



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL SUIT NO. 63 OF 2017 (O.S.)**

**IN THE MATTER OF MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

**FM- G.....APPLICANT**

**VERSUS**

**MNG.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Plaintiff/Applicant herein FM-G (hereafter referred to as the Applicant) filed this Originating Summons dated 19<sup>th</sup> October 2017 pursuant to Article 45 of the Constitution and Section 17 of the Matrimonial Property Act 2014 against the Defendant/Respondent MNG (hereafter referred to as the Respondent) seeking the following orders that:

**a. A declaration that the property (movable and immovable) acquired by joint funds and efforts of the Applicant and the Respondent (being the following) are matrimonial property, jointly owned by the Applicant and Respondent:-**

**1. 5 bedroom maisonette and 3 bedroom bungalow both situate on LR NO. NAKURU/MUNICIPALITY BLOCK [xxxx], Milimani, Nakuru County;**

**2. 2 bedrooms Apartment situate on LR NO. NAKURU/MUNICIPALITY BLOCK [xxxx], Milimani, Nakuru County;**

**3. 3 bedrooms Masionette No. AX Lonesview Estate on LR NO. [xxxx] Mlolongo Machakos County.**

**b. An order that a valuation be done for the properties above by a valuer jointly appointed or identified mutually from the Institute of Surveyors of Kenya and the cost of the same be shared equally;**

**c. An order do issue distributing the net values of the properties in 1 (a), (b) and (c)**

**d. That this Honorable Court be pleased to grant such further or other relief as may be just in the circumstances;**

**e. That the cost of this suit be in the cause.**

2. The application is premised upon grounds stated on the face of it and an affidavit sworn on 13<sup>th</sup> October 2017 by the applicant. In response, the respondent filed a replying affidavit on 4<sup>th</sup> December 2017 contesting the applicant's claim.

3. The applicant and the respondent celebrated their marriage on 16<sup>th</sup> December 2006 at the Queen of Apostles Church in Nairobi under the Christian Marriage and Divorce Act. Their marriage was blessed with two issues namely: KGN and KMN born on 28<sup>th</sup> June 2005 and 28<sup>th</sup> December 2007 respectively.

4. Due to allegations of cruelty allegedly meted against the applicant and desertion of the applicant from their matrimonial home, their marriage hit a rock. It was subsequently dissolved on 10<sup>th</sup> November 2017 and a decree nisi absolute issued on 20<sup>th</sup> December 2017.

Consequently, this suit was filed seeking a declaration that the properties herein above listed were acquired during coverture and that the same be shared out equally.

### **Applicant's Case**

5. It is the applicant's case that, after celebrating their marriage, they settled and continued cohabiting as husband and wife in Nakuru. That during the subsistence of their marriage, they jointly acquired three properties which form the subject of these proceedings.

6. Regarding their matrimonial home (house) Nakuru/Municipality Block [xxxx] Milimani the applicant confirmed that when she got married, the respondent had already acquired the said parcel of land with an old three bedroomed house thereon. That the respondent later on caused the property to be registered in their joint names and a title deed issued.

7. She averred that, sometime on 3<sup>rd</sup> April 2007 they jointly applied for a mortgage facility of Kshs.6,395,778.25 from Housing Finance to enable them construct a five bedroomed house within the same property. That to secure the loan, her employment documents were used as collateral to secure preferential loan rates as she was by then working at [particulars withheld] University on permanent and pensionable terms.

8. She further averred that, on 23<sup>rd</sup> August 2010, they again applied for a top up loan to the tune of Kshs.1,500,000= . That upon completion of the main house, they embarked in renovation of the old 3 bedroomed house which they later rented out and is currently fetching Kshs.30,000/= per month. That her contribution towards renovation was in cash or cheques given to the respondent as evidenced by exhibits FMG 9 (i) and (ii).

9. She stated that, upon separation in June 2014, she relocated to Nairobi where she currently resides with her children. Due to increased financial pressure in terms of renting a house and daily upkeep of the children, she terminated her contribution towards mortgage loan repayment. She stated that when she stopped contributing, they had already paid 8.5 million and the balance of 4,513,000/= was cleared by the respondent. Referring to her contribution towards renovation of the 2 bedroomed, she claimed to have contributed Kshs.500,000/= out of a total cost of 1 million.

10. Concerning the two bedroomed apartment situate on L.R. No. Nakuru/Municipality block [xxxx], Milimani, she stated that the same was acquired and registered in the 2012. As proof of her contribution, she attached Exh FMG 13 (i), (ii) and (iii) being copies of receipts, bank statements and bankers cheques to that effect. She estimated the current value of the property at Kshs.6,000,000/= and that the respondent has been collecting rent of Kshs.25,000/= per month.

11. Touching on the 3 bedroomed maisonette in Mlolongo, Machakos, acquired sometime 2010, the applicant claimed to have paid a deposit towards the purchase of the house before the respondent agreed to contribute. She attached copies of receipts, cheque transactions and bank statements marked FMG13 as proof.

12. She also claimed that the current market price of the said house is 10 million and that it has been rented out at Kshs.36,000/= per month. She contended that her contribution towards the acquisition of both properties was both direct and indirect.

13. It was her argument that, amicable settlement having failed, the properties should be sold and the sale proceeds shared out equally. Alternatively, she proposed the matrimonial home be sub-divided and the portion with 3 bed room bungalow be transferred to her solely together with the 2 bedroomed apartment in Milimani (2<sup>nd</sup> property) and the maisonette in Mlolongo Machakos (3<sup>rd</sup> property) thereby leaving the respondent with the larger portion of the matrimonial home with the 5 bedroom maisonette in property one.

14. During the hearing, the applicant entirely adopted the averments contained in her affidavit in support. In response to the proposal by the respondent on cross examination to create a trust for the property to be held in trust for the children, she dismissed the arrangement as it did not make sense and that children have nothing to do with matrimonial property. On further cross examination, she admitted that the land in property No. 1 together with the three-bedroom bungalow was acquired the year 2001 long before they got married.

### **The Respondent's Case.**

15. The respondent admitted the fact that he got married to the applicant and later divorced as claimed. He however disputed the claim by the applicant that matrimonial property Nakuru Municipality Block [xxxx] was jointly acquired and developed and that it should be shared out equally. He averred that he bought the property consisting of a 3bedroom house on 1<sup>st</sup> February 2001 before he married the applicant (See MMG1 copy of sale agreement and copy of lease MMG2).

16. He further averred that, sometime 2012, he generated architectural plan to built a 5 bedroomed house on the same property (See annexure MNG4). He admitted transferring the property into their joint names the 2007 and a title deed issued as such but in the interest of the family and the future of the children.

17. He conceded admitted that they took a joint loan of Kshs.6,395,778.25 and a further top up of Kshs.1,500,000/= but denied that it was solely serviced on the applicant's documents as he was a lawyer in the panel of lawyers acting for Housing Finance Corporation of Kenya hence had the benefit of preferential and lower loan repayment rates as well.

18. He stated that out of the Kshs.151,000/= being the monthly repayment amount, the applicant used to contribute Kshs.45,000/= - 50,000/= per month while he contributed Kshs.100,000/=. That when the applicant stopped contributing, he single handedly contributed Kshs.143,000/= per month until he cleared the loan.

19. He expressed his desire to have the property held in trust for the benefit of the children and that the property would in the future accommodate their children to built their houses.

20. In reaction to the two other properties (Property 1 and 2), he admitted they were bought in joint names and through joint efforts during the pendency of the marriage. He stated that it was the applicant who has been collecting rent at Kshs 36,000/= out of the maisonette No. [xxxx] Machakos. He admitted also that he was the one collecting rent at Kshs.25,000/= per month out of Nakuru Municipality Block [xxxx].

21. He proposed to transfer property No. 2 and 3 to the applicant to be held in trust for the children. As to property No. 1 he proposed it be registered in his name or joint names in trust for the children or jointly with the children.

### **Submissions**

22. Mrs. Namisi appearing for the applicant filed her submissions on 22<sup>nd</sup> October 2018 reiterating the averments contained in the applicant's affidavit. She contended that the loan repayment in respect of the mortgage obtained to build a 5 bedroomed house was in equal contribution. She justified this arguing that, out of a total of Kshs.150,000/= per month, the applicant paid Kshs.50,000/=. That from their 3 bedroomed bungalow in the said property, rent at Kshs.35,000/= was used to pay part of the loan and the balance of Kshs 70,000/= by the respondent so as to also cover the top up loan of Kshs.1,500,000/= which money the respondent pocketed for his office operations.

23. She opined that the loan was given at preferential lower rates because of the employment position of the applicant serving as collateral thus indirect contribution. Further, counsel submitted that by bearing children, nurturing them and her companionship to the respondent, she indirectly made contribution. To support her position, counsel referred the court to the decision in the case of **Agnes Nanjala William vs Jacob Petrius Nicholas Vander CA No. 127/2011** where the court recognized both monetary and non monetary contribution. Counsel further referred the court to the case of **Echaria vs Echaria Civil appeal No. 75/2001 and Burns vs Burns 1 All E.R 244** where both courts recognized indirect contribution toward acquisition of matrimonial property.

24. As to whether the property should be held in trust for the children, counsel urged that there is no law recognizing children in division of matrimonial property proceedings. Counsel urged the court to adopt the proposal by the applicant but on a no prejudice basis to have the parties' respective shares of the property being registered in each party's name in addition to the children to ensure that they are safeguarded.

### **The Respondent's Submission**

25. The respondent a lawyer by profession who appeared in person literally adopted averments contained in his replying affidavit. He urged the court to find that the matrimonial property land together with a 3 bedroomed bungalow were exclusively acquired by him before he married the applicant and that before any distribution takes place, that part of property must be excluded.

26. He asserted that matrimonial property does not involve land acquired before coverture. That matrimonial property only consists of what a party to a marriage has contributed and not to acquire property regardless of non-contribution. He referred the court to the decision in the case of **PNN vs ZWN CA Civil Appeal No. 128/2014 (2017) eKLR** where J. Kiage stated:

**“I think it would be surreal to suppose that the constitution somehow converts the state of covertures into some sort of laissez faire, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designing to convert otherwise honest people into gold digging, sponsor seeking, pleasure loving and divorce hoping brides and, alas, grooms”**

27. He expressed himself that the only property which should be subject of matrimonial property is the main home (5 bedroomed) and not the entire property. It was his submission that the applicant only contributed Kshs.50,000/= per month from 2007 – 2014 towards the loan repayment making a total of Kshs.3,510,000/= while he contributed Kshs.7,800,000/= during the same period and a further 6,500,000/= from 2014 up to 2017 when the loan was cleared making a total of Kshs.13,950,000/=. In his view, he contributed 75% and the applicant 25% only. He urged the court to apply Section 7 of the Matrimonial Property Act to apportion the property according to individual contribution.

28. The respondent dismissed reliance on **Echaria vs Echaria** case which according to him has since been declared as bad for espousing the principle that equality is equity which principle has been overtaken by the enactment of matrimonial property Act. He referred the court further to the decision in the case of **FIDA vs The Honourable Attorney General and ISLA, Nairobi, HC Constitutional Petition No. 164B of 2006** where the court recognized that contribution towards acquisition of matrimonial property by parties to a marriage whether monetary or nonmonetary should be treated equally.

29. Referring to the other two properties (property 2 and 3), he offered to have the two registered jointly in trust for the children. Lastly, he urged the court in the alternative to give the two properties (property 2 and 3) to the applicant and treat the same as fair compensation towards her contribution in the Nakuru Matrimonial property (property No.1).

### **Determination**

30. I have considered the pleadings herein and rival submissions by both parties. Issues that emerges for determination are:

**(1) Whether the properties in question were acquired by the joint efforts of both parties during coverture.**

**(2) If the answer to (a) is in the affirmative, what was each party's contribution.**

31. Before I endeavor determining the issues at hand, it is crucial to highlight on salient legal principles governing division of matrimonial property in Kenya. Key among them is, the Matrimonial Property Act No. 49/2013. At Section 6, matrimonial property is defined as

- (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.

32. The Act further goes on to provide at Section 2 what entails contribution in matrimonial property as:

- (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.

33. Section 7 lays further emphasis on ownership of matrimonial property as follows:

**“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”.**

34. Section 14 also adds more flesh by providing that; where 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 a rebuttable presumption that their beneficial interest in the matrimonial property are equal.

35. From the above quoted provisions, no single party will enter into a marriage relationship with nothing and leave with more than he or she contributed during the subsistence of the marriage. In other words, courts must be vigilant in interrogating the actual role played by each spouse in a marriage relationship in terms of investment or property acquisition whether indirect or direct to discourage undue advantage, indolence or dependency on a co-spouse marital union.

36. There is no doubt that the applicant and the respondent started cohabiting as husband and wife the year 2004 but solemnized their marriage in December 2006. It is also common ground that due to irreconcilable differences their marriage nosedived and a divorce ensued on 10<sup>th</sup> November 2017. The crucial question that pegs for an answer is whether the three properties were acquired during the subsistence of their marriage and the extent of each party’s contribution in the acquisition. In answer to that question, I will consider each property separately and make a finding.

**(a) L.R. No. Nakuru/Municipality Block [xxxx] Milimani Nakuru**

37. Both parties are in agreement that this property was their matrimonial home having settled and cohabited in there since celebrating their marriage up to the time of their separation. They are also in agreement that this property originally comprised of a three bedroomed house (bungalow) and that it was bought by the respondent alone on 1<sup>st</sup> February 2001 much earlier before he married the applicant. To prove that fact, the respondent attached a sale agreement (MNG1) and a lease certificate to that effect (Ex. MNG3).

38. In determining whether property acquired by a party before marriage is matrimonial property, Section 5 of the Matrimonial Property Act provides an answer as follows; **subject to Section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property.**

39. Further guidance on this subject can be derived from the wisdom espoused in the case of PAW- M vs CMAW –M (2016) eKLR where the court held that:

**“The plaintiff cannot claim exclusive possession of property. She came to the property by virtue of her marriage and her rights to the property are tied with the marriage status. She cannot claim to be the owner of the property as exclusive possession is reservation of a property owner”**

40. Similar position was held in the case of M V M Civil Appeal No. 74 of 2002 (2008) IKAR, 247 where the court of appeal held that:

**“...property inherited and gifted to one spouse before the marriage, and where property exists in the same condition as it was inherited or gifted, no problem arise. The spouse to whom it was gifted should be allowed to retain it. Problems however arise where improvements are made using matrimonial recourses and then the property ceases to be in its original form and increases in value”**

41. From the above provisions and case law, it is clear that the applicant cannot lay claim over the land and the three bed roomed bungalow acquired by the respondent before she got married. Save for the contribution towards its renovation which was in this case admitted to be Kshs.500,000/= out of a total of Kshs.1,000,000/= spent in renovation, there was no other further contribution.

42. Having held as such, the applicant's entitlement is to the extent of her contribution towards the renovation of the three bed roomed house and for the construction of the main house. In other words, the value of the land and the three-bedroom bungalow before renovation is not subject to distribution as they were acquired before marriage.

43. However, as stated in PAW-M vs CMAW-M(supra), it becomes a challenge to assess the value of the contribution towards renovation as at now considering that the 3 bed roomed house was not valued before renovation commenced. Since parties are in agreement that the applicant contributed Kshs.500,000/= towards its renovation against a total cost of Kshs.1,000,000/= I will only assess the current value of her contribution taking into account the rate of inflation for the last 13 years and increase in value at Kshs.3,000,000/= as reasonable compensation.

44. I will now turn to each party's contribution towards construction of the main house. The applicant claimed to have contributed 4.5 out of a total of about 13.5 million. The respondent stated that the applicant contributed about 3.5million while he paid Kshs.13.5 Million to clear a total of about 17 million inclusive of interest.

45. The applicant admitted terminating her contribution after separation and that she took full responsibility in taking care of the children as she also paid rent for her house hence her indirect contribution towards the loan repayment. She also claimed that the lower rates they were given was by virtue of her employment which was treated as collateral. Both parties agreed that from the onset the applicant was contributing about 50,000/= per month while the respondent contributed Kshs.150,000/=. The respondent by then was collecting rent of about 30,000/= from their 3 bed roomed bungalow house in Milimani and Kshs.25,000/= from the other 2 bed roomed house within Nakuru Municipality. He was staying alone and therefore not paying rent nor buying food for children, payment for electricity, clothing, medical care, house help and the general daily upkeep of the family.

46. Considering all those responsibilities, and assuming the Kshs.30,000/= rent from the bungalow took care of part of the loan, the respondent is left with a balance of Kshs.70,000/= loan repayment per month. Out of the Kshs.70,000/=: take out his Kshs.50,000/= monthly contribution thus leaving a balance of Kshs.20,000/= extra contribution which is not anywhere near the applicant's other responsibilities referred to herein above. To that extent, I will comfortably say that the non-monetary contribution made by the applicant as referred to herein above, will compensate for the extra contribution the respondent claims to have made over and above that of the applicant

47. Besides, part of the loan was a top up of Kshs.1,500,000/= which the respondent allegedly put into use in his office operations thus the need to pay more in loan repayment. It is trite that in assessing contribution towards acquisition of matrimonial property, the court must take into account both monetary and non-monetary contribution bearing in mind that such assessment is strictly not pegged on any mathematical precision See NWM vs KNM (2014) eKRL and PNN vs ZWN (2017) eKLR.

48. For those reasons, it is my finding that both parties made equal indirect and direct contribution towards the loan repayment which was used to construct the main house and therefore entitled to 50% each exclusive of the value of the land in which its stand.

**(b) 2 bedroom apartment LR Nakuru/Municipality Block [xxxx] Milimani Nakuru, and**

**(c) 3 bedroom maisonette No. [xxxx] erected on LR [xxxx] Mlolongo, Machakos County**

49. Both parties are in agreement that the two properties jointly registered in their names were acquired during the subsistence of the marriage through their joint efforts in equal share. Pursuant to Section 14 of the Matrimonial Property Act, the two properties shall be shared equally in the ratio of 50% by 50%.

50. In her endeavor to arrive at a fair distribution without subjecting any of the properties for sale, the respondent proposed to take the entire property L.R. Nakuru/Municipality Block [xxxx] while the applicant takes the other two properties. On the other hand, the applicant proposed to take property 2 and 3 as well as a portion comprising the 3 bed roomed bungalow in property 1 after subdivision. In the alternative, the respondent proposed the properties be registered in their joint names in trust for the children.

51. Do children have a role to play in division of matrimonial property? Under the Matrimonial Property Act, children are not a factor for consideration. Ordinarily children should not feature in division of matrimonial property unless exceptional circumstances dictate. Such circumstances may include but not limited to, use of family vehicle when going to school or the only house the subject of the proceedings is where the children reside before age of majority and to throw them out would not be in their best interest.

52. I do not find any exceptional circumstances in this case to warrant transfer of the disputed properties into the children's names unless by consent of parties. Matrimonial issues under Matrimonial Property Act are purely private affairs between a couple who have quit their union. Therefore, I do not find that last option viable in the circumstances as it will trigger future litigation on rent collection, misuse and non-accountability before the children are of age.

53. Having made the above conclusion, it is my finding that the application herein partially succeeds and therefore inclined to make the following declarations and orders:

**a) That land in respect of Nakuru/Municipality Block [xxxx] Milimani Nakuru with a three bed roomed bungalow exclusive of the five bed roomed home was acquired by the respondent before coverture.**

- b) That a sum of Kshs.3,000,000/= being the applicant's contribution towards the renovation of the 3 bedroomed bungalow on the said property shall be payable to the applicant.
- c) That the construction of a five bedroomed house on the said property (property 1), was realized through the joint effort of both parties at the ratio of 50% to 50%.
- d) That upon compensating the applicant as per prayer b, the applicant shall be entitled to the value of the bungalow or its equivalent value.
- e) That the applicant is entitled to the land without the fixtures or its equivalent value exclusively.
- f) That the five bedroomed house shall be valued and each party be entitled to 50% to 50% share.
- g) That each party shall be at liberty to buy out the other party's beneficial interest in the property with first priority given to the respondent.
- h) For avoidance of doubt, incase of sale of the property, the value of land shall be assessed separately and its proceeds goes to the respondent, the value of the 3 bedroom bungalow shall be ascertained separately and the proceeds given to the respondent less Kshs.3,000,000/= to be given to the applicant and lastly, the value of the five bedroomed house be shared out equally.
- i) That LR Nos Nakuru/Municipality Block [xxxx] Milimani Nakuru and Maisonette No. [xxxx] on LR [xxxx] Mlolongo Machakos shall be sold and proceeds shared out equally.
- j) That each party shall be at liberty to buy out the beneficial interest of the other in those two properties named in h above with the applicant having priority.
- k) That to ascertain the value of the properties as indicated above, both parties shall engage a mutually agreed valuer to ascertain the current market price.
- l) Parties shall be at liberty to enter a consent if they wish to transfer their beneficial interests to the children subject to clear terms
- m) This being a matrimonial issue with family inclination, each party shall bear his or her own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JULY, 2019.**

**J.N. ONYIEGO**

**(JUDGE)**