



**DAR v DML (Matrimonial Cause 71 of 2019)
[2023] KEHC 21802 (KLR) (Family) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21802 (KLR)

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

MATRIMONIAL CAUSE 71 OF 2019

PM NYAUNDI, J

JULY 14, 2023

**IN THE MATTER OF SECTIONS 2, 6, 7, 12 & 17
OF THE MATRIMONIAL PROPERTY ACT, 2013**

AND

**IN THE MATTER OF AN APPLICATION FOR
THE DIVISION OF MATRIMONIAL PROPERTY**

BETWEEN

DAR PETITIONER

AND

DML RESPONDENT

JUDGMENT

1. The Petitioner presents Originating Summons dated 5th November 2019 under Sections 2,4,6,7,12, 14(b) of the *Matrimonial Property Act*, 2013 and Sections 1A,1B and 3 A of the *Civil Procedure Act* and seeks the following orders-
 1. That a determination be made as to each party's contribution towards the acquisition and development of the matrimonial properties known as Ruiru East Block1/5563, Kajiado/kitengela/60702 and Kajiado/kitengela/60703 and a distribution be made.
 2. That each party to bear their costs in the suit
2. The Originating Summons is supported by the Affidavit sworn by the Petitioner on even date. The Respondent swore an affidavit in opposition on 18th December 2019.



3. The matter proceeded by way of viva voce evidence in open court on the 23rd March 2023 with both the Petitioner and Respondent testifying as the sole witness in support of their respective cases.
4. At the close of the hearing each of the parties filed written submissions and list of Authorities. The Submissions of the Petitioner are dated 24th May 2023, while those of the Respondent are dated 20th June 2023.

Summary of the Petitioner Case

5. Parties solemnised their marriage under the *Marriage Act*, Chapter 150 Laws of Kenya (now repealed) on 16th December 2011. The marriage was dissolved vide Decree issued in Divorce Cause No. 4 of 2019 at Thika Law Courts. The marriage was blessed with two children.
6. During the subsistence of the marriage the couple acquired the following properties
 - a. Ruiru East Block/1/5563
 - b. Kajiado/ Kitengela/60702
 - c. Kajiado/ Kitengela/60703
7. That she contributed towards the acquisition and development of the properties as she was in salaried employment and was therefore able to access loans. Her contribution to the acquisition of the plots was both financial and non-financial.
8. In addition to the loans she took, she also contributed her bonus income to the acquisition and development of the matrimonial properties. She supervised the Construction of the matrimonial home which was at Ruiru East Block /1/5563. She also contributed towards the expenses of running the home and was responsible for the care of the minor children of the marriage.
9. She adds that when she sold her motor vehicle, she gave the Respondent the proceeds of the sale as contribution towards the development of the property at Ruiru.
10. That they constructed a home on Ruiru East Block/1/5563 and moved in May 2017 although the Construction was not complete. In September 2018, the Respondent evicted her from the matrimonial home.
11. At the time of separation, the parties signed a 'separation agreement' on 19th September 2018, which provided that the Petitioner move out of the house and that the Respondent would pay her rent in the house she moved into. Further that the Respondent would pay the Petitioner, Kshs 53000 to pay her personal loan. The Petitioner to have interim custody of the children and the Respondent to take care of the education.
12. She had a stable income and therefore took responsibility for running the home. The Respondent did not have stable income and therefore she had to pitch in to run the home.
13. She had also paid off a loan of Kshs 700,000 that the Respondent owed his sister.
14. In Her Submissions the Petitioner identifies the following as the issues for determination
 - a. Whether the suit properties constitute matrimonial property.
 - b. Whether the Petitioner contributed towards the acquisition and development of the matrimonial properties.



- c. Whether Kajiado/ Kitengela/ 60702 and Kajiado/ Kitengela/ 60703 should still constitute part of the matrimonial properties.
 - d. Whether the Petitioner is entitled to an equal share or such higher proportion of the matrimonial property, Ruiru East Block 1/ 5563.
15. On the first issue, the Petitioner submits that the properties were acquired during the subsistence of the marriage and that therefore the conditions laid out in Section 6(1) of the Matrimonial Act have been met. She counters the Respondents allegation that the sale of the Ruiru parcel was rescinded and that Barzan Limited took over the purchase of the property.
 16. She submits that the Respondent being a director of Barzan Limited still has a beneficial interest in the parcel of land and the house constructed on the Ruiru Plot. In any event it is submitted that the Respondent did not substantiate the claim that Barzan had taken over the purchase of the land at Ruiru.
 17. Further it is asserted that the parties had planned for this to be the matrimonial home, that the Petitioner registered the water and electricity meter in her name. it is submitted that the contradictions related to the purchase of the property by Barzdan company were not satisfactorily resolved by the Respondent.
 18. On the 2nd Issue, it is submitted that the Petitioner has established that during the pendency of the union she was employed at Safaricom. And that she deployed her salary, bonuses and took loan to contribute towards running the home and projects such as the parcel of the parcels of land in Kajiado and Ruiru. It is submitted further that the Petitioner also made payments to the sister of the Respondent to settle a debt on his behalf.
 19. In addition to the direct financial contributions, the Petitioner it is submitted also made non-financial contributions, including taking care of the children and managing the household. The Petitioner relies on the decision in GKO vs HOO [2018] eKLR and JKO v CKO (Civil Appeal 560 of 2019) [2023] KECA 115 (KLR).
 20. On the 3rd Issue, it is contended that the Respondent having determined to gift the Petitioner, the same should not be considered matrimonial property and the decision in LIO v AOO [2020] eKLR is relied upon.
 21. On the 4th Issue, the Petitioner urges the Court that the property at Ruiru belongs to the parties and that on the evidence the Petitioner took out a loan to service the construction of the matrimonial home.
 22. The Petitioner therefore urges that the Court finds that all the properties are matrimonial properties, that the Petitioner made a substantial contribution to their acquisition and in the case of the Ruiru property to their development and that she is entitled to more than 50 per cent share of the property.

Summary of the Respondent Case

23. The Respondent joins issue on the allegations made by the Petitioner in the Originating Summons as regards the acquisition of the properties and whether they constitute matrimonial property.
24. He concedes that he and the respondent were married from 2011 until 2019, when the marriage was dissolved. It is his contention that the Petitioner deserted the marriage and moved out of the home in September 2018.



25. He states that the properties L.R. Kajiado/ Kitengela/ 60702 and LR Kajiado/ Kitengela /60703 were acquired as matrimonial property and that the Petitioner left with both titles of the land and he states that he has since given both properties to the Petitioner.
26. He maintains that the Petitioner did not contribute towards the acquisition of the land at Ruiru and her contribution towards its development was inconsequential.
27. In any event he avers that the agreement between him and the vendor for the purchase of the plot was rescinded and that a company, Barzdan had taken over the purchase of the property as demonstrated by sale agreement dated 6th July 2017 between the vendors and the Barzdan Limited.
28. The Respondent has made available certificate of Registration that shows that Barzdan was registered on 9th October 2013 and he holds 1/3 (333) of the shares. The other shareholders are Bernard Kiprof Chemweno and Aggrey Kiplangat.
29. The Respondent contended that by letter dated 23rd November 2018 the Petitioner recanted the agreement dated 19th September 2018 and that therefore she could not rely on it.
30. In submissions the Respondent submits that it is only the properties in Kajiado that compromise the matrimonial property and that he has surrendered them to the Petitioner. He avers that the sale in respect to the property in Ruiru was rescinded and the property taken over by Barzan Limited and that therefore it does not belong to him.
31. He identifies the following as the issues for determination-
 - a. Whether property L.R. Ruiru East Block 1/ 5563 is matrimonial property.
 - b. Whether the Petitioner should be granted the orders sought.
32. On the 1st issue, the Respondent submits that the Petitioner has not established that the property was jointly owned by the parties. It is submitted that the property is still registered in the name of Peter Irungu Mwangi Nyadundo and Mary Nyanjau Mwangi, the Vendors.
33. It is further submitted that a sale agreement is not proof of ownership and reliance placed on the provisions of Section 26 of the [Land Registration Act](#). The Respondent relies on the decision in [AKM v NNN](#)[2019] eKLR.
34. It is further submitted that the Petitioner has not discharged her evidentiary burden as she has not demonstrated to the required standards her actual contribution to the acquisition of the property and its development.
35. It is the Respondents submissions that the payments were made out of the Standard Chartered Account, and he is the only one who made deposits to that account. The Respondent relies on the decision in *MWM v GL* [2016] Eklr.
36. The Respondent submits that the most that the Applicant did was purchase furniture for the house, which she left with when she left the home at Ruiru. The Respondent relies on the decision in to aver that to discharge the burden the Petitioner was required to demonstrate that she contributed to the acquisition of the matrimonial property and that she also needed to prove ownership as the basis of laying claim to the property.
37. Relying on [NWN v JNK](#) [2015] eKLR and [PBW v JWC](#) [2017] eKLR, the Respondent submits that since the property belongs to a company it cannot be said to be matrimonial property.



38. On the 2nd Issue, the Respondent contends that the Petitioner has failed to lay sufficient basis for the orders sought as
- a. The property does not belong to the Respondent
 - b. The Property is in a process of being acquired by a limited liability company Barzdan, who are still paying the balance of the purchase price
 - c. That the property still belongs to Peter Mwangi Nyadundo and Mary Nyanjau Mwangi who are not party to this suit
 - d. This being a matrimonial property court, this court lacks jurisdiction on questions of ownership that are being raised. The same can only be determined by the ELC Court should such a dispute arise.
 - e. That the Petitioner failed to support any allegation on contribution throughout this case either directly or indirectly.
 - f. That a sale agreement is not proof of ownership.

Analysis and Determination

39. The following facts are not in dispute that,
- a. The Parties were married on 16th December 2011 and the marriage was dissolved following grant of issue of decree absolute on 30th day of October, 2019
 - b. During the course of the marriage the following were acquired as matrimonial property, L.R. Kajiado/kitengela/60702 and L.R. Kajiado/kitengela/60703
 - c. On or about 12th April 2013 the Respondent entered into a sale agreement for the purchase of a portion of Title No. Ruiru East Block 1/1313 for the sum of Kshs 1,900,000 (Referred to as L.R. Ruiru East Block 1/5563 upon subdivision)
 - d. That in 2017, the Couple moved into the house that was constructed on parcel no. L.R. Ruiru East Block 1/5563 and stayed there until the exit of the Respondent on 24th September 2018, the circumstances under which she left are disputed
40. The issues left for determination material to the Originating Summons as discerned from the pleadings, rival submissions and authorities cited are
- a. Whether the Parcel L.R. Ruiru East Block 1/5563 constituted matrimonial property.
 - b. If a) is in the affirmative, whether the Petitioner contributed to its acquisition and or development?
 - c. Whether the Petitioner is entitled to a share of the matrimonial property identified as Ruiru East Block 1/5563.
41. On the 1st Issue it is not disputed that in 2013 the Respondent entered into a sale of agreement for the purchase of land, that a house was constructed and that the parties moved into the house that was constructed on Ruiru East Block 1/5563 as their matrimonial home.
42. Section 6 of the Matrimonial Properties Act defines Matrimonial properties to include-
- 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
43. Section 2 defines, matrimonial home in turn is defined to include ‘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’.
44. The Tanzanian Court of Appeal in Civil Appeal No. 283 of 2017, *National Bank of Commerce Limited V Nurbano Abdallah Mulla* had the opportunity to define Matrimonial home and property and stated as follows-
- From the above provision, we are of the considered view that a property will be termed a matrimonial home when the spouses ordinarily occupied it as their family residence. On the other hand, the phrase matrimonial property has a similar meaning to what is referred as a matrimonial asset and it includes a matrimonial home or homes and all other real and personal property acquired by either or both spouses or during their marriage.
45. This definition is in tandem with that under Section 6 of the Kenyan *Matrimonial Property Act* which distinguishes between immovable and movable property jointly owned and acquired during the subsistence of the marriage and the matrimonial home which is owned or leased by one or both spouses and occupied or utilised by the spouses as their family home.
46. I agree that the parcel of land referred to as Ruiru land does not comprise matrimonial property and is not available for distribution but find that the development thereon comprising the home is matrimonial property as defined under Section 6 of the Act.
47. I am persuaded by the decision of Limo J in *AKM v NNN* [2019] eKLR where he stated-
- (48) I am certain that despite the absence of evidence of actual contribution, the plaintiff must have made significant contribution towards the acquisition of land parcel; ...and construction of matrimonial house or home....I have already found that that the land on which the matrimonial house stands is not part of the matrimonial property...What can only be shared in my view is the value of the home and the parties in the cause and particularly the plaintiff made things difficult by not tendering evidence about the value.
48. I am fortified in this position as the Respondent has demonstrated that he has continued to maintain control and make decisions with regard to the property. Including rescinding the sale with the original vendor and encouraging Barzan Limited a company in which he holds 33% shares to take over ownership.
49. The Respondent admits in evidence that the house is currently earning rental income but does not disclose who is receiving the rent, based on his account it would be safe to conclude that it is Barzan Limited.
50. Having determined that the home constructed on the subject parcel of land constitutes matrimonial property, the question is whether the Petitioner contributed to its development.
51. In *JKO v CKO* (Civil Appeal 560 of 2019) [2023] KECA 115 (KLR) (3 February 2023) (Judgment) the Court of Appeal observed-
- (21) The division of matrimonial property is never an easy task...there is no formula for division of matrimonial property. However, when called upon to do so, a court must painstakingly take



the contribution of each of the spouses into consideration so as to arrive at a just position'. In the decision of *ANJ vs ANK* [2015] (Supra), a decision relied on by the respondent's counsel, it was held:

“the ultimate objective of any approach towards the division of matrimonial assets is to accord due and sufficient recognition to each party's contribution towards the marriage without overcompensating or under compensating a spouse's indirect contributions- so that the outcome would, in the circumstances of each case, lead to a just and equitable division..’

52. The Petitioner has demonstrated to my satisfaction that at the time material to this claim she was in gainful employment at Safaricom Limited and had access to staff loans and bonuses. I am also satisfied that the Respondent was making a sizeable income as a consultant. The Respondent travelled extensively and during the construction of the home the Petitioner had the responsibility of supervising the project as evidenced by the fact that the parties ran a joint account that the Petitioner withdrew from to meet construction costs. Both parties, while the relationship was in good health, contributed towards the acquisition and development of matrimonial properties.
53. As demonstrated earlier the Respondent acknowledged the contribution of the Petitioner in the acquisition of the 2 properties in Kitengela and has surrendered both the titles to her. The observation I make from this is that the Petitioner actively invested in the acquisition and development of family assets. This is further supported by the email communication between the parties between August 28, 2018 and November 2, 2018.
54. It is also on record that by agreement dated 19th September 2018, the Respondent was prepared in addition to having given the Petitioner the 2 plots in Kitengela to pay the Petitioner the sum of Kshs 53000 every month so as to help the Petitioner offset the personal loan she had taken. This amount corresponds with the monthly deductions that the Petitioner was paying to service the loan.
55. In arriving at this conclusion, I would distinguish the facts in the current case from the facts in *MM v JKM* [2019] eKLR as in the current case, there was uncontroverted evidence that the parties moved into the property and it therefore was a matrimonial home.
56. In addition to the direct financial contribution that the Appellant made to the development of the matrimonial home and contributing to the expenses of running the home. I would factor in the non-financial contribution made by the Petitioner in maintaining the home, caring for the children and providing companionship to the Respondent.
57. Section 2 of the *Matrimonial Property Act* defines contribution as
 - “Contribution” means monetary and non-monetary contribution and includes;
 - a. Domestic work and management the matrimonial home;
 - b. Child care
 - c. Companionship
 - d. anagement of family business or property; and
 - e. Farm work
58. Having determined that the Petitioner contributed to the development of matrimonial home that constitutes matrimonial property I now will embark on determining her share.



59. As noted above the Petitioner has already taken possession of the 2 Kitengela Plots (L.R.kajiado/kitengela/60702andL.R.Kajiado/kitengela/60703), which by admission of the parties were jointly acquired.
60. It is not lost on me that in September 2018 the parties had arrived at a settlement where the Respondent would support the Petitioner pay off her loan and in his words of August 28th 2018, ‘pay her off.’
61. I find that as at September 5th 2019 (bank statements submitted by the Petitioner), the amount of loan outstanding was Kshs 2,029,449.52. I hold that this is the amount payable to the Petitioner as her contribution to the development of the matrimonial home.
62. Accordingly, I find that
- a. The house constructed on the Ruiru land is matrimonial home acquired during the subsistence of the marriage and therefore constitutes matrimonial property
 - b. The plots in Kitengela comprise matrimonial property and by consent of the parties are allocated to the Petitioner absolutely
 - c. The Petitioner contributed to the development of the matrimonial home and her share is determined to be Kshs 2,029, 449 payables to her by the Respondent
 - d. The Respondent to pay to the Petitioner the stated sum of Kshs 2,029, 449 within 120 days
 - e. Mention on 6th December 2023 to confirm compliance
 - f. Each party will bear their own costs

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF JULY, 2023.

P M NYAUNDI

JUDGE

In the presence of:

Ms Dulo for the Petitioner

Ms. Chitechi for the Respondent.

Karani Court Assistant

