



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**FAMILY DIVISION**  
**ORIGINATING SUMMONS NO. E070 OF 2023**

**SUSAN WAIRIMU KARIUKI.....**  
**PLAINTIFF**

**VERSUS**

**CHARLES GICHEHA GITAU.....**  
**DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By Originating Summons dated 5<sup>th</sup> September 2023, the Applicant seeks the that-

- a. An Order do issue declaring that the Applicant is entitled to 50% or such other or higher proportion as this Court may to the following properties; Land parcel number MWANA WIKIO CO-OP SOCIETY LTD BALLOT NO. 110 ( MITUBIRI/ NANGA/ BLOCK 1/110) which was the matrimonial home together with plots that have 44 rental units that fetch an income of Kshs 1500 per month; MWANA WIKIO CO-OP SCOIETY

LTD BALLOT No. 144 (MITUBIRI/ NANGA/ BLOCK 1/144); MWANA WIKIO CO-OP SOCIETY LTD BALLOT NO. 218, KIAMBU/ MUNYU/ 3312, KISII/ MAKONGENI, Motor Vehicle registration number KBD 930Q, KBS 928L and KCK 011B

2. The Originating Summons is supported by her affidavit sworn on even date. She and the defendant were married from 16<sup>th</sup> December 2006, the marriage was dissolved on 25<sup>th</sup> May 2023 by decree nisi which was made absolute on 7<sup>th</sup> July 2023. She submits that during the pendency of the marriage, she and the defendant jointly acquired the listed properties. Her contribution was both financial and non-financial. Her non-financial contribution included taking care of their 4 children.
3. The respondent has sworn a replying affidavit on 7<sup>th</sup> November 2023 in opposition. He denies that the property in question is matrimonial property and asserts that he inherited it from his deceased father. He avers that the plaintiff did not contribute to the developments on the parcels of land and further he denies owning any of the motor vehicles. He also denies that he is the father to the children named by the deceased.

## **SUMMARY OF EVIDENCE**

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4. **PW1 Susan Wairimu** she reiterated the averments in her affidavit. On cross examination she conceded that the share certificate Mwana Wakio Co-Op Society did not bear her name. She stated that the defendant sold her his share. She stated that she contributed to the purchase of the plot, she has taken a loan of Kshs 150,000. She did not have the documents to show she took the loan. She did not call as witnesses those who signed the document dated 13<sup>th</sup> June 2019.
5. She did not have evidence of the rental units. She did not remember the year that the vehicles were bought and she did not have documents showing the ownership of the motor vehicles. She contributed towards the purchase of the motor vehicles.
6. She only had title for Kiambu/ Munyu/3312. She contributed a total of Kshs 150000 towards the construction of the matrimonial home. She admits that 3 of the children were her sisters and the youngest was the child she bore together with the defendant as shown in affidavit before Court.

7. On reexamination she asserted that although she did not have the title, the parcel of land Ballot 110 is where they had constructed the matrimonial home.
8. They also built a shop on the subject parcel of land. She managed the shop and from the proceeds she contributed towards the acquisition of assets.
9. **DW1 Charles Gicheha Gitau** he confirmed that he and the Plaintiff were married but their marriage was subsequently dissolved. He states that he developed the home on Mwakio without any contribution from the defendant. His parent supported him in the construction of the home. In cross examination, he stated that at the time of marriage they were living at his parents' home, later his mother gifted him Plot No. 110. The House was constructed in 2008 during the pendency of the marriage. He denied that the applicant had an income. He was the sole breadwinner for the family.
10. He had since disposed of the property KIAMBU/MUNYU/3312. The plots 218 and 144 and Kisii/ Makongeni are unknown to him. He denied owning any car. He denied that the Plaintiff took care of his mum.

## **SUMMARY OF SUBMISSIONS**

11. The Applicant's Submissions are dated 27<sup>th</sup> June 2025.

The issue for determination is

a. Whether the Applicant is entitled to 50% or higher of the matrimonial properties.

12. It is submitted that the assets pleaded comprise Matrimonial property and that the applicant made both financial and non-financial contribution. The applicant submits that the duration of the marriage should be considered in finding that she contributed towards the acquisition of assets and their development both through monetary and non-monetary contribution.

13. It is submitted nothing is placed before the Court to demonstrate that the property was acquired through inheritance. Reference is made to the decision in **MGNK vs AMG [2016] eKLR** for the assertion that given the special nature of the marriage relationship, parties would not normally keep a record of transactions they made on behalf of the family.

14. Further reference is made to the case of **EMN vs NM [2018] eKLR** on the submission that due credit should be

given to household work which though not valued is very critical and is substantial, if for no other reason it frees hands of the other spouse to develop. See **JMO v CLO [2019] eKLR**.

15. Submits that Article 45 of the Constitution of Kenya introduces the equal share rule, as marriage is a partnership of equals. Reference is made to the decision in **GNJ V JMM [2019] eKLR** on the need to balance the contribution of both the partners without any discrimination based on the division of labour and urges the Court not to depart from the original intention of the parties which was to own the home in equal shares. See **Njoroge vs Ngari (1985) KLR** on the Court's exercise of discretion in distributing matrimonial property.

16. The Defendant's submissions are dated 28<sup>th</sup> July 2025. He also frames the issue for determination to be whether the applicant is entitled to 50% of the Matrimonial property. It is submitted that the applicant did not prove that the properties claimed were owned by the defendant except for **KIAMBU/ MUNYI/3312**. It is submitted that she has not discharged the onus that lay on her to prove the existence of the

properties and her contribution. Reference is made to the decision in **Isca Adhiambo Okayo vs Ken Women's Finance Trust KSM Civil Appeal No. 19 of 2015 (2016) eKLR** and **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civ Appeal No. 342 of 2010 [2013] eKLR**

17. The respondent submits that the Supreme Court decision in the case of **JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Anor (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR)** settled the correct application of Article 45 3) of the Constitution to parties' rights to matrimonial property. The same had earlier been enunciated by the Court of Appeal in the decision of **PNN v ZWN [2017] eKLR** and the mischief that the provision is meant to prevent. Reference is made to the decision in **EGN v BMM [2020] eKLR** on the necessity of ensuring that upon dissolution of a marriage a party gets only what is there entitlement.

18. The applicant concedes that the only property that the client established during the marriage was Kiambu/

Munyu/3312 and her contribution to the acquisition would not amount to 50%.

## **ANALYSIS AND DETERMINATION**

19. Having considered the pleadings herein, the evidence adduced and the submissions filed alongside the relevant law,

I consider the following to be the issues for determination-

- a. What properties comprise matrimonial property
- b. What is the respective share of each of the parties to matrimonial property?
- c. Arising from (b) and (c) above what are the consequential orders?

20. The Applicant claims that the following assets comprise matrimonial property-

- a. Land parcel number MWANA WIKIO CO-OP SOCIETY LTD BALLOT NO. 110 (MITUBIRI/ NANGA/ BLOCK 1/110) which was the matrimonial home together with plots that have 44 rental units that fetch an income of Kshs 1500 per month;
- b. MWANA WIKIO CO-OP SOCIETY LTD BALLOT No. 144 (MITUBIRI/ NANGA/ BLOCK 1/144);
- c. MWANA WIKIO CO-OP SOCIETY LTD BALLOT NO. 218,
- d. KIAMBU/ MUNYU/ 3312,
- e. KISII/ MAKONGENI,
- f. Motor Vehicles registration number KBD 930Q, KBS 928L and KCK 011B

21. Section 6 of the Matrimonial Property Act, 2013 provides the definition of Matrimonial property to include

**Meaning of matrimonial property**

**( For the purposes of this Act, matrimonial property**

**1 means—**

**) (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.**

22. She has provided Title in respect of Kiambu/ Munyu/3312

it is registered in the name of the defendant. Title was issued on 9<sup>th</sup> October 2017. The defendant also admits that the family home was constructed on Land parcel number MWANA WIKIO CO-OP SOCIETY LTD BALLOT NO. 110. He denies knowledge of the other properties enumerated and there is no proof of ownership submitted before Court. He confirms that it was acquired during the pendency of the marriage. He alleges that the same was inherited from his parent but adduces no evidence to this effect.

23. In the circumstances, I find that the only assets that

comprise matrimonial property are Kiambu/ Munyu/3312 and Land parcel number MWANA WIKIO CO-OP SOCIETY LTD BALLOT NO. 110 (Title is yet to be issued). The defendant alleged that he had sold Kiambu/ Munyu/3312 but does not

adduce any evidence to this effect, there is a title showing the parcel is registered in his name.

24. The 2<sup>nd</sup> issue what is the respective share of the parties to the matrimonial property? Section 17 makes the following presumption with regard to ownership of matrimonial property

**14. Presumptions as to property acquired during marriage**

**Where matrimonial 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 rebuttable presumption that their beneficial interests in the matrimonial property are equal. (Emphasis Supplied)**

25. The law recognises that for a variety of reasons property that is matrimonial may be registered in the name of one spouse solely and therefore shifts the onus on the party in whose name the property is registered to disprove the presumption that the property is held in trust for the other spouse. In the circumstances of the case, I do not find that the defendant discharged this burden. I therefore find that although the properties were registered in his name they were held in trust for the plaintiff.

26. The next issue arising from this finding is what is her share. Section 7 of the Matrimonial Act is clear that the share of each party is dependent on their contribution.

**7. Ownership of matrimonial property**

**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.**

27. Beyond the declaration of the asset as matrimonial property it is incumbent on the party claiming a share to demonstrate their contribution. It is not open to Court to assume the contribution of a party to the acquisition or development of the matrimonial property. In this case the applicant averred that she made both financial and non-financial contribution.

28. It is her evidence that she took a loan to contribute to the purchase of the land and that she also ran a shop and used the proceeds from that shop to contribute towards the purchase and development of the home. The agreement she has attached dated 13<sup>th</sup> June 2019, does not state the amount of the loan and neither is it possible to confirm the existence of the loan or that it was applied to the common family

enterprise of purchasing any of the assets or undertaking developments thereon.

29. Monetary transactions are never recorded in invisible ink.

It was necessary for the applicant to show that she had money passing through her hands. She failed to do this. The Supreme Court in the case of Ogentoto cited above stated as follows-

**[18.] It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. The learned judge having appreciated the appellant and the respondent were married for 18 years and 15 of those years the appellant was in gainful employment; she constantly took loans, having found the only property that was acquired with joint efforts was the matrimonial home where the appellant was residing; the fact that upon separation the respondent was able to purchase another home where he settled. For those reasons, we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired a beneficial interest therein...**

30. I do not think that this is intended to absolve a spouse who alleges financial contribution from her duty under Sections 107 and 108 of the Evidence Act to establish that claim. I find

therefore that the plaintiff did not establish financial contribution.

31. The Plaintiff submits that that her non-financial contribution should be considered in determining her share to the matrimonial properties. It is not disputed that she and the defendant lived together until the marriage broke down and that during that period, she was a home maker providing companionship and running the home for 17 years. The issue for determination is what weight the Court should give to the non-monetary contribution which is not challenged.

32. Again, in the *Ogentoto case*, the Supreme Court cited with approval the dicta of the House of Lords in the decision in **White v White [2001] 1 AC 596** on the weighting between financial and non-financial contribution-

**Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. As Butler-Sloss LJ said in *Dart v Dart* [1996] 2 FLR 286, 303, the statutory jurisdiction provides for all applications for ancillary financial relief, from the poverty stricken to the multi-millionaire. But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband**

and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions. This is implicit in the very language of paragraph (f): '. . . the contribution which each has made or is likely . . . to make to the welfare of the family, including any contribution by looking after the home or caring for the family.' If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.

33. In **Njoroge v Daudi Alias Ngari [1985] eKLR** readily considered the non-financial contribution of the Plaintiff having observed that the defendant had not produced documentary evidence to prove his financial contribution even as he discounted that of the plaintiff-

**On that evidence, I hold that the defendant is unfair in attributing the profits of the farm entirely to his own extortion and expenditure and denying completely any part played in it by the plaintiff. His contributions are, in my view, contrary to the weight**

**of the evidence and unrealistic in the context of dairy farming. I am satisfied on the evidence of the plaintiff, and the evidence of the son, David that the plaintiff and the defendant did buy and did not work on the Gilgil farm together in a joint enterprise and that through her work, the plaintiff made substantial contribution towards its acquisition. That contribution must now be recognised**

34. Having considered all the factors and the circumstances, I find that the applicant's share in the matrimonial assets (viz Kiambu/ Munyu/3312 and Land parcel number MWANA WIKIO CO-OP SOCIETY LTD BALLOT NO. 110) is 25%
35. What then are the consequential orders? -
- a. **Kiambu/ Munyu/3312 and Land parcel number MWANA WIKIO CO-OP SOCIETY LTD BALLOT NO. 110** comprise matrimonial property
  - b. The property shall be divided between the plaintiff and the defendant in the share of 25%:75 % respectively
  - c. In the case the parties are unable to agree on the value of the assets, the Counsel for both parties will jointly nominate a valuer within 21 days from the date hereof.
  - d. If counsel are unable to agree, then Counsel for the plaintiff will nominate a valuer within 14 days from the lapse of the period under (c) above
  - e. The valuer so appointed will prepare a report within 21 days of nomination

- f. The Defendant shall have the first right to buy out the Plaintiff within 90 days of the presentation of the report of the valuer
- g. In the event he elects not to buy out the plaintiff or is unable to do so, the properties shall be sold and the net proceeds shared in the proportion of 25%:75%
- h. Provided that if indeed the defendant had sold Kiambu/ Munyu/ 3312 he shall pay to the Plaintiff 25% of the purchase price.
- i. In the event that he fails to comply with (h) above the plaintiff's entitlement shall be recouped from the sale of **MWANA WIKIO CO-OP SOCIETY LTD BALLOT NO. 110**
- j. Both parties shall execute documents necessary for the compliance with these orders within 14 days of presentation of the same, in the event that any party fails to execute the documents within this period, the documents will be executed by the Deputy registrar, Family Division, Milimani Court, Nairobi
- k. This being a family matter each party will bear their own costs.
- l. Parties are at liberty to exercise their right of appeal within 30 days

It is so ordered

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 13<sup>th</sup> day of February, 2026.

**P. M NYAUNDI**

**JUDGE**

**In the presence of:**

Fardosa Court Assistant

Moraa holding brief for Ngeresa for Respondent

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