



**FNN v FAJB (Matrimonial Case 13 of 2017)
[2023] KEHC 26342 (KLR) (4 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 26342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CASE 13 OF 2017**

G MUTAI, J

SEPTEMBER 4, 2023

BETWEEN

FNN APPLICANT

AND

FAJB RESPONDENT

JUDGMENT

1. The parties hereto were previously married to each other. Upon the breakdown of their relationship, the Applicant filed the Originating Summons dated 15th March 2017 and filed on 7th July 2017. The summons seeks the following orders: -
 - a. That a declaration to issue that land parcel Nos. Plot No. Kwale/Diani Beach Block/1537 And Plot No. Kwale/Diani Beach Plot No.1538 are matrimonial properties;
 - b. That a declaration do issue that the respondent holds the Plot No. Kwale/Diani Beach Block/1538 in trust for the applicant and an order do issue directing the Registrar of Lands Kwale Registry to effect the same forthwith;
 - c. That the Plot No. Kwale /Diani Beach Block /1537 be shared equally between the applicant and the respondent and/or in the ratio equivalent to each party’s contribution and or as the court may deem fit;
 - d. That the respondent himself, his agents and or servants be restrained from alienating and or encumbering or in any manner disposing of the said properties; and
 - e. That the respondent be condemned to pay the costs of this application and incidentals thereto.
2. The Originating Summons is premised on the supporting affidavit of the applicant sworn on 15th March 2017. The applicant stated that she got married to the respondent on 8th January 2010. Prior to the wedding, they had lived together since April 2003, and the relationship was known to all sundry.



That their union was blessed with one issue, namely Lise Lotte Brinkmann, born on 4th June 2008. She has three other children whom the respondent assumed parental responsibility over, who all reside in Germany with her. She is employed part-time and also pursuing further studies in Germany, whereas the respondent is retired and enjoying his retirement benefits. They divorced on 17th August 2016 in the district court in Rheine, Germany. She was granted custody of their daughter, and the respondent was ordered to pay 238.12 Euros per month as maintenance.

3. She further stated that sometime in 2005, she identified a parcel of land in Diani and negotiated with the seller for the purchase of the same. They agreed with her husband that the title deed for the ¼ acre parcel would be in her name alone as the sole proprietor, whereas the ½ acre parcel would be in their joint names. When the title deeds were processed, the ¼ acre was in her then husband's name as the sole proprietor (of Plot No. Kwale/Diani Beach Block/1538). She has been the beneficial owner of the same, collecting rent from the tenants who have leased the units therein. The other parcel of land, Kwale/Diani Beach Block /1537, on which they have built their matrimonial home, is also in the sole name of her husband.
4. She deponed that the respondent caused disruptions in January 2017 by disconnecting the water supply in an effort to frustrate the tenants to leave the property. She was apprehensive that the respondent may dispose of the properties, whereas he holds them in trust for her and the children.
5. She averred that she did not receive anything from her husband after the divorce, whereas he retained the matrimonial home, forcing her to rent a house for herself and the children. It is only proper, she urged, that a declaration is made that the respondent holds Plot No. Kwale/Diani Beach Block/1538 in trust for her and that the same be registered in her name as the sole proprietor. Regarding Plot No. Kwale/Diani Beach Block/1537 the applicant urged that the matrimonial home be registered in their joint names as it was the matrimonial home.
6. She stated the subject properties were acquired during the subsistence of their marriage and urged the court to allow the summons.
7. In response, the respondent filed a replying affidavit sworn on 14th March 2018 and filed on 23rd March 2018. He stated that they had never lived together as husband and wife, as he only visited Kenya occasionally as a tourist. He admitted to having a daughter and three other children, as stated by the applicant, whom he is maintaining as per the court order from the court in Rheine. As for the three children, the German Government took over, and the applicant receives upkeep for all of them. The applicant was receiving 258.12 Euros for her upkeep and 309 Euros for their daughter from him, 194 Euros for Ascha, 194 Euros for Saomo, 200 Euros for Afany and 225 Euros for Lise, their daughter, from the German government as well as house allowance and maintenance.
8. The respondent admitted paragraphs 5, 6 and 7 on their current status economically and on the identification and negotiation on the purchase of land in Diani in 2005, save for the fact they were not legally married.
9. He further admitted paragraph 8 of the supporting affidavit to the extent that the vendor offered two parcels of land. The applicant borrowed a refundable sum of Kenya shillings three million from which she used to build the residential houses, which was to be recovered from the rental income, but the same remains unpaid to date. The applicant was the one collecting the rent at the time he was out of the country, but she never submitted the same to him. When they shifted to Germany, the applicant's brother started collecting the rent but never submitted the same to him. The disconnection of the water supply was done after consultations with the Police in Diani, and it was done to compel the tenants to pay the requisite fees for the upkeep of the property in terms of service charges and utility bills.



10. He averred that Plot No. Kwale/Diani Beach Block/1537 has a pending suit in court and no title deed facts whereof are within the applicant's knowledge. The applicant has placed a caution on Plot No. Kwale Diani Beach Block/1538 and thus cannot dispose of the same as alleged by the applicant. The respondent deposed that the house built on Plot No. Kwale/Diani Beach Block /1537 is not a matrimonial property, and the proceeds cater for the upkeep of the house, paying the security guard and the gardener, as well as minor repairs.
11. He further averred that the house in Germany was not classified as a matrimonial home as it was a matrimonial property for his first wife and was acquired 30 years before he met the applicant.
12. The matter was canvassed by way of viva voce evidence.
13. When the matter came up for hearing, the applicant told the court that she was relying on her witness statement and list of documents.
14. It was her evidence that they acquired the properties together during the subsistence of their marriage. They cohabited together from 2003 and married in 2010. The properties were bought in 2006. The applicant gave the contractor Kes.3,000,000/- to construct apartments in Plot No.1538 and told her it was her gift. The owner of the property gave her ¼ an acre as a present for getting them a buyer. She was the one collecting the rent from the four apartments; however, the respondent disconnected the water, causing the tenants to vacate. She stated that has not collected rent from the said houses since 2016.
15. It was her evidence that she refunded Kes.3,000,000 to the respondent from the rental income on their relocation to Germany.
16. During cross-examination, the applicant told the court that she legally got married to the respondent in 2010; however, they had cohabited since 2003 and had sworn an affidavit before a Notary Public to that effect. The respondent gave the contractor the Kes.3,000,000/- and duped her to sign up for the same.
17. It was her evidence that the respondent burnt all her ownership documents to the suit properties and that she contributed to constructing the wall and not towards the purchase of the property.
18. It was her testimony that she had three children before she got married to the respondent.
19. In re-examination, it was her evidence that the ¼ acre parcel of land is Plot No.1538, Which she was given as a present.
20. On the other hand, the respondent, in his evidence, told the court that he was relying on his replying affidavit as a witness statement and his list of documents as evidence. It was his evidence that before his marriage to the applicant in 2010, he was married to Elsbeth Brinkman and that they divorced in 2009. He deposed that one cannot get married to two women in Germany. He could not, therefore, have been married to the the applicant in 2003 as alleged.
21. Further, he bought the parcel of land in 2006 but got the title deed in 2012. It was his testimony that the applicant did not contribute to the purchase of the said parcel of land and that he paid Kes.100,000/- for the transfer of the same, but the applicant collected the money from the advocate. At the time of the purchase of the said parcel of land, they were with the applicant, who was his friend; however, he bought the land as an individual.
22. It was his evidence that he has a daughter with the applicant, born in 2008, who he takes care of despite there being no court orders compelling him to do so.



23. On cross-examination he told the court that he signed the affidavit dated 19th April 2007 without reading it as he thought it was correct but he did not understand its context.
24. It was his evidence that it was the applicant who introduced him to the seller of the property. That ¼ an acre was given to him while the ½ an acre is what he bought. The house built on the property was his, as he was the one who paid for it. The applicant did not contribute anything towards the same, nor did she build the perimeter wall.
25. He further told the court that the rental income was meant to go to him and that the money he lent the applicant was a debt. He however admitted that the tenancy agreements were in the name of the applicant.
26. On re-examination by his counsel, it was his evidence that he did not give the applicant permission to be a landlady. He stated that the applicant has not tendered any evidence to show that she repaid the money he lent her, to wit the sum of Kes.3,000,000/-. He averred that they agreed that the the applicant would receive the rent and repay the loan.
27. After the conclusion of the hearing the court directed the parties to file written submissions. Subsequently, the applicant, through her advocates, Messrs. Okemwa & Company Advocates, filed written submissions dated 16th May 2023. The said counsels identified three agreed issues as being due for determination.
28. On the first issue, counsel submitted that the applicant, in her evidence, produced exhibits 1-9 filed in her list of documents which the respondent did not object to nor controvert the evidence therein. Counsel further submitted that the fact that the applicant was the one who got the seller and identified the land for purchase is not in dispute and that the ¼ acre given as a gift by the seller was meant for the applicant hence the reason why she constructed the four residential houses. They both acquired the suit properties, which form part of matrimonial property. To support his argument, counsel referred the court to Exhibit No.2, a sale agreement dated 14th September 2005. Counsel urged the court to find that Plot No. Kwale/Diani Beach Block 1538 was registered on 30th May 2012, during the subsistence of the marriage and the two suit properties are indeed matrimonial properties.
29. On the second issue, counsel relied on Section 6(3) and Section 7 of the *Matrimonial Property Act* 2013, which provides that matrimonial property vests in the spouses according to their contribution towards its acquisition, and the same shall be divided between them if they divorce or their marriage is otherwise dissolved. Counsel further relied on PNN v ZWN; Civil Appeal No. 128 of 2014 and submitted that the parties herein acquired the property together, and the respondent loaned the respondent Kes.3,000,000/- to construct residential houses on Plot No.1538, which she refunded upon their relocation to Germany.
30. Counsel submitted that the applicant contributed to the acquisition of the suit properties based on the sale agreement dated 14th September 2005 and the agreement advancing money to the applicant dated 26th September 2006. The Court was urged to find that land Plot No. Kwale/ Diani Beach Block/1538, with four units constructed by the applicant, belongs to her.
31. On the third issue, counsel submitted that the same was not pleaded and does not fall under the jurisdiction of this court as it is not a debt collection court.
32. In conclusion, counsel urged the court to allow the summons as prayed.
33. On the other hand, the respondent, through his advocate, Lawrence Obonyo Legal Advocates, filed his written submissions dated 13th June 2023. Counsel identified four issues as coming for determination,



- namely; whether the suit properties are matrimonial properties; whether the Plot Kwale/Diani Beach Block/1538 was held in trust for the applicant; whether the applicant contributed towards the acquisition and development of the suit properties; and whether the properties should be shared and/or transferred to the applicant.
34. On the first issue, counsel relied on sections 6 and 5 of the *Matrimonial Property Act* and submitted that from the contents of the sale agreement dated 11th December 2006, it is evident that the undisputed suit property was acquired by the respondent solely in 2006. The late registration of the suit properties was due to the fact that the respondent was always in and out of the country, making it difficult to follow up the registration process immediately after acquisition. Thus, the properties cannot be said to form part of matrimonial property under Section 6 of the said Act.
 35. On the second issue, counsel submitted that the suit properties were solely acquired by the respondent vide sale agreement dated 11th December 2006 at the price of Kes.550,000/- with no contribution from the applicant towards the acquisition or development of the same. Counsel submitted that the monies obtained by the applicant from the respondent were never refunded, and no evidence tendered to prove the refund. It was submitted that the applicant's actions did not amount to a contribution towards the development of the suit properties. The applicant had not proved a contribution towards the acquisition and development of the suit properties. Counsel relied on Section 107 of the *Evidence Act* on the burden of proof.
 36. On the third issue, counsel submitted that the presumption of a 50:50 ratio can only be invoked where there is evidence of contribution towards the acquisition of the properties by both spouses. The applicant did not tender any evidence to support her claim.
 37. In conclusion, learned counsel urged the court to find that the applicant has not proven her case on a balance of probabilities. Counsel urged the court to dismiss the suit with costs.
 38. I have considered the summons, the response therein, the oral evidence of the parties and the rival submissions by both counsels. The issues that emerge for determination are: -
 - a. Whether the following properties are matrimonial properties:-
 - i. Plot No. Kwale /Diani Beach Block/1537; and
 - ii. Plot No. Kwale/Diani Beach Block/1538;
 - b. Whether the applicant contributed towards the acquisition and or development of the suit properties;
 - c. Distribution of the suit properties.
 39. On the first issue, Section 6 of the *Matrimonial Property Act* No. 49 of 2013 provides that:-
 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.
 2. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.



3. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
 4. 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.
40. Further, section 14 of the said Act provides: -
- Where matrimonial property is acquired during marriage—
- a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
 - b. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.
41. The applicant herein argued that suit property Plot No. Kwale/Diani Beach Block/1537 was given to her as a gift by the seller of the other suit property for bringing her a purchaser. She is the one who identified and negotiated for the purchase of the two parcels of land. The seller offered them two parcels of land, one 1/4 acre and the other ½ acre. She produced an agreement dated 14th September 2005 between them and the seller known as Hamadi Juma Mwakibibo stating that the seller had agreed to give them Diani Beach ¼ acre plot for free and for them to buy Plot No. Diani Beach /25 from Mr. Mwakibibo. She further argued that they agreed to have the ¼ parcel registered in her name as the sole proprietor and the ½ acre in their joint names, only to learn later that the two properties were registered in the name of the respondent as the sole proprietor.
 42. The applicant alleged that she started cohabiting with the respondent in 2003 but officially got married in 2010, while the suit properties were bought in 2006. She produced an affidavit dated 19th April, 2007 as exhibit no.3 to support her claim. The respondent gave her Kes.3,000,000/-, which she used in the construction of apartments erected on Plot No.1538. They have their matrimonial home on the other piece of land, Plot No.1537. On their relocation to Germany she refunded the amount given to her by the respondent to the respondent. She further stated that the suit properties were jointly acquired during the subsistence of their marriage.
 43. The respondent, on the other hand, argued that he bought the suit properties in 2006 before he got married to the applicant in 2010. It was his evidence that the applicant was the one who introduced him to the seller and that the house/apartments built belonged to him. However, at the time of purchase of the suit properties the applicant was present helping him as they were friends. Further, there was no way he would have married the applicant as he was married to one Elsbeth, whom they divorced in 2009, as German laws do not allow bigamy.
 44. On the affidavit sworn on 19th April 2007, the respondent stated that he was made to sign the same without reading as he thought the contents therein were correct. He did not understand the context of the affidavit. He disputed the fact that they were husband and wife in 2007 and stated that he believed everything he was told as he did not understand English. No evidence tendered to show coercion, undue duress and or fraud in signing of the said affidavit.
 45. In this case, the respondent has not tendered any evidence to show that he was married to Elsbeth during the period his cohabitation with the applicant is alleged to have happened. It is also not in dispute that they were blessed with one minor born on 4th June 2008 and their marriage formalized on 8th January 2010. Further, the involvement of the applicant towards the acquisition of the two



suit properties is not disputed however, it's not clear in what capacity as the only evidence tendered is the affidavit sworn on 19th April 2007 in which paragraph 3 states that the two parties had been living together as husband and wife from 16th April 2003 in Diani Beach and their intention was to inform the society and to have the society treat them as such.

46. It would therefore appear to me that there was a common law marriage between the parties that existed from 2003, which marriage was formalised on 8th January 2010.

47. Accordingly, it's my finding that the respondent has not tendered any evidence to rebut the fact that the suit properties were acquired during the subsistence of marriage, thus forming part of matrimonial properties. Therefore, it's my view that the suit properties are matrimonial properties and declare them so.

48. On the second issue, Section 7 of the matrimonial properties act provides;

“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.”

49. Section 2 of the said Act defines contribution as:-

“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.

50. In this case, the applicant has argued that she utilized the Kes.3,000,000/-given to her by the respondent to develop Plot No. Kwale/Diani Beach Block/1538 by constructing apartments which they have been collecting rental income from, and she was the one taking care of the children, both here in Kenya and in Germany.

51. The act recognises both monetary and non-monetary contributions by a party towards the acquisition of matrimonial property. In this case, the applicant has proved that she made monetary contribution towards the construction of the apartments on Plot No. 1538. The same come from a loan that the respondent gave her. She has also proved non-monetary contribution.

52. On non-monetary contribution, the court in the case of AWM v JGK [2021] eKLR stated:-

“It is my considered view that the non-monetary contribution oftentimes cannot be quantified. If that contribution were to be reduced to monetary terms, I am sure that a woman's non-monetary contribution in the home would amount to a higher amount compared to that of the man. It is my finding therefore that the Applicant made monetary and non-monetary contribution towards acquiring the matrimonial property and that her non-monetary contribution is higher than that of the Respondent.”

53. Accordingly, it's my finding that the applicant made monetary and non-monetary contributions towards the acquisition of the suit properties.



54. On the third issue, the applicant urged the court to distribute the suit properties equally.
55. In dealing with equal distribution in matrimonial property, the court, in the case of *AWM v JGK* (supra) stated:-

“I have considered the provisions of *the Constitution* on Article 45(3) as well. This article provides that:

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage”

Although this provision grants equal rights to parties to a marriage as stipulated, this does not mean that a party to a marriage is entitled to equal share of the property acquired during marriage unless his or her contribution is ascertained to have been equal to that of the other spouse. However, the article guides the courts in determining the rights of parties to a marriage in respect to subdivision of matrimonial property. The view, that the provisions of Article 45(3) of *the Constitution* does not entitle parties to equal distribution of matrimonial property, was taken by the Court of Appeal (Kiage, JA) in *PNN v ZWN* [2017] eKLR where the good judge has 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 than 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.”

The share of each party to a marriage is pegged on the contribution made by each party. That is the law as it is and as applied in various decisions.”

56. Accordingly, it is my view that the applicant deserves a share from the suit properties for her contribution towards their acquisition.
57. The upshot of the foregoing is that;
- a. I find both properties to wit Plot No. Kwale/Diani Beach Block/1537; and Plot No. Kwale/Diani Beach Block/1538 to be matrimonial properties;
 - b. I find and hold that the applicant contributed towards the constructions of rental units on Plot No. Kwale /Diani Beach Block/1538 through a loan granted to her by the respondent, and she is entitled to it on a 50:50 basis with the respondent;
 - c. I also find that Plot No. Kwale/Diani Beach Block/1537, upon which the matrimonial home is constructed, is owned by the respondent and the applicant on a 70:30 basis. The applicant made a non-monetary contribution towards its purchase and development.
 - d. I therefore order that;
 - i. The two properties be valued within 60 days of the date of this judgment by a valuer to be agreed by the parties. In the event the parties are unable to agree the valuation shall be done by the government valuer Kwale;



- ii. Each party to be at liberty to buy out the other party. In the event none of the parties buys out the other, the two properties shall be sold by way of public auction and proceeds therefrom distributed in the ratio I have established above; and
- iii. Each party shall bear own costs of the suit.

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

**GREGORY MUTAI
JUDGE**

