



REPUBLIC OF KENYA



**WNO v JMK (Family Originating Summons E001 of 2023)  
[2025] KEHC 1278 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1278 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
FAMILY ORIGINATING SUMMONS E001 OF 2023**

**TA ODERA, J**

**FEBRUARY 26, 2025**

**BETWEEN**

**WNO ..... APPLICANT**

**AND**

**JMK ..... RESPONDENT**

**JUDGMENT**

1. The applicant filed the originating summons dated 17.7.2023 seeking separation of matrimonial property.
2. The applicant (Pw1) pleaded and testified that she got married to the respondent on or about January 2013 and they cohabited at Giesembe Rianyoka for 9 years the properties were acquired during the subsistence of the marriage and they divorced on 12.5.23 vide a decree issued Keroka principal magistrates court Divorce cause number E022 of 2022.
3. She listed the following properties which she said were bought during the subsistence of the marriage which she now wants this court to declare to be matrimonial property:
  - a. Land parcel East Kitutu/Bonyamondo 11/3X7 (25ft x 60 ft Ongori purchased at Kshs. 155,000/=.
  - b. Land parcel no. Nyaribari Masaba /Bombea /2XX1 (registered in the name of RMO purchased at Kshs. 40 ,000/=) Both with rental houses.
  - c. Motor cycle registration no. KMDG 380 M registered in the name Car & General Trading) Limited.
  - d. A refrigerator
  - e. A welding machine



- f. Photocopier,
  - g. 3 computers,
  - h. 3 heads of cattle.
4. She produced the land sale agreements for the said portions of land (Pexh 2 and 3), official search for land parcel no. Nyaribri Masaba /Bombea /2XX1 30x 54 (pexh 4) the copy of log book for the motor cycle Pexh 5). She told this court that though the agreements are in the name of the respondent, she contributed to the acquisition of the same while respondent was serving at Kisii county Government while she was operating M-pesa business and selling tomatoes and used the income to support purchase of the properties and also taking care of their children and providing for their daily needs.
  5. JMK the respondent herein filed a replying affidavit dated 18.9.2023 and testified as Dw1. He termed the application incompetent vague and full of inaccurate facts meant to enrich applicant unlawfully. He said that the lands parcels mentioned are not in his name and so are not available for separation. Also, that though the agreements are in his name they were terminated by the parties. Further that the refrigerator belongs to his brother and that he was not privy to the divorce and that the applicant deserted their matrimonial home taking away matrimonial property including Mpesa business line which she still operated.
  6. The applicant filed a supplementary affidavit dated 5.10.23 in which she joined issue with the respondent and said that she seeks equal sharing of the property.
  7. On cross examination PW1 told this court that they had not obtained title deeds of the said parcels and that she contributed to purchase of the said properties. Also, that the motor cycle was not registered in the name of respondent as it was second hand.
  8. In his evidence in chief the respondent said that he was holding the motor cycle as a lien for a friendly loan and that the applicant went with the log book which he wants back as the owner is demanding for it. He said that the Bombea land was objected to by the family. He admitted that the agreements have not been terminated. He said that the applicant went away with the Mpesa line, Barber shop machines, sewing machines and other house hold goods.
  9. I have carefully considered the applicants case, the respondent's case and the able submissions filed by both counsels herein.
  10. The issues for determination are as follows:
    - a. Whether the parties were divorced.
    - b. whether the listed properties are matrimonial property
    - c. what is the percentage of contribution by each party.
  11. On whether the parties were indeed divorced, the applicant told this court that they were divorced after 9 years of marriage and produced the judgment "WNO" annexed to the supplementary affidavit dated 5.10.23. The respondent questioned the divorce but admitted that he was served with the divorce papers but he did not appear in court. It is thus not disputed that the parties herein lived together as husband and wife for 9 years before the marriage was dissolved.

Section 17 of the matrimonial properties Act provides that that:

- (1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.



- (2) An application under subsection (1) –
- (a) shall be made in accordance with such procedure as may be prescribed;
  - (b) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

It thus matters not that the parties are not divorced at the time of application for separation of matrimonial property.

12. On whether the listed properties are matrimonial, applicant said that they were acquired during the subsistence of the marriage, the respondent said that the parcels of land are not in his name and that the sale agreements for the same were terminated by the sellers. On further cross examination he changed the story and said that the agreements still exist. He also took issue with the motor cycle saying that the same is being held by him as a lien for a debt and that the applicant carried with her the log book which the owner is now demanding from him. This issue of the motor cycle was not pleaded and the respondent cannot now be heard to deny the same. He said the fridge belongs to his brother who is in possession of the same but did not deny that the same being used by them during the subsistence of the marriage and he did not explain how they were using it in their home if it belonged to his brother. The applicant testified that that they had 3 head of cattle which was denied by the respondent. No evidence was adduced to prove this point. I find that the issue of cattle was not proved.
13. It is clear from the evidence adduced by the respondent that he was economical with the truth. The fact that the parties acquire a welding machine, photocopier, and 3 computers was not disputed.

Section 6 of *matrimonial property Act* defines matrimonial property as;

- (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.
14. I have no doubt in my mind that the listed properties were bought during the subsistence of the marriage save for the cattle.

However, on Land parcel no. Nyaribari Masaba /Bombea /2XX1 respondent testified that its sale was objected to was objected to by the family of the seller. Applicant said that the land belonged to RMO and this is confirmed by the official search produced herein. It is not clear whether the said owner is dead or alive and why a third party sold it. Land parcel no East Kitutu/Bonyamondo 11/3X7 was also sold by a person who is not the owner. The owner is indicated on the sale agreement as Kaburi Nyangonya whose status is not clear. The motor cycle is also in the name of car and general and not the parties herein. The respondent told this court that the said land parcels and motor cycles were not in his name which is not in dispute.

Court orders are not issued in vain and courts avoid granting orders which may be embarrassing to them at the end of the day. I find that the said land parcels and the motor cycle are not available for separation. As they are not registered in the name of either party herein. The only items remaining for separation are;

- i. refrigerator



- ii. A welding machine
  - iii. Photocopier,
  - iv. 3 computers,
15. On contribution to the acquisition of the said property, Section 2 of the *Matrimonial Property Act*, 2013 defines contribution in the following terms:

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.

Section 7 of the *Matrimonial Property Act* is clear in its terms that:

“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.”

16. I am guided by the decision of the supreme court in the case of *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment)* while dealing with the issue of contribution to matrimonial property held that:

- “12. Equity was an important principle when it came to matrimonial property since what was fair as it related to equity was not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to the acquisition of matrimonial property, even though such contribution was indirect, but had in one way or another, enabled the acquisition of such property amounted to significant contribution. Such direct or indirect acts included:
- a. Paying part of the purchase price of the matrimonial property.
  - b. Contributing regularly to the monthly payments in the acquisition of such property.
  - c. Making a substantial financial contribution to the family expenses to enable the mortgage installments to be paid.
  - d. Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.



- e. Caring for children and the family at large as the other spouse worked to earn money to pay for the property.
13. While article 45(3) of the *Constitution* dealt with equality of the fundamental rights of spouses during and after the dissolution of marriage, equality did not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither did the reading of that provision lead to the assumption that spouses were automatically entitled to a 50% share by fact of being married.
14. The stated equality under article 45(3) of the *Constitution* meant that the courts were to ensure that at the dissolution of a marriage, each party to a marriage got a fair share of the matrimonial property based on their contribution. That was best done by considering the respective contribution of each party to ensure no party was unfairly denied what they deserved as well as ensuring that no party was unfairly given more than what he or she contributed.
15. In a marriage, the general assumption was that both spouses shared everything and on the face of it, both parties contributed towards the home or family in one way or another, to whichever extent, however big or small.”
17. It is clear contribution can be direct or indirect and proceeded to list what can be considered to be contribution, applicant said she contributed to the acquisition properties while respondent was serving at Kisii County Government while she was operating M-pesa business and selling tomatoes and used the income to support purchase of the properties and also taking care of their children and providing for their daily needs. This has not been denied. Contribution to the general welfare of a home while the other spouse is paying the price of a property and caring for children is a contribution to the acquisition of matrimonial property. There is no evidence of applicant’s direct contribution to the acquisition to the properties but indirect evidence of companionship and support the respondent and also running the home, taking care of the children and general welfare of the family which contributed to acquisition of the said properties.
18. Article 43 of the *Constitution* provides for equality of marriage partners during the substance of marriage and after divorce. This however does not mean that matrimonial property shall be shared on 50 :50 basic as sharing depends on contribution of each party.
19. I find that the applicant and respondent contributed to the acquisition of the movable properties at 50: 50 and so the properties shall be shared between the respondent and the applicant on 50: 50 basis.
20. Each party shall bear his own costs since this is a family matter.

**T.A ODERA**

**JUDGE**

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM ON THIS 26<sup>TH</sup> DAY OF FEBRUARY 2025  
IN THE PRESENCE OF:**

Mr. Nyariki for the Respondent

Mr. Bosiberi for the respondent

Court Assistant - Oigo

