



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL SUIT NO. 32 OF 2010 (O.S)**

**FNK.....APPLICANT**

**-VERSUS-**

**PWW.....RESPONDENT**

**RULING**

1. The applicant and the respondent got married under Kikuyu customary law in 1994. On 20<sup>th</sup> December 2001 the marriage was solemnized under the **African Christian Marriage and Divorce Act** (now repealed). The marriage was blessed with two issues. Following a petition filed by the applicant, the marriage was dissolved.

2. The respondent filed an originating summons to determine the matrimonial property acquired between them. In a judgment delivered on 26<sup>th</sup> September 2014 the court determined that LR No. [...] Kahawa Sukari and motor vehicle Toyota Spacio registration number KAY [...] were matrimonial properties between them. It was found that the applicant's contribution to the acquisition of the land was 75% and the respondent's contribution was 25%. For the vehicle, each party's contribution was 50%. The properties were valued. At the end of the day, it was ordered that the applicant pays to the respondent Kshs.3,305,525/= in respect of the properties.

3. It is not disputed that there were proceedings between the parties for maintenance of the children. The proceedings were in children case No. 605 of 2009 at Nairobi filed by the applicant. On 21<sup>st</sup> January 2010 the respondent was ordered to pay Kshs.10,000/= per month being maintenance. It was pleaded by the applicant, and not denied by the respondent, that the latter fell into default in regard to the payment of the maintenance, and that, as matters stand, a total of Kshs.1,041,700/= is outstanding. Evidence of a notice to show cause why the respondent should not be sent to civil jail for non-payment was annexed to the present application.

4. The application dated 15<sup>th</sup> November 2018 was filed by the applicant seeking that she be allowed to pay to the respondent Kshs.3,305,525/= less the Kshs.1,041,700/= that the respondent owes her in maintenance of their children. It is evident that the respondent has demanded from her the Kshs.3,305,525/=. This application for set-off was brought under **Order 7 rules 3 and 4, Order 22 rule 22 and Order 45 of the Civil Procedure Rules and sections 1A, 3A and 63(e) of the Civil Procedure Act.**

5. The response was that the applicant is a wealthy lady, a consultant with the World Bank and earning over Kshs.1,000,000/= monthly, and the suit property has a tenant who pays Kshs.45,000/= per month which she has not accounted for. He claimed to be unemployed, and that the applicant is bent on harassing and intimidating him. These allegations, I find, do not go to the substance of the application for set-off.

6. On the facts on record, I find that, instead of the parties prosecuting separate execution proceedings to recover the money owed by one party against the other, it is just, efficient and timely use of court's and the parties' resources to allow the set-off, even considering that the two claims were independent of each other (**County Government of Kilifi –v- Mombasa Cement Limited [2017]eKLR**). I consequently allow the applicant to pay to the respondent Kshs.3,305,525/= less Kshs.1,041,700/=, which comes to Kshs.2,263,825/=.

7. I consider that the Kshs.2,263,825/= has remained unpaid since 23<sup>rd</sup> October 2018. I ask that the payment be done within 90 days, failing which the present application shall be deemed to have been dismissed.

8. I do not make any order as to costs.

**DATED and DELIVERED at NAIROBI this 7<sup>TH</sup> NOVEMBER 2019**

**A.O. MUCHELULE**

**JUDGE**