



REPUBLIC OF KENYA



KENYA LAW
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**HDG v EWW (Matrimonial Cause E15 of 2022)
[2022] KEKC 162 (KLR) (13 December 2022) (Judgment)**

Neutral citation: [2022] KEKC 162 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
MATRIMONIAL CAUSE E15 OF 2022**

IA HUSSEIN, PK

DECEMBER 13, 2022

BETWEEN

HDG PETITIONER

AND

EWW RESPONDENT

JUDGMENT

1. The petitioner filed this petition against the respondent for an order directing the Respondent to pay the amount of KES 20,000 per month towards the children's maintenance (food, clothing and rent); an order directing the Respondent to pay the amount of KES 20,000 per month towards the children's school fees and madrassa; that the Plaintiff receives her contributory share of their matrimonial properties, thus the commercial plot be given to the Plaintiff and be registered under her name and lastly for an order for salary attachment as the Respondent is a difficult person to provide children with maintenance and school fees.
2. The respondent filed an answer to the petition denying allegations raised by the Petitioner and seeking the dismissal of the suit with costs.
3. The petitioner's case is that she got married to the respondent sometime in April 2007 under Islamic law. They were blessed with two issues. The petitioner stated that during the subsistence of their marriage, the Respondent brought his three children from the previous marriage to their matrimonial home and the Petitioner took care of them to their adulthood. She further stated that at some point during the subsistence of the marriage, the Respondent fell sick and the Petitioner took care of him solely and even took out a loan from Equity to the tune of KES 60,000 to facilitate his medication.
4. It is the Petitioner's case, that sometime in 2013 during the subsistence of marriage she facilitated the purchase of a Motor Vehicle with instruction from the Respondent with a loan of KES 800,000 of which the Petitioner brought the car with KES 450,000 and the balance of KES 350,000 added in the



building of their residential house and that later in the year 2015 She further took another loan of KES 1.2 million from Equity Bank meant for the building of their matrimonial home and that she also took another loan from the same bank of KES 1.3 million for the building of their commercial property located in Moyale town in Marsabit County.

5. The Petitioner further stated that sometime in May 2020 parties divorced and the Petitioner was sent away from their matrimonial home, the Respondent took the custody of the two issues away from the petitioner, feeling desperate the petitioner sought help from the elders in a bid to get the custody of the minors back, the Respondent agreed to her demand but under the condition that the petitioner will provide for the needs of the issues single-handedly without his support and that she agreed under duress since then the Respondent has not been providing for the issues of marriage despite being a man of means, the fact which forced the Petitioner to seek a loan of KES 100,000 to cater for the issues of the marriage.
6. The respondent agrees in his answer to the petition that he was married to the petitioner under Islamic law in 2007 and they have two children together. He stated that at the onset of their marriage, he had brought his other three children from the previous marriage to stay with the petitioner but upon persistent complaint by the Petitioner he was forced to relocate the three children. The respondent further averred that it is true that he was taken ill during the subsistence of their marriage but he was under the care of his brother till when he recovered and further stated that he solely developed the suit properties through a bank loan and the petitioner has never contributed any cent at any time.
7. The respondent further stated that the parties are divorced and it's the petitioner who moved out of the matrimonial home on her own volition that he has been providing for the issues of the marriage and that he left half of his commercial plot in Moyale in care and control of the petitioner to cater for the upkeep of the issues of the marriage and that the suit should be dismissed for want of merit.

Analysis

8. I have considered the evidence before me and the written submissions by both parties. The issues for determination are: Whether the Respondent should maintain the children of the marriage; whether the Petitioner is entitled to receive her contributory share of the matrimonial properties.
9. In answering the first issue, the duty of this court while dealing with issues touching on minors, is neither bound by technicalities nor by strict rules of procedure. In determining the issues affecting minors, the paramount consideration should be the welfare and well-being of the children. In such case, the Court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a children's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. In the same breath, when a court of law deals with cases of maintenance of children, the court must be guided by article 53 of the *Constitution* which provides:

53.

- (1) Every child has the right–
 - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;



10. Further, under Islamic law the right and a corresponding obligation on maintenance of the minors arise out of the following verse of the Holy Qur'an;

“But he shall bear the cost of their food and clothing on equitable terms.”(Chap 2 V 233)

11. Maintenance is an aspect of parental care and is the responsibility of the parents of a child. Section 114(2) of the *Children Act, 2022* stipulates the considerations by which the Court shall be guided when making an order for financial provision for the maintenance of a child. These considerations include inter alia:

- a. the income or earning capacity, property and other financial resources which the parties or any other person in whose favour the Court proposes to make an order, have or are likely to have in the immediate future;
- b. the financial needs, obligations, or responsibilities which each party has or is likely to have in the immediate future;
- c. the financial needs of the child and the child's current circumstances;
- d. the income, if any, derived from the property of the child;
- e. any physical or mental disabilities, illness or medical condition of the child;
- f. the manner in which the child is being or was expected to be educated or trained;
- g. whether the respondent has assumed responsibility for the maintenance of the child and, if so, the extent to which, and the basis on which, he or she has assumed that responsibility, and the length of the period during which he has met that responsibility;
- h. whether the respondent assumed responsibility for the maintenance of the child knowing that the child was not his child;
 - i. the liability of any other person to maintain the child;
 - j. the liability of that person to maintain other children.

12. In a nutshell the respondent shall not be treated unfairly or harmed on account of the minors' needs as stipulated under Chap. 65 V. 7 of the *Holy Qur'an* which provides:

Let the man of means spend according to his means; and the man whose resource are restricted, let him spend according to what Allah has given him.

13. The record before the court has an indication on the earning capacity of both parties. It indicates the Respondent senior head teacher at Galmadido Primary School, earning a total of KES 144,000 with several deductions leaving him with a net pay of KES 30,644.65. Further, the Respondent admitted to taking care of his other three children from the previous marriage including paying their school fees the fact which was never rebutted. But he failed to adduce evidence in favour of his assertion of providing for the two children of the petitioner. Why would a father attend to the need of some of his children and negate others? It is a trite law the notion of justice in the Qur'an denotes moral virtues such as fairness, balance, temperance, and uprightness, which are universally objective values “ingrained in the human soul” (Q al-Shams, 91:8). The Qur'anic conception of justice goes well beyond the confines of its legal connotations and courtroom proceedings. As their principal mission on building a just social



order, Muslims are enjoined to act justly at all times, not only occasionally nor selectively, and to reject oppression and injustice (cf., al-Ma'idah, 5:8). For justice is an emphatic command; it is a universal objective and its impartiality may not be compromised, as far as possible, regardless of considerations of colour and creed (al-A.rāf, 7:29).

14. The Petitioner's assertion of providing for the needs of the minors singlehandedly on condition imposed by elders for the Petitioner to have back the custody of the minors is never rebutted or denied.
15. Children should not be reduced to mere chattels or toys for their parents. The absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions, must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of the welfare of the minor children and the rights of their respective parents over them.
16. Traditional mechanisms dealing with the custody and maintenance of the children under any customs cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minors. The traditional thinking of children as chattels of fathers must not ignore, eschew or obliterate the vital factor of the welfare of the minor.
17. Having considered the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future and, after considering the parties' financial needs, obligations, or responsibilities. As regards, the children and their financial needs and circumstances. The answer to the first issue is affirmative.
18. In answering the second issue it's a common ground that the Petitioner contributed to towards the construction of the suit property, the issue that requires serious consideration is her entitlement.
19. The court's attention is drawn to *AWA v HDD* [2018] eKLR the court stated that

“As held in the case of *MSR v NAB*, a dispute involving Matrimonial Property of a Muslim can be heard by either the subordinate court including the Kadhi's Court or the High Court provided that the Islamic law is used as the determinant factor.

Section 3 of the *Matrimonial Property Act* allows for the application of Islamic Law on Matrimonial property. The window granted to Muslims to have their disputes on the matrimonial property does not mean that matrimonial property belongs to a spouse. Even under Islamic Law, the Contribution of each spouse has to be determined depending on the circumstances of the case. The *Matrimonial Property Act* does not define the Court where such disputes are to be heard. Section 17 of the Act provides that a person may apply to a Court for a declaration of rights to any contested property.”
20. So, while I agree that article 45(3) of our *Constitution* guarantees equality in the treatment of either the wife or husband at the time of marriage, during the marriage and at the dissolution of marriage as read together with Article 24(4) of the *Constitution*, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of marriage should in all cases be shared equally upon divorce. This means that even in the context of marriage the right to own property individually is preserved by our Constitution as is the right of an individual to own property in association with others may include a spouse, children, and parents among others. The above principle is fortified by Chap 4 v 32 of the Holy Qur'an.



21. On ownership of matrimonial property Section 7 of the said [Act](#) provides:
- “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.”
22. On equality in marriage the attention of the court is drawn to [MEK v GLM](#) [2018] eKLR the court held that;
- “Equality in marriage is not a principle to be applied blindly nor is it intended to encourage dependency by one spouse. It is a situation where each party makes a contribution. In other words, it is not shifting the burden, but the sharing of responsibilities and benefits taking into account the gender limitations.”
23. Thus, when dealing with matrimonial property, the Court has to take into consideration –
- a. To what extent are the contributions made by each party in terms of money, property or work to acquire the properties;
 - b. Any debts owed by one of the parties made for their joint venture; and
 - c. The needs of the children from the marriage, who are not yet of age, if any, and subject to those considerations, the Court must, as much as possible, make a fair division according to each person’s effort or capital.
24. A spouse must prove contribution directly or indirectly, In [Nderitu v Nderitu](#) [1997] Kwach J held that;
- “A wife must prove that she contributed directly or indirectly to the acquisition of the assets. It is not enough for her to simply show that during the period under review she was sitting on the husband’s back with her hands in his pockets. She has to bring evidence to show that she made a contribution towards the acquisition of the properties”
25. In [ENK v MNNN](#) (Civil Appeal 559 of 2019) [2021] KECA 219 (KLR) (3 December 2021), the Court of Appeal stated that:
- “In any case marriage per se is not a ground for sharing properties acquired during marriage in an equal basis. The law in a well trodden path has established that parties must show evidence of their respective contribution to the properties and secondly to the family well being.”
26. In [PNN v ZWN](#) [2017] eKLR, Justice Kiage; expressed himself as follows:
- “I think that it would be surreal to suppose that the [Constitution](#) somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the [Constitution](#) gives automatic half-share to



a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words “50 per cent.”

27. In *EMK v SSS*, Thande J, held ‘The Qur’an recognizes that each spouse is entitled to their property. Surah An Nisa: 4:32 provides as follows

‘For men is a share of what they have earned, and for women is a share of what they have earned.’

It is clear from this provision of the Qur’an that earning is a key factor in determining each spouse’s entitlement to matrimonial property. Said differently, division of matrimonial property, must be based on each spouse’s contribution.

28. The evidence did establish on a balance of probabilities that the Petitioner took out several loans from an equity bank amounting to KES 2,500,000 and contributed towards the construction of the Suit properties. What is not clear is the quantification of non-monetary contribution considering the fact that the Petitioner was not a housewife but a full-time employee of TSC. This does not negate the indirect contribution made by the spouse in a full-time job such as performing domestic chores/home management among others.
29. It is a trite law the court of law cannot presume the existence of a fact, and the onus of proving the indirect contribution is on the claimant. Lastly, should the Petitioner be refunded whatever amount sought as suggested by the Respondent?
30. From the instant case, the very concept of the matrimonial property connotes a jointness of possession “partnership” is the relation between persons who have agreed in sharing the benefit or the profit of a venture they have established. In an ordinary set up persons who have entered into a partnership with one another are called individually “partners” and collectively “a firm” and the name under which their business is carried on is called the “firm name” and are bound by an express or implied terms of agreement, with some element of dominion but the same test is not necessarily the same in marital alliance since dominion in marital setup might be as a result of entrustment.
31. It is, therefore, manifest that in a partnership the wife contribution towards matrimonial property must by some clear and specific act indicates that the same contribution is either on account of debt or capital.
32. In the instant case, however, there is neither any allegation nor anything to show that the amount contributed by the Petitioner towards the construction of matrimonial properties is a debt or entrusted with the money for him to repay back when required.
33. In the light of the above it would be farcical to assume that despite the factum of a marriage and a joint contribution by the two spouses towards the matrimonial properties of which one is of a commercial nature the Petitioner would only be entitled to her actual share notwithstanding the changes in the value of the property. See *Mausu’a Alfiqbiyyah Alkuwaitiyah* Vol 26 P 60.
34. At all times the law must impart justice and fair play to the citizens or people and should not be torn or twisted by a morbid interpretative process that instead of giving haven to the disappointed and dejected litigant negates their well-established rights in law.

Disposition and Orders

35. It is accordingly ordered and or declared as follows:-



- i. That the respondent shall provide KES 10,000/- monthly towards the maintenance of the minors.
- ii. That the respondent shall provide clothing for the minors.
- iii. The petitioner shall provide minors shelter and medical cover.
- iv. That both parties shall contribute equally towards the school & madrassa and other school & madrassa-related expenses.
- v. The petitioner is entitled to matrimonial properties to the extent of her direct contribution subject to the evaluation report.
- vi. No order as to cost.

DELIVERED DATED AND SIGNED AT ISIOLO ON THIS 13TH DAY OF DECEMBER 2022

AJ ISHAQ

PRINCIPAL KADHI

In the Presence of:

Mr. Osman – C/A

Ms. Zainab for the Petitioner

Ms. Nyasani for the Respondent

The Petitioner

