free area comprising of 18 units, the same be shared out so that the applicant gets 4 units, the children 8 and the respondent 6 units. He urged the court to allow the Originating summons in line with the terms laid out in his submissions.

Analysis and Determination

27. I have given due consideration to the pleadings and the evidence on record and the submissions by the parties and what is before this Court is clearly the issue of the distribution of matrimonial property.
28. Section 6 of the *Matrimonial Property Act* 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.



29. In the case of *T.M.V. v F.M.C* [2018] eKLR, 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.”
30. 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.
31. However Section 7 of that *Matrimonial Property Act*, provides as follows:
- Ownership of the matrimonial property vests in the spouses according to the contribution of other spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
32. Under section 2 of *Matrimonial Property Act*, 2013 “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.
33. In *ENN v SNK* [2021] eKLR the court held that a matter regarding division of matrimonial property ought/shall have the following facets proved by either party:-
- a. The fact of a valid, legal, regular marriage in law;
- b. Dissolution of such marriage by/through an order of the Court;
- c. That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage;
- d. Contribution by each party to the acquisition/development.
34. In *EGM v BMM* [2020] eKLR the Court of Appeal opined as hereunder:
- “We think it was erroneous for the learned judge to assume and hold that the Constitution gives spouses an automatic 50% share of the matrimonial property simply by being married... The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed.”



35. In a recent case of *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) as also relied upon by the applicant, the Supreme Court held as follow:

“6. The equality provision in article 45(3) of the Constitution did not entitle any court to vary existing proprietary rights of parties and take away what belonged to one spouse and award half of it to another spouse that had contributed nothing to its acquisition merely because they were married to each other. To do so would mean that article 40(1) and (2) of the Constitution which protected the right to property would have no meaning which would not have been the intention of the drafters.....

8. The guiding principle should be that apportionment and division of matrimonial property could only be done where parties fulfilled their obligation of proving what they were entitled to by way of contribution...

16. In the event that a marriage broke down, the function of any court was 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) had the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages. Noting the changing times and the norms in the society, 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, and proceed to have the marriage dissolved then wait to be automatically given 50% of the matrimonial property.”

36. In the instant case the marriage solemnized between the applicant and the respondent in 18th March 2008 was dissolved vide a Certificate of making a Decree Nisi absolute dated 18th June 2020. The applicant herein seeks distribution of the matrimonial properties listed in the affidavit in support of her application. The said matrimonial properties include; Lorries of motor vehicle registrations numbers KBT xxxK, KCH xxxx, KCF xxxE, KBU xxxC, KAP xxxZ, KBD xxxB, Pick-up registration No. KBJ xxxJ, Toyota Prado KBD xxxP, Parcel of land no. Nakuru Municipality block xx/xxx plot nos.xxx & xxx where the matrimonial home was built, Parcel of Land Reference No. IR No. xxxxx situated in Free area comprising 18 units of rental houses and Two Grain Stores.

37. The said properties pursuant the provision of Section 6 of the *Matrimonial Property Act* amount to matrimonial property as it is not disputed that the same were acquired during the subsistence of marriage between the parties herein. The documents produced as evidence of purchase does not dispute the above conclusion despite some of them being in the name of the respondent.

38. At the hearing of the case both parties in their testimonies agreed that they had shared out the two grain stores and the respondent had no objection to the applicant taking the household items. Therefore, the matrimonial properties remaining for distribution are lorries, Parcel of land no. Nakuru Municipality block xx/xxx plot nos.xxx & xxx where the matrimonial home was built, Parcel of Land Reference No. IR No. xxxxx situated in Free area comprising of 18 units of rental houses.

39. The applicant testified that she was entitled to all matrimonial properties and the respondent should get nothing as he sold some of the matrimonial property and the family had not benefitted from the said sell. She also testified that she had made contribution in the acquisition of the said properties despite being registered under the respondent’s name.



40. On his part the respondent testified that the lorries as listed by the applicant had been attached by the bank due to loan arrears and had been sold out. He testified further that plot No. xxx was in his name but plot No.xxx was both their names. He proposed that the applicant takes the plot xxx which had no debts. As for the 18 rental units in free area in his name, he proposed that the children take 7 units and the applicant 5 and him 6 units.
41. From the evidence on record this court is satisfied that the properties were generally acquired during the subsistence of their marriage. The motor vehicles seemed to have been either sold or some are owned by the parties separately. I did not come across a serious claim over the said vehicles. In other words, they did not assert much claim over the same.
42. In the premises this court would not say much on them save to state that the status quo regarding the motor vehicles shall remain so and each of them may do as they wished with them. In other words, whatever is encumbered shall be the responsibility of whoever owned to see how to sought out any encumbrances. In short I do not find them clearly proved as part of the matrimonial properties.
43. In regard to the two plots which houses the matrimonial home, what is clear is that the same that is plot number xxx and 187 are matrimonial properties. Although one is still in the name of the respondent and the other in their joint names I cannot hesitate to conclude that that is where their matrimonial home is.
44. Evidence was led to show that the development is joined and the same cannot be separated. Since the parties cannot agree on how they can be divided this court is left with no other option but to grant them three options.
45. The first option is to have parcel number xxx be taken over by the applicant as the matrimonial home is basically built therein and that is where she is staying with the children. I state so because it was not rebutted by the respondent that he had already engaged himself in another marriage after the divorce.
46. Although this plot number xxx had some loan repayment, the same should be repaid by the two parties in equal portions jointly and separately as the debt accrued during the subsistence of their marriage.
47. Secondly parcel number xxx shall go to the respondent. Since the same is not encumbered the only logical way is what is suggested above, namely to contribute towards the settlement of the liability of plot number xxx.
48. Each of the parties as a third option and after the above exercise may be at liberty to sale their respective portions to third parties on condition that they issue a written notice giving priority to either of them to purchase the same. The value of course must be at market value and a valuation must be done by an authorised registered valuer.
49. As regards the 18 apartments units the only logical thing to do is to share out the same between the parties and the children as suggested by the respondent. This is for the simple reason that the same cannot be sold as they are in a unit. It is also appreciated that the same are rented out and the proceeds utilised for fees payments for their children's education.
50. At the same time, it appears that they all give equal rents and thus there is none which has preference over the other.
51. In his evidence the respondent had suggested that the children get 7 portions or units, the applicant gets 5 and he gets 6 units.



52. The court agrees with the proposal by the respondent above for the reason that each of the child shall get a unit and the applicant shall get 5 units as she did not rebut the evidence that she got the bigger grain or cereal store owned by the parties as well as household items. The respondent got the smaller store.
53. Luckily there is no evidence that the said units comprised in LR No xxxxx Free area are encumbered.
54. The above distribution in my view falls in line with the Supreme Court decision in *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another* (Supra) that the function of any court was to make a fair and equitable division of the acquired matrimonial property guided by the provisions of Article 45(3) of the *Constitution*

Conclusion

55. In concluding this matter the court directs as hereunder;
 - (a) The applicant GWM shall have land parcel number xxx comprised in plot number Nakuru municipality Block xx/xxx and 5 units in the apartments comprised in parcel number LR xxxxx situate at Free Area.
 - (b) The respondent SMN shall have plot number xxx comprised in plot number Nakuru municipality Block xx/xxx and 6 units comprised in parcel number LR xxxxx.
 - (c) Both parties shall pay the balance of the loan/liabilities equally so as to free parcel number xxx
 - (d) Each of the parties' children shall each have a unit in the apartments comprised in LR No xxxxx which portions shall be determined jointly by their parents herein, that is the applicant and the respondent.
 - (e) The two cereal stores shall remain as agreed between the applicant and the respondent and for avoidance of doubt the applicant shall have the bigger one and the respondent the smaller one.
 - (f) The Applicant shall have all the house hold items and appliances.
 - (g) Each of the parties shall execute the conveyancing instruments where necessary so as to transfer the respective properties as directed above.
 - (h) Being a family matter each party shall meet their own costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 15TH DAY OF JUNE 2023.

H. K. CHEMITEI

JUDGE

