



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 62 OF 2018 (OS)**

**IRENE CHEPKOECH NG'ENO .....**

**APPLICANT**

**VERSES**

**WYCLIFFE SITATI NALIANYA .....**

**RESPONDENT**

**JUDGEMENT**

1. In her Originating summons dated 19<sup>th</sup> October 2018 the Applicant prayed for the following orders:-

**(1) That an order do issue declaring that 50% or such other or higher proportions of the underlisted properties held jointly by the Applicant and the Respondent is for the beneficial interest of the Applicant.**

**(i) Property title number Madaraka Infil Flat No. C719 situated in Madaraka Estate Nairobi County held by the Applicant and the Respondent.**

**(ii) Property in Sirisia center situated in Bungoma county currently leased to**

**various businesses and rental houses held in the name of the Respondent.**

**(iii) A white pick-up motor vehicle held in the name of the Respondent.**

**(iv) A Toyota Yaris registration Number 62403 in Oman held in the name of the Respondent.**

**(v) A plot in Bungoma County held in the name of the Respondent directly or indirectly.**

**(vi) A two-bedroom property built in rural home of the Respondent situated in Bungoma county.**

**(vii) A saving account in the name of the Respondent.**

**(2) That the division to separate the interest in the properties be done within 90 days from the date of the judgement at the Respondent's costs.**

**(3) That the Respondent be ordered to transfer the Applicant's share in the property to her within 60 days from the date of divisions.**

**(4) That in default the Registrar High Court of Kenya be authorised to sign any transfer in place of the Respondent or any other person holding any title on behalf of the Applicant to affect all the orders of this court in favour of the Applicant.**

**(5) That an order do issue declaring that the Respondent is accountable to the Applicant in respect of all income derived from the said properties.**

**(6) That this court be pleased to order that the properties and income from the same be settled in proportions aforesaid as the court may order.**

**(7) Costs be provided for.**

2. The suit was supported by the affidavit sworn by the Applicant dated 2<sup>nd</sup> October 2018 and the supporting documents.
3. The Respondent on his part filed a replying affidavit dated 13<sup>th</sup> October 2020 and the Applicant filed a further affidavit dated 3<sup>rd</sup> February 2021.
4. When the matter came up for directions the court ordered the same to proceed by way of oral evidence. Both parties testified and did not call any witnesses. They relied heavily on their affidavits on record and the annexures thereto.
5. What is not disputed herein is the fact that their marriage broke down and vide case number CMCC 294 of 2016 a decree absolute was eventually issued and what remained therefore is this cause.
6. There was also a children's case between the two which featured in the cause of the hearing.
7. The thread of the Applicant's case is that she heavily participated in the acquisition majorly of the Madaraka

property. She testified that she made an initial deposit of Kshs. 1 million and she attached a statement to that effect.

8. She further testified that she went to Oman where the Applicant was working and was able to acquire some part time job as a swimming instructor. Previously before going to Oman, she had been working with two companies. Through her savings therefore she was able to contribute to the repayment of the loan and other family needs.
9. She emphasized that she took care of the children while the Applicant was away on duty and that it was a crucial factor which the court ought to take into consideration.
10. She also produced some bills of quantities for the development of the Bungoma property. She said that this was their rural home and she participated directly and indirectly in its development.
11. She also testified that she would occasionally pick and drop the Respondent at the airport when heading to Bungoma, the rural home and thus she was entitled to the said properties in Bungoma.
12. On motor vehicles she emphasized that she had a share as well and this ought to be taken into account.
13. The Respondent on his part did not deny the issue of their marriage having broken down. He however claimed that the Makadara property was solely acquired by him through a loan facility and he produced evidence to that effect.

14. He said that the deposit allegedly made by the Applicant was not true as the amount claimed was as a result of selling of furniture and other household items while she joined him in Oman. He denied that the Applicant ever contributed at all to the acquisition of the same and he relied on the loan statement on record.
15. As regards the Bungoma properties he testified that this was his rural home and the house which was in his father's land was built by his parents now that he was the last born at home and by dint of cultural requirements.
16. He also denied development of any commercial property at Sirisia and that the bills of quantities were never affected at all as the idea was shelved noting that the land was not his.
17. As regards the motor vehicles he testified that the same was no longer in existence as it was sold by the Applicant and she purchased another Suzuki vehicle thereafter.
18. In essence he claimed that the Applicant cannot get half share of the properties as she did not contribute financially to its acquisition and further even the Makadara flat was still encumbered as the stamp duty and other statutory requirements are yet to be paid.
19. The court directed the parties to file written submissions which they complied.
20. The Applicant identified two issues for determination which mirrored those by the Respondent as well. These are whether the Applicant contributed to the acquisition of the matrimonial properties and whether or not she was

entitled to the above prayers. In other words, whether she was entitled to the 50% demanded.

21. Both parties reiterated the position taken in their rival affidavits and the testimony presented in court. I have perused both extensively as well as the mentioned authorities and see no need to reproduce them here.

### **Analysis and determination**

22. I agree with the parties that the twin issues for determination are the contribution of each of them in acquisition of the properties during coverture and whether it therefore ought to be shared equally as prayed by the Applicant.
23. In my view there was no evidence presented to the court in respect to the properties in Bungoma County by the Applicant. The closest piece of evidence was the bills of quantities titled.

***“Mr. Wyclef Sitati Nalianya proposed one storey commercial residential houses on plot. Bungoma municipality. Specifications and bills of quantities.”***

24. The Respondent acknowledged the same but argued that it never took off as the land in question was not his.
25. I think in the first instance it was incumbent upon the Applicant to provide details of the parcel of land in which the construction was to take place. Secondly was to provide evidence of real developments if any and her level of contribution. There was none.

26. At the same time the “*small home*” which the Respondent acknowledged was built by his parents and the same sits on his parent’s parcel of land. The Applicant did not counteract this. It can therefore not form part of a matrimonial property.
27. The same goes with the Toyota Yaris motor vehicle. There was no evidence to back it and I suppose that it was actually sold by the Applicant. The same goes to the “*white pick-up motor vehicle*” mentioned on the body of the application. There was no iota of evidence.
28. There was no evidence at all tendered by the Applicant of a saving account held by the Respondent either in his or joint names. The same is therefore mere speculation.
29. I think the contentious one and which I suppose is more valuable is the Makadara Flat. The Applicant contented that she contributed substantially up to Kshs. one million for its acquisition. She said that she paid Kshs. 800,000 in August 2010, Kshs. 205,387 in 2013, Kshs.183,729 and Kshs. 206,741 three times.
30. She said that she was in employment between 2004 and 2009 with Spectra Engineering and Avis communication respectively.
31. The Respondent countered this argument by stating that it was not possible to pay the sum of Kshs one million in 2010 as the agreement of purchase had not crystalized. He exhibited the letter of acceptance from National Housing Corporation (NHC) dated 3<sup>rd</sup> December 2012.

32. The said letter indicated the acceptance date as 3<sup>rd</sup> December 2012 although the Respondent's application was 13<sup>th</sup> November 2012.
33. This being the case therefore, there was no reason for the Applicant to pay the Kshs. one million way back in 2010 before the aforestated NHC communication.
34. I find the argument by the Respondent that the amount paid by the Applicant into his account was from the disposal of the household furniture when she joined him in Oman plausible as the Applicant did not object to this.
35. I also find the evidence of payments made on various dates as evidenced by the Respondent's attached bank statements to be plausible and believable.
36. In my view therefore, I find that the Applicant could have financially contributed to the acquisition of the Makadara property but not to the level made by the Respondent who clearly took some loan and as it is evident from the bank statements he paid fully and what was outstanding now was the stamp duty and other outgoing statutory requirements.
37. The issue of rent from the said house was not sufficiently argued by the parties. The Applicant submitted orally that it was the Respondent who collected but at the same time stated that when she was managing there was no guarantee of continuous occupation by the tenants.
38. I thus take the view that this ground was not established.

39. What then is the ultimate contribution by the Applicant? Section 2 of the Matrimonial Property Act states as hereunder:-

***“In this Act, unless the context otherwise requires—  
"contribution" means monetary and non-monetary contribution and 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;***

***"Family business" means any business which—***

***(a)is run for the benefit of the family by both spouses or either spouse; and***

***(b)generates income or other resources wholly or part of which are for the benefit of the family;***

***"Matrimonial home" means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;***

***"Matrimonial property" has the meaning assigned to it in section 6;***

***"spouse" means a husband or a wife.'***

40. I think the Applicant fully qualifies under the above sub headings. For all the period their marriage subsisted she assisted in taking care of the home as well as the children. The Respondent's argument that he contributed towards paying for the nanny is of course plausible but I doubt if it

diminishes the part taken by the Applicant as a mother to the children.

41. She provided companionship while in Kenya and Oman and although these cannot be quantified the Act recognizes the same.

42. Article 45 (3) of the Constitution provides equality during marriage and its dissolution. The same states thus;

***“(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”***

43. The view which this court and many others including the appellate courts take is that each case must be handled independently and the contribution by each party considered cumulatively and independently as well. Obviously, there is no formula or uniformity for that matter for the simple reason that couples enter into a marriage union to stay. There is always a trust which unfortunately is broken and causes such kind of suits. Otherwise, it could have been possible for each party to keep records and accounts for purposes of such disputes.

44. Nonetheless in the situation at hand I find and hold that the Respondent shouldered the heavy lifting of the liability in acquisition of the Makadara flat. I did not find a satisfactory proof that the Applicant substantially paid off the loan as she claimed.

45. She however qualifies under the provisions of Section 2 of the Act cited above.

46. In the premises I hold that the Applicant shall be entitled to 35% and Respondent 65% of the Makadara flat. Any outstanding liabilities in form of stamp duty or any outgoings shall be settled in that ratio.
47. The Applicant prayed that a valuation be undertaken within 90 days so as to know the value of the same. I think this is reasonable save that the costs shall be met by both parties in the above ratio.
48. The property shall thereafter be shared out in the said ratio and if not feasible either party be granted the liberty of buying out each other within 90 days after valuation and in default the same be sold in a public auction through a reputable auctioneering firm within 60 days thereafter.
49. As regards the other properties enumerated therein, the Applicant did not meet the threshold under Section 107 of the Evidence Act. In other words, she did not tender any evidence of her contribution in their acquisition and the prayers are disallowed.
50. **In the premises the court orders and directs that:-**
- (a) The property namely Makadara Infil Flat NO. C719 situate at Makadara Estate shall be shared in the ratio of 35% in favour of the Applicant and 65% for the Respondent and the same to be divided as outlined above.**
  - (b) The rest of the prayers are hereby disallowed.**
  - (c) Each party to bear respective costs.**

**Dated signed and delivered via video link at Nairobi  
this  
9<sup>th</sup> day of October 2025.**

**H K CHEMITEI  
JUDGE**