



Madenge v Katana (Civil Suit 3 of 2022) [2025] KEHC 4486 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 3 OF 2022
M THANDE, J
MARCH 28, 2025**

BETWEEN

EDITH MBODZE MADENGE APPLICANT

AND

EZEKIEL KAI KATANA RESPONDENT

JUDGMENT

1. By an Originating Summons (OS) dated 17.11.22, the Applicant seeks the following orders against the Respondent:
 - a. That an order do issue that the Plaintiff has beneficial interest in 50% of the properties listed below jointly held by the Plaintiff and Defendant:
 1. Two (2) acres of land parcel known as Title Number Kilifi/Mwanda/Mbalamweni/3260 registered to the Respondent who Title Deed is yet to be collected from Kilifi Lands Registry.
 2. One (1) acre of land parcel to be subdivided from Title Number Kilifi/Mwanda/Mbalamweni/2263 in Kilifi County.
 3. Rental house sitted on a 50x100 feet unregistered land located in Baba Dogo Village, Kaloleni Sub-County, Kilifi County.
 4. Fittings, Furnitnure and Household goods.
 - b. That the division to separate the interest in the properties be done within 60 days from date of judgment at the Defendant's cost.
 - c. That the Defendant be ordered to transfer the Plaintiff's share of the property to the Applicant within 60 days after date of division.



- d. That in default, the Registrar High Court be authorized to sign transfer documents in place of the Defendant or any other person holding any title on behalf of the Plaintiff to effect all orders of this court in favour of the Plaintiff.
 - e. That an order does issue declaring the Defendant is accountable to the Plaintiff in respect of the income derived from the said property.
 - f. That costs of this summons be provided for.
2. In her affidavit sworn on even date, the Applicant averred that the parties were married in 2010 under Chonyi Customary marriage and blessed with one child aged 9 years. The marriage was however dissolved on 22.8.22. The Applicant's case is that during the subsistence of the marriage, she and the Respondent acquired and developed the properties listed in the OS namely Kilifi/Mwanda/Mbalamweni/3260 (Plot 3260), Kilifi/Mwanda/Mbalamweni/2263 (Plot 2263) and a rental house on a 50x100 unregistered plot in Baba Dogo village Kaloleni, Kilifi County (the rental house). They also acquired furniture, fittings and household goods.
 3. The Applicant averred that Plot 3260 was registered in the Respondent's name as the head of the family for the benefit of the family, with the intention that it was family property. The Respondent collects a monthly rent of Kshs, 10,500/= from the rental house. Further, that since February 2021 due to threats on her life by the Respondent, the Applicant no longer lives in the matrimonial home. She does not also have access to the same and to some of her personal belongings. The Applicant contends that she is entitled to 50% share of the properties having directly and indirectly contributed to their acquisition.
 4. In his replying affidavit sworn on 20.11.23, the Respondent averred that prior to and during his marriage to the Applicant, he worked in Qatar. He was able to support the Applicant and their child and ensured they lacked for nothing.
 5. The Respondent stated that the rental house claimed by the Applicant stands on family land donated by his father for them to build rental premises. Using his salary, he built the rental units and their home. He paid for all labour and materials through mpesa. As regards Plots 3260, the Respondent stated that he purchased the same through his earnings and money borrowed from friends and still owes between Kshs. 115K and 120K. He stated that Plot 2263 is registered in their joint names. He further averred that he sent to the Applicant Kshs. 50,000/= which she topped up with her share and took a Kshs. 100,000/= to Kshs. 120,000/= loan and he added a further Kshs. 250,000/= which he paid to the seller in instalments. The Respondent further stated that the Applicant failed to disclose a 1 acre plot in Vishakani which they purchased jointly. She also failed to disclose a property in Mikapuni area which is in her name and on which she built between 2019 and 2020 during the subsistence of the marriage.
 6. The respondent further stated that as per Chonyi traditions, the Applicant's family should refund the dowry he paid following the dissolution of the marriage. Further, that he should be paid "malu" being compensation for pain and shame caused to him by the Applicant. He urged that these payments be made before the division of matrimonial property.
 7. The Respondent opposed the division of property opposed by the Applicant as she already took away the furniture and further failed to disclose the property she owns.
 8. In her further affidavit sworn on 25.7.24, the Applicant conceded that the rental house is constructed on land that the Respondent was given by his father but she asserted that she financially contributed to the construction of the same in the sum of Kshs. 250,000/= which she borrowed from Afya Sacco Ltd and Imarika Sacco. Further that Plot 3260 registered in the Respondent's name was acquired in 2017 during the subsistence of our marriage. Further that she contributed Kshs. 450,000/= thereon, through



- a loan from Imarika Sacco to the acquisition of the said plot and construction and furnishing of their matrimonial home. She stated that Plot 2263 is about 1 acre was jointly acquired by the parties. It is however yet to be registered in their names and is still in the name of the seller, Katana Muruu Gona.
9. The Applicant admitted that the unsurveyed piece of land in Vishakani was acquired by both of them during the subsistence of our marriage. However, that the Respondent paid only Kshs. 40,000/= out of the total purchase price and the rest was paid off by the Applicant and her mother. As regards the piece of land located in Mikapuni, she stated that the same belongs to her mother and is not hers and that the same belongs to her mother. She further stated that the money used to pay the dowry during the traditional marriage ceremony was provided by her and that the Respondent cannot demand a refund. Further, the matter before this Honourable Court is a matrimonial property cause and not divorce cause. The Applicant reiterated that it is only fair that each party gets an equal share of the properties acquired during our marriage as each party contributed directly and indirectly to the acquiring of the properties.
10. I have considered the OS, the response and submissions filed the parties. The issues that fall for determination are:
- i. Whether the suit properties are matrimonial property.
 - ii. Whether the Applicant is entitled to half share interest of the properties.

Whether the suit property is matrimonial property

11. In order to determine if the Applicant is entitled to half share interest in the properties, it is necessary to first establish whether the same constitute matrimonial property. Section 6 of the [Matrimonial Property Act](#) (the Act) defines matrimonial property as follows:
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
 12. For any property to be said to be matrimonial property, it must constitute the matrimonial home or homes of spouses, household goods and effects in such home or homes. Other property jointly owned and acquired during the subsistence of marriage also constitutes matrimonial property.
 13. From the evidence on record, Plots 3260 is the matrimonial home of the parties. As such, it constitutes matrimonial property.
 14. The evidence on record further shows that the 1 acre portion of Plot 2263 which is still in the name of the vendor Katana Muruu Gona, was acquired by the parties jointly and both parties acknowledge as much. This property also constitutes matrimonial property.
 15. As regards to the Vishakani property. Although not listed in the OS, the Applicant subsequently acknowledged the same and stated that it was acquired by both parties during the subsistence of the marriage. The property is thus matrimonial property.
 16. The rental house stands on a portion of the Respondent's father's land. This property is neither the matrimonial home of the parties nor is it jointly owned by the parties. It does not therefore constitute matrimonial property.



17. As regards the Mikapuni property claimed by the Respondent, the Appellant stated that the same was purchased by her mother Mose Edwin Mwangu. She exhibited an agreement or sale to that effect. Since the Respondent did not provide any evidence to the contrary, the Court is inclined to find on a balance of probabilities that this property does not belong to the Applicant. The property cannot therefore be considered in this division of matrimonial property cause.

Whether the Applicant is entitled to half share interest of the property

18. It is well settled that the basis upon which property, matrimonial or otherwise, is divided between spouses, is contribution. Section 7 of the Act makes provision relating to ownership of matrimonial property as follows:

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. (emphasis)

19. In *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)*, the Supreme Court reaffirmed this principle of contribution and stated:

The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution.

20. A party seeking a share in matrimonial property must thus demonstrate that they have contributed to the acquisition or development of the said property. This is observed in the *P N N v Z W N* case (*supra*), where Waki, JA citing the case of *Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR* stated:

The Court also examined local decisions and came to the following conclusion:-

“In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see *Essa vs. Essa (supra)*; *Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported)*, *Kamore vs. Kamore (supra)*; *Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported)*). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife’s (sic) contribution as equal to that of the husband.”

21. Plot 3260 is in the name of the Respondent. The Applicant stated that she contributed Kshs. 450,000/- from a loan from Imarika Sacco. The Respondent however asserted that he purchased the property from his earnings and loans from friends. Neither the Applicant nor the Respondent provided any evidence of their contribution towards the acquisition of this property. Further, no sale agreement was placed before the Court. While the Applicant annexed an agreement to her further affidavit, the same relates to Plot No. 2261 and not Plot 3260 and the relationship between the two was not explained. The Applicant provided no evidence of the loan she allegedly took from Imarika Sacco. Similarly, the Respondent did not say how much he paid for this property from his earnings nor the amount he borrowed from his friends or the names of his friends.



22. Like Plot 3260, no evidence was placed before the Court to support the claims by the parties of their respective contributions towards the acquisition of a portion of Plot 2263.
23. I now turn to the Vishakani property which the Applicant had failed to disclose in her OS, but which she later acknowledged was acquired by both parties during the subsistence of the marriage. Her case is that the Respondent only contributed Kshs. 40,000/= towards the purchase price. What the Applicant did not tell the Court is what the purchase price was and how much she contributed.
24. The Applicant submitted that she was and is gainfully employed as a nurse. Further that she was in charge of running the household and was the sole caregiver of their son. Additionally, that they had a few businesses and a farm that she ran and managed. She also contributed by shopping and buying groceries, paying school fees for the child and salaries for the farmhand when the Respondent was unable to. She also oversaw the purchase of the property and construction of the matrimonial home as the Respondent was away in Qatar.
25. The foregoing has only come up in submissions. It is trite that parties are bound by their pleadings and that new issues cannot be raised in submissions as the Applicant. In *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another CA NRB Civil Appeal No. 240 of 2011 [2014] eKLR* the Court of Appeal held:

Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.
26. While the Section 2 of the Act recognises non-monetary contribution in a claim for division of matrimonial property, the same has to be proved. The Applicant's submissions on non-monetary contribution does not constitute evidence. The new issues raised in submissions are thus best ignored.
27. Where property is acquired during the marriage, Section 14 of the Act provides certain rebuttable presumptions as follows:

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.
28. The Court notes that the parties herein have been very economical with information. From the evidence on record, it is not clear how much each party contributed towards the purchase and development of the suit properties. In the premises, the presumption under Section 14(a) that Plot 3260 is held by the Respondent in trust for the Applicant remains unrebutted. Similarly, as regards portion of Plot 2263 and the Vishakani property, the presumption under Section 14(b) that the parties' beneficial interest in the suit property is equal, remains unrebutted.
29. In cases where the contribution of the parties cannot be ascertained from the evidence, as in the present case, our courts have divided matrimonial property equally.



30. In the case of Peter Mburu Echaria V Priscilla Njeri Echaria [2007] eKLR the Court of Appeal stated:

However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “Equality is equity” while heeding the caution by Lord Pearson in *Gissing vs. Gissing*(supra) at page 788 paragraph c that:

“No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing”.

31. Duly guided, and given that the parties’ contribution is unascertainable, I find that this is a proper case where it is equitable to apply the maxim “equality is equity.” The Court thus finds that the parties’ beneficial interest in Plot 3260, 1 acre portion of Plot 2263 and the Vishakani property, is equal.

32. As regards the rental house, no evidence was placed before Court of the loans the Applicant claims she took from Afya Sacco and Imarika Sacco for the construction. The Respondent did not also provide the mpesa statements he indicated in his affidavit he would supply to the Court at a later date.

33. It is trite law that he who asserts must prove. Even in an undefended case such as the one before me, an applicant must prove his claim to the required standard if he is to obtain the remedy that he seeks. The *Evidence Act* is very clear in this regard. Section 107 stipulates:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108 provides:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 provides:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

34. Without any evidence of the amount contributed by either party and noting that this rental house is built on the Respondent’s father’s land, the Court makes no finding on the division of the same.

35. Household goods form part of matrimonial property. However, in this case, the Applicant did not list the same to enable the Court make an informed decision thereon. In any event, the Respondent claimed that the Applicant had taken all the household goods, a claim that the Applicant did not controvert.

36. I now turn to the strange claim by the Respondent of refund of the dowry he paid and payment of “malu” under Chonyi traditions. With respect, these claims do not fall under the scope of matrimonial property and can only be claimed elsewhere and not in this Court.



37. The Applicant has asked that the Respondent transfers her half share interest in the properties to her within 60 days. Such order can only be given in respect of Plot 3260 which is in the Respondent's name. The other properties acquired jointly are yet to be transferred to the parties. As such, it would be unduly onerous to place the entire responsibility of transferring the same solely upon the Respondent.
38. In the end, after taking into consideration the totality of the evidence and the applicable law as analysed herein, I make the following orders and declarations:
- i. The Applicant is entitled to half share interest in Kilifi/Mwanda/Mbalamweni/3260, 1 acre of Kilifi/Mwanda/Mbalamweni/2263 and the Vishakani property.
 - ii. The Respondent shall transfer to the Applicant, her half share interest in Kilifi/Mwanda/Mbalamweni/3260 within 60 days from the date hereof. In default, the Deputy Registrar of this Court is hereby authorised to sign the transfer documents in place of the Respondent.
 - iii. The circumstances of this case do not call for an award of costs

DATED, SIGNED AND DELIVERED IN MALINDI THIS 28TH DAY OF MARCH 2025

M. THANDE

JUDGE

