



REPUBLIC OF KENYA



KENYA LAW
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**HMM v AMR (Matrimonial Cause E012 of 2021)
[2025] KEHC 3685 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E012 OF 2021**

**TA ODERA, J
MARCH 25, 2025**

BETWEEN

HMM PLAINTIFF

AND

AMR DEFENDANT

JUDGMENT

1. The Plaintiff filed an originating summons dated 18th May, 2022 under Section 3A of the [Civil Procedure Act](#), Section 2, 6, 7, 9 and 17 of the [Matrimonial Property Act](#) 2013, and Section 93 (3) of the [Land Registration Act](#) seeking the following orders: -
 - a. That a declaration do issue That all those properties known as Land Reference Number Bahati/Engorusha-block 3/XXX (Tuinuane) measuring 0.0827 Ha., Bahati/Engorusha-Block 3/XXX (Tuinuane) measuring 0.0827 Ha., and Nakuru Municipality Block 23/XXX (hereinafter referred to as the “suit properties”) together with all buildings and developments thereon registered in the joint names of the Plaintiff and Defendant are matrimonial property That were acquired by the joint funds and efforts of the Plaintiff and the Defendant during the subsistence their marriage.
 - b. That all the suit properties be divided equally between the Plaintiff and the Defendant or in such other just and equitable manner and proportion as this Honourable Court deems fit.
 - c. That the Defendant, either by himself, his agents and/ or servants, or otherwise howsoever be restrained from alienating, selling, leasing, charging, encumbering and from disposing or dealing with in any manner prejudicial with the interest of the Plaintiff without her consent.



- d. That the cost of this suit and incidentals thereto be borne by the Defendant.
2. In support of her case, the Plaintiff averred she got married to the Defendant on the 29th day of December 1990 in Kenya. However, the marriage broke down and hence on 20th January 2011 she filed suit no ADYY/IP 2011 in High Court of Justice of Adamawa State of Nigeria, in the Yola Judicial Division for the dissolution of her marriage to the Defendant. A decree nisi was issued on 23rd December 2011 and the same was made absolute on 23rd March 2012 and the marriage between the Plaintiff and the Defendant was dissolved. On 18th February 2021, the Plaintiff filed Nakuru High Court Misc. Civil Application No. 7 of 2021: HMN v AMR seeking the recognition, adoption, and registration of a foreign dissolution of her marriage with the Defendant. On 15th March 2021, the said application was compromised by a consent letter dated 12th March 2021.
 3. She averred further the properties mentioned herein above were acquired by the joint efforts the Plaintiff and the defendant during the course of their marriage. The said properties together with the buildings and developments thereon registered in the joint names of the Plaintiff and Defendant are matrimonial properties That were acquired by the joint funds and efforts of the Plaintiff and the Defendant during the subsistence of their marriage.
 4. She equally averred That Defendant is now cohabiting with another woman at the matrimonial home situate at Nakuru Municipality Block 23/XXX and it is imperative That matrimonial property be divided. She claimed That she is entitled to an equal share of the properties purchased during their marriage. She also claimed That her contribution in the acquisition of the matrimonial home was in the nature of monetary and non-monetary contribution including, childcare, companionship, management of the matrimonial home, management of the family businesses and properties. She thus urged the court to grant the orders sought in the interests of justice.
 5. In response, the defendant / respondent admitted That in deed there was marriage between him and the applicant between the year 1990 and 2012 and That the marriage was blessed with 3 children. He also admitted That their marriage had irretrievably broken down and they went through a divorce and decree nisi was made absolute in the year 2012.
 6. He averred further during the subsistence of the said marriage, they jointly saved money and acquired the suit properties which are registered in their joint names. He deposed That when he relocated to Kenya from USA, he singlehandedly developed the house on parcel No. Nakuru Municipality Block 23/XXX to the foundation level and later constructed it to completion when he came back home from relocated from Nigeria.
 7. Further he claimed they jointly developed the Bahati/Engorusha Block 3/ 121 Tuinuane together; however, for the Nakuru Municipality Block 23/XXX, he was the one who single-handedly developed it hence the plaintiff cannot be heard to claim That they jointly developed it. He stated That he is currently single-handedly repaying the loan he borrowed to finance the main development of the matrimonial home herein.
 8. He thus urged the court to share out Nakuru Municipality Block 23/XXX to him to hold in trust for their children while the plaintiff to hold plot numbers Bahati/Engorusha Block XXX (Tuinuane) and Block 3/XXX (Tuinuane). He also urged the court to restrain the Plaintiff from accessing property Nakuru Municipality/Block 23/XXX and disturbing the quiet possession his family which including the children born in his marriage with her and his new wife.
 9. The matter was heard by way of viva voce evidence and both parties testified in support of their cases.



The Plaintiff's Case

10. The plaintiff testified as PW1. She adopted her originating summons and her supporting Affidavit as her evidence in chief. She testified That she together with the defendant jointly acquired the suit properties through their joint HFCK account. She stated further That while they were working in USA, they used to send monies their mutual friend Joseph Kithure who assisted them to build a house on parcel, Nakuru Municipality/Block 23 /XXXX which house was completed while they were working in Nigeria. She equally stated That they also got loans from Egerton Sacco. She produced documents at page 47 to 49 of her bundle of documents as evidence to demonstrate That they authorized their friend Joseph Kithure to withdraw money from the bank for purposes of the construction of the house.
11. She denied knowledge of loans taken by the Defendant to build the house and insisted That the loan amounts were not used to build the house. She went on to state That the house was completed in 2011. She went on to disagree with the proposal by the defendant That the Tumaini Plot should be registered in her name and the Nakuru municipality registered in the defendant's name and reiterated That both properties were acquired jointly.
12. She stated two That the said properties are not of equal value and therefore the proposal of allowed would not amount to equal distribution. She proposed That she be given the Nakuru Municipality property and the Defendant allocated other two properties of Engorosha and Tumaini. She however indicated That she would be agreeable to the way the court would order the property to be distributed wherein she would be amenable to buying out the defendant or the defendant buying her out.
13. During cross examination by the learned counsel for the Defendant she stated That they purchased parcels XXX and XXX before the year 1999 and developed them in 1999. She stated further That plot 23/XXX was purchased in 2000 and they developed it between 2009 to 2011. She also stated That she separated with the defendant in 2010, filed divorce proceedings in Nigeria in 2010. She indicated That in 2008 when they sent money to Joseph Kithure Money to start the foundation of the house on parcel 23/XXX, they were in good terms and were yet to separate. She reiterated That she did send him money for construction as per documents at page 47 to 49 of her bundle of documents. She further stated the purpose for the said monies was fortified by emails which however did not attach. She however attached invoices at page of 51 to 53 as evidence of her contribution to the construction of the house. She also indicated That she did apply for the water as was supported by her documents.
14. During re-examination by her learned counsel, she pointed out That at page 51 to 54 were receipts for the construction of the house. She particularly pointed out at page 51 which was a quotation dated 1st July, 2009 for doors and windows which she claimed they paid through their salaries. She pointed out at to letters at page 47, 48 and 4 jointly signed by both of the them authorizing Kithure to access their joint accounts and withdraw monies therein for purposes of constructing the house.

The Defendant's Case

15. Upon the plaintiff closing her case the defendant took the witness stand and testified as DW1. He testified he lives in plot parcel 23/353 with his new wife and two children. He disclosed That the property was bought at a consideration of Kshs. 440,000. The purchase money came from HFCK. He went on to state That he solely developed the property while he was in USA and the Plaintiff was a student before they moved to Nigeria. He indicated he started the construction in 2004 but suddenly got a court order barring him to proceed with the construction. He went on to state That they did give Joseph Kithure instructions to construct the house on his behalf. He went on to aver That in 2011



- he did approach Standard Chartered, KCB and Cooperative banks for loans to enable him develop the house. He insisted That the Plaintiff did not contribute any money for purposes of constructing the house.
16. He revealed That the plaintiff only saved money to buy a house in Kitengela. He stated further That all the merchants he used know him as the owner of the house. She also stated That the plaintiff was not supporting him in anyway and in fact at times she refused to pay school fees for their children. He proposed That he continues keeping parcel 23/353 in trust for the children and the plaintiff to keep parcels XXX and XXX also in trust for the children. He stated land parcel 118 That was developed and That the house thereon dilapidated.
 17. During cross-examination by the learned counsel for the Plaintiff, documents at page 47, 48 49 were put to him. He yielded That in deed they had a joint account with HFCK through their salaries used to go through. He yielded That they indeed gave instruction to Joseph Kithure Mberia to access the account and withdraw some from its money. He stated That even though they him authority to withdraw the money the same it was not absolutely true That the money was for used constructing the house. He indicated That he stopped depositing the money in the account in 2006. When shown the invoices and quotations at pages 51 to 54 he did yield That the same related to the house but insisted That the same did not mean That the house was completed by 2009.
 18. The defendant did yield That while they were in USA the plaintiff used to receive 80% of her salary while on study leave. He yielded That even though he had filed loan statement from cooperative bank of Kshs. 1.6 million, there was no evidence to show the said money went to the development of the house. He also stated That the said loan was taken between 2015 to 2016. He yielded That he did not attach the loan statement from Standard Charted Bank. Further he produced a statement from ABSA for a loan of Kshs. 5.6 million but he said he had no evidence That the loan was for construction of the matrimonial home.
 19. He recalled That the plaintiff had a plot at pipeline Nakuru which they disposed of but denied That the proceeds of the same were used towards construction of the house on Parcel 23/XXX. He equally denied That the plaintiff claim That she contributed towards the development of the matrimonial home and plot no 181. He also insisted That he wanted to keep parcel 23/XXX for himself and the children since the plaintiff has another home in Kitengela. However, he disclosed That he no longer has the custody of the children because after the divorce and That he has not live with the children from the year 2021.
 20. On re-examination by his learned counsel claimed That the money sent to Joseph was not used to construct the house. He insisted That the Joint accounts were active from 1993 to 2006. He went to state That he did not stay with his children from the year 2021 and That they were adults by then. He also denied the money from the sale of the pipeline plot was used to buy their air tickets for travel.
 21. Upon each party closing their cases, this court directed the parties to file their written submissions.

Issues Of Determination

22. Having considered the originating submissions, the prayers thereto, all the documents attached in support of the same, the replying affidavit filed by the response as well as the documents attached thereto, the testimonies of the parties during the hearing of the case and the written submissions, the sole issue of determination is whether plaintiff is entitled to the prayers sought in her originating summons.



Determination.

23. It is a common ground That the plaintiff and the defendant were married in between 1990 to 2012 which marriage broke down irretrievably and are now divorced. It is equally a common ground That the two did purchase the three land parcels herein which were jointly registered in their names during the subsistence of their marriage and thus matrimonial properties. Both parties herein were working as lecturers at all material times and earning salaries.
24. However, the bone of contention is Parcel No. Nakuru Municipality Block 23/XXX where the matrimonial home lies. While the plaintiff claims That she contributed to the development of the house, the Defendant insists That he single handedly developed the house thereon. The plaintiff in order to prove That she indeed contributed to the development of the house stated That she jointly together with the defendant gave instruction Joseph Kithure Mberia to construct the house for them. To substantiate her claim she did point out at three letters wherein they gave authorization to the Joseph Kithure Mberia to access their joint account and withdraw money That was meant for construction of the house. The defendant on his part did yield Mr. Kithure was in deed engaged to construct the house, he equally yielded That jointly gave authority Mr. Kithure to access the joint account and withdraw money but insisted the money was not used for the construction of the house. He also claimed That the joint account was only active between 1993 and 2006.
25. 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.
26. 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.”
27. 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. “
 30. I have considered the two averments with regard to their contribution towards construction of the matrimonial home and the testimonies of the parties regarding the role of Joseph Kithure, I find the claim by the defendant That the amount withdrawn from the joint account was not used for the construction as baseless since he did not tender any evidence to show That the money was for other purposes. It is clear the Kithure had been engaged for purposes of building of the house and not any other purpose other than for construction of the house. I equally find the Defendant’s claim That the construction started in 2004 but stalled after he got a court order stopping the construction is equally a vague one since the said order was not availed in court. Surprisingly, the Defendant did confirm That the invoices and quotations produced by the Plaintiff related to the construction of the house which confirmation cemented the plaintiff’s averment That she did contribute to the construction of the building.
 30. The defendant did share loan statements of loans advanced to him between 2015 to 2016 and claimed he used the borrowed money in the construction of the house. He however did not demonstrate any relationship between the said borrowed monies and the construction. At the very least he did not share even receipts of monies spent for construction of materials bought for purposes of constructing the house out of the said borrowed monies just like the plaintiff did. He did not therefore controvert the plaintiff evidence That she did contribute to the development of the house on Parcel 23/353. His claim That he single handedly build the house on the parcel fell short of material evidence.
 28. Article 43 of *the constitution* provides for equality of marriage partners during the subsistence of marriage and after divorce. This however does not mean That matrimonial property shall invariably be shared on 50 :50 basic as sharing depends on contribution of each party.
 29. I note That the house was not complete by the time the parties divorced in 2012 and thus it cannot be said That the plaintiff contributed 50% or more towards the construction of the house. In fact the 2009 invoice pointed out That by then the parties were preparing to install doors and windows of the



house. In all fairness I estimate the Plaintiff's contribution to the acquisition and contribution the plot and development thereon to 40%.

30. In the up shot, I find That the plaintiff has partially proved her case on a balance of probability. I proceed to order as follows;
- a. A declaration is hereby issued That all those properties known as Land Reference Number Bahati/Engorusha-block3/121 (Tuinuane) measuring 0.0827 Ha., Bahati/Engorusha-Block 3/XXX(Tuinuane) measuring 0.0827 Ha., and Nakuru Municipality Block 23/XXX together with all buildings and developments thereon registered in the joint names of the Plaintiff and Defendant are matrimonial properties That were acquired by the joint funds and efforts of the Plaintiff and the Defendant during the subsistence their marriage.
 - b. A declaration is hereby issued That the plaintiff is entitled to a share of 40% Nakuru Municipality Block 23/XXX together constructed the house thereon. The Defendant is at liberty to buy out the plaintiff's share in the property and the developments thereon upon valuation of the same.
 - c. A declaration is hereby issued That plaintiff and defendant are entitled to equal share of parcels Bahati/Engorusha-Block3/XXX (Tuinuane) measuring 0.0827 Ha. And Bahati/Engorusha-Block 3/XXX (Tuinuane) measuring 0.0827 Ha.
 - d. A permanent injunction is hereby issued against the defendant restraining him, his agents and/or servants, or otherwise howsoever from alienating, selling, leasing, charging, encumbering and from disposing or dealing with in any manner prejudicial with plaintiff's share of the three properties in the manner outlined in 2 and 3 above without her consent.
 - e. Each party shall bear his own costs as this is a family matter.
 - f. It is so ordered.

T.A ODERA

JUDGE

25.3.25

Delivered Virtually Via Teams Platform in the presence of:

Court Assistant - Oigo

Parties absent

