



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL CASE NO. 42 OF 2019 (O.S.)**  
**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**

**JDF.....APPLICANT**

**AND**

**DB Alias DB Alias DF.....RESPONDENT**

**JUDGMENT**

1. JDF the Applicant and DF the Respondent got married on the 29<sup>th</sup> of November, 1994. The said marriage was dissolved on the 11<sup>th</sup> of May, 2011. Both the parties were previously married to other spouses and divorced. The two did not sire any children, the Respondent (wife) brought to the marriage two issues of her previous marriage.

2. According to the applicant, when the going was good within their marriage the two acquired several assets most of which are listed hereunder as follows;

**i. L.R. No. 209/2197 – Flat [...] Wambugu Lane**

**ii. L.R. No. [...] Membley farm**

**L.R. No. [...] Membley farm**

**L.R. No. [...] Membley farm**

**iii. An apartment and beach plot Pondicherry in India**

**iv. Two Apartments in Auroville Pondicherry India**

**v. Motor vehicles:**

KAA [...]

KAW [...]

KAG [...]

KAD [...]

KRS [...]

**vi. Household items**

**vii. Bank Accounts;**

Fixed Deposit Account [...]

Fixed Deposit Account [...]

Fixed Deposit Account [...]

Fixed Deposit Account [...]

Fixed Deposit Account [...]

Fixed Deposit Account [...]

Fixed Deposit Account [...]

**viii. Investments**

Holiday share investment

Ocean Paradise Village

Micato Returns.

3. The Applicant moved the court so as to have the properties acquired during the subsistence of the marriage shared between them on an equal basis. It was his case that most of the listed properties were bought solely by him during the marriage as the respondent did not have a big income, however since they were acquired within marriage, he is willing to have the same shared. However, L.R. No.[...] Court Apartment Rhapta Road Westlands, he contends is not up for sharing, as the same was solely bought by him before marriage and it therefore does not form part of the matrimonial properties.

He also seeks to have the monies in the banks, shares and motor vehicles registration shared equally.

4. The Respondent's position is that a number of assets as listed above are not available for distribution as some were disposed of with consent and knowledge of the Applicant and proceeds used to defray educational costs and some reinvestment done. It is her case also that most monies in the fixed deposit accounts were transferred to a friend of the Applicant in the UK and she is not aware of any existing funds as of now as alleged. She is equally not aware of the whereabouts of investment/shares listed as the Applicant was fully in charge of the same, further that the Applicant dealt with vehicles and therefore she does not know of what became of them.

5. The Respondent admits having sold the Beach plot and one apartment at Pondicherry to offset school fees and for reinvestment. She also confirms having collected rent from the [particulars withheld] house since their estrangement to-date close to 17 years which sum the Applicant assessed at GPD 204,000.00. She equally admits selling two plots of the 3 plots at Membley farm.

As regards L.R. No. [...] Court Apartment No. [...] Rhapta road it is the Respondent's case that the same forms part of the matrimonial property and further the Applicant had expressed his wish to gift it to her earlier in their relationship.

6. From the pleadings and evidence, the following properties are not disputed as being matrimonial property and available for distribution:

**i. L.R. [...] –Wambugu Lane Flat [..]**

**ii. 1 plot at Membley farm**

**iii. An Apartment at Pondicherry**

**iv. Assorted household goods**

**v. Motor vehicle registration [...], and**

**vi. Registration [...] Mitsubishi**

7. In dispute are:

i. Bank Accounts

ii. Investments (shares)

iii. 2 plots at Membley

iv. Property at Pondicherry

v. Marion flat

8. The law expects the person who asserts an issue to present evidence in support of the same, more specifically where the said issue is being challenged.

9. The Applicant in support of his claim to share on 50/50 basis monies allegedly in accounts in Pondicherry India being savings and investment made during the marriage relied on a document that had been prepared by the Respondent in an attempt to settle this matter out of court.

10. The court was not furnished with recent documents of the alleged savings accounts Nos:

[..]

[...]

[...]

[...], and

[...]

Consequently, the court is unable to arrive at a definite conclusion in the absence of evidence.

11. Likewise, no documents were made available to prove the existence of investments in;

**Holiday investments RCI**

**Ocean Paradise Investments and**

**Micato Investments**

The claim must inevitably fail.

20. Both parties worked for gain during the subsistence of marriage and are amenable towards sharing of agreed and existing matrimonial properties on 50/50 basis which is in tandem with the law.

21. Therefore, left for the court is to identify what constituted matrimonial property, investigate and arrive at a decision of what is available, arrive at a decision on those already disposed of and thereafter proceed to apportion.

22. **Section 6(1) of the Matrimonial Property Act 2013** (the Act) which is the operational law defines matrimonial property to mean:

**a. The matrimonial home or homes;**

**b. Household goods and effects in the matrimonial home or homes;**

**c. Any other immovable and movable property jointly owned and acquired during the subsistence of marriage.**

**Section 2** of the Act, defines Matrimonial Property as to mean any property that is owned or leased by one spouse or both spouses and occupied or utilized by the spouse as their family home.

23. In distributing the matrimonial property and in being as equitable, I realise that 50/50% sharing may not be attainable due to affluxion of time, lack of sufficient evidence being place in court and doing the best I can I distribute the matrimonial properties as follow:

**Respondent:**

i. ½ share of L.R. No. [...] Wambugu lane Flat B6.

ii. ½ share of remaining plot at Membley farm

iii. ½ share of the remaining flat Pondicherry

iv. ½ share of assorted household goods as will be agreed by the parties.

v. Motor vehicle registration No. [...] which she acknowledges was in her possession.

**Applicant**

vi. ½ share of L.R. No. [...] Wambugu lane Flat [...].

vii. ½ share of remaining Membley farm

viii. ½ share of the remaining flat in Pondicherry

ix. ½ share of assorted household goods as will be agreed by the parties.

x. Motor vehicle registration No. [...].

24. In recognition of the Respondent's admission that:

i. Rent for the Wambugu lane property has gone to her account from 2011 to date at the rate of Kshs.70,000/= which would be to the tune of Kshs.6,720,000/=.

ii. She sold Membely properties for approximately Kshs.3 million.

iii. Sold 2 properties in Pondicherry and utilized the money to the exclusion of the Applicant.

I am of the view that justice of this matter militates towards the Applicant retaining to his exclusive use and to his name L.R./ No. [...] court Apartment No. [...] Rhapta Road Westlands.

Further there is an admission that the said property was bought before marriage between the two. Any suggestion that the same was transferred through a casual note from the applicant to a lawyer is nothing but a "big joke". Both parties are well educated, have transacted in property severally and know that any valid transfer would require execution of transfer documents which did not happen in this instance further there was no claim that the said property was used as a matrimonial home.

The properties as distributed may be sold or parties may buy out the other by way of an agreement failure of which the same be valued. Costs of valuation be shared.

25. Each party will meet their costs of the suit.

**SIGNED DATED and DELIVERED** in open court this **6<sup>TH</sup>** day of **FEBRUARY, 2020.**

.....

**ALI-ARONI**

**JUDGE**