



**FRA v MSB (Matrimonial Cause E006 of 2024)  
[2025] KEHC 8493 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 8493 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MATRIMONIAL CAUSE E006 OF 2024  
G MUTAI, J  
MARCH 28, 2025  
IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013**

**BETWEEN**

**FRA ..... CLAIMANT**

**AND**

**MSB ..... RESPONDENT**

**JUDGMENT**

1. Vide the Originating Summons dated 9<sup>th</sup> August 2024, the Claimant sought the following orders:-
  1. That the joint ownership in respect of the properties known as Title No Mombasa/Block xxxx/1425 and CR No 47xxx, Subdivision No. 17xxx, Original No 117xx/xx, Section I/MN be severed;
  2. That the joint title deed in respect to the property, namely Title No Mombasa/Block xxxx/1425, be severed and a new title be issued solely in the name of the applicant herein;
  3. That the joint title deed in respect to the property, namely CR No 47xxx, Subdivision No. 17xxx, Original No 117xx/xx, Section I/MN, be severed, and the same be held by the applicant herein in trust for the issues of the marriage namely SSMS and SMS ;
  4. That the Court be pleased to order that the respondent retain the property in Bakarini;
  5. That the Deputy Registrar be empowered to execute any document that the respondent may refuse/decline to execute in the process of severing the titles herein;
  6. That this honourable court be pleased to make such further orders as the interest of justice may require; and
  7. That the respondent be condemned to pay the costs of this suit.



2. In the grounds as well as in the affidavit in support of the originating summons the claimant averred that she got married to the respondent on 10<sup>th</sup> October 2011 under Islamic law. During the course of the marriage, the claimant and the applicant jointly acquired the suit properties with the contribution by both, either directly or indirectly. The parties are now divorced under Islamic law. The claimant has custody of the children.
3. The claimant averred that she was apprehensive that the respondent may sell the suit properties and, for that reason, desired to have this honourable court issue the orders sought.
4. To safeguard the interest of the minor children, the claimant proposed that CR No 47xxx, Subdivision No. 17xxx, Original No 117xx/xx, Section I/MN, be held in trust for the children and that she be allowed to develop the same for the benefit of the said issues.
5. In the affidavit, the claimant averred that she procured an Islamic marriage with the respondent on 10th October 2011, which was dissolved under Islamic law in June 2023. During the subsistence of the marriage, the parties had two issues, fraternal twins, Salman Mohamed Said and Salmin Mohamed Said, born on 6th April 2013, whose birth certificates she exhibited. She also produced certificates of titles for Title No Mombasa/Block xxxx/1425 and CR No 47xxx, Subdivision No 17xxx, Original No 117xx/xx, Section I/MN, whose details show that both are jointly owned.
6. She deposed that the third property had not been transferred to them but was in the occupation of the respondent's sister or cousin. She urged that the property be registered in the respondent's name since his relatives were in occupation of it.
7. The claimant averred that when the properties were acquired, she and the respondent were in gainful employment. She was, therefore, able to contribute and did, in fact, contribute to their acquisition and development. On her proposed mode of division of the matrimonial property, the claimant urged that it was fair and that "none of the parties will suffer any prejudice in the event the application herein is granted".
8. Even though the respondent was served with the originating summons and the subsequent hearing and mention notices, as evidenced by the affidavits of service filed herein, he failed to file a response to the same, nor did he appear during the subsequent mentions and hearing. The matter, therefore, proceeded as an undefended cause. Directions were issued to that effect were issued on 25<sup>th</sup> November 2024. On 27<sup>th</sup> January 2025, the suit was heard. The Court notes that the respondent was served with a hearing notice for the hearing of the main cause, as evidenced by the affidavit of service. The service notwithstanding, he failed to attend court.
9. In her testimony, the claimant stated that she was a nurse assistant in Oslo, Norway at the time of the hearing. She averred that her Islamic marriage to the deceased was dissolved in June 2023. It was her evidence that her attempt to have the properties divided amicably had failed, as the respondent did not want to talk to her and had even blocked her from calling him. She further testified that she had tried all means to procure an amicable resolution without success. She thus prayed that the originating summons be allowed.
10. Upon the conclusion of the hearing, the court directed the claimant's counsel to file written submissions. The claimant's counsel duly complied by filing written submissions dated 12<sup>th</sup> February 2025.
11. In the said submissions, counsel for the claimant urged that the main issue for determination by the court was how the three matrimonial properties could be divided.



12. The claimant’s counsel submitted that since the respondent pronounced the Islamic divorce, there was no marriage. Therefore, the union had been dissolved. It was, therefore, in the interest of justice that joint ownership in respect of the suit properties be severed and the matrimonial properties divided between them.
13. Regarding Title No Mombasa/Block xxxx/1425, it was urged that the same be in the claimant’s name as it would not be reasonable for them to own it jointly.
14. Counsel submitted that CR NO 47xxx be secured for the children as originally intended. The children are under the care of the claimant. Accordingly, it was urged that the said property should be held in trust for them by the claimant. This, it was urged, would not cause the Respondent any prejudice.
15. On the property near xxxx School and Mosque, it was submitted that the same be registered in the respondent’s name as it was occupied by his relatives.
16. I have considered the originating summons, the supporting affidavit and the evidence adduced. Although the case was not opposed, I must examine it on its merit and determine if the orders sought should be issued.
17. It is necessary that I first set out some statutory underpinnings of my decision below. The quest will begin from *the Constitution*, which in our legal set-up is the grund norm, our true North.
18. Article 45 (3) of *the Constitution* states that:-
  - “(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.”
19. Section 7 of the *Matrimonial Property Act* states: -

“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.”.
20. Section 6 of the *Matrimonial Property Act* states: -
  - “(1) For the purposes of this Act, matrimonial property 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.
  - (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
  - (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
  - (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if



it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.”

21. Section 2 of the *Matrimonial Property Act* states;

“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.”

22. Applying the above provisions of the law to the instant matter leads me to the ineluctable conclusion that this matter has merits.

23. It hasn't been controverted that the claimant was married to the respondent. From the birth certificate of the issue of their union, I am persuaded on a balance of probability that there was indeed a marriage celebrated under Islamic law. I am also persuaded for want of evidence that the said marriage was dissolved under the same law. It is evident that under the said law, all the respondent was required to do for the marriage to be repudiated and to cease to exist was to pronounce talak three times, something that he apparently did.

24. There is no dispute that all three properties, the subject matter of this originating summons, were acquired during coverture. That being the case, the same are matrimonial properties under the laws of Kenya.

25. Given that the claimant was in employment as a nursing assistant in Norway and earned, going by what she stated, a good salary, it is my view that she had the means to contribute towards the purchase and the development of the matrimonial properties. Her contribution would necessarily have been monetary and non-monetary, as she provided the husband with companionship, love and affection that enabled him to thrive, and also as she took care of the issue of the marriage as the primary caregiver.

26. The principles used by the courts in determining the division of matrimonial property were settled by the Supreme Court in the case of Joseph Ombogi Ogentoto Vs Martha Bosibori Ogentoto [2023]eKLR, where it was stated inter alia as follows:-

“In the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of Article 45(3) of *the Constitution*. To hold that Article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties



within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non- monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.”

27. I agree with the holding of the court in the case of P N N v Z W N [2017] eKLR, in particular the holding by Kiage, JA that: -

“The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in Francis Njoroge vs. Virginia Wanjiku Njoroge, Nairobi Civil Appeal No. 179 of 2009;

“... a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in Lock Yeng Fun V Chua Hock Chye [2007] SGCA 33;

‘It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – e precise mathematical exercise’.”

28. It would appear that marriage is contracted by two people deeply in love and with a positive attitude towards the future. As long as the marriage is healthy, record keeping is frowned upon as it suggests a lack of trust. I therefore agree with the observations the Court made in ENK vs JNK [2015]eKLR and, in particular, to the holding that:-

“When parties get into marriage, they usually intend the arrangement to be for life. Divorce is not in their minds. This is the position regardless of the system of law under which the parties contract the marriage. Indeed, that is the conception of marriage in Hyde vs Hyde and Woodmanse (1866) 1 LRIP & D 1230. The parties to the marriage thereafter live their lives according to the concept of permanence of their marriage. This then creates the presumption that whatever property is acquired must have been intended to be for the benefit of the family.”

29. What flows from the above is that it is difficult to ascertain contribution with certainty. Division of matrimonial property, therefore, isn’t an exercise in mathematics, but rather a delicate balancing act governed by tenets of justice and common sense.

30. Since it isn’t possible to determine contribution with precision am inclined to make a presumption that the matrimonial property is owned by the parties hereto equally. Guided by the equitable maxim that equality is equity, I find and hold that they are equally entitled to the said matrimonial properties.

31. I take note of the fact that the children are young. The claimant proposes that title number CR No 47xxx, Subdivision No. 17xxx, Original No 117xx/xx, Section I/MN be held in trust by her for them. I am of the opinion that the said proposal is sound. However, as a trust is created, it would be better if both parties were the trustees, as opposed to the claimant being the only claimant. Having both of them as trustees will promote accountability and secure the interests of the minor children.



32. A fair division would leave each of the parties with one property each. Although it would have been ideal to value the properties to establish their respective open market values, I have made a presumption that Title No Mombasa/Block xxxx/1425 and property near xxxx School and Mosque are of similar value. The claimant may have the first property.
33. The second property, property near xxxx School and Mosque, can remain with the respondent since the same is occupied by relatives on his side. In my view, it will be much easier for him to reclaim possession and register it in his name.
34. In the circumstance, I find and hold that Title Mombasa/Block xxxx/1425, CR No 47xxx, subdivision No. 17xxx, Original No 117xx/xx, Section I MN and the houses in xxxx near xxx School and Mosque are matrimonial properties. I declare that these properties are jointly owned by the parties hereto equally on a 50:50 basis.
35. Since it isn't possible for these properties to be shared or owned jointly given the irredeemable breakdown of the relationship between the parties, I am inclined to accept the mode of division proposed by the Claimant as it is unopposed and also for being, in my view, fair.
36. In the circumstances, I find and hold that the originating summons has merits. I allow the same on the terms below.
37. The orders that commend themselves to me and which are hereby issued are that:-
1. Title No Mombasa/Block xxxx/1425 be transferred to the Claimant absolutely;
  2. CR No 47xxx, Subdivision No. 17xxx, Original No 117xx/xx, Section I/MN, be registered in the joint name of the claimant and the respondent as trustees for their children; and
  3. The xxxx property near the xxxx school and mosque is hereby declared as belonging to the respondent absolutely.
38. I direct that the respondent signs documents of transfer within 30 days of the date hereof. In the event he is unable to do so, the Deputy Registrar of this Court or the Land Registrar, Mombasa, shall do so on his behalf.
39. Since this is a dispute between former spouses, I do not think that it would be prudent to issue orders as to costs. In the circumstances, each party shall bear her/his own costs of the suit.
40. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 28<sup>TH</sup> DAY OF MARCH 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Ms Githinji, for the Claimant;

No appearance for the Respondent; and

Arthur – Court Assistant.

