



REPUBLIC OF KENYA



KENYA LAW
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**FNM v JAM (Matrimonial Cause 1 of 2022)
[2023] KEHC 26263 (KLR) (4 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 26263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE 1 OF 2022**

G MUTAI, J

SEPTEMBER 4, 2023

BETWEEN

FNM APPLICANT

AND

JAM RESPONDENT

JUDGMENT

1. Before this court is an Originating Summons dated 17th March 2022 vide which the applicant seeks the following orders: -
 - a. That a declaration do issue that the movable and immovable properties known as:
 - i. Motor Vehicle Registration No. KCQ 490N-Nissan March;
 - ii. Motor Vehicle Registration No. KBK 778C-Toyota Premio;
 - iii. Motor Vehicle Registration No.-Isuzu Truck;
 - iv. 3 acres of land at Nakuru Elementaita;
 - v. 1 acre at Narok;
 - vi. 1 acre at Zimmerman;
 - vii. Plots at Kasarani;
 - viii. Lands at Karama;
 - ix. Matrimonial home in Ukunda-Plot No. Kwale/Ukunda/4808
 - x. Rental houses in Ukunda-Plot No. Kwale/Ukunda/4809
 - xi. Rental houses in Meru;



- xii. Matrimonial home in Meru;
- xiii. Rental building in Murangá;
- xiv. Digital petrol station at Karama, Meru;
- xv. Transportation business;
- xvi. Posho mill at Karama, Meru; and
- xvii. Borehole at the rental houses in Ukunda.

Are owned jointly by the applicant and the respondent.

- b. That a declaration to issue that the respondent holds the said property named in paragraph “1” above in trust for the applicant and for himself too;
 - c. That this honourable court be pleased to issue a declaration that the said properties mentioned above are jointly owned by the parties herein and the same should be sold and/or divided and/or the income derived from the rent/sale be shared equally between the petitioner and the respondent as this honourable court deems fit and just;
 - d. That the applicant do own and manage the matrimonial property named in paragraph “1(a), (i) and (j)” above, divided to her absolutely and/or exclusively without respondent’s interference;
 - e. That the respondent himself, his agent and/or his agent be restrained from alienating, encumbering, or in any manner disposing of the said property without the express written consent of the applicant; and
 - f. That the respondent be condemned to pay the costs of this application and other costs incidental thereto.
2. The summons is premised on the grounds stated therein and the applicant’s supporting affidavit.
 3. The applicant’s case is that she got married to the respondent on 9th April 1985 and cohabited with him in Diani, Kwale County. They were blessed with three children who are now adults, namely, Peninah Muthoni, born on 6th April 1985; Philip Gitonga, born on 17th June 1986; and Rebecca Mwikali, born on 18th November 1994. They divorced, and the decree nisi was made absolute on 14th July 2021.
 4. She stated that during the subsistence of their marriage, she worked as a senior clerical officer while the defendant worked as a police constable. She earned more than the respondent, so she opted to take an early retirement.
 5. Ms. Manyara averred that she contributed financially towards the acquisition of properties and investments. Their savings were consolidated as they planned for them jointly. She used her retirement funds to develop and improve their matrimonial home. Apart from the financial support, she performed her duties diligently as a wife and a mother.
 6. She further stated that she paid both primary and high school fees for their lastborn child at Kes.22,000/- per term for primary school and Kes.45,000/- per term for high school as well catering for the school-related expenses. She was able to provide for the children even after retirement as she sold water, clothes and handbags, all established using her pension money.



7. She averred that she took care of the respondent when he was admitted to the hospital following a road traffic accident by visiting him daily, taking him lunch and supper, as well as taking care of the children and running and maintaining the home.
8. She deponed that during the subsistence of their marriage, she bought a Land Rover Pick Up KAC 093 with her pension money, which she used for business and the proceeds were used to build the matrimonial home. She was the one maintaining the matrimonial house as well as the rental houses, including paying for renovations such as replacing the roof, which had collapsed, and re-wiring the houses.
9. Further, during the subsistence of their marriage, they acquired the following properties she had listed in her claim, whose documents are with the respondent except for the two parcels of land in Kwale.
10. She stated that without any justifiable cause, the respondent denied her access to the matrimonial property and proceeds from the businesses therein. He also took away the motor vehicle registration number KCQ 490N. The respondent has been enjoying the use of their matrimonial properties to her exclusion, only allowing her to collect rental income from the houses in Diani, which is approximately Kes. 37,500/- out of which she gives their daughter Rebecca Kes.10,000/-.
11. She thus urged the court to allow the originating summons.
12. In response, the respondent filed a replying affidavit sworn on 8th June 2022.
13. He denied the contents of the applicant's originating summons and the supporting affidavit therein. He submitted that he formally married the applicant at the Redeemed Gospel Church in 1997 and that they divorced in 2021. They were blessed with their children, who are now adults. He retired from the National Police Service as a Chief Inspector in June 2020.
14. He stated that he singlehandedly educated their children as well as the lastborn, who is at Kenya School of Law, whom he singlehandedly pays for her tuition and upkeep.
15. Further, during the subsistence of the marriage, they lived in the police lines provided by his employer. Then, the applicant's salary was paltry, only catering for her expenses and transport to and from Diani to her job in Mombasa. They did not have joint savings or investments, as alleged by the applicant. The applicant opted to retire from formal employment in 1997, making her financially dependent on him, and thus could not contribute towards the acquisition of the suit properties.
16. He averred that the applicant used her pension to purchase a temporary licence at Mwakwingwena Primary School, Kwale, in her name and built a structure which she rents out, which has not been mentioned; contributed to the purchase of a Land Rover motor vehicle, which she gave Kes.60,000/- and him Kes.40,000/- which vehicle was later sold to her sister for her own sole benefit; established a butchery business in one of the shops in his property Plot No. Kwale/Ukunda/4808, which failed, and to dig a borehole on his property Plot No. Kwale/Ukunda/4808, from which she sells water for her sole benefit.
17. He further averred that since his transfer from Kwale County in 2003, the applicant was the one collecting rent from the rental units on Plot No. Kwale/Ukunda/4808, which she used to acquire property in Diani, Kwale, with a two-bedroom house and to establish a church known as Diani Chapel Church, which she owns and runs in her name but has not disclosed in her pleadings. She also used the income to acquire property in her rural home in Kyanzavi, Machakos, in her name, which she has similarly not disclosed. Further, she used the rental income to acquire ordinary shares in FEB Holdings Ltd, which she did not disclose in her original summons.



18. He stated that in 1988, before the marriage, he got involved in a road accident and was paid Kes.300,000 in 1992, which he used to acquire a rental property in Kwale /Ukunda/4808. He built their matrimonial home on Kwale/Ukunda/4809, jointly registered in their names. However, he singlehandedly acquired and developed the same.
19. He further stated that since his transfer from Kwale in 2003, they have not lived in the same house, nor did he get companionship or domestic services from the applicant. The applicant, of her own volition, moved out of the matrimonial property and let it out for commercial use as a school, Brainsworthy Junior Academy, without informing him. She also took household goods and his personal effects.
20. He contended that they have never had a matrimonial home in Karama, Meru, as they resided as a family in Ukunda, Kwale and that the land at Karama, Meru, was inherited from his father. None of them contributed towards its acquisition.
21. On the motor vehicles, he contended that he acquired single-handedly Motor Vehicle No. KBK 778C during their period of estrangement. Motor Vehicle No. KAP 940K Isuzu truck, which he purchased after the divorce, and motor vehicle KCQ, which he sold.
22. He stated that he had given his daughter, Rebecca Mwikali, Title Number Naivasha /Ol Jarai Phase 11/7883, to safeguard her.
23. He further stated that he has retired and will heavily rely on the rental income from Kwale/ Ukunda/4808, which is registered in his name and the most important investment during his work life. He offered to share Plot No. Kwale/Ukunda/4809 with the applicant as it was their only matrimonial property. His intention is to retain Title No. Kwale/Ukunda/4809 as their family home since the children are attached to it, and the same should not be commercialised.
24. He urged the court to dismiss the applicant's Originating Summons with costs.
25. The applicant, in response to the respondent's replying affidavit, filed a replying affidavit sworn on 20th July 2022 and filed on 12th September 2022. She denied the contents in the replying affidavit, reiterated her position in the supporting affidavit and stated that the school is not operational and that the rental property is her sole source of income. The chapel was built with donations from members of the church; therefore, it belongs to them. She stated that during their marriage, she was a dutiful wife managing the household and everything in it.
26. The matter proceeded by way of viva voce evidence, with the applicant being the first witness. She told the court that she was relying on her supporting affidavit, a further affidavit sworn on 20th July 2022 and the annexures therein. She reiterated her position in the affidavits and stated that she was seeking her share of the suit properties, somewhere to live and feed herself, and her car, KCQ Nissan March, returned.
27. It was her testimony that the respondent used to show her the properties he was buying and that all their properties were registered in his name. After her retirement, she became a housewife, making nonmonetary contributions as a wife.
28. On cross-examination, it was her testimony that the respondent purchased Plot No.4809 and 4808. They developed Plot No.4808 together, which has seven double rooms, five singles and two shops, using the respondent's compensation money.
29. Further between 2003 and 2008, the respondent was living in Nairobi while she was living in Ukunda. Prior thereto they lived in police lines as well as in rental houses. The respondent was paying school fees while she was paying the house help.



30. It was her testimony that she collects rent from rental houses on Plot No.4808, has a pension of Kes.5,600/- and several businesses and sometimes gets income from the church.
31. In re-examination she stated that she used to visit the respondent in Nairobi regularly.
32. The respondent in his examination in chief, told the court that he was relying on his affidavit and annexures therein. He reiterated his position in the affidavit and stated that he invested individually and not as a family and that he got loans to finance his investments, inheritance in Meru and profit from shares.
33. On cross-examination, he reiterated his position and told the court that the applicant was taking care of the properties in his absence and that the money from the rent was to take care of the family.
34. Further, the applicant has enough income to take care of herself, and the properties jointly owned may be shared.
35. In re-examination, it was his testimony that they moved to the matrimonial home in Ukunda in 1999.
36. At the end of the trial the court directed the parties to file written submissions. Subsequently, through her advocate, Fida Kenya, the applicant filed written submissions dated 9th June 2023 on 13th June 2023. Counsel identified three issues as coming up for determination, namely, whether the respondent holds the movable and immovable property outlined in the originating summons in trust for the applicant; whether the applicant is entitled to an equal beneficial interest with the respondent in the suit properties; and whether the movable and immovable properties outlined in the originating summons are jointly owned.
37. Regarding the first issue, counsel relied on Section 14 of the *Matrimonial Property Act* No. 49 of 2013 and submitted that since the respondent and the applicant jointly acquired, developed and/or maintained properties during their marriage and registered most in the name of the respondent, there's a rebuttable presumption that indeed the respondent held the suit properties in trust for the applicant. The applicant contributed directly and indirectly towards the acquisition of the said properties as she was employed as a clerk and earning more than the respondent. She was customarily married to the respondent in 1985 before the solemnization of their marriage in 1997, and they were blessed with three children. All along, she was a working woman and a mother who worked hard for her family, and it would be unfair to claim that she was not a proprietor on the mere fact of non-registration of title documents in her name. To support her submissions, counsel relied on the following case laws: *FS v EZ*[2016] eKLR; *PWK v JKG* [2015] eKLR; and *TMW v FMC* [2018] eKLR.
38. On the second issue, counsel relied on Article 45(3) of the *Constitution* 2010, Section 2 of the *Matrimonial Property Act* 2013 and submitted that the applicant did not produce substantial documents to prove her direct contribution as she trusted the respondent to hold the properties in trust for her and did not see the need to keep documentary proof of the expenses she incurred towards the same.
39. Counsel submitted that the circumstantial evidence and testimony on the applicant's employment status, pension dues and retirement benefits can be used to infer her financial capability and hence contribution towards the acquisition/development and/or maintenance of the suit properties. It can also be used to proof her indirect contribution towards acquisition/development and maintenance of the suit properties which included; supervising domestic workers, managing and running the matrimonial home, children care, emotional companionship to the respondent, management of family business, rentals and water business.



40. She further submitted that the proceeds of all properties sold by the respondent without the consent and or knowledge of the applicant be declared joint property.
41. Counsel relied on the following authorities to support her submissions: *EKTM v ECC* [2021] eKLR and *EMN v NM* [2018] eKLR.
42. On the 3rd issue, counsel relied on Section 6(1) and Section 7 of the *Matrimonial Property Act* 2013 and submitted that by dint of the applicant's direct and indirect contribution, it is evident that the suit properties were jointly owned.
43. In conclusion, counsel urged the court to consider the contribution of each party, the duration of marriage and the needs of each spouse in determining each party's share. She urged the court to allow the summons as prayed.
44. On the other hand, the respondent, through his advocates Njoroge & Katisya Advocates, filed his written submissions dated 30th June 2023. Counsel submitted that none of the properties listed by the applicant meets the definition of matrimonial property under Section 6 of the *Matrimonial Property Act* 2013.
45. Counsel relied on Section 13 of the *Matrimonial Property Act* and submitted that the marriage between the respondent and the applicant was contracted in 1997 and not 1985 as alleged by the applicant, who did not produce any evidence on the alleged customary marriage prior to 1997. Plot No. Kwale/Ukunda/4808 was acquired before marriage and therefore not a matrimonial property. The Narok Property and personal car KBK 778C were purchased during the period of estrangement without the applicant's contribution.
46. Counsel further submitted that the following properties were non-existent as the respondent does not own them: Elementaita property, Title No. Naivasha /Ol Jarai Phase 11/7883, which the respondent gave their daughter as a gift; properties in Murangá, Zimmerman, Meru and Kasarani, which the respondent asserted that he does not own; Motor Vehicle KCQ 490N, which was sold; Posho Mill which broke down and has been out of commission for many years; and transport business which no evidence was produced.
47. On the matrimonial home, counsel relied on Section 2 of the *Matrimonial Property Act* on the definition of a matrimonial home and submitted that the same is registered in the joint names of the respondent and the applicant. There is no matrimonial home in Meru as Karama Meru is the respondent's ancestral home, and the family has never lived there. Neither has the applicant tendered any evidence to show the existence of the same. Counsel submitted that the respondent inherited the said land and owns it in trust for his children.
48. Counsel submitted that contribution must be determined on the basis of the circumstances of each case. It was submitted that the applicant did not have the financial wherewithal or enterprise to contribute to the acquisition of the properties monetarily. Ms. Katisya submitted that the parties were estranged for a large part of their marriage from 2003 thus there was no companionship or companionship for many years. As a matter of fact the long separation of the parties was one of the grounds for their divorce.
49. The respondent submitted that they had always employed domestic workers and that he was an active parent who participated in the upbringing of the children. When he moved to Nairobi, he lived with the older children during school holidays as they were in boarding schools.



50. On the applicant having own properties, counsel submitted that the applicant did not deny the same, and it's unfortunate that she did not disclose the same nor consider them sharable; therefore, the respondent's properties acquired from his labour should be retained by him.
51. In conclusion, counsel urged the court to disallow the prayers sought and the matrimonial home Kwale/Ukunda/4809 to be shared at 10:90 in favour of the respondent, and the value of the borehole be independently assessed and paid to the applicant.
52. In support of the said submissions, counsel relied on the cases of *PNN v ZWN* [2017] eKLR, *Federation of Women Lawyers Kenya(Fida) v Attorney General & Another* [2018] eKLR and *ENK v MN*(Civil Appeal 559 of 2019 [2021] KECA 219 (KLR).
53. I have considered the originating summons, the responses therein, the evidence and the rival submissions of both counsel and the issues that emerge for determination are: -
- a. Whether the suit properties form part of matrimonial property?
 - b. Whether the applicant contributed towards the acquisition of the said properties?
 - c. How the matrimonial properties, if any may be divided?
54. On whether the following properties form part of matrimonial property, Section 6 of the *Matrimonial Property Act* No. 49 of 2013 provides: -
- a. 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.
 - b. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property;
 - c. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights;
 - d. A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.
55. Further, section 14 of the said *Act* provides: -
- Where matrimonial property is acquired during marriage—
- i. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
 - ii. In the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.



56. In discussing section 6 of the *matrimonial property act* the court in the case of *TMW v FMC* (*supra*) stated: -

“Turning the provisions of the *Matrimonial Property Act*, Section 6 of the *Matrimonial Property Act*, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Basically, 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.”

57. In this case, the parties agree that they formally got married in 1997 and divorced in 2021 when the decree absolute was issued. The applicant has listed several properties, claiming that they were acquired during the subsistence of their marriage, thus forming part of the matrimonial property. I will then endeavour to discuss the same separately.

58. The applicant testified that Motor Vehicle Registration No. KCQ 490N, Nissan March was bought for her by the respondent, but was registered in his name, and that he had already sold it.

59. On the other hand, the respondent argued that he bought the said motor vehicle for his own use and that he had already sold it. That at the time of purchase, they had already separated. He produced a sale agreement dated 10th August 2021 between himself and Mwenda Chokera, the buyer, which is marked “JAM -8” in his replying affidavit sworn on 8th June 2022.

60. The applicant did not tender any evidence to show that the motor vehicle was bought for her or it was a family motor vehicle and or bought during the subsistence of their marriage. Therefore, it is my view that the same was not a matrimonial property.

61. Regarding Motor Vehicle Registration No. KBK 778C, Toyota Premio, the respondent stated that it is his personal car, which he acquired singlehandedly during his employment and in the period of estrangement. He produced a copy of the logbook, which indicates that he is the registered owner and that the motor vehicle was acquired in 2013. No evidence tendered to show that at the acquisition of the said motor vehicle, the parties were estranged and /or that the same was not acquired during the subsistence of their marriage. Therefore, it is my view that same property is part of the matrimonial property and thus available for division between the parties.

62. In respect of Motor vehicle registration no. KAP 940K-Isuzu Truck, the applicant argued that the same was acquired during the subsistence of marriage. On the other hand, the respondent argued that the same was purchased after divorce. He produced a copy of the sale agreement signed on 3rd March 2022 and a copy of logbook.

63. The parties herein divorced in 2021 vide Divorce Cause No.164 of 2019 and a decree absolute issued on 14th July 2021. Therefore I do concur with the respondent and find that the said motor vehicle is not a matrimonial property.

64. On the 3 acres of land at Nakuru Elementaita, the respondent stated that it belongs to his daughter Rebecca fact which has not been disputed by the applicant. He produced a copy of the title deed dated 27th February 2018, which shows that Rebecca Mwikali Manyara is the absolute proprietor. It is, therefore, my view that the same does not form part of the matrimonial property.



65. Regarding the 1 acre at Narok, the respondent stated that he acquired it through a loan while working in Narok and intends to give it to his son. As it was acquired during coverture, it is my opinion that the same is a matrimonial property.
66. In respect of the following properties 1 acre of land at Zimmerman, Plots at Kasarani and transportation business, no evidence was tendered to show their existence. It is, therefore, my finding that the same do not form part of the matrimonial property.
67. On the lands at Karama, the applicant stated that the respondent ails from Karama and that she did not have proof of purchase of the same. The respondent, on the other hand, stated that the land in Karama was an ancestral land which is yet to be distributed under the succession law.
68. In my opinion, ancestral land cannot be matrimonial property unless it is shown that a spouse made identifiable improvements on it during coverture. The applicant did not convince me that she is entitled to the said parcel of land. Accordingly, it is my finding that the land in Karama, Meru is not matrimonial property.
69. On plot no. Kwale/Ukunda/4808, the applicant stated that it hosts the rental houses from which she collects rental income for her upkeep. The property has seven double rooms, five singles and two shops. Further, they developed the same together, with the respondent making a financial contribution from his compensation money. The respondent concurred with the applicant and stated that the applicant did not contribute to the acquisition of the said property. On top of the compensation money, he used his salary and savings to develop the units progressively.
70. During the time the respondent was unwell the applicant took care of him. She also took care of the children and managed the home. Although the formal marriage took place in 1997 it would appear to me that there had been a customary union prior thereto. It is therefore my finding that the said property was acquired during the subsistence of marriage and is thus a matrimonial property.
71. On Plot No. Kwale/Ukunda/4809, the applicant stated that it is their matrimonial home, was purchased by the respondent and is registered in their joint names. The respondent did not dispute the same. He, however, stated that the same was rented out to Brainsworthy School without his consent by the applicant, who left voluntarily with all household goods for Kes.18,000/- per month. He testified that he was in Tharaka Nithi when all this happened, and he now stays in a hotel whenever he visits Mombasa. He urged the court to have the same shared in a ratio of 10:90 in his favour.
72. Based on the evidence before me I find and hold that the said property was acquired during the subsistence of the marriage thus the same is matrimonial property.
73. In respect of rental houses in Meru, matrimonial home in Meru, Digital Petrol Station at Karama, Meru, the respondent stated that he does not have such properties and that the petrol station is his business as the applicant did not contribute towards the acquisition of the same. The applicant did not tender any evidence to rebut the respondent's evidence. In any case, her claim concerning these properties was too general and lacked specificity. I, therefore, find and hold that these properties are not matrimonial property.
74. On the Rental building in Murangá, the applicant, during cross-examination, stated that no rental building owned by the respondent exists in Maranga. That being the case, I will not delve into the same as it is non-existent.
75. in his evidence, the respondent told the court that the posho mill broke down. The applicant has not disputed the same. I find and hold that a non-existent posho mill cannot be a matrimonial property.



76. Regarding the borehole at the rental houses in Ukunda, the applicant stated in paragraph 11 of her supporting affidavit that she sank the same using her pension funds. This has not been disputed by the respondent. Accordingly, it is my finding that the same was acquired during the subsistence of marriage, thus forming part of matrimonial property.

77. On the second issue, Section 7 of the *Matrimonial Property Act* provides 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.”

78. The court in the case of *TMW v FMC* (*supra*) stated: -

“as regards ownership of matrimonial property, Section 7 states as follows: -

“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.”

The above provision of law entails that ownership of matrimonial property vests with the husband and wife/wives according to what each party contributed towards the acquisition of the same. This section introduces yet another aspect as far as ownership of property by spouses is concerned, that is the aspect of contribution of each party towards the acquisition of such property. In my view, what this provision of law entails is that it is possible for spouses to own certain properties but not in equal shares. Thus in case of divorce, the court would look at what each party brought to the table for the purposes of the distribution of such properties if any dispute concerning distribution of matrimonial property arise. Further, section 9 of the Act also provides as follows: -

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in property equal to the contribution made.”

This above provisions raises the question of contribution. What the court is left to determine is the kind of contribution applicable in the instant case which can be either the one envisaged under section 7 or that in section 9.”

79. Section 2 of the said *Act* defines contribution as;

“contribution” means monetary and non-monetary contribution and includes—

- i. domestic work and management of the matrimonial home;
- ii. child care;
- iii. companionship;
- iv. management of family business or property; and



v. farm work;

80. In this case, the applicant has argued that she, directly and indirectly, contributed towards the acquisition of the said suit properties as she was a working woman supporting her family financially before taking early retirement. She testified and submitted that he did not keep receipts to show expenses incurred as she trusted the respondent to hold the properties in trust for her. Further, following her retirement, she became a housewife managing and running the matrimonial home, taking care of the children, managing the family businesses, supervising domestic workers, taking care of the properties and offering emotional companionship to the respondent.
81. On the other hand, the respondent has argued that the respondent did not make any monetary contribution towards the acquisition of the suit properties instead she used her money on her personal needs and transport. He testified and submitted that he also contributed in taking care of the children by paying school fees and other school related expenses and upkeep. On his transfer from Ukunda he took two children with him to Nairobi without their mother. Further, the applicant did not offer him any companionship, for they have not stayed together since 2007, which resulted in the filing for divorce by the applicant.
82. Having considered the matter at length it is my finding that the applicant made both direct and indirect contribution towards the acquisition and development of some of the suit properties. I am guided by the case of *EKTM v ECC* (*supra*) where it was stated as follows: -

“It therefore follows that the mere fact that one spouse is not engaged in any income generating venture does not necessarily mean that the said spouse is not contributing to the acquisition of the matrimonial property and ought to leave the union barehanded. One however has to show some contribution made towards the acquisition and preservation of the acquired property. In the old days it was presumed that it was the husband who would be going to work while the wife stays at home. In a majority of the old cases, non-monetary contribution was geared towards ensuring that the non-working wife’s contribution was appropriately taken into account when the marriage was dissolved. However, these days, it is not uncommon to find cases where the roles have reversed. Maybe out of sheer laziness or due to circumstances beyond the control of the husband, such as redundancy, it is the wife who is in income generating activity while it is the husband who is left to look after the home. In a case where the husband is at home out of sheer laziness, it would be unfair to the wife to hold that in the event that the marriage is dissolved, the property acquired during the marriage be shared equally. In that event, I have no doubt at all in my mind that the husband must accept his position and move on without making any claim to the properties he never contributed in their acquisition. As was appreciated by Kiage, JA in *P.N.N v Z.W.N* [2017] eKLR:

“In such circumstances, an assessment of the inauspicious party’s non-monetary contribution may well turn out to be in the negative, the account in debit. No fifty-fifty philosophy would grant such a party any right to property acquired without their contribution notwithstanding their negation or diminution of the efforts towards its acquisition.

In the end it does work out justly and fairly enough in that assessment may turn out 50:50 or as in the case of *Njoroge v Njoroge* (*supra*) 70:30 in favour of the man. There is no reason why the math may not be in favour of the wife if that



is what the evidence turns up. In many cases in fact, percentages never feature as the Court only ascertains who between the spouses owns which property.”

On the other hand, the husband may not be in an income generating engagement but may be involved in other non-monetary activities such as management of the home by making sure that it is clean, supervision of the farm or business activities etc. It is not uncommon to find such a husband dropping and picking the children to and from school. Such contribution must be taken into account when the marriage is dissolved and ought to be quantified somehow.

The reverse is also true when it comes to the wife. However, one must take into account the fact that the wife also bears the burden of childbearing, a task which husbands do not perform. However, it is possible to find that the contribution of a particular wife to the acquisition of the properties is minimal due to sheer laziness. On the other hand, it is not unheard of to find circumstances where a working wife decides to leave her job in order direct her attention fully to the care of the family. That is a fact that must also be considered in determining the apportionment of contribution...”

83. On the division of the suit properties, having found some as matrimonial properties and the applicant made both direct and indirect contribution towards the acquisition and development, it is my view that the applicant deserves an equal share of the same.
84. The upshot of the foregoing is that this Court issues the following orders: -
- a. Declaration is hereby issued that the following properties are matrimonial properties and are owned jointly by the applicant and the respondent: -
 - i. Motor Vehicle Registration No. KBK 778C Toyota Premio;
 - ii. 1 Acre of land in Narok;
 - iii. Title No. Kwale/Ukunda/4808;
 - iv. Title No. Kwale/Ukunda/4809; and
 - v. Borehole at the rental houses in Ukunda
 - b. Declaration is hereby issued that the respondent holds the properties listed in a) above in trust for the applicant and himself;
 - c. That the matrimonial properties in a) above be divided between the applicant and the respondent in the ratio of 50:50 percent being their contribution towards the acquisition and development of the same;
 - d. The said properties be valued within 60 days and sold within 90 days thereafter with each party being at liberty to buy out the other; and
 - e. Each party to bear own costs.

DELIVERED, DATED AND SIGNED IN MOMBASA THIS 4TH DAY OF SEPTEMBER 2023 VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

