



**FOO v MCA (Matrimonial Cause 49 of 2013)
[2023] KEHC 24900 (KLR) (Family) (13 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

MATRIMONIAL CAUSE 49 OF 2013

PM NYAUNDI, J

OCTOBER 13, 2023

**IN THE MATTER OF SECTIONS 7,12 & 17 OF THE
MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

AND

**IN THE MATTER OF: AN APPLICATION FOR DIVISION OF
MATRIMONIAL PROPERTY**

BETWEEN

FOO APPLICANT

AND

MCA RESPONDENT

JUDGMENT

Introduction

1. The applicant presents Originating Summons dated 10th May 2023 under Section 7, 12 & 17 of the [Matrimonial Property Act](#), Order 37 of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and seeks the following orders: -
 - a. That this Honourable Court do issue an order compelling the Respondent to vacate the Applicant’s property known as L.R. No. xxxx.
 - b. That the Court do issue an order to the Respondent to accept a payment of Kshs. 2,400,000/ = being the value of 30% of the suit property whose estimated value is Kshs. 8,000,0000.
 - c. That in the alternative, to issue orders that the Respondent vacate the property within 30 days of the order to give room for the property to be advertised for sale.



- d. That the cost of this application be provided for.
2. The application is based on the grounds on the face of it and supported by the affidavit of the Applicant, FOO sworn on 10th May 2023.
3. The Respondent opposes the Application and has filed grounds of opposition dated 9th June 2023.

Background

4. By Judgment of the Court delivered on 16th June 2022 by the Hon Muchelule J (as he then was) in MCA v FOO Matrimonial Cause No E074 of 2021, the Court found that the Subject property, Land Title Number L.R. No. xxxx, was matrimonial property and determined the interest of the Applicant and Respondent to be 70:30 percent respectively.
5. Upon dissolution of the marriage the Applicant has presented this Application so as to distribute the asset between the parties.
6. The matter proceeded by Viva Voce evidence on 22nd June 2023 and thereafter the parties proceeded to file written submissions. The Applicants submissions are dated 6th July 2023 together with supplementary submissions dated 24th July 2023. The Respondents submissions are dated 12th July 2023.

Analysis and Determination

7. Having carefully considered the evidence tendered by the parties and the submissions, alongside authorities cited and the relevant law, I determine the following as the issues for determination.
 - a. Who should retain the matrimonial asset by buying out the other spouse
 - b. Who should pay costs
8. Both parties have argued fervently that they should be allowed to buy out the other spouse. The Applicant would like to sell or rent the property while the Respondent states that she would like to stay there with the Children who have a sentimental attachment to the property.
9. It is not in dispute that the Respondent is in current occupation of the house and has been since the parties separated.
10. The Court has been invited by the Respondent to be guided by the best interest of the child principle as articulated in Article 53 (2) of *the Constitution*, Section 8 of the *Children Act* and the First Schedule of the Act since one of the children of the marriage is a minor.
11. It is the Applicant who has moved the Court with a proposal on how the parties should proceed to implement the decision of the Court that was rendered in June 2022.
12. In exercising the discretion, the Court will be guided by the following,
 - a. Best interest of the child as a paramount consideration
 - b. Which offer reflects interest of justice in the instant case
13. With regard to the ‘best interest of the Child principle’, the law and judicial precedent require that this be the paramount consideration. The Court is obligated to consider the impact that its decision will have on the well-being of the child and always make a decision that fosters the well-being of the child.



14. It therefore rests on the party raising the issue to place before the Court sufficient material that demonstrates on the one hand the threat to the well-being of the child and how the proposed action prevents, avoids or mitigates that risk.
15. In the instant case, the parties entered into a custody arrangement by consent on 15th July 2022, wherein the Applicant was granted actual custody, care and control of the minor issue of the marriage, with the respondent having access on alternative weekends and the 1st half of every school holiday. It was further agreed that the picking up and dropping off point would be the Applicant's house in Syokimau.
16. This therefore, is a child who since June 2022 has moved between two homes.
17. It has been stated that the child has a sentimental attachment to the house. It has not however been demonstrated to my satisfaction what this sentimental attachment entails. I do not think that it is being suggested that application of the best interest principle means that children are not open to shifting residences and homes. As this has no evidentiary basis
18. In the absence of any evidence that demonstrates that an outcome that would entail sale of the home would result in emotional, physical or other harm to the minor child I am unable to find that it is in the minor's best interest to ensure that the Respondent remains in occupation of the home.
19. The best interest principle is not an abstract concept, Schedule 1 of the *Children Act*, 2022 spells out the considerations that would guide the Court, I find that in this instance the party alleging has not met the threshold to persuade the court that the offer as presented by the Applicant would occasion harm to the minor herein.
20. This means therefore that I will proceed to consider the 2nd limb. Both parties are willing to buy out the other. The valuation of Kshs 8 million is not contested. The Applicant is prepared to pay to the Respondent the sum of Kshs 2.4 million immediately. While the Respondent proposes to pay the Applicant in instalments spread out within a year.
21. It is in the interest of justice to give the first right of purchase to the party who has the larger interest, in this regard I agree with the reasoning of Odunga J (as he then was) in *EKTM v ECC* [2021] eKLR. Accordingly, I would allow the Application and make the following orders
 - a. The Applicant to pay to the Respondent her 30 per cent share of the property amounting to Kshs 2, 400, 000 (Two Million four Hundred Thousand) only within 21 days of this judgment
 - b. The Respondent to vacate the house on the property known as L.R. No. xxxx within 7 days of payment of the sum of Kshs 2,400,000 as ordered in (a) above
 - c. In default of a) above the Respondent shall have the right to buy out the Applicant by payment of Kshs 2,800,000 within 21 days of the Applicant defaulting and the balance of Kshs 5,200,000 within 60 days thereafter.
 - d. In the event that both parties are in default the property to be put up for sale by the Applicant and the parties to share the proceeds of the sale in the ratio of 70:30
 - e. In the event that the property is to be sold under (d) above, the Respondent will vacate the property within 7 days of the Applicant entering into a sale agreement with the prospective buyer.
 - f. On account of the relationship between the parties, each party will bear their own costs.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
13TH DAY OF OCTOBER, 2023.**

P. NYAUNDI

JUDGE

