



**SNW v PMW (Matrimonial Cause E001 of 2022)
[2023] KEHC 21175 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
MATRIMONIAL CAUSE E001 OF 2022**

SM GITHINJI, J

JULY 6, 2023

BETWEEN

SNW APPLICANT

AND

PMW RESPONDENT

JUDGMENT

1. The Applicant filed an Originating Summons dated March 15, 2022 seeking the following orders;
 - a. A declaration that the Applicant and the respondent were at one time married but they are now divorced.
 - b. A declaration that the Applicant and the respondent acquired some property to wit;- Half (1/2) an acre out of land known as Lamu/Lake Kenyatta 1/xxxx & Land known as Lamu/Lake Kenyatta 1/40xx with a one storey building comprising of three (3) bedroomed house on ground floor and an unfinished 1st floor, otherwise known as matrimonial property.
 - c. An order that the applicant is entitled to half the share of the ten (10) acres comprised in half (1/2) an acre out land known as Lamu/Lake Kenyatta 1/xxxx with a one storey building comprising of three (3) bedroomed house on ground floor and an unfinished 1st floor, otherwise known as matrimonial property.
 - d. Any other relief that honourable court may deem fit and just to award.
 - e. Costs of this suit be borne by the respondent.
2. The Originating Summons is anchored on the sworn affidavit of SNW the applicant who deponed that she was married to the respondent and started cohabiting in the year 2009 until the year 2021 when they got divorced vide Mpeketoni Divorce Cause No 1 of 2021. That during the pendency of their marriage, they were blessed with two issues (minors) whom the applicant was granted custody



vide Mpeketoni Children’s Case No Eoo6 of 2021. She also stated that during the period of their marriage, they acquired the following properties; Half (1/2) an acre out of land known as Lamu/Lake Kenyatta 1/xxxx & Land known as Lamu/Lake Kenyatta 1/40xx with a one storey building comprising of three (3) bedroomed house on ground floor and an unfinished 1st floor. It was her testimony that the purchase of the property with her authority were made in the name of the respondent but she also made substantial monetary and non-monetary contributions towards their purchase and acquisition. It was also stated that the property known as Lamu/Lake Kenyatta 1/40xx is where the matrimonial house is constructed and where they were all along living until the respondent deserted them while the other property being half an acre of land excised from Lamu/Lake Kenyatta 1/xxxx is agricultural land where they have ventured into farming but she no longer has access to it. In addition, she stated that the respondent has since locked the children and her out of the matrimonial house and they have nowhere to stay. Further, that having participated in the acquisition and development of the aforesaid properties, she is entitled to a share.

3. The applicant in her supplementary affidavit dated April 25, 2022, deponed that she made none-monetary contribution as she was always there for the respondent and offered emotional support as the wife, prepared his meals and kept him clean at all times, took care of the children and performed all household duties. She added that the respondent left the matrimonial home in the year 2020 and returned in the year 2022 to chase them away from the matrimonial home where she had been staying with the children.
4. In response, the respondent filed a replying affidavit dated March 31, 2022 stating that the properties herein are not matrimonial property as the applicant has never contributed to their acquisition either financially or in terms of their management. That the applicant fully depended on him for financial provision as she has never been in employment during the course of their marriage to provide any funds towards the acquisition of his properties. He stated that the property known as Lamu/Lake Kenyatta 1/40xx is not matrimonial property as is jointly owned by himself and Reuben Wanjohi Macharia in equal shares which he bought with his savings after working as an Agricultural Extension officer and that there was no intention of the property being deemed as matrimonial property.
5. Mr. PMW also stated that the applicant has not exhibited any financial statement to prove her contribution towards acquisition of the property nor has she described the nature of authority she gave to its acquisition. Further, the respondent denied the claims of having deserted the matrimonial home and asserted that the applicant created an environment he could not live in by being violent, attempting to kill him and being both abusive and cruel. He also deponed that after their divorce he went to the house to live therein as he could not afford rent and he did not chase the applicant and the children but it is the applicant who opted to leave the house on her own and went to live at his niece’s premises. He added that he too has rights to the matrimonial house and the applicant is welcome to live there as long as she respects his rights.
6. The respondent details in his affidavit how he acquired and developed the properties herein through loans and savings which copies of bank statements were annexed to the affidavit as evidence.

Analysis and Determination

7. I have considered the parties’ pleadings and submissions and the issues emerging for determination are; whether the suit properties are matrimonial properties and whether the applicant is entitled to an equal share of the same.
8. Matrimonial property is defined in Section 6 of the [*Matrimonial Property Act*](#) as follows:
 - (1) For the purposes of this Act, matrimonial property means—



- (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
9. From the above definition, matrimonial property must constitute the matrimonial home or homes of the parties and household goods and effects in such home or homes. Other property jointly owned and acquired during the subsistence of the marriage of the parties also constitutes matrimonial property. However, from the definition it is clear that acquisition of a property during the subsistence of a marriage does not necessarily make it matrimonial property as it should be jointly owned.
10. From the evidence on record, it is clear that the house standing on Lamu/Lake Kenyatta 1/40xx is the matrimonial home where the parties lived before the divorce. This fact is acknowledged by the parties that it is where they set up the matrimonial home. Thus it is my finding that this property is the matrimonial home.
11. As regards property Lamu/Lake Kenyatta 1/xxxx (half an acre), the respondent contends that he owns the same jointly and in equal share with one Reuben Wanjohi Macharia which he defended stating that he bought it from loans and savings without the applicant's input. Nonetheless, he is a registered co-owner notwithstanding the source of the purchase price.
12. Section 24 of the [Land Registration Act](#) provides:
Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
13. By dint of Section 24 of the [Land Registration Act](#), 50% of the absolute ownership and leasehold interest in the said property, as the case may be, is vested in the Respondent by reason of his registration as co-owner of the same. The applicant has not placed any evidence before court demonstrating that she is a co-owner of the said property. In my view then, this does not constitute matrimonial property.
14. Now, onto the issue of whether the applicant is entitled to an equal share of the suit properties; The applicant asserts that she is entitled to an equal share of the suit properties on account that she made non-monetary contribution. She relied on Article 45 (3) of the [Constitution](#) and Section 2 of the [Matrimonial Property Act 2013](#). Section 2 of the [Act](#) stipulates that non-monetary contribution 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;
15. The Applicant outlined her non-monetary contribution as providing love, companionship and support to the Respondent for the 12 years and stepping in to care for the children. She did domestic work and managed the matrimonial home and the agricultural farm.
16. The Supreme Court of Kenya in *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) rendered itself as follows;

“Equality of parties to a marriage had largely been interpreted and construed in two ways. On the one hand, an interpretation of article 45(3) of the Constitution had been construed to mean a division of matrimonial property down the middle through the literal application of the 50:50 division ratio. Proponents of that argument largely opined that since non-monetary contribution could not be quantified but was equally important, a split right in the middle would be more appropriate. The second approach was that ‘equal’ as provided for under article 45(3), meant that a party obtained an equivalent of what one contributed, monetarily or otherwise. 10. Article 45(3) of the Constitution underscored the concept of equality as one that ensured that there was equality and fairness to both spouses. Equality and fairness were therefore one and intertwined. Equality also underscored the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, each party’s contribution to the acquisition of matrimonial property could not have been done in an equal basis as a party could have significantly contributed more in acquiring property financially as opposed to the other party. 11. Equity denoted that the other party, though having not contributed more resources to acquiring the property, could 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. That was what amounted to indirect contribution. Equity therefore advocated for such a party who could 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. 12. The maxim ‘equality is equity’ had never been truer. Equity was an important principle when it came to matrimonial property since what was fair as it related to equity was not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to acquisition of matrimonial property, even though such contribution was indirect, but nevertheless had in one way or another, enabled the acquisition of such property amounted to significant contribution. Such direct or indirect acts could include:

- a. Paying part of the purchase price of the matrimonial property.
 - b. Contributing regularly to the monthly payments in the acquisition of such property.
 - c. Making a substantial financial contribution to the family expenses so as to enable the mortgage installments to be paid.
 - d. Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.
 - e. Caring for children and the family at large as the other spouse worked to earn money to pay for the property.
17. While article 45(3) of the *Constitution* dealt with equality of the fundamental rights of spouses during and after dissolution of marriage, equality did not mean the re-distribution of proprietary rights at the



dissolution of a marriage. Neither did the reading of that provision lead to the assumption that spouses were automatically entitled to a 50% share by fact of being married.

18. Flowing from the foregoing, I am of the view that disregarding this unquantifiable non-monetary contribution by the Applicant would clearly negate the equality principle in Article 45(3) of the Constitution and result in injustice. Thus, it is my finding that based on this non-monetary contribution, the Applicant is entitled to a beneficial interest in the properties herein. However, I find that the prayer for equal share of the property has not been proved and the same cannot issue but 30% share of the value of each property would be equitable in the circumstances.
19. In sum therefore, I make the following declarations and orders;
 1. A declaration be and is hereby made that the applicant is entitled to 30 % share of the value of the following properties;
 2. Land known as Lamu/Lake Kenyatta 1/xxxx with a one storey building comprising of three (3) bed-roomed house on ground floor and an unfinished 1st floor.
 3. The respondent's half share in land known as Lamu/Lake Kenyatta 1/40xx .
 4. Parties to agree on the valuation of the properties and mode of distribution.
 5. This being a family matter each party shall bear their own costs.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT GARSEN THIS 6TH DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Soita for the Applicant and in the absence of the Respondent.

Respondent be notified of the outcome.

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S.M. GITHINJI

JUDGE

6/7/2023

Malindi HC Matrimonial Cause NoE001 of 2022 - Judgment Page 4

