



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**ORIGINATING SUMMONS NO.06 OF 2020**

**IN THE MATTER OF**

**SHARING MATRIMONIAL PROPERTY**

**AND**

**IN THE MATTER OF**

**MATRIMONIAL PROPERTY ACT 2013**

**BETWEEN**

**DAK.....APPLICANT**

**VERSUS**

**MK .....RESPONDENT**

**JUDGEMENT**

1. The Applicant herein and the respondent celebrated their marriage through a church wedding on 8<sup>th</sup> February 2005. Due to irreconcilable differences, their marriage which was not blessed with any biological child hit a rock resulting to the inevitable divorce on 29<sup>th</sup> October 2013 vide Mombasa High Court Divorce Cause No. xx of 2008.

2. Consequently, the applicant moved to this court vide an Originating Summons dated 24<sup>th</sup> September, 2020, supported by her supporting affidavit sworn on the same date seeking the following orders:

**a) A declaration that the below listed properties are owned jointly by the applicant and the respondent;**

**i. Residential plots in Shanzu furnished with matrimonial home with 3 bedroomed (sic).**

**ii. Farm at Nguuni within Kisauni Division where the house lies.**

**iii. Plot in Kashani measuring 1.43 acres**

**iv. Piece of land in Kashani around Lwangwani measuring 12 acres.**

**b) An order for the above properties hereto be given back to me in such percentages as the court deems fit.**

**c) A mandatory injunction restraining the respondent by himself, his servants, agents and /or employees from interfering, selling or alienating the suit properties until this case is determined.**

**d) An order that the above properties were acquired by the applicant and unless the court intervenes them (sic) the respondent be restrained from disposing the same.**

**e) An order that the respondent do execute necessary documents of transfer of the applicant's portion in the above**

**properties and in default, the deputy registrar or any other court official do execute the same.**

**f) In the event that any property has been transferred to a third party before this suit was filed that the respondent do account for the proceeds therefrom for equitable distribution between the parties,**

**g) The respondent to acquire (sic) money withdrawn from the applicant's ATM Card as he took the same from the applicant.**

3. It is the applicant's case that when she got married to the respondent the year 2005, the respondent had no material possessions. That prior to her marriage, she had acquired [Particulars Withheld] Farm Kilifi in 1989 measuring 1.8ha and [Particulars Withheld] Farm Bamburi Measuring 1 1/3 acres in 2004. That she put up a four bedroomed mud house fully furnished at [Particulars Withheld] farm which they later occupied as their matrimonial home after their marriage.

4. She further averred that she single handedly bought [Particulars Withheld] Farm measuring 12 acres and Nguuni plot in the year 2006. She also stated that the year 2007, she bought two pieces of land in Shanzu, Mombasa on which she built a matrimonial house with 3 rooms, fully furnished on one plot and 3 rooms for rental income on the second plot.

5. It was her contention that she acquired the properties through bank loans, her salary and other sources. In her endeavour to prove that she solely acquired the said properties without any contribution from the respondent, she attached the following documents;

**a) 1<sup>st</sup> agreement dated 14/6/2008 sale of two plots for a price of Kshs 160,000 between the applicant as the buyer and Mwijasi Mohamed Mwalimu as the seller(exhb.1)**

**b) 2<sup>nd</sup> agreement dated 11/7/2008 sale of a plot at Kshs 55,000-reflecting the applicant as the buyer and Nzai Ruwa as the seller of [Particulars Withheld] farm (exhb.2).**

**c) 3<sup>rd</sup> agreement [Particulars Withheld] farm between the applicant and Katana Kombe at a price of Kshs 40,000 paid in 3 instalments on diverse dates namely 10.3.2004,10.5.2004 and 1.7.2004 (exhb.3)**

**d) Loan agreement for a sum of Kshs 20,000 between the applicant and Platinum Credit dated 20<sup>th</sup> December, 2005 (exhb.5)**

**e) Loan application between the applicant and KCB Bank for kshs 150,000 to finance land development.**

**f) Payslips for the months of August 2006, November 2006, December 2006 reflecting Sacco loan recoveries (exhb.6)**

**g) Loan statement from KCB for diverse dates and months in the year 2005**

6. In response, the respondent filed grounds of opposition dated 12<sup>th</sup> November, 2020 stating that the application is frivolous, vexatious, bad in law, amounts to an abuse of the court process, brought in bad faith and ought to be dismissed. He also filed a replying affidavit sworn on 12<sup>th</sup> November, 2020 denying the applicant's averment in the affidavit in support of the application. Basically, he claimed that he acquired the subject properties a lone and that the applicant did not make any contribution at all.

7. He stated that the plot in Shanzu area is subject to a dispute which is still pending in court vide Mombasa Civil Application No.xx of 2015(O.S). He further claimed to have bought Kashani plot on 13<sup>th</sup> June 2004 at kshs 35,000. He attached an agreement marked MK2 reflecting the property as land near Livingstone sold to him by Mwaka Charu

8. That he bought Nguuni plot from Nzai Wa Ruwa with his money at a cost of Kshs 55,000 in the year 2007 and not 2006 as alleged by the applicant (see annexure-KM 3). In his effort to prove that he did develop the plots a lone, he attached several hardware cash receipts (annexture- MK5) and Equity Bank loan statement (annexture MK-6) as proof of his monetary contribution.

9. During the hearing, the applicant reiterated that she bought the two properties in Kashani, Bamburi Kisauni and Roka Uyombo Plot xxx before marriage. That the respondent was the one controlling her salary and that she surrendered all her salary to him. That the respondent did not contribute anything towards acquisition of the same. That all properties acquired during marriage was through her salary and loans. It was her testimony that Nguuni plot was acquired using her salary and a loan that she had taken and given to the respondent. That Shanzu property was also bought using funds obtained through a loan she had acquired. That the respondent was not working but was always in the beach with the house boy.

10. On cross examination, she stated that the Kashani plot has no house in it as it was demolished. She acknowledged that Kashani land is still undergoing demarcation and that there are no title deeds.

11. On his part, the respondent adopted the content contained in his replying affidavit. He stated that he is a pastor running a church within the 12 acre land and that he does farming, business and poultry. It was his contention that the applicant did not buy any property nor contribute to their acquisition and that he got the properties through church tithe, offering and seed sowing. That the applicant was a church treasurer. He denied knowledge of land in Kilifi (Uyombo plot) and that he has no interest in it.

12. He maintained that he developed Kashani property after separating with the applicant. That Kashani property is owned by the church with a church house erected thereon. He stated that the property in Kashani measuring 12 acres was sold to him by the applicant's cousin at

KShs 35,000 and that he has invested 4.5 million. That Kashani 12 acres is where he stays with his workers.

13. He also alleged that the applicant has since sold 1.6 acres out of Kashani land. That as a Christian, he was willing to give the applicant two acres out of Kashani property in addition to Nguuni plot which he also bought with his money. He however proposed to take Kashani 12 acres and Shanzu property. He justified the proposal on the ground that he took a loan from Equity Bank and that he spent 1.4 million to build Shanzu property. On cross examination, he stated that he is a pastor and that the church was generating money.

14. After the close of the hearing, parties were directed to file their submissions.

15. The applicant filed submissions in person on 26<sup>th</sup> May 2021. The same is a replica of the content in her affidavit in support of her application and testimony in court. However, from the story advanced in the name of submissions, she has introduced new facts which were not pleaded nor canvassed during the hearing. It is trite law that parties are bound by their pleadings hence I will direct my mind to the issues pleaded and canvassed. Unfortunately, counsel for the respondent did not file his submissions.

#### **Analysis and determination**

16. I have considered the originating summons and the response thereof, evidence on record and the applicant's submissions; Issues that emerge for determination are;

- a) Whether the subject properties were acquired during coverture**
- b) Whether the subject properties qualify to be matrimonial property**
- c) What was the contribution of each party towards the acquisition of the said properties.**
- d) Division of the said properties**

17. There is no dispute that the couple got married the year 2005 and divorced in November 2013. From the pleadings, both parties are in agreement that the subject properties are; a plot in shanzu; two plots in kashani; and Nguuni plot. I will however not consider a plot said to be in Uyombo Kilifi as it was alleged to have been bought by the applicant before she got married to the respondent. In any event, the respondent is not claiming it and it is not listed in the Originating summons. Further, from the pleadings and annexures attached by both parties, the disputed properties were acquired during the subsistence of their marriage.

18. I have however noted that the subject properties have no description. They have no title deed hence not registered. Some of them like Kashani farm is land still undergoing demarcation hence ownership is yet to be determined. On the other hand, there is an ongoing case in court in respect to Shanzu property between the respondent and three other parties against some 3<sup>rd</sup> parties. In essence, ownership is not yet determined. Before the ELC case is determined, this court cannot conclusively determine and declare ownership rights on the Shanzu Property.

19. I will therefore not make any declaration on the Shanzu property until the Mombasa High Court Civil Case No.xx of 2015 is determined. If the applicant is claiming proprietary rights over the same property, she should seek to be enjoined as a party or wait until the respondent gets his share and then seek her share from him also. With that clarification in mind, I am left with two Kashani properties measuring 1.43 acres and 12 acres and Nguuni farm.

20. The key question is, are the disputed properties qualified to be matrimonial property. Section 6 of the matrimonial property act defines matrimonial property and provides as follows;

**(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) ...**

**(4) ...**

21. According to the respondent, he bought Nguuni property from Nzai Ruwa on 16<sup>th</sup> October 2007. On the other hand, the applicant claimed to have bought the same land from Nzai Ruwa on 11<sup>th</sup> July 2008. The sale agreement attached by the applicant (exhb.2) does not describe the land bought. Since there is only one piece bought from Nzai, I can only assume it was the Nguuni plot. The same having been bought during the subsistence of marriage it is deemed to be matrimonial property subject to proof of contribution.

22. The critical question requiring an answer is the extent of contribution. Section 7 of the Matrimonial Property Act provides;

**“Ownership of matrimonial property 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”.**

23. Section 14 of the matrimonial property act also states that;

**“Presumptions as to property acquired during marriage- 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”**

24. Before a party can lay claim on any matrimonial property, he or she is under obligation to prove monetary or non -monetary contribution. Under Section 2 of the Matrimonial Property Act, contribution is defined as;

**“Monetary and non-monetary contribution 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;**

25. With regard to [Particulars Withheld] Farm, the applicant stated that she bought the same with her salary and a loan that she had taken and given to the respondent. On his part, the respondent claimed to have taken a loan from Equity bank and also money sourced from the church in form of tithes, offerings, farming and chicken rearing. The applicant attached her payslip reflecting Sacco loan deductions and KCB loan repayment statement.

26. It was also admitted that the church was founded by the respondent in which the applicant was a treasurer meaning that she played a role in supporting church activities. It is also not lost in my mind that she was the only spouse then in salaried monthly employment and that the applicant was merely depending on well-wishers and tithes which money is not authenticated.

27. From the respondent’s bank statement, it appears like he had some source of income reflected from a number of credit entries. Without calculating contribution with mathematical precision, it is apparent that both parties did contribute both directly and indirectly towards the acquisition of the Nguuni property. Whereas each party made direct monetary contribution, the applicant did run domestic work as a wife besides employment while the respondent also played a supervisory role during construction hence indirect contribution.

28. On Kashani Plot measuring 1.43 acres, the applicant stated that it was their first matrimonial home. That she bought it at Kshs 40,000 from Mzee Katana Karisa Kiti in the year 2004 before they got married. The applicant produced an agreement conforming the same (exhb.3). The respondent on the other hand stated that he bought it at a cost of Kshs 35,000 in 2008 and not 2004 as alleged by the applicant. The agreement alleged to be for Kashani plot is not signed by the alleged seller (annexture mk2). The respondent could not therefore prove that he bought the land in question.

29. It is trite that he who alleges contribution must prove. See TKM V SMW (2020) eKLR. From the sale agreement tendered by the applicant, it is clear that Kashani land measuring 1.43 acres was bought by the applicant before marriage hence the property of the applicant 100%.

30. With regard to the piece of land in Kashani around Lwangwani measuring 12 acres, the applicant stated that she bought the farm through loans from Platinum Financing Institution, Harambee Sacco (Kshs 50,000), and 5,000 from the sale of her cow. She also produced an agreement by Nzai Ruwa dated 11<sup>th</sup> July 2008 for sale of the plot at Kshs 55,000-showing her as the buyer. The respondent on the other hand stated that the property in Kashani measuring 12 acres was sold to him by the applicant’s cousin at Kshs 35,000 and that he has invested 4.5 million in developing the property. That Kashani 12 acres is where he stays with his workers.

31. It is noteworthy that none of them call an independent witness to corroborate their competing claims that it is so and so who bought the property and not the other. The only inference left for the court to draw is that they jointly bought the property during coverture regardless of whose name appears in the disputed sale agreements minus registration of title documents which is lacking.

32. The respondent did not produce any evidence on his contribution on acquisition of the Kashani property. However, it’s evident that the same was acquired during the subsistence of marriage hence matrimonial property and that he has contributed extensively towards its

development.

33. The court in the case of MNH v FHM [2018] eKLR stated as follows;

**“What the Matrimonial Property Act of 2013 does is formalize and make provision for giving due consideration to both the monetary and non-monetary contribution of parties in a marriage as is evident from the clauses cited in the antecedent paragraphs. This position has been cemented by the Courts in different instances. For starters, in NWM v KNM (2014) eKLR it was stated that the court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.”**

34. It's evident from the above evidence that the applicant made contribution in the acquisition of the suit properties in both monetary and non-monetary terms. The applicant has also been able to establish her source of income that was used in acquisition of the suit property. On the hand, the respondent has also endeavoured to establish his monetary contribution. From the several cash sale receipts for purchase of building materials and bank loan from equity bank which is manifested from deductions reflected in his Equity bank account statement, it is clear that he made contribution although not measurable with exactitude. Besides, he performed the role of supervision on construction which has not been controverted hence non-monetary contribution. See Agnes Nanjala William v Jacob Patrius Nicholas Vander C.A No. 127 of 2011 and Peter Mburu Echaria v Priscillah Njeri Echaria(2007) e KLR where both courts recognized both monetary and non-monetary contribution.

35. In the case of MNH v FHM (supra) the court stated thus;

**“The logical conclusion flowing from the judicial precedence quoted above is that in determining the distribution of matrimonial property at the dissolution of a marriage, the Trial Court ought to dispassionately scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties. Furthermore, where property is registered singularly in the name of one spouse, there shall be a rebuttable presumption that such property is held in trust for the other spouse”.**

36. Having made the finding that the subject properties were acquired during coverture and therefore matrimonial property and further having found that both parties made both monetary and non- monetary contribution, it's my holding that the said properties be distributed as follows:

- a) The residential plots in Shanzu furnished with matrimonial home with 3 bedrooms to await the outcome of the pending suit.
- b) Farm at Nguuni within Kisauni Division be shared equally between the two parties.
- c) Plot in Kashani measuring 1.43 acres is declared as the applicant's property 100%.
- d) Kashani Lwangwani measuring 12 acres to be shared equally amongst the parties.
- e) For avoidance of doubt, during subdivision of 12 acres Kashani property, the church house shall be on the respondent's side (share).
- f) This being a family property, each party shall bear own costs

**DATED, SIGNED AND DELIVERED IN MOMBASA THIS 5TH DAY OF NOVEMBER 2021.**

J.N.ONYIEGO

JUDGE