



**HSJ v SAA (Matrimonial Cause 17 of 2019)
[2021] KEKC 12 (KLR) (13 September 2021) (Judgment)**

HSJ v SAA [2021] eKLR

Neutral citation: [2021] KEKC 12 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
MATRIMONIAL CAUSE 17 OF 2019
AH ATHMAN, SPK
SEPTEMBER 13, 2021**

BETWEEN

HSJ APPLICANT

AND

SAA RESPONDENT

JUDGMENT

1. Through Originating summons dated October 26, 2019 the petitioner prayed for the following orders:
 - i. That it be presumed that there is a presumption of marriage between the applicant and respondent
 - ii. That it be declared that the properties (movable and immovable) acquired by the joint funds and efforts of the parties during the subsistence of marriage and registered in the sole name of the respondent are held in trust for the applicant and the same be divided and / or sold and the proceeds of sale or subdivision be shared equally or according to each party's contribution towards its acquisition.
 - iii. That the respondent be restrained by an order of injunction from alienating, encumbering and disposing of, selling or in any manner dealing with properties known as Plot No xxxx / Tullu Toba – Isiolo Township (hereinafter referred to as ‘the plot’)
2. The originating summons is supported by applicant's sworn affidavit. She deposed that she was married to the respondent under Islamic law in 1996 and divorced in 2009 and were blessed with four children. She further deposed that they acquired and developed the plot where they established their matrimonial property and that she financially contributed towards the construction of the



matrimonial house and indirectly contributed towards the welfare of the family by purchasing food, clothing, house hold goods and paying school fees.

3. Through replying affidavit dated 22ⁿ November, 2019, the respondent opposed the originating summons. He deposed that the plot was given to him by his late sister before he had married the applicant and started improving it a year before the divorce. He deposed further that the matrimonial property is in Merti township where the applicant still resides with their children and denies the plot was at any time their matrimonial property or that the applicant in any way contributed towards its development. He further stated he had been solely providing for the family.
4. The court directed the originating summons be dispensed with by way of viva voce evidence as the issues could not be properly determined on affidavit evidence. The matter was dismissed for want of prosecution on September 14, 2020 but reinstated by consent adopted by court on applicant's application on November 3, 2020.
5. The parties were married under Islamic law at Merti. Their marriage lasted for thirteen years from September 15, 1996 to September 19, 2009 when they divorced. They are blessed with four children from their marriage. The applicant is a teacher while the respondent is a Police Officer. The parties' matrimonial home was in Merti where the applicant worked, the respondent often lived in different towns depending, due to the nature of his work, on posting. The respondent was stationed in Naivasha in 2007 when a six-unit house for let was developed in Isiolo. This development is the issue in dispute in this matter.
6. Upon reading the depositions by parties and hearing the parties and their evidence, the issues for determination in this matter are:
 - i. Whether or not the plot qualifies to be referred to as matrimonial property and
 - ii. Whether or not the applicant contributed to the development of the plot and the extent of the contribution, if any.
 - iii. Whether or not the applicant is entitled to a share in the property in dispute and the share thereof.
7. The petitioner called one witness, PW1, a mason and produced documents to support her case. I noted that petitioner through his counsel objected to the production of some of the documents (loan document, bank slips, receipts for materials from hardware) during trial unless produced by the maker. This is premised on the evidence Act, which I observe, does not fully apply in the Kadhi's Court. Under section 6 of the [Kadhi's Court Act](#), Cap 11 Laws of Kenya, the applicable law of evidence in the Kadhi's Court is Islamic law of evidence. It provides:

"The law and rules of evidence to be applied in a Kadhi's court shall be those applicable under Muslim law: Provided that-
8. Part XII of the [Kadhi's Court \(Procedure & Practice\) rules 2020](#) (hereinafter referred to as the rules) provides for rules of Islamic law of evidence applicable in the Kadhi's Court. Islamic Law of evidence demands that any party who alleges a claim, must provide proof on same. Contrary to common law, the testimony of parties to a case, save for admissions, does not, under Islamic law, constitute evidence. Evidence is what witnesses or documents of parties support their respective claims. Rule 128 of the rules provide:

"The petitioner and the respondent are not competent witnesses in their own cases".



9. Evidence may be produced through testimony of witnesses or documents. Section 131 of the rules provide:
- (1) Any document submitted to the court as evidence shall require the proof of authenticity thereof.
 - (2) The court may at any stage of hearing, require the attendance of a deponent or an author of a document for the purposes of examination of the facts deponed or written.
10. Documentary evidence is thus admissible and may be produced by the author or maker. The requirement is not couched in mandatory terms and the evidence shall be considered on its merit upon testing under cross-examination and in totality of analysis of the evidence adduced. A party should not be estopped from producing his or her evidence merely due to the inability to have the maker produce it in court. It amounts to concealing of evidence which is prohibited under Q.2.283
- ‘... and do not conceal testimony, and for whoever conceals it, his heart is indeed sinful, and Allah is knowing of what you do’.
11. PW1, a mason, testified he was engaged and paid by the petitioner to do the project in the plot in March 2007; that he and his workers were paid by the petitioner who also bought the material herself. His evidence is that he did the entire main structure of the six single, not self-contained rooms, except for painting, fencing and gate installation. The Cash deposit slip dated March 8, 2007 indicate the petitioner deposited into her account with Isiolo Teachers’ Sacco Limited (hereinafter referred to as ITSL) Kes 254,600.00. I have examined the fifteen cash withdrawal vouchers produced. They indicate the petitioner withdrew monies in different amounts from her account with the ITSL on diverse dates from March 2, 2007 to September 4, 2007 totaling Kes 499,000.00. I have also examined the receipts for building materials from three hardware shops in Isiolo, namely Isiolo Nyota, Isiolo Mwangaza and Isiolo Kwetu hardware shops. All the receipts are dated in various dates from March 12, 2007 to August 20, 2007. There are three receipts dated 7, 8 and December 12, 2007. The receipts total to kes 123,588.00. The petitioner further produced a fourteen-page expenses booklet, a record of expenditure incurred in the project. It shows the expenses from March 13, 2007 to August 27, 2007. It included expenses for labour to mason and Fundis, transport of materials, loading and unloading, security, water and for other materials not bought at hardware shops and not receipted such as sand, murrum, hardcore, timber, doors and door frames etc. The total expenses according to the expense’s booklet is Kes 657,517.00
12. On the other hand, the respondent called one witness, RW. His evidence is that the plot belonged to him and that his late wife (the respondent’s sister) requested it on behalf of his brother, the respondent. He stated that he gave it to the respondent after the death of his wife in 1994 before the parties had been married. The respondent had claimed another mason did the works for him. He did not call him to give evidence. He claimed he took loan of Kes 250,000.00 to finance the project. He did not produce any document to support this claim. The petitioner admitted the respondent also made some financial contribution (Kshs 200,000.00) towards the development of the plot. The petitioner also admitted the plot is registered in the name of the respondent.
13. The time frame of the development of the project is not disputed. It is also not in dispute that it was started and completed within six months in 2007, eleven years after their marriage and two years before they divorced. For clarity, the parties were divorced on September 19, 2009. The project was thus developed entirely during parties’ coverture.



14. The respondent admitted the expenses booklet produced is the same he claimed to have also kept and that both of them made entries of the expenditure. It is therefore admissible as a true reflection of the costs of the project and that the petitioner participated both physically and financially in the said development. The dates of cash deposits and withdrawals into and out of the petitioner's account with ITSL correspond with the dates of the projects as do the receipts for purchase of the construction materials. This evidence was not shaken under cross examination and none was produced to contradict it.
15. It was incumbent upon the respondent to produce evidence to support his claims as well counter applicant's evidence. His failure in this regard is fatal. Evidence adduced in court, including respondent's admission of the expenses' booklet, the key evidence, heavily tilts in favour of the applicant in support of her claim of making considerable financial and non-financial contribution towards the development of the plot. Her contribution, both financial and otherwise, far outweigh that of the respondent. Although the plot belongs to the respondent and was acquired before coverture, the six-unit development on Plot No 113 / Tullu Roba / Isiolo, I find and hold, constitute matrimonial property.
16. Section 3 of the [Matrimonial Property Act, 2013](#) provide:

'A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.'
17. It is now well settled that the Kadhi's court has competent jurisdiction to determine disputes of matrimonial property between parties who profess the Muslim faith and submit to its jurisdiction. The Court of Appeal in [RMM v BAM](#) [2015] eKLR, Civil Appeal No 267 Of 2011, Waki, Gbm Kariuki, Mwilu, M'inoti & Murgor, JJA; held:

'At the root of the issue is whether it was the High Court or the Kadhi's Court which has jurisdiction to determine the matter of distribution of the matrimonial property...If their marriage was purely Muslim, and the property in issue was acquired during the currency of that marriage, the Kadhi's Court would be the most efficacious in handling and determining the dispute.'
18. Matrimonial property has been defined in the Kadhi's Court Bench Book (2020) (KCBB) at section 461 page 110 as:

'a property acquired through joint efforts of the husband and wife during the marriage'.
19. This definition is similar to that in the [Islamic Family Law Act \[IFLA\] \(Malaysia\)](#) which defined it

'as property acquired by the husband and wife during the subsistence of the marriage in accordance with conditions stipulated by Hukmu Syariah'.
20. The KCBB further clarified types of contributions towards matrimonial. At section 461 page 110. It stated thus:

'Contribution towards property can be direct or indirect. Any spouse who makes such contribution can acquire beneficial interest in the property, equal to the contribution made'.



21. The High Court In OS No 3 of 2015 (Mombasa), *EMK v SSS*, [unreported], Thande J, held that Islamic law recognizes both financial and non-financial contribution of spouses in matrimonial property. It stated:

‘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... from the forgoing, it is evident that non-monetary contribution by spouses must be taken into account in the division of matrimonial property acquired or improved during coverture, notwithstanding that property is in the name of one spouse.’

22. She cited with approval ‘the Qur’an and the common law, Islamic law Reform and theory of legal change, published in the American journal of comparative law, vol 43; issue 3, summer 1994, pg 543-580. Prof. Donald L. Horowitz of the Duke university school of law, writing on merging and emerging law on marital property, cited Hj. Salleh bn Hj. Buang, who in ‘frontiers in Harta sepancarian 5-9 (1988) stated:

‘Harta sepancarian is an institution of marital property. The historical core of the institution holds that property (usually land) acquired or improved during marriage by means of the joint resources or joint labour of husband and wife belong to both of them and will be divided into shares upon divorce or death. The woman’s share in such property titled in her husband’s name has been variable over time and place but generally it has been put at one-half, one-third or a fraction proportionate directly to her contribution.’

23. Matrimonial property is founded on established Islamic legal traditions on protection of individual wealth generally. Q.2.188 provide:

‘And do not consume one another’s wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].’

24. Islam specifically prohibits dealing with another’s property without his consent. Al Albany in his *Irwa’ul Ghalil* at page 1459 reported that Ibn Abbas (May Allah be blessed with him) narrated that the prophet Muhammad (May Allah’ peace and blessings be upon him) said:

‘the wealth of Muslim is not legal (to others) except with his free will and consent’.

25. Having found the petitioner made considerable direct and indirect contributions towards the development of the plot, the last issue is how to distribute the same. The parcel of land is not part of the matrimonial property. However, I differentiate between the land and developments on it apart from the six-unit development. Islamic law recognises the concept of house without land, which common law in *Salim & Another v Mohamed* KLR EAC 1, also adopted. The petitioner is only entitled to her share in the six-unit development at current market rates. The petitioner valued the property (without the land) at kes 800,000.00 while the respondent valued it at Kes 700,000.00. The expenditure book puts the valuation in 2007 at Kes 658,000.00. Accordingly, I adopt Kes 800,000.00 as the current value of the six-unit development. According to their individual contributions, on the evidence adduced in court, the applicant made about 60% of the contribution. I thus I award her Kes 480,000.00 as her share of the matrimonial home. The respondent to settle the same within six (6) months from date hereof.



DATED, SIGNED AND DELIVERED AT ISIOLO ON 13TH SEPTEMBER, 2021

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of:

Mr. Guyo Adan, Court Assistant

Mr. Kiogora Mugambi for petitioner

Mr. Mukira Mbaya for the respondent

