



REPUBLIC OF KENYA



**KENYA LAW**  
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**JKK v EKW (Matrimonial Cause E003 of 2020)  
[2023] KEHC 20544 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20544 (KLR)

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

**A MSHILA, J**

**JULY 14, 2023**

**BETWEEN**

**JKK ..... APPLICANT**

**AND**

**EKW ..... RESPONDENT**

**JUDGMENT**

1. Before court is an application by way of Originating Summons filed on November 30, 2020 and brought under Order 37 of the *Civil Procedure Rules*, Section 7 of the *Matrimonial Property Act*, the proceeding rules and all other enabling provisions of the law. The Applicant sought for orders:-
  - a. That this Honourable Court do make an order that the property namely Ruiru Kiu Block Xx (mahiira)/xxxx is solely owned by the Applicant.
  - b. That a permanent order do issue excluding the Respondent from occupying the property namely Ruiru Kiu Block xx (Mahiira)/xxxx.
2. The application is premised on the grounds that the parties herein cohabited as husband and wife between the year 2006 until 2020 but the said marriage has since been dissolved. That during the subsistence of the marriage the Applicant solely acquired the suit property where the Respondent failed to make any meaningful contribution towards the acquisition directly or indirectly. That the Respondent solely occupies the property and the Applicant is apprehensive that the property might be alienated.
3. The application is supported by the affidavit of JKK sworn on November 18, 2020. The Applicant deposed that his marriage became estranged due to difficulties. That during the marriage they were blessed with two issues. That in 2008 he solely bought the suit property which he developed and moved his family in 2009. That in 2007 the Respondent had deserted him only to return in 2009 when the construction was over. That save for Kshs 50,000/= that the Respondent loaned to the Applicant



- and which has since been refunded, the Respondent only partially financed the construction. He contended that he finances the family as such the Respondent cannot claim direct or indirect contribution. That due to unfavourable conditions he left the matrimonial home in 2020. That efforts to have the Respondent vacate from the matrimonial home have been futile as such he continues to suffer loss.
4. EKW filed her Replying Affidavit sworn on February 9, 2021, in opposition to the Applicant's application. She deposed that she contributed towards the development of the suit property as such it is matrimonial property as she took loans from her chamas and merry go rounds which she gave to the Applicant. That the Applicant left the matrimonial home for another wife and the Respondent had never threatened him. She indicated that she had left the home briefly in 2008 due to the Applicant's violence and returned in 2009 but they moved into the matrimonial home in 2013. The Kshs 50,000/= claimed to have been loaned by the Respondent in 2007 and refunded in 2017 was said to have been school fees and not a refund as claimed by the Applicant. She contended that she has been taking part of the financial responsibilities by doing house shopping of Kshs 9,000/= and that she used her earnings towards the construction. That she reported the Applicant and his family when they violently tried to evict her from the matrimonial home in 2020. She urged the court to grant her 50:50% of ownership as she has put direct and indirect input as well as taking care of the minor children.
  5. JKK filed a Further Affidavit on 23/3/2023 reiterating the contents of his Supporting Affidavit. In his witness statement filed on 23/3/2023 he stated that he cohabited with the Respondent between 2006-2020 where they were blessed with two issues and thereafter the marriage became estranged due to difficulties. That in 2008 he solely bought the suit property which he developed as his father supervised and that he moved his family in 2009 upon completion. That in 2007 the Respondent had deserted him only to return in 2009 when the construction was over. That save for Kshs 50,000/= that the Respondent loaned to the Applicant and which has since been refunded, the Respondent only partially financed the construction. He contended that he finances the family as such the Respondent cannot claim direct or indirect contribution. That due to unfavourable conditions he left the matrimonial home in 2020. That efforts to have the Respondent vacate from the matrimonial home have been futile as such he continues to suffer loss.
  6. EKW in her witness statement filed on February 10, 2021 stated that she was married to the Applicant from 2006 to 2020 and they were blessed with two issues. That in 2008 they separated for six months as the Applicant had become very violent. That she went back in 2009 when they started constructing their home. That will her days earnings she assisted in paying the fundis and she joined chamas which money she also used towards the construction. That she also used to buy shopping for the home as well as take care of the children. That the Applicant moved out of the home and has since been threatening the Respondent to move out of the matrimonial which she has refused to do as she has nowhere to go with her children.
  7. The Originating Summons was heard by way of *viva voce* evidence.
  8. JKK (PW1) urged the court to adopt his filed documents as his primary evidence. He stated that he constructed the property when the Respondent was away. That his father supervised the property until they moved in in 2012. He stated that he separated with the Respondent in 2007 and that she came back in 2010. He denied that the money from chamas was for construction. He denied that the Respondent contributed towards shopping money as he is the one who took care of the family. He contended that he sold the family car and that he has since refunded the Kshs 50,000/= loaned to him by the Respondent being money for tank, cabro, electricity and gutters. That he moved out for his well-being as such he urged the court to grant him his property back.



9. EKW (DW1) stated that she relied on the divorce proceedings. She also stated that she was married to the Applicant in 2006 but left in 2008 for six months due to differences. That they moved into the matrimonial home in 2013. During the subsistence of the marriage she bought shopping, contributed her chama money towards the construction of the house. She contended that the Kshs 50,000/= sent to her by the Applicant was for paying school fees. She added that she carries out household chores and takes care of the children.
10. Thereafter the parties were directed to file and exchange their written submissions. Hereunder is a summary of the submissions;

### **Applicant's Submissions**

11. The Applicant submitted that he has indefeasible title to the land which he purchased without the Respondent's input and thereafter he developed the same when the Respondent had left and that she came back when construction was almost complete. It was submitted that the Respondent failed to produce evidence proving contribution towards acquisition and development, directly or indirectly. Reliance was placed in the case of *PNN VS ZWN* (2017) eKLR. He further submitted that he refunded the minimal contribution of Kshs 50,000/= by the Respondent which contribution was said to be unsubstantial. The Applicant submitted that he is greatly prejudiced as he is forced to rent whereas the Respondent enjoys the property. In any case, the issue of housing for the children should be dealt with by the children's court. That the trial court based its grounds of the dissolution of marriage on the Applicant's cruelty as such this court was urged not to be influenced by the same.

### **Respondent's Submissions**

12. The Respondent submitted that the matrimonial property was acquired and developed by the joint efforts of both parties herein. She contended that her contribution was both monetary and non-monetary in form of childcare and management of the matrimonial home. The Respondent submitted that based on the facts of her direct and indirect contribution as enumerated in her pleadings she is entitled to an equal share of the property. She urged the court to be guided by Section 2 of the *Matrimonial Property Act* in regard to non-monetary contribution. She also placed reliance on the case of *AWM vs JGK* (2021) eKLR.

### **Issues For Determination**

13. Having considered the Applicant's application, the Replying Affidavit by the Respondent in opposition to the same and the parties submissions, the issues framed for determination are as follows;
  - i. Whether the subject property is matrimonial property;
  - (ii) Whether the same be shared and the parties ratio of contribution

### **Analysis**

#### **Whether the subject property is matrimonial property;**

14. The parties herein were married in 2006 until 2020 when the marriage subsequently broke down. The Applicant claims to have purchased the property known as Ruiru Kiu Block xx Mahiira/xxx where he solely constructed the matrimonial home. That for his well-being he moved out of the said matrimonial home where he left the Respondent but now wants the court to order the Respondent to vacate as the home belongs to him.



15. On the other hand, the Respondent contends that she contributed towards the development of the matrimonial home as at the time she was running a business and would use her earnings to pay the fundis and that she also used her chama money to contribute towards the construction. She also stated that she bought shopping as well as took care of their two children. In the circumstances she urged the court to find that she contributed monetary and non-monetary towards the development of the matrimonial as such she is entitled to an equal share of the matrimonial property.
16. 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.
17. The suit property herein was bought by the Applicant during the subsistence of their marriage that lasted between 2006 to 2020. It is clear from the evidence that the Applicant bought the matrimonial property which is registered in the Applicant's sole name during the subsistence of the marriage therefore, making it matrimonial company.

#### **Whether the same be shared and the parties ratio of contribution**

18. What is in contention is the level of contribution by the Respondent towards the construction of the matrimonial home. The Applicant avers that the contribution by the Respondent was not substantial to warrant her to any share while the Respondent claims that she made both monetary and non-monetary contribution. Indeed, the Applicant agrees that the Respondent loaned him Kshs 50,000/ = which he refunded.
19. In regard to contribution each case must be determined based on its own peculiar circumstances. Indeed the Court of Appeal had this in mind in *TKM v SMW* [2020] eKLR where it is stated as follows:

“We bear in mind the edict in *Muthembwa v. Muthembwa* (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.”
20. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the *Matrimonial Property Act*, 2013 in the following terms:

In this Act, unless the context otherwise requires—

“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.



21. The Applicant herein contends that he acquired the suit land and thereafter constructed the matrimonial home without the input of the Respondent. The Respondent however, contends to have contributed both monetary and non-monetary contribution. She alleged to have used her earnings from her business as well as her contributions from chama. She also indicated that she used to do shopping of Kshs 9,000/= as well as take care of the household and the children as most of the times the Applicant was away on work related engagements.
22. The Applicant concedes that the Respondent made contribution which according to him was not substantial as the Kshs 50,000/= spent by the Respondent on electricity, cabro and gutter was refunded to the Respondent. The Respondent however claims that the said Kshs 50,000/= sent to her by the Applicant was for paying school fees for the children.
23. In respect of contribution, it is clear that the Respondent made both monetary and non-monetary contribution as per Section 2 of the *Matrimonial Property Act*. The Respondent's non-monetary contribution was said to be in form of childcare, companionship and management of the matrimonial home. The Respondent's contribution in a matrimonial home cannot be quantified in monetary terms. The Respondent ensured that the home was running smoothly. She did not even have someone assisting her with domestic work even when she was still running her business. The Applicant is said to have been working away from home most of the time. All the while the Respondent made sure that the children and the home were well taken care of. The Respondent contends to have provided companionship to the Applicant. This is also considered as a form of non-monetary contribution as provided in Section 2 of the *Matrimonial Property Act*.
24. The *Matrimonial Property Act* of 2013 recognizes and formalizes both the monetary and non-monetary contribution of parties in a marriage.
25. Reference is made to the case of *NWM v KNM* (2014) eKLR where it was stated that

“The court must give effect to both monetary and non-monetary contributions that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.
26. From the evidence adduced this court is satisfied therefore, that the Respondent made both monetary and non-monetary contribution towards acquiring the matrimonial home.
27. The Applicant sought a court order that the Respondent vacates from the matrimonial home where she currently lives with the children the Applicant having moved out for his well-being. The Respondent contends that she contributed towards the development of the home as such she is equally entitled to a share of the said home. She proposes that the matrimonial property be divided on a 50:50% basis.
28. It is clear from the record, that the Applicant is the registered owner of the matrimonial property the subject of these proceedings. The Applicant claims to have acquired the same solely and proceeded to develop on his own as the Respondent had left only to come back when the construction was almost complete. The Respondent claims to have encouraged the Applicant to buy the plot where the family was going to settle and subsequently she gave out her money towards the same to the Applicant where she took loans and chamas. The Applicant at some point does not deny these contributions, his contention is that the same is not substantial.



29. Section 7 of the *Matrimonial Property Act* is clear in its terms that:

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

30. This therefore means that it is not automatic that parties in a marriage are entitled to an equal share of the matrimonial property as the same is pegged on contribution. This position was held in the case of *PNN v ZWN* [2017] eKLR where Kiage JA had this to say:-

“Thus it is that *the Constitution*, thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the *Matrimonial Property Act*, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.”

31. The Applicant contends that the contribution by the Respondent is not substantial as such he is entitled to the whole share of the matrimonial property. Having considered the rival arguments by both parties this court is satisfied that the Respondent made both monetary and non-monetary contributions. The Respondent has listed that she catered for a tank, electricity installation, cabro and gutters. She did attach her conversation with the Applicant where she strongly contended to have participated in acquiring and developing the matrimonial home a fact that was not denied by the Applicant in the said conversation. Indeed, the contributions that the Respondent is able to outline, portray a picture of someone who was committed with the development of the matrimonial home.

32. In view of the foregoing, and from analysis of the evidence on record, this court is satisfied that the Applicant has proved to the desired threshold that he made greater contributions to the acquisition and development of the subject property; like-wise the Respondent is also found to have made monetary and non-monetary contributions which cannot be quantified in monetary terms towards acquiring and developing the matrimonial home. Based on the evidence this court is satisfied that the Applicants contribution is 70% and the Respondents suggestion of 50% cannot be a true reflection of the value of her contribution and this court is satisfied that 30% suffices.

### **Findings And Determination**

33. In the circumstances this court makes the following findings and determinations;

- i. A declaration be and is hereby issued that the property known as Title Number Ruiru Kiu Block xx Mahiira/xxxx with all the buildings thereon and registered in the sole name of the Applicant was acquired during the subsistence of the marriage between the Applicant and Respondent to be matrimonial property.
- ii. The property be distributed to the Applicant and Respondent on a ratio of 70:30 per cent respectively being their contributions to the purchase and development of the said property.
- iii. The Applicant be at liberty to purchase the Respondents share of contribution of the property Ruiru Kiu Block xx Mahiira/xxxx; or in the alternative vice versa;
- iv. This being a family matter each party to bear their own costs.

Orders Accordingly.



**DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 14<sup>TH</sup> DAY OF JULY,  
2023**

**A. MSHILA**

**JUDGE**

**In the presence of;**

Mourice – Court Assistant

Onsembe – for the Respondent

Githinji – for the Applicant

