



**AWK v PNW (Family Originating Summons E001 of 2023)  
[2024] KEHC 3970 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3970 (KLR)

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

**GL NZIOKA, J  
APRIL 23, 2024**

**BETWEEN**

**AWK ..... APPLICANT**

**AND**

**PNW ..... RESPONDENT**

**JUDGMENT**

1. The applicant commenced the matter herein by filing an originating summons dated 16<sup>th</sup> February 2023, bought under the provisions of section 2, 6, 7, 9 and 17 of the Matrimonial Property Act, 2013; section 93(3) of the Land Registration Act and all other enabling provisions of the law.
2. The applicant is seeking for the following orders against the respondent:
  - a. That the honourable court be pleased to declare and issue a declaration that the under listed properties which are registered in the name of the respondent is owned jointly by the applicant and the respondent and/or is held beneficial and in trust for the applicant.
    - i. Residential home erected on Land No. Naivasha/Maraigushu Block 1/4272
    - ii. Two (2) pieces of land LR No. Nyandarua/Ol Kalou Block 1/425 (Mugathika) and LR No. Kijabe/Kijabe Block 1/10497 for which the respondent is holding the title deeds.
    - iii. Motor Vehicle registrations No. KBT 784W Toyota S. Wagon
    - iv. Furniture, fittings and other household goods including but not limited to items bought by the applicant.
    - v. Costs incurred as well as financial contribution to matrimonial home.



- b. That an order do issue declaring that the applicant is entitled to 50% of the said property or proceeds of sale of the same or such other proportion as this honourable court may deem fit.
  - c. That alternatively, a declaration that the applicant is entitled to the very least, an equal share either in kind or cash to the proceeds of the sale/transfer of the said properties.
  - d. That the division to separate the interest in the properties be done within 90 days from the date of the judgment at the respondent's costs.
  - e. That the respondent be ordered to transfer the applicant's share in the property to her with 60 days from the of division.
  - f. That in default the Registrar High Court be authorized to sign any transfer documents in place of the respondent or any other person holding any title on behalf of the applicant to effect all orders of this court in favour of the applicant.
  - g. That an order do issue declaring that the respondent is accountable to the applicant in respect of all the income derived from the said properties.
  - h. That an injunction do issue restraining the respondent from evicting the applicant out of their matrimonial home namely LR. No. Naivasha/Maraigushu Block 1/4272.
  - i. That a temporary injunction do issue restraining the respondent, his servants and/or agents from alienating, wasting, damaging and/or otherwise interfering with the above mentioned properties pending the hearing and the determination of the Originating Summons.
  - j. That this honourable court be please to order that the properties and the income aforesaid be settled in proportions aforesaid or as the court may order.
  - k. Such relief or order as this honourable court may deem fit and just to grant in the circumstances of the case.
  - l. That the costs of the summons be provided for.
3. The summons is based on the grounds thereon and an affidavit of even date sworn by the applicant. She avers that, she got married to the respondent in the year 1999 under Kikuyu customary law. That the marriage was blessed with two children. Further she is a teacher by profession employed by the Teacher Service Commission (TSC).
  4. That in the year 2019, she bought land, Naivasha/Maraigushu Block 1/4272 with a loan secured from Co-operative Bank Ltd, to construct the matrimonial home, which was completed and occupied by the family. She avers that, the purchase of that property cost her Kshs 600,000 and the construction of the home thereon, Kshs 800,000. That she also obtained a loan from Metropolitan Sacco Ltd to buy a motor vehicle, for the family. That the loan and contribution to the motor vehicle was Kshs 450,000. She estimates her total contribution towards the purchase of the family property to be Kshs 1,830,000
  5. She further avers that, additional properties namely LR No. Nyandarua/Ol Kalou Block 1/425 (Mugathika) and LR No. Kijabe/Kijabe Block 1/10497 were jointly purchased by her and the respondent, and so was a motor vehicle registration number KBT 784W Toyota Station Wagon. That the titles thereto are held by the respondent. That her contribution to the property was in the nature of monetary and non-monetary contribution, including childcare and companionship.
  6. She avers that the parties had matrimonial issues wherein the respondent threatened to burn down the matrimonial home and in the year 2021, the marriage broke down which led to her filing a divorce



- cause No. 191 of 2021. That eventually she left her matrimonial home due to the threats over her life by the respondent. However, the respondent has decline to allow her access to her property in order to deprive her of her interest in the afore mentioned property hence the orders sought for herein.
7. Upon considering the summons the court directed that, the same be served for directions inter parties on 13<sup>th</sup> April 2023. On that date the respondent through the firm of G.M. Njuguna & Co. Advocates sought for 21 days to file a response. The request was granted. On 4<sup>th</sup> April 2023, the respondent filed a replying affidavit of the even date. He averred that the applicant purchased the land Naivasha/Maraigushu Block 1/4272 at Kshs 700,000 only and laid the foundation. That he completed construction of home. That the motor vehicle in question was purchased in the year 2013 and not 2019. He conceded that after completion of the matrimonial property the family moved therein.
  8. He denied holding the title deed to the other parcels of land but conceded to holding the original logbook to the motor vehicle. Further, he purchased food, paid school fees and general running of the household needs. Furthermore, he solely paid the motor vehicle insurance. He averred that, the total contribution by the applicant was as follows:
    - a. Purchase of LR No. Naivasha/Maraigushu Block 1/4272 Kshs 700,000.
    - b. Construction of foundation Kshs 500,000.
    - c. Contribution towards purchase of motor vehicle Kshs 450,000.Total contribution Kshs 1,650,000.
  9. He denied being violent or threatening to burn a house he contributed to and blamed the applicant of leaving the house on 5<sup>th</sup> April 2021 with all the furniture and household assisted by her father, two (2) brothers and a cousin. He further denied the allegation that he denied her access to the matrimonial house. He averred that, it is the applicant who has alienated him by deserting the matrimonial home and refusing to engage in talks. Finally, he argues that the division of matrimonial property is premature as the divorce proceedings is still on going.
  10. However, by a further affidavit filed on 8<sup>th</sup> May 2023 and dated 5<sup>th</sup> April 2023, the applicant in which she averred that other than purchasing the land for the matrimonial home, she contributed Kshs 500,000 in putting up the house, while the respondent used Kshs 900,000 towards the construction. That she contributed additional sum in legal fees and fencing giving the total of Kshs 780,000. Further the respondent sold land LR Kijabe/Kijabe Block 1/10497 without her consent and utilized all the money, despite being family property. She produced an OB extract No 44/5/4/2021 from Naivasha Police Station to prove the threats of burning the house and on her life by the respondent. She averred that, her family members assisted her move out for security reasons and that she left more valuable assets in the house due to the respondent refusal to allow her take them away.
  11. On 8<sup>th</sup> May, 2023 the firm of Nancy Njoroge, Kairu & Co. Advocates filed a notice of appointment on behalf of the applicant, and filed the aforesaid further affidavit. On 23<sup>rd</sup> May 2023 the respondent filed a supplementary affidavit tabulating the expenses the applicant incurred, as stated under paragraph 4 thereof and of which the respondent averred that he refunded through Mpesa as evidenced by the Mpesa statement annexed to that affidavit. He reiterated the contents of the replying affidavit and denied owning the Kijabe property and alleged additional expenses incurred by the applicant.
  12. The matter was disposed of vide filing of submissions. The applicant's submissions are dated 26<sup>th</sup> May 2023. She submitted that, the court in the case of JOO -vs- MBO Federation Women Lawyers (FIDA) Kenya and Another (Amicus Curiae) (Petition No. 11 of 2020) [2023] KESC 4 (KLR) held that, the distribution to matrimonial home must be proved. The mere proof of marriage does not entitle any



- spouse to 50% right therein. She argued that given her immense contribution to the purchase of the matrimonial home, she should be given 70% value thereof and half contribution in the value of the motor vehicle KBT 784W while the respondent retains the land in Nyandarua/Ol Kalou Block 1/425
13. In response, the respondent filed submissions dated 23<sup>rd</sup> May 2023 and argued that, the applicant has not attached copies of title deed and log book of the property she is claiming. Further she has dealt mainly on the matrimonial home. The respondent relied in the case of MW -vs- AN HCCC No. 246 of 2016 on the formulae of dividing matrimonial and other family property.
  14. On 3<sup>rd</sup> July, 2023 the parties highlighted the submissions. The judgment was set for 26<sup>th</sup> September, 2023. However, due to pressure of work, it was not ready and the parties were informed accordingly and the court appreciates their understanding and patience.
  15. At the conclusion of the arguments by the parties and in consideration the evidence adduced by the respective parties one issue arises, being whether the court can deliberate and issue orders on the distribution of the matrimonial property and other family property where the parties involved in the matter have a pending divorce cause in court. The applicant averred at paragraph 13 of the affidavit in support of the originating summons that the parties are engaged in a divorce cause No. 191 of 2021 at Naivasha Law Court. The proceeding thereof have not been availed to this court to support that allegation. But assuming that is the factual position, at the time of writing this judgment and despite adjourning it severally the applicant has not appraised this court of the status of that matter. Therefore, this court cannot tell whether the divorce cause has been finalized or not, and if finalized, the orders issued
  16. In response, the respondent termed the matter herein as premature as deposed at paragraph 15 of the replying affidavit. However, the respondent did not make any application to stay these proceedings nor pursued that critical issue. To the contrary both parties advanced their respective case completely subordinating that very important issue.
  17. To revert back to the key question, is this matter premature I find the answer in the positive. This is informed by the fact that a party seeking to lay a claim on a matrimonial property must attach “a decree absolute” as evidence of dissolution of marriage. Therefore, division of matrimonial property cannot take place during the subsistence of the marriage. Further section 6(3) of the Matrimonial Property Act, 2013 states that, the matrimonial property shall be divided between spouses “if they divorced or their marriage is otherwise dissolved”.
  18. Pursuant to the foregoing, it is clear that the distribution of matrimonial property cannot be dealt with where the marriage between the parties subsists as herein as such, the matter herein was filed premature. Any final orders thereon will be void ab initio and may prejudice any future claim of the same right.
  19. Therefore I disallow the originating summons on the grounds that it is not properly before the court or it is premature. It is so ordered and further that each party do meet its respective costs as both parties acquiesced in this litigation.

**DATED, DELIVERED AND SIGNED THIS 23<sup>RD</sup> DAY OF APRIL 2024.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

The applicant present virtually



Ms Nancy Njoroge Kairu for the applicant

Mr G. M. Njuguna for the respondent

Ms Ogutu Court Assistant

