



**NBMK v AFAL (Originating Summons 7 of 2017)
[2023] KEHC 23213 (KLR) (15 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 7 OF 2017
G MUTAI, J
SEPTEMBER 15, 2023**

BETWEEN

NBMK APPLICANT

AND

AFAL RESPONDENT

JUDGMENT

1. The Applicant filed this Originating Summons on 10th February 2017 seeking various among which were that:-
 1. A declaration does issue that Flat No. XXXX on Plot Nos. XXX XX Kizingo and XXX XX Kizingo registered in the name of the Respondent is owned jointly by the Applicant and the Respondent;
 2. The honourable Court be pleased to order the sale, division and or apportionment of the same between the parties equally;
 3. Declaration that the following properties registered in the name of Applicant are owned jointly by the Applicant and the Respondent:-
 - a. Plot No XXX XXVI (Flat No. XXX) Kizingo;
 - b. Motor vehicle registration number KBV XXXS, Toyota Ractis;
 - c. Several properties (land) in Uganda;
 4. That the Respondent be restrained from withdrawing, transferring, pledging or borrowing against any sums standing in any and all banks accounts held with any of the following banks until the hearing and determination of these proceedings or until the Respondent secures the



Applicant in terms of prayers (2) (3) (4) and (5) of the Originating Summons and such order be served upon the said banks:-

- i. Standard Chartered Bank Limited Account
 - ii. No. XXXX 177 98XXXX (Ksh)
XXXX 77 98XXXX(Euro)
XXXX 77 98XXXX (US\$)
XXXX 377 98XXXX(Ksh)
Children A/C XXXX 477 98XXXX(Ksh)
Children A/C XXXX 477 98XXXX (Ksh)
 - iii. Crane Bank Uganda; and
 - iv. Standard Chartered Dollar account in Dubai.
2. The Applicant averred that she got married to the Respondent on 26th January 2002. The marriage was blessed with 3 issues to wit two sons HL and AL (who were 13 and 7 years old at the time the Originating Summons was filed) and a daughter Ihaam Ladha who was 10 years old at the said time. The Applicant is a Ugandan citizen.
 3. The couple initially lived in Uganda from 2002 up to 2009 when the Respondent secured employment with Hashi Energy Ltd and was posted to Mombasa. From the affidavit filed by the Applicant it would appear that the marriage between them was rocky from the start. She accused him of having been verbally and physically abusive, of restricting her movement and denying her opportunities to meet with family and friends. The abusive conduct, she stated, took place even in the presence of the children. She stated that the Respondent at one point got her sedated on the false ground that she has a mental illness.
 4. Regarding the assets the Applicant averred that Flat No. XXXX on Plot Nos. XXX XXVI Kizingo and XXX XXVI Kizingo was purchased on 3rd February 2010 with funds contributed by both of them after the sale of the farm, registered in her name, in Uganda. It was her statement that the farm in Uganda was their matrimonial home when they resided in the said country. She stated after the celebration of the marriage she was engaged in the business of selling mandazis and old newspapers “to cater for the family” and personally decorated the family home. She indicated that she was the children’s principal caregiver.
 5. The Applicant averred that the Respondent registered family assets in his own name and made sure that she never got hold of the title documents. Although she was a cosignatory to most of the family business accounts the Respondent had taken to managing the bank accounts on his own and kept her in the dark as to what was going on.
 6. The Applicant urged that she was the children’s primary caregiver and would attend most of the children’s school activities as the Respondent, a petroleum consultant, was usually away from home on account of his employment. She ensured that the children were well-fed and that they had performed their chores with dedication. She urged that it was due to her good parenting skills that the children performed well in school and excelled in extracurricular activities.
 7. The Applicant and the Respondent got divorced on 14th June, 2018 at the Kadhi’s Court Mombasa.



8. The Applicant thus sought the division of accounts, monthly provision for each from the joint personal and business accounts, necessary to meet their separate expenses, so that each of them was not rendered destitute as well as costs of the Originating Summons. It was averred that the properties that are listed in the Originating Summons were acquired during the marriage and the Respondent directly and indirectly contributed financially to the acquisition of the same. Lastly the Applicant averred that the property known as Flat No. XXX on Plot Nos XXX XXVI Kizingo and XXX XXVI Kizingo is the parties' matrimonial home.
9. The Respondent opposed the Originating Summons vide a Replying Affidavit filed on 15th March 2017. In the said affidavit he stated that he got to know the Applicant at a time he was working in Kampala. The Applicant was then based in the United States where she had gone for studies. They got married on 26th January 2002 with the blessings of the family members.
10. The Respondent averred that he was a very supportive husband, despite the difficulties they experienced in their marriage and that he supported her family. In particular, he gave her father a loan of US10,000.00 so that he could organize the Applicant's sister's wedding, which amount he stated had not been repaid in full. His family accommodated her family whenever they visited Kampala, and later when they relocated to Mombasa.
11. The Respondent averred that the Applicant had mental health challenges and had tried to commit suicide. She was treated at the Retreat Hospital in Nyali. He claimed that the Applicant habitually left home for no apparent reason.
12. The Respondent averred that they Applicant regularly refused to be intimate with him and that they underwent counseling on numerous occasions.
13. On the properties the Respondent stated that the property Flat No. XXX on Plot Nos XXX XXVI Kizingo and XXX XXVI Kizingo is now registered in his name as the trustee for HAL, IAL and AAL, their children.
14. The Respondent denied owning motor vehicle registration number KBV665S. He stated that the said vehicle belonged to his relative, one Misbah Ismail Mohamed. He also denied owning any property in Uganda "under my name till to date".
15. The Respondent also stated that he took care of the children almost singlehandedly as the Applicant had Mental health challenges. He provided for the family and ensured that the children who he said are gifted got good education. He denied that the Applicant lacked access to the family accounts. He pleaded that she withdrew huge sums of money from the Standard Chartered Account without any explanation and took a loan she was unable to repay. The Respondent therefore prayed that the Applicant's Originating Summons be dismissed.
16. The Originating Summons proceeded by way of Viva voce evidence. Both the Applicant and the Respondent testified. I shall set out their oral evidence below.

Evidence of the Applicant

17. The Respondent testified that she got married in January 2002, on the date I have previously stated, to the Respondent under the Islamic Sharia law. They lived together at Muyenge, Uganda after marriage. She stated that they acquired a farm near Jinja which measured 22 acres which was registered in her name as she is a Ugandan. They kept chickens, cows, goats, sheep guinea fowl and grew pine trees. The farm was sold for US\$.120,000 which was paid to the Respondent.



18. She testified that the house in Kizingo was bought in 2009-2010. The house is in his name. The family moved in 2009. She testified that she and the Respondent had marital difficulties which required mediation by various sheikhs. Despite the best efforts of the mediators their relationship did not improve.
19. The Applicant testified that she took a loan to buy the property in Lugazi, Uganda. She baked cakes, buns and mandazis which she sold to sustain herself, which business the Respondent allegedly sabotaged.
20. She stated that there were 2 properties in Uganda in her name, in Lugazi and Kapeka. There were 2 properties in the Respondent's name in Kawepe and Masdundi. The property in Kawepe was sold and part of the funds was used to buy Flat No. 1. She denied consenting to the transfer of the said flat to the Respondent as the trustee for the children and denied having appeared before Geoffrey TS Were, advocate, to sign the spousal consent required to effect the transfer of the property. She had no documentary proof of the property in Uganda. She stated that the Respondent took away all the documents as he was very domineering.
21. The Applicant stated that motor vehicle registration number KBV XXXS was bought with funds from their joint account. She could not however remember the exact date when it was bought.
22. She testified that there were joint accounts in their names, which had been set out in her Originating Summons.
23. In cross-examination the Applicant admitted that their marriage had numerous challenges. She also admitted that she had been receiving money from the Respondent. She stated that there were occasions when she took money from their son's savings so that she could buy sanitary towels.
24. Regarding the Uganda properties she stated that she did not have documentary evidence of their existence. She did not meet the buyer of the farm in Lugazi which was sold for US\$.120,000 nor did she see the sale agreement. The sale proceeds came from Uganda into the Kenya Shillings account and was transferred on 6th August 2010. The amount received was Kes.5,044,545.00. The Kizingo house on the other hand was purchased in 2008/2009. She admitted taking a loan of Uganda Shillings 30,000,000.00, which was done at the Respondent's request. She denied signing the affidavit of spousal consent.

Evidence of the Respondent

25. The Respondent testified on 24th October 2018. He testified that he was a petroleum consultant with Petro Oil Limited. He averred that the Applicant was his former wife. He deposed that his marriage to the Applicant was difficult from the beginning.
26. It was his testimony that while in Uganda they lived in rented premises, firstly in Mupenga Road, Kampala, secondly in Nagunru Hill Kampala, thirdly in Mawanda Road and lastly at Kanjokya. It was his testimony that they never had a matrimonial home of their own in Uganda nor did they purchase a farm. The Applicant did not work as she was a housewife. He claim that her highest education certificate was an O Level diploma from Uganda. He denied that they had done any family business in Kenya since coming back in 2009.
27. The Respondent averred that he supported his wife as evidenced by the Mpesa records. She could with draw money from the joint accounts as she was a signatory and the mandate allowed her to do so alone. He was there for her whenever she was ill and even took her to India for treatment of a stomach ailment.



28. He denied owning motor vehicle registered number KBV XXXS Toyota Ractis. He testified that it belonged to his relative Misbah Ismail Mohamed who is his cousin. He denied owning property in Uganda despite living there between 1998 and 2012.
29. The Respondent stated that the Applicant had filed 6 cases against him. In his view that was done to harass him. Among the said cases Criminal Case No. 470 of 2018 in which he was charged with forging documents. He testified that he bought the property in Kizingo on his own and that it was now registered in his name as the trustee for the children. He averred that he purchased the property in 2010 for Kes.10,000,000.00 which money came from his savings with NSSF Uganda. He denied that the Applicant transferred Kes.5,044,545.00. He testified that the Applicant contributed nothing.
30. The Respondent accused the Applicant of being a spendthrift.
31. The Respondent was recalled for further cross examination of 19th May 2022. He stated that all the properties he purchased were bought with funds from his salary as the Applicant was a housewife and a home maker. He reiterated that he purchased the Kizingo house with money from his savings and investments. The title of the property bears his name as the trustee for their 3 children. He averred that he was acquitted of the charges of forgery.
32. In re-examination the Respondent stated that he had not changed signing instructions with the banks. He deposed that he was earning US\$7,900 when he worked in Uganda. He indicated that Motor Vehicle Registration KBY 665S Toyota Ractis belongs to a Mr. Ismail Mohamed.
33. Mr. Geoffrey Were, advocate testified that he witnessed the execution of the spousal consent by the Applicant on 3rd October, 2016 at his office. It was his evidence that the Applicant came to his office with Respondent.
34. On cross examination Mr. Were stated that he witnessed the execution of the consent. He was not however the person who drew the said document. The Applicant was present when he witnessed her execution of the document.
35. At the close of the hearing the Court directed the parties to file Written Submissions. I will briefly set out the submissions by the parties.

The Applicant's Written Submissions

36. The Applicant submitted that the parties lived in Uganda and Kenya. During the course of the marriage they acquired various properties together using funds from the Applicant's formal employment and various businesses and the Respondent's employment income. She listed the matrimonial properties as being
 1. Plot No. XXX XXVI (Flat No. XXX) Kizingo;
 2. Motor vehicle registration number KBV XXXS Toyota Ractis;
 3. Several properties in Uganda;
 4. A property in Dubai; and
 5. Bank accounts.
 - a. Standard Chartered Account No.0150 177 98900 (Ksh)
XXXX277 98XXX(Euro)
XXXX 277 98XXX (US\$)



XXX 377 98XXX (Ksh)

Children A/C XXXX 477 98XXX(Ksh)

Children A/C XXXX 477 98XXX (Ksh)

- b. Crane Bank in Uganda
 - c. Standard Chartered Bank Dollar A/C in Dubai
 - d. Standard Chartered Bank Dubai-Dirham joint A/C No. 1820463401
37. She submitted that she had a farm in Uganda where she sold farm produce. The Respondent on the other hand controlled the expenditure of money and was in charge of investments. On her part she took care of the children, supervised their school work and was in charge of the domestic affairs. As a result of her diligence, the children excelled in school and got awards in various school activities. It was urged that this was her indirect contribution to the acquisition of the matrimonial properties.
38. The Applicant identified 6 facts which she reckoned were undisputed: -
1. That the Applicant and the Respondent got married on 26th January 2002 and that their union was dissolved on 14th June 2018;
 2. That the Respondent had excluded the Applicant from the management of their joint assets without her consent;
 3. That all the properties the parties hereto have were acquired during coverture;
 4. That the Applicant had been in continuous occupation of the house in Kizingo from the time it was bought until “recently when she moved out”;
 5. That the Applicant had continuously nurtured and taken care for the children as the Respondent was posted to various places; and
 6. That the Respondent was charged in Court with the offense of forgery and assault and later acquitted.
39. The Applicant identified the applicable law and referred this Court to various laws, Constitutional provisions and international treaties and conventions applicable in Kenya.
40. The Applicant identified 6 issues as being due for determination
1. Which law is applicable in this matter?
 2. Whether the properties disclosed in the suit are matrimonial properties?
 3. Whether the Applicant directly or indirectly contributed to the acquisition of the said properties as to entitle her to the benefit of the same?
 4. Whether the transfers made by the Respondent of the home and motor vehicle without her consent are null and void ab initio for want of spousal consent?
 5. Whether the Applicant is entitled to accounts?
 6. Who should pay the costs?
41. Regarding the applicable law the Applicant urged, relying on the case of SHH v MHY [2015]eKLR that this Court has jurisdiction to hear and determine the matter.



42. On whether the properties disclosed in this suit are matrimonial properties acquired during the subsistence of marriage the Applicant argued that she made direct and indirect contributions to the acquisition of the same. The Applicant identified her contribution as being from the business of selling buns and mandazis and farm work. Relying on section 2 of the *Matrimonial Property Act* she identified her non-monetary contribution as coming from domestic work and management of the matrimonial home, child care, companionship and management of family business or property and farm work. In support of the propositions under this issue I was referred to ENK v JKN[2015]eKLR and HWM versus WNM [2015]eKLR. On the basis of the foregoing it was submitted that the properties listed in the Originating Summons were matrimonial properties.
43. The Applicant submitted that she made direct and indirect contributions to the acquisition of the properties and that she was therefore entitled to the benefit of the same. I was referred to the following cases MAA versus AR[2018]eKLR, and JAO versus NA[2013]eKLR in support of her submissions. On individual properties it was urged as follows: -
Plot No. XXX XXVI (Flat No.XXX) Kizingo
44. The Applicant submitted that the funds with which the property was purchased came from joint account number XXXX 77 98XXX which is a Kenya shillings account. She denied that the funds with which the house was purchased came from NSSF Uganda account and averred that it was the proceeds from the disposal of the farm and sale of buns were used to do so.
45. On whether the transfers of the Kizingo house and Toyota Ractis were done fraudulently thus null and void the Applicant, relying on several authorities, averred that they were. She impugned the consent she is said to have signed and cast doubts on the competence of the lawyer who is said to have attested to her signature. She submitted that the document was incompetent while the attesting advocate lacked a practicing certificate. That being the case she submitted that the said transfers were void ab initio and should be disregarded.
46. The Applicant urged that she is entitled to accounts. The Court was thus urged to order the Respondent to account for the monies he allegedly received from the NSSF Uganda and that the proceeds be shared equally between the two parties.
47. On costs the Applicant urged that I find the Respondent liable to pay costs. In support of this I was referred to the case of Mugo Muiri Investments Ltd v EWB & 2 others [2017] eKLR.
48. Motor Vehicle Registration Number KBV XXXS Toyota Ractis.
It was submitted that the said motor vehicle was purchased with funds from the family business. She therefore urged that it be sold and the proceeds shared equally.
49. Properties in Uganda
The Applicant averred that the family had several parcels of land in Uganda. Although the existence of the same was denied, the Court was urged to award the same to the Applicant.
50. Property in Dubai
The Applicant urged the Court to grant her half the said property.
51. Bank Accounts
52. The Applicant submitted that she is entitled to half of what is in the accounts she listed. In support of her contention I was referred to numerous authorities to wit FWM v MK [2014]eKLR, ENK v



Respondent's Written Submissions

53. The Respondent opposed the Originating Summons in his submissions.
54. The Respondent identified 3 issues to wit: -
1. Whether Flat No. 18A Kizingo forms part of the matrimonial property;
 2. Whether the parties owned several properties and businesses in Uganda? and
 3. Whether the Applicant proved her case on a balance of probability and whether reliefs sought should be granted?
55. On whether Flat No. XXX Kizingo is a matrimonial property the Respondent denied that it was. It was submitted that the said property was purchased in the year 2010 by the Respondent using his own funds and with no contribution from the Applicant. It was submitted that section 7 of the *Matrimonial Property Act* “presupposes that entitlement to matrimonial property is dependent on spousal contribution. It was urged that the said house was purchased singlehandedly by the Respondent and the Applicant never contributed anything and is not therefore entitled to the share of the same. I was referred to Article 45(3) of *the Constitution* of Kenya, 2010 which states that:-
- “parties to a marriage are entitled to equal rights at the time of marriage and at the dissolution of the marriage”
56. The Respondent referred the Court to Kiage JA’s holding in PNN v ZWN CA No. 128 of 2014 and also to the Supreme Court decision in Joseph Ombogi Ogentoto v Martha Ogentoto, Petition No. 11 of 2020 where the Court stated that:-
- “the equality provision in Article 45(3) of *the Constitution* does not entitle any Court to vary existing property rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that Article 40(1) and (2) of *the Constitution* which protects the right to property would have no meaning which would not have been the intention of the drafters”.
57. The Respondent urged that the Applicant had no money to contribute as she admitted that she was so destitute that on several occasions she took money from their son so as to buy sanitary towels for herself.
58. He denied that the house in Kizingo had been a matrimonial home. he submitted that the said house had since been transferred to him as a trustee for their 3 children. Therefore, he argued, Flat No. XXXX was under a trust and could not be a matrimonial property.
59. On whether the Applicant signed the spousal consent the Respondent relied on the testimony Geoffrey TS Were advocate that she had.
60. The Respondent denied that they had properties and business in Uganda. He also submitted that he did not own Motor Vehicle Registration Number KBV XXXS Toyota Ractis. He referred the Court to the logbook which identified the owner of the motor vehicle as being one Misbah Ismail Mohamed.



In support of his contention the Respondent referred ENK versus MNM, CA No 559 of 2019 where it was stated that:-

“in any case a marriage par se is not a ground for sharing properties acquired during marriage on an equal basis. The Courts, in a well trodden path, have established that parties must show evidence of their contribution to the properties... As stated earlier, there is evidence to show that the Respondent purchased her own properties during the subsistence of the marriage and the Appellant is not to his credit claiming any share or interest in the property. We do not understand why the Respondent wants to benefit from the hard earned labour of the Appellant”.

61. The Respondent denied that there was a property in Dubai in the Respondent’s name. he submitted that if there was one the Applicant may be given ownership thereof.
62. On the accounts the Respondent urged that the named bank accounts were jointly owned and operated, they were active and the Applicant was able to procure accounts statements. Thus he submitted demand for accounts was misplaced.
63. Relying on section 107 to 109 of the *Evidence Act* the Respondent averred that the Applicant had not proved her case and prayed that it be dismissed with costs.

The Applicable Law

64. Kenya has a very progressive Constitution. At the heart of our constitutional order is the equality of the sexes, and also the equality of the spouses when they get married. To illustrate this point it is important that I set out the relevant provisions of *the Constitution* of Kenya, 2010 and the law as these shall underpin the decision that I shall make.
65. Article 45(3) of *the Constitution* of Kenya 2010 provides that
“parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”.
66. Section 6 and 7 of the *Matrimonial Property Act*, Act No 49 of 2013 provide that:-

“6.

- (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.

7. 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.”

67. Section 14 of the said Act provides that:-

“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.”

Issues for Determination

68. I have looked at the matter and considered the testimony of the Applicant as well as the submissions filed herein. It would thus appear to me that I must determine:-

1. Whether the properties the subject matter of these proceedings are matrimonial, and if so, what the respective contributions of the parties were;
2. What orders should issue based on my finding above; and
3. Who should bear the costs.

Analysis of the Law and the Facts

69. I will look at each of the issues that I have identified above in turns as I make my determination.

Is the Suit Property a Matrimonial Property

70. What amounts to matrimonial property has been widely discussed by the Kenyan courts.

71. In *TMW v FMC* [2018]eKLR the Court said as follows:-

“Firstly, I shall determine whether the suit property falls in the category of matrimonial property. 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. In the instant case, the marriage between parties herein commenced 1993 and was officiated through Kikuyu Customary Law in 2001. The property in question was acquired in 2010 and the same was acquired during the subsistence of the marriage between the parties herein. There is also evidence that the suit property was acquired for purposes of building a family home. As a result, there is no doubt whatsoever that the suit property including the Juja farm forms part of matrimonial property as far as the parties herein are concerned.”



72. . The parties got married on 26th January, 2002. Their marriage subsisted until 14th June 2018 when it was dissolved. Although the marriage had its share of difficulties it resulted in 3 issues who, from the evidence I have seen in the file and on perusal of the proceedings before the 2 trial judges, appear to be remarkably well adjusted in life.
73. The properties under contentition were acquired during coverture. Are they matrimonial properties? Did the Applicant contribute directly or indirectly? What orders should issue in this matter? I will look at each of the properties in turns.
74. Flat No. XXX Kizingo
This property was acquired in 2010. From the evidence adduced in the Court the funds used to purchase it came from the joint account number 01517798900. The Respondent claims that all the funds came from him after he drew down his NSSF savings. I have been unable to establish the exact nexus between the payments from the NSSF and the purchase monies.
75. I am convinced that Applicant had income that supplemented what the husband earned from employment. Her earnings would in my view have freed the Respondent from the responsibility of paying domestic bills and thus left him with money to save and invest. The law recognizes such contributions as being non-monetary contributions.
76. In the circumstances therefore I would have found Flat No. 18A to be a matrimonial property and could have therefore declared that it was owned on 50:50 basis. I however note that the same was transferred to the Respondent to hold as a trustee for the issues of the marriage. Although the Applicant averred that she did not sign the consent form She did not call evidence to back up her claim that the signature on the impugned consent wasn't hers. The decision of the criminal Court did not support her case as the respondent was acquitted.
77. I am aware that criminal cases have a higher standard of proof than civil or family cases and that it is open for this Court to reach a different conclusion from a criminal Court. There is however insufficient evidence before me that the consent of the Applicant was obtained fraudulently or that it was forged.
78. The said flat was transferred to the Respondent as a trustee for their children. In my view this is not a bad thing. Provision for one's own children would appear to me to be a good thing. I am thus unable to agree with the Applicant that the said Flat is still a matrimonial property.
79. Motor vehicle Registration Number KBV XXXS
The Applicant claims that the said care belongs to the Respondent. The logbook that was exhibited in the Respondent's Replying Affidavit shows that the same is owned by Misbah Ismail Mohamed. It was open for the Applicant to carry out a search with NTSA and disprove the Respondent's assertion. Being a property registered in the name of a third party I am unable to see how it can be said that the same belongs to the Respondent. I therefore find and hold that the same is not a matrimonial property.
80. The properties and businesses in Uganda
The Respondent denies that these properties exist. The Applicant failed to produce any titles or deeds evidencing existence of such properties. I note that the properties weren't described with sufficient specificity. In my view, the prayer in respect of this said properties must fail.
81. Property in Dubai
My finding in paragraph 70 above applies to this property as well. Accordingly, this claim fails too.
82. Funds in various bank accounts.



The Applicant and the Respondent had joint accounts that were listed in the Originating Summons. As both of them contributed to the said accounts and since I cannot ascertain the exact contribution of each with certainty I must apply the equitable maxim that equality is equity and find that the said account belonged to the parties equally and should be divided accordingly.

Disposition

83. Based on the foregoing I make the following orders:-

1. I find and hold that although Flat No. 18A on Plot Nos. XXX XXVI Kizingo and XXX XXVI Kizingo was a matrimonial home and was jointly, directly and indirectly, acquired by the Applicant and the Respondent the same has since been transferred to the Respondent in his capacity as the trustee of the 3 issues of their marriage. The transfer was made with the consent of the Applicant and attested by Geoffrey TS Were advocate. Upon the said transfer the property ceased being a matrimonial property;
2. The motor vehicle registration number KBV XXXS Toyota Ractis is not a matrimonial property as it is registered in the name of a third party;
3. There is no evidence that the Respondent owns properties in Uganda;
4. There is also no evidence that the Respondent owned property(ies) in Dubai, other than the bank accounts;
5. I find and hold that the following bank accounts are matrimonial properties and should be shared equally by the Applicant and the Respondent:-

1. Standard Chartered A/C Nos. XXXX 177 98XXX(Kes A/C)
2. Standard Chartered A/C Nos. XXXX 277 98XXX (Euro A/C)
3. Standard Chartered A/C Nos. XXXX 277 98XXX (US A/C)
4. Standard Chartered A/C Nos. XXXX 377 98XXX(Kes A/C)
5. Standard Chartered A/C Nos. XXXX 477 98XXX (Kes children joint A/C)
6. Standard Chartered A/C Nos. XXXX 477 98XXX(Kes children joint A/C)
7. Crane Bank Uganda account
8. Standard Chartered Dollar account in Dubai
9. Standard Chartered Dirham Joint A/C No. 18XXXX in Dubai.

I direct that the funds in the said account be shared within 30 days of the date of this judgment.

84. Although costs ordinarily follow the event I do not think that in the circumstances of this case costs should be awarded. The Applicant and the Respondent are former spouses with 3 children they are co-parenting. Each party shall therefore bear own costs.

Orders accordingly.

DATED AND DELIVERED THIS 15TH DAY OF SEPTEMBER 2023 AT NAIROBI VIA MICROSOFT TEAMS.

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GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Osino for the Applicant

Mr. Siminyu for the Respondent

Mr. Arthur Ranyondo – Court Assistant

