



**Ndege v Gakuo (Matrimonial Cause E008 of 2023)
[2024] KEHC 11892 (KLR) (1 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E008 OF 2023
SM MOHOCHI, J
OCTOBER 1, 2024**

BETWEEN

SUSAN NKATHA NDEGE APPLICANT

AND

DAVID JOTHAM GAKUO RESPONDENT

RULING

1. Before this court is a Notice of Motion Application dated 24th October 2023 filed pursuant to Order 40 Rule 1 and 2 and Order 51 of the Civil Procedure Rules, Section 1A, AB and 3A of the Civil Procedure Act Section 12 (1), 3) of the Matrimonial Property Act No. 49 of 2013 and all enabling provision of the Law seeking the following relief(s);
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the originating summons herein this court be pleased be pleased to restrain the Respondent by himself, his servants, employees, agents, assigns and/or any person or entity claiming through or under him, from entering, remaining, taking photos, interfering with the construction thereon or the workers thereon and/or in any way dealing with the subject parcel of land known as Kiambogo/Kiambogo block 2/18491 measuring approximately 0.0400 Hectares contrary to the rights and/or interests of the Applicant.
 - d. The costs of this application be provided for.
2. The Application is premised on the annexed affidavit of Susan Nkatha Ndege and the following grounds;



- a. That the Respondent and Applicants have since separated and there is an existing Domestic Violence Order, issued by the Australian Court, in favour of the Applicant as against the Respondent which order will subsist until the year 2027
 - b. That, during the subsistence of the said marriage, the Applicant and the Respondent would each purchase individual properties without involving the other party.
 - c. That, the Respondent purchased properties in Kamulu, Kangudo road Malindi and has built a three-bedroom house in Ol-Kalou.
 - d. That similarly, the Applicant purchased all that property known as Kiambogo/Kiambogo block 2/18491 and obtained a titled deed registered in her name.
 - e. That, the Respondent never paid a single cent towards the acquisition and subsequent development of the said property and any amount he ever gave, the Applicant duly refunded the same upon the demands of the Respondent. The Respondent therefore relinquished any rights he might have had on the subject property
 - f. That, the Respondent has started interfering with the ongoing construction of the property where he has formed a habit sending his representatives and/or agents to the contraction site whereby the said representative are taking photos of the building which acts are posing a security threat on the workers thereon forcing them to almost down their tools
 - g. That, it is therefore mete and just that this Honorable Court do come to the Applicant's rescue and aid since the Applicant will suffer irreparable loss if the Respondent is not restrained from interfering with the said construction which the Applicant has solely heavily invested on.
 - h. That, it is in the interest of justice that the orders sought are granted.
3. Despite the Respondent being served with the application on the 3rd December, 2023 through electronic service has failed and or refused to file response and or any written submissions.
 4. The Applicant further and in compliance of the court's directions filed her written submissions dated 18th June 2024 That the Applicant and the Respondent met in the year 2004 and have two issues to the marriage. During the subsistence of their marriage, they agreed to each purchase properties solely without involving the other. The Respondent purchased his and the Applicant purchased hers being Kiambogo/Kiambogo block 2/18491 (the subject matter herein)
 5. Around April, 2022 the Respondent and the Applicant, having moved to Australia and living together since 2015, the Respondent resolved to acts of violence which ultimately led to their separation. There is currently a Domestic Violence Order against the Respondent in favour of the Applicant produced as "SNN10" which restrains the Respondent from being in contact with the Applicant.
 6. Thereafter, the Respondent started claiming ownership of the subject property, stating that the same is matrimonial property and that he is entitled to a share thereof. The Applicant in seeking to protect her interest on the said property filed the cause herein.
 7. The Respondent was duly served with the pleadings. However, vide an affidavit of service filed on 14th November, 2023 the Respondent, through the email excerpts attached thereon, stated that he did not wish to participate in the proceedings following the advice from his solicitors consequently, the Respondent has never entered appearance.



Issues for Determination

- a. Whether the Applicant and Respondent were in a marriage.
- b. Whether the subject property is matrimonial property.
- c. Whether the Applicant acquired the subject solely without any contribution, financially or otherwise from the Respondent.
- d. Whether the Applicant is entitled to the subject property, exclusively.
- e. Who should bear costs of the suit.

Whether the Applicant and the Respondent were in a marriage

8. The Applicant testified and further adopted the contents of her supporting affidavit. She gave evidence that she met the Respondent in the year 2004 when they both resided in Kenya. Their marriage was blessed with two children in the year 2006 and 2011.
9. They later separated and the applicant moved to Australia in the year 2015. Around July 2015, the Applicant and the Respondent rekindled their relationship and the Respondent joined the Applicant in Australia. They lived together until the year 2022 when the Respondent's acts of violence worsened forcing the Applicant to obtain a Domestic Violence Order against the Respondent which order subsists to date.
10. The Applicant submit that the circumstances herein paint to a marriage where the Applicant and the Respondent lived together as husband and wife and have even sired children together. Even the presence of the Domestic Violence Order granted by the Australian Magistrate Court under the Domestic and Family Violence Protection Act, 2012 points to there having been an existence of a marriage and subsequently a family.

Whether the subject property is matrimonial property

11. The Applicant relies on Section 6 (1) (c) of the *Matrimonial Property Act*, No.49 of 2013 which provides:

“6(1) for the purposes of this Act, matrimonial property means: -

 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”
12. The Applicant testified that during the subsistence of the marriage between the Respondent and herself, they would each purchase individual properties without involving the other.
13. The fact that the property, whether acquired individually or not, was acquire when the Applicant and the Respondent lived together as husband and wife, qualifies the subject property as matrimonial property.

Whether the Applicant acquired the subject property solely without any contribution, financially or otherwise the Respondent.

14. The Applicant gave evidence that during the subsistence of their marriage, they would each purchase individual properties without involving the other.



15. She gave evidence that it is because of the said agreement that the Respondent purchased his properties in Kimulu, Malindi and Ol-Kalou and the Applicant purchased hers in Nakuru being: Kiambogo/ Kiambogo block 2/18491.
16. The law does appreciate that parties, though in a marriage, are free to enter into an agreement to determine their property right. Through the law talks of “before a marriage” we believe that the Applicant and the Respondent in agreeing to such an arrangement wanted to protect each of their property rights therein. Section 6(3) of the *Matrimonial Property Act* provides: -

“Despite subsection (1) the parties to an intended marriage may enter into an agreement before their marriage to determine their property right”
17. The Applicant therefore call upon Court to appreciate that, there is a possibility that such an agreement and/or arrangement was made between the Applicant and the Respondent. We rely on the holding of the Court in the case of RHL-V- HKK where the Court in quoting the case of TMW-V-FM C (2028) eKLR held;

“.....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 between them that such matrimonial property....”
18. Be that as it may, even if such an arrangement was not there, the Applicant testified that she acquired the said property without any help whatsoever from the Respondent. The Applicant gave evidence that she purchased the subject property on 8th January, 2019 from one James Kimani Muthiora for Kshs.1,900.000/=. With this she produced;
 - a. Sale agreement dated 8/1/2019 between one James Kimani Muthiora and herself as Annexure 1(a).
 - b. Bank statement belonging to the Applicant showing payment of the purchase price to the said James Kimani as Annexure 1(b).
19. The Applicant further testified that following the said purchase, she obtained a title Deed in her name which she produced as Annexure 2.
20. To that font, on matters acquisition of the property, the Applicant has shown that she solely entered into the sale agreement and solely paid for the purchase price without any contribution from the Respondent.
21. On matters development of the property, the Applicant testified that, in seeking to develop the property, she single-handedly approached all the relevant authorities and sought all the relevant approvals for any such construction. With this, the Applicant produced; -
 - a. Building plan approval dated 20th July, 2020 issued solely to the Applicant Annexure 3a.
 - b. Approved change of user dated 30th September, 2020 issued solely to the Applicant's name as Annexure 3b
 - c. Excerpt of the Environmental Impact Assessment project report dated March 2021 issued to the Applicant as Annexure 3c.
 - d. Construction project contract between Samnga Consortium and the Applicant dated 22nd October, 2021 as Annexure 3d.



- e. A construction project billboard showing the construction Applicant as the client (Owner of construction) as Annexure 3e.
 - f. Compliance certificate from National construction issued to the Applicant as Annexure 3f.
22. The Applicant further gave evidence that she commenced construction and funded the same solely without any help from the Respondent. In the Applicant affidavit evidence, she gave evidence that she would send the engineer thereon any amount needed in purchasing any necessary building materials. She produced a copy of an M-Pesa and Bank statement from Kenya Commercial Bank for the Engineer one Eugene Wekanda Malunga as Annexure 4 showing monies sent for the said construction.
23. The Applicant would at times purchase and pay for construction materials from Australia to different hard-wares and suppliers. She produced screenshots for receipt in respect of the said transactions as Annexure 5.
24. Therefore, the question that arises is whether, though the Respondent never participated and/or contributed to the acquisition of the property, he contributed to the development and/or improvement of the said property? The Applicant in her affidavit evidence stated that the only time the Respondent's money was used towards the construction on the property was when the Respondent sent money to the Engineer, the said Eugene Wakanda. This was because at the time, the said Engineer could not be reaching the Applicant via Mobile and so he had to call the Respondent. There were three (3) such instances where: -
- a. The Respondent sent Kshs.105,000/= for payment of some construction approvals as evidence on Annexure 7a.
 - b. The Respondent sent Kshs. 148,500/= for purchase of cement as per Annexure 7b.
 - c. Kshs. 5,000/= for purchase of water drum as per Annexure 7c
25. However, and despite the said payment, the Respondent always made sure to remind the applicant that he never wished to be part of the said construction thereby giving weight to their agreement that each party should acquire own property individually. This he would do, by demanding a refund of all the monies sent from the Applicant worst of all, he would ask for such a refund by use of uncouth language as per Annexure 8a-c.
26. Upon such demand for a refund by the Respondent, the Applicant would refund the same as evidenced by Annexure 9a-c. As such, any contribution that the Respondent ever made towards the development of the property was always demanded back and the Applicant always paid back.
27. It is therefore the Applicant considered submissions that, upon the said refund, it is conclusive to say that the Applicant exclusively acquired and developed the property without any contributions, even minimal, from the Respondent.
- d. . Whether the Applicant is entitled to the property exclusively
28. That, whereas Section 14 of the [matrimonial property 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...”



29. That Section 7 of the said Act provides: -

“Subject to section 6(3), ownership of matrimonial property rests in the spouses according to the contribution of either spouse towards its acquisition.....”

30. As such, the registration of the Applicant as the sole owner of the property creates a rebuttable presumption that the property is held in trust for the Respondent. However, that presumption has been rebutted following the Applicant’s proof that she solely contributed to the acquisition and development of the same.

31. As such, having the said contribution as a factor, Section 7 of the *Matrimonial Property Act*, allows this Honorable Court to vest the property on each spouse according to their contribution.

32. That it should be noted that the Respondent never participated in these proceedings to controvert the evidence produced by the Applicant. The Respondent never availed any evidence to show that she ever contributed towards the acquisition of the property. Any evidence of contribution was diluted by the evidence produced by the Applicant showing that such contribution was demanded back by the Respondent. The court in the case of RHL-v-HKK (originating summons 12 of 2021) 2023 faced with a similar case held:

“The evidence of the Applicant is uncontroverted. I thus find that the two payments she made to Astony Chego were in settlement of the purchase price. In any case, the fact that the transfer of title was registered is sufficient evidence in my view that the vender was paid the purchase price in full....It is clear from the evidence that the Applicant paid the purchase price in full. I have not seen evidence of any contribution made by the Respondent towards the purchase price. There is also no evidence that he contributed towards the construction of the villas and the related amenities or that he paid for the furnishing that was done. As we have already seen, despite being served, he did not file pleadings to oppose the originating summons.”

33. That, the Applicant has placed evidence and material before this Court to show that the acquisition and development of the subject property was done solely with the efforts and funds of the Applicant. The Applicant has demonstrated that she is 100% deserving of the orders sought herein and it is only fair that this Court considers the Applicant’s contribution with fair eyes.

34. Reliance is placed on the Court's holding in the case of RHL-v-HKK where the Supreme Court in quoting the case UMM -v- IMM (2014) eKLR held:

“We find the above opinion and finding persuasive and it is our finding that the Stated Equity under Article 45(3) means that the Courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed”

35. That, it is without a doubt that the Applicant has demonstrated her 100% contribution to the acquisition and construction of the property. As such, it is only fair that she is not denied what she is deserving of.



36. That, the court in the case as quoted above, in granting the Applicant the order sought held:

‘I find and hold that the Applicant made 100% contribution towards the purchase of the property and that the Respondent did not contribute anything towards its purchase’

37. That the Applicant's evidence was unchallenged and the Applicant having proved her case that she is indeed entitled to the subject property by being virtue of her sole acquisition and development, this Honorable Court has jurisdiction under the *Matrimonial Property Act* and the rules made thereunder and particularly Rule 30(1), to vest the property exclusively to the Applicant.

Who should bear the cost of the suit.

38. That given the Respondent did not take part in these proceedings and his general attitude towards the same as exhibited in the email excerpts on the affidavit of service, each party should bear own costs so as to avoid any possible back and forth with the said Respondent.

39. In conclusion, the Applicant submit that the prayers sought in the Originating Summons, though uncontroverted, have been proved to the desired degree and the Applicant is deserving of the same. We pray that the same be allowed as prayed.

Determination

40. I will not regurgitate the case but which in a nutshell showcases that the Applicant purchased the suit premises by herself at the same time the Respondent made a similar acquisition, she has been developing the same, the Respondent has been interfering despite there being a protective order against him. It also showcases the estrangement of the parties.

41. In absence of a response the Originating Summons dated 24th October, 2023 remains undefended.

42. I am thus constrained to allow the application as undefended.

43. A declaration is hereby issued that property known as Kiambogo/Kiambogo block 2/18491 measuring approximately 0.0400 Hectares though acquired during subsistence of the marriage between the Applicant and the Respondent, was acquired by the sole efforts and funds of the Applicant as per the registration.

44. There shall be no costs orders in view of the undefended claim.

It is so ordered.

RULING SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 1ST DAY OF OCTOBER, 2024

MOHOCHI S.M

JUDGE

