



**PWG v JMK (Matrimonial Cause E011 of 2022)
[2024] KEHC 2072 (KLR) (Family) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E011 OF 2022
SN RIECHI, J
FEBRUARY 28, 2024**

BETWEEN

PWG APPLICANT

AND

JMK RESPONDENT

JUDGMENT

1. This Originating Summons is filed pursuant to Order 39 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act*, Section 2, 6, 7, 9, 10 and 14 of the *Matrimonial Property Act* 2013, Section 93 (3) of the *Land Registration Act* and all other enabling provisions of the law. In the summons the applicant, DM seeks against JMK, the Respondent, the following orders:

1. That the applicant and the respondent during the subsistence of their marriage used and applied their income unsparingly towards matrimonial properties.
2. That the properties listed below with all buildings and developments thereon acquired and or developed by the joint efforts of the applicant and respondent during their marriage and all registered in the name of the respondent are matrimonial property being held by the respondent in Trust;
 - a. [particulars withheld]
 - b. Karen Stables Shop [particulars withheld](Land Reference number XXX).
 - c. Furniture and Fittings
 - d. Cutlery & Electronics



3. That an order do issue declaring that 50% of such other or higher proportion of the properties aforesaid is held by the respondent in Trust for the beneficiaries interest of the applicant.
 4. That the division to separate the interest on the properties be done within 90 days from the date of the judgement at the respondent's cost;
 5. That the respondent be ordered to transfer the applicant's share in the property to him within 60 days from the date of division.
 6. That in default the registrar High Court of Kenya be authorized to sign any transfer documents in the place of the respondent or any other person holding any title on behalf of the applicant to effect all the orders of this court in favour of the applicant.
 7. That an order does issue declaring the respondent is accountable to the applicant in respect of all the income derived from the said properties from the said properties from the 1st February 2020 until the date of division.
 8. That an order does issues declaring the respondent is accountable and liable for Kshs.1,122,846 on account of a non performing loan taken to pay for stamp duty of our Kitusuru Home(LR. No [particulars withheld] estate) from Standard Chartered Bank Limited incurred during the subsistence of the marriage and for the benefit of the marriage.
 9. That an order does issue declaring the respondent is accountable to the applicant in respect of all the furniture, fittings and other household goods including but not limited to the items bought by the applicant.
 10. That an order do issue declaring the respondent is accountable to the applicant in respect of the respondents monthly salary of Kshs.600,000/= from 2nd February 2020 to March 2021.
 11. That the respondent be condemned to provide the costs of the summons.
2. The grounds in support of the Originating Summons are found on the face of the Application and in the Supporting Affidavit sworn by the Applicant on 16.2.2022. He also filed a further affidavit dated 3rd February 2023.
 3. The Applicant states briefly that the applicant and respondent got married on the 7th December 2002 and that the subject properties in issue were acquired, developed, improved and maintained by joint efforts of the Applicant and Respondent during the pendency of their marriage.
 4. The applicant stated further that since their divorce he has continued to provide for the children through payment of school fees and requested therapy session. He attached a copy of receipts for school fees payments and therapy sessions payment in support.
 5. The applicant deponed that his income has always been an open book and that he sourced the house in Karen where they resided and paid two months deposit and one month rent. He attached a copy of the bank transaction in support. The applicant stated further that over the period of their stay together he paid rent of Kshs.60000/=. He attached bank transaction in support.
 6. The applicant stated that he made non-financial contribution through teaching respondent how to drive, purchased golf kit and paid golf instructor for their children, The applicant stated further that he used to drop the children in school in Karen from their residence at Kitusuru every morning and picked them in the evening after school. The applicant deponed that he provided the respondent with companionship during the marriage.



7. The Respondent has opposed the instant Originating Summons. In her Replying Affidavit dated 5th July 2022 she deponed that throughout their marriage she was employed and earned an income and contributed to the care of the family, the acquisition and improvement of the properties in question. She attached her CV and various proof of employment as JKM-2 in support.
8. The respondent deponed that in respect to [particulars withheld] that between 2012 and 2015 she purchased the above stated property on Dagoretti/Mutini/567 and registered it in her name. She attached a copy of certificate of lease, offer for sale and sale agreement in support. She stated further that the applicant is in possession of the original title deed of the said property. She stated that the applicant did not contribute to purchase of the said property and she attached copies of bank statement and correspondence between her advocates and theirs confirming receipt of the payment in support. She deponed that the applicant did not make any non-financial contribution to the acquisition of this property.
9. The respondent deponed that in respect to Karen Stables that between 2015 and 2016 she purchased the property Unit 10 on L.R.No.2259/713 Karen Road and registered it in her name. she deponed that the applicant has possession of the original title document which he took while they lived together. She deponed that the applicant did not contribute to purchase of the said property and she attached copies of transaction documents in support. She deponed that the rental income earned from this property has helped her provide for the children and meet all other family expenses.
10. The respondent stated in respect of the Kitusuru Home that she identified the house and convinced the applicant to take a mortgage from his employer to purchase it. The respondent deponed that the applicant was out of work for about five months and did not make mortgage repayment for about 5 years as he claimed. She deponed that applicant only made repayment while he worked at Fina Bank for about two years and one or two payments when he worked at ABC Bank.
11. The respondent stated that ABC Bank attempted to auction the house off but respondent managed to raise money towards the accruing debt. She attached extract of bank statement in support. The respondent deponed that the applicant eventually sold the subject house and he did not disclose how much he earned from the sale and he did not share the sale proceeds with the respondent.
12. The respondent deponed in respect to the rental house that the applicant lost his job and he had sold the Kitusuru house. The respondent deponed that applicant sourced and found a house in Karen for rent at Kshs.60,000/=. The respondent deponed that she was to pay rent and cater for family upkeep and applicant did not contribute anything. She attached copies of bank transactions and receipts in support.
13. The respondent deponed that in respect of the household assets she purchased furniture and utensils in the house. The respondent deponed that in 2015 ABC Bank also proclaimed their household assets for sale to recover car loan. She deponed that she filed civil suit 2355 of 2012 and proved that she was legal owner of the assets and in this way she was able to stop them from being auctioned. The respondent deponed that in addition to items she carried for comfort of the children, she has purchased additional household assets for her house without applicant's contribution. She attached copies of receipts and bank transactions documents in support.
14. The respondent deponed in respect non-financial contribution that she maintained the matrimonial home and purchased day to day household goods and ensuring that the home amenities were fully functional. She deponed she made meals for the family and handled most household chores thus relieving applicant of any domestic chores and demands. The respondent deponed that she provided support and companion to the applicant by decision making, problem solving compassion and



- sympathy. The respondent deponed that she also contributed to the family by catering for the welfare of their children.
15. Following court direction this matter was heard by viva voce evidence and written submissions.
 16. The applicant David Kimeli Mugun testified that the respondent is his ex-wife and they married from December 7, 2002 until March 2021. He testified that we wish adopt his affidavits dated February 16, 2022 and further February 3, 2023 as evidence in chief.
 17. The applicant testified further that in 2007 he moved to banking and was entitled to mortgage and he took a mortgage of Kshs.15million and he was paying Kshs.125,000 and kshs20000 as interest and he was earning a gross salary of 40,000/= .The applicant testified that the mortgage is in respect to the house in Kitusuru and he sold it and it no longer in his name.
 18. On being cross examined the applicant stated that he has not shown evidence of payment to Nine Sister Apartment. He stated that it is true that he has not shown evidence of contribution of [particulars withheld] Property. He testified that he was paying rent to PCEA Mutero. He stated that in June 2020 he took responsibility of the rent arrears. He testified that he signed an agreement with the respondent on page 233 of the respondent's bundle. He confirmed that the respondent did not sign it.He stated that he produced receipt for school fees and that respondent took all the other receipts.
 19. The respondent JMK on her part testified that she is the respondent adopted her replying affidavit as evidence in chief. The respondent testified further that she was working during her marriage in several companies. She testified that have has two children who she takes care of food, house girl, groceries and assisted in paying school fees. She testified that medical cover was provided by her employer.
 20. The respondent testified that the applicant played golf and drunk a lot and when he left Fina Bank the respondent took full responsibility of school fees. She testified that even when the applicant got a job at Strathmore he paid rent for a few months and he went to children court but he has not complied with the orders. She testified further that the respondent did not contribute to property at Nine Sisters or Karen Stables. She prayed that the application be dismissed.
 21. On cross examination the respondent confirmed that the subject property were bought during marriage. She stated that the applicant bought the Kitusuru house and he paid mortgage and lived there for 5 years. She stated that she purchased two properties while working with KWAC and she testified that she was earning Kshs.200,000/=. She stated that Nine sister property was about 6.5million-6.7million and she did not take a loan to buy the property.
 22. The respondent stated further the Karen Stable property was 1.9million and she did not take a loan to purchase it. She stated that she consulted the applicant and he was aware when she bought it. The respondent stated further that she consulted him because she wanted the beneficiaries to be aware.
 23. The Applicant's submissions are dated 10th May 2023 and the respondents' submissions are dated 23rd June 2023 filed through their respective advocates. I have carefully analyzed and considered the submission and case law in supports. The parties in their respective submissions reiterated the averments in their testimonies and affidavits and do not wish to reproduce the same.
 24. I have read all the pleadings of both the Applicant and the Respondent, all the submissions and all the authorities they are relying on. The main issues arising for determination are;
 1. Whether the applicant contributed towards the acquisition and development of matrimonial properties



2. Whether the applicant is entitled to an equal share or such higher proportion of matrimonial properties.

From the material placed before me, both parties agree that subject properties are matrimonial properties. The only issue in dispute between them is simply the distribution of property acquired during the pendency of their marriage. From the Originating Summons, I note that the properties sought to be shared are the following:

 1. 9 sisters Karen (Title number Dagoretti/XXXX).
 2. Karen Stables Shop Number 10(Land Reference number XXXX).
 3. Furniture and Fittings
 4. Cutlery & Electronics
25. [particulars withheld]).
26. From evidence on record this subject property is registered in the name in the name of respondent as shown by Certificate of lease produced by the respondent. The applicant testified that he made financial contribution in the marriage to enable her acquire the property. The applicant during cross examination informed court that he has not shown evidence of payment to Nine Sisters Apartment in Karen.
27. The respondent on her part stated that property 9 sisters Karen (Title number Dagoretti/[particulars withheld]) was about 6.5 to 6.7 million she did not take a loan to purchase the property. In her affidavit she stated that she purchased the subject property and she registered it in her name. She attached a copy of sale agreement and a copy of the Certificate of Lease as JMK-11 to her bundles of documents in support. The respondent stated that the applicant did not contribute financially to the acquisition of the property and she paid solely the full purchase price and all requisite taxes and legal fees. The respondent attached to her affidavit copies of extracts from her bank statement and correspondences between applicant and her advocates and their confirming receipt of payment as JMK-12 in support.
28. From the above evidence I find that the property [particulars withheld] is registered in the name of the respondent as evidenced by Certificate of Lease and that the respondent purchased the property as evidenced by sale agreement dated 16th July 2013. It is also my finding that the respondent purchased the property solely as evidenced by her NCBA bank statements and Advocates correspondences produced by the respondent in her bundle of documents. The applicant did not produce any evidence to show that he contributed to acquisition of the subject property and indeed during his cross examination he confirmed that he did not produce evidence to show that he purchased the property.
29. Unit 10 on L.R.No.XXXX Karen Road([particulars withheld])
30. The applicant content that he found the rental house in Karen where they were residing and paid Kshs.180,000/= being deposit and two months rent as well as monthly rent payments of Kshs.60,000/= after they moved from Kitusuru. He submitted that all these allowed the respondent to save up her salary and purchase the property. The respondent also submitted he made financial contribution in the marriage to enable her acquire
31. The respondent on her part stated that between 2015 and 2016 she purchased the above property. She stated further that the property is registered in her name. The respondent submitted that the applicant did not contribute to purchase of Unit 10 on L.R.No.XXXX Karen Road([particulars withheld]). The respondent stated that she purchased the said property while working with Kenya Wine Agency Company and she solely paid the full purchase price and all requisite taxes and legal fees.



She stated that the subject property was purchased at Kshs.1.9million and she did take a loan to finance it. The respondent attached a copy of the transaction documents in support as JMK-14. Unit 10 on L.R.No.XXX Karen Road(Karen Stable). The respondent stated that the applicant did not make non-financial contribution to purchase of the two properties being [particulars withheld] and Unit 10 on L.R.No.XXXX Karen Road(Karen Stable).

32. I have analyzed the evidence adduced by respective parties and it is my finding that the subject properties were acquired during the subsistence of the marriage. The two properties [particulars withheld] and Unit [particulars withheld] are both registered in the name of the respondent.
33. The applicant herein during cross examination in court he confirmed to court that he did not produce evidence to prove his financial contribution towards purchase of [particulars withheld]. He also did not produce evidence to prove his financial contribution of purchase [particulars withheld]. The respondent on his part did produce any evidence to prove his financial contribution to the purchase of the properties as indicated in copies of bank statements transactions attached to her affidavit as exhibit JMK-11 and JMK-12.
34. It is trite law that whoever alleges must prove. The onus of prove obviously rested on the applicant to prove both monetary contributions made and non-monetary contribution in acquisition and developments of the listed properties. The onus of proof however is subject to a presumption of law under Section 14 of Matrimonial Properties Act and it provides;

There is a presumption of law) that 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 interest in the matrimonial property are equal.”

35. The listed immovable properties in this cause are all registered in the name of the Respondent. The Respondent went to great lengths to show that she acquired the properties solely.

The Constitution of Kenya 2010 under Article 45(3) states that;

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage.”

The constitutional provision does not however equate equal rights to a 50/50 sharing of assets but rather to the rights to be treated equally and fairly. The statute (Matrimonial Property Act) provide under Section 7 that;

“Ownership of 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.”

36. The law therefore provide that in the event of divorce, the matrimonial property is divided between the spouses according to the contribution of each spouse. Section 2 of the same statute defines "contribution" as monetary and non-monetary 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
37. In the supreme court decision of The Supreme court of Kenya in Petition No 10 of 2020 Joseph Ombogi Ongetoto v Martha Bosibori Ogentoto [2023] agreed with Echaria case on the principles applied for distribution of matrimonial property. It stated thus: '[78]to our minds the finding in Echaria was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse a share of the property.'
38. The court went on to emphasize that the spouse seeking a share in the matrimonial property has to prove the extent of his or her contribution to the acquisition or development of the property.
39. Also in Civil Appeal No. 142 of 2018 in CWM v JPM [2017] eKLR, the Court of Appeal held as follows:
- “..... parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of Respondent at the time of such overture. In our view, that contribution, be it domestic work and management of the matrimonial home, child care or companionship falls within the definition of contribution under the Act”.
40. Guided by the above authorities and given the fact that the Applicant was married to the respondent for 18 years, I am certain that despite the absence of evidence of actual financial contribution, the applicant must have made some significant non financial contribution. This contribution include contribution to school fees for the minors, payment of rent for the rented apartment they stayed together in Karen before the respondent moved out as evidenced by exhibit DKM-11 and DMK-13 attached to the application. The applicant also offered companion to the respondent.
41. This contribution was non-monetary that this court has to consider the value of non-monetary contribution. The court based on the material before it apportion the percentage of this non-monetary contribution to acquisition of the property.
42. In this case both parties were working and earning. This court finds that each were contributing to the welfare of the family. I will therefore assess the non-monetary contribution of the applicant to the suit properties at 20%. The respondent will have 80% of the suit properties.
43. I will exercise my discretion in the spirit of Article 159(d) of *the Constitution* and distribute the properties as follows;
- 1. Nine Sisters Apartment Title number 567/4/6 Dagoretti/Mutini/567
 - David Mugun- 20%
 - Jane Muthoni 80%
 - 2. Karen stable Unit 10 on L.R.No.2259/713 Karen Road ([particulars withheld]).
 - David Mugun-20%
 - Jane Muthoni-80%
 - 3. Furniture



David Mugun- 20%

Jane Muthoni 80%

4. Cutlery & Electronics

David Mugun- 20%

Jane Muthoni 80%

Orders shall issue accordingly.

DATED at NAIROBI this 28th day of February 2024.

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S. N. RIECHI

JUDGE

