



**ZMZ v EMH (Originating Summons 17 of 2023)  
[2024] KEHC 10699 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 10699 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
ORIGINATING SUMMONS 17 OF 2023**

**G MUTAI, J**

**MAY 29, 2024**

**IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT, 2013**

**AND**

**IN THE MATTER OF SECTION 3(1) OF THE JUDICATURE  
ACT (CHAPTER 8 OF THE LAWS OF KENYA)**

**BETWEEN**

**ZMZ ..... CLAIMANT**

**AND**

**EMH ..... RESPONDENT**

**JUDGMENT**

1. The Claimant and the Respondent are former spouses. The couple got married on 15 October 2014 under Islamic law. Their union was blessed with one issue, KE. However, the marriage failed and was dissolved on 29 September 2022.
2. The Claimant avers that during coverture, the Respondent gifted her four properties, which were registered in her name, and that he subsequently fraudulently transferred them to himself.
3. She, therefore, sought to recover the properties in dispute by filing the cause the subject of this judgment.  
The Pleadings by the Parties  
The Originating Summons
4. The Claimant herein moved this court vide Originating Summons dated 21 February 2023 seeking the following orders:-
  - a. Spent;



- b. That the Honourable Court be pleased to declare and issue a declaration that Apartment G2 on Mombasa/Block XVII/809, Apartment No. A9 on Mombasa/Block XVII/809 and Apartment No. G6 on Mombasa/Block X/307 Tudor, Mombasa, are gifts given by the Respondent to the Applicant during the subsistence of their marriage;
  - c. That the Honourable Court be pleased to issue a declaration that property known as Apartment No. 10 on Mombasa/Block XVII/606 located in Tudor, Mombasa was acquired in the subsistence of their marriage and registered in the names of Ahira Company Limited fully owned by the Respondent and the same should be shared equally between the Applicant and the Respondent or as this court deems fit;
  - d. That in the alternative, this Honourable Court do order that the Applicant be compensated for her share in immovable property Apartment No.10 on Mombasa/Block XVII/606 located in Tudor, Mombasa; and
  - e. That the Respondent does pay the costs of the proceedings.
5. The Summons is based on the grounds stated in the body of the Summons and the Supporting Affidavit of the Applicant sworn on 21 February 2023. I will state the precis of the averments below.
  6. The Claimant stated in her said affidavit that before the divorce, they had separated for two months, and it was during that period that she discovered that the suit properties, to wit, Apartment G2 on Mombasa/Block XVII/809, Apartment No. A9 on Mombasa/Block XVII/809 and Apartment No. G6 on Mombasa/Block X/307 Tudor, Mombasa, which she said were gifts made by the Respondent to her during the subsistence of their marriage, had been transferred from her name to that of the Respondent without her knowledge and or consent. She stated that upon learning of the said occurrence, she lodged restrictions on the said properties and instigated criminal investigations, which are still pending.
  7. She further averred that during the subsistence of their marriage, they acquired other properties whose respective acquisitions she directly and or indirectly contributed. In this regard, she specifically mentioned Apartment No.10 on Mombasa/Block XVII/606 located in Tudor, Mombasa. She deposed that the said property ought to be declared a matrimonial property and shared out accordingly.
  8. She urged the court to share the rent collected from the alleged matrimonial properties equally, subject the said properties to valuation, sell them, and share the proceeds equally between the parties hereto.

### **The Respondent's Replying Affidavit**

9. In response, the Respondent filed a Replying Affidavit sworn on 11 October 2023. In the said document, he denied that he gifted the Claimant any of the suit properties. He averred he had them transferred to her when he was critically ill, and that as soon as he recovered, she wilfully re-transferred them back to him.
10. He further stated that the Claimant was not entitled to any share of the suit properties as she did not contribute to their acquisition. He urged the court to dismiss the Summons with costs.

### **The Evidence of the Parties**

11. This matter was heard on 5 December 2023. The case proceeded in open Court, and neither party called an additional witness.



### **Evidence of the Claimant**

12. The Claimant adopted her supporting affidavit as her evidence in chief and produced the documents therein as exhibits. She stated that there was then an ongoing case regarding the forgeries of transfers and the divorce certificate.
13. Further, during the marriage, she was a housewife, and she did not make a monetary contribution to the acquisition of Apartment No. A9 on Mombasa/Block XVII/809, Apartment No.10 on Mombasa/Block XVII/606 located in Tudor, Mombasa, and Apartment G2 on Mombasa/Block XVII/809; however, she contributed Kes.3,500,000/- towards the acquisition of Apartment No. G6 on Mombasa/Block X/307 Tudor, Mombasa. She stated that a gift cannot be taken away even if parties part ways and that it is not necessary for a party to contribute to a gift.

### **Evidence of the Respondent**

14. The Respondent relied on his Replying Affidavit, sworn on 11 October 2023, and produced the documents therein as his evidence. He alleged that the properties were transferred when he was critically ill; however, he did not have evidence on the same, and that at the time of the transfer, he had parted ways with the Claimant.
15. It was his evidence that the Claimant did not contribute anything towards the acquisition of the suit properties.

### **Parties' Written Submissions**

16. After the hearing concluded the court directed the parties to file their written submissions.

### **Written Submissions of the Claimant**

17. The Claimant, through her advocates John Kebaso & Co. Advocates, filed her written submissions dated 15 January 2024.
18. Counsel relied on Section 15 of the *Matrimonial Property Act* and submitted that no reason was given as to why the properties were registered in the name of the Claimant in the first instance.
19. Counsel further relied on Sections 14, 2, and 7 of the said Act and submitted that the applicant was a housewife during the marriage and she took care of the child of the marriage and managed the home. Counsel urged the court to consider Sections 2 and 15 of the *Matrimonial Property Act*.

### **The Respondent's Submissions**

20. The Respondent, on the other hand, filed his written submissions dated 2 February 2024 through his counsels, Mutisya Mwanzia & Ondeng Advocates.
21. On whether the property known as Apartment No.10 on Mombasa /Block XVII/606 located in Tudor, Mombasa, registered in the name of Ahira Company Limited, should be shared between the Claimant and the Respondent, counsel submitted that this court couldn't issue a declaration as the requisite jurisdiction is vested in the Commercial Court. It was urged that the said property wasn't matrimonial property as it is registered under the name Ahira Company Limited.
22. On whether the Claimant is entitled to compensation for her alleged share in Apartment No. G6 on Mombasa/Block X/307, Tudor, Mombasa, Mombasa, Counsel relied on Sections 107,108 & 109 of



the *Evidence Act* and submitted that the Claimant did not prove contribution towards the acquisition of the same.

23. Were Apartment Nos. G2, G6 and A9 were gifts given by the Respondent to the Claimant during the subsistence of their marriage? Counsel submitted that there are two types of gifts in law; gifts made between living persons (inter vivos) and gifts made in contemplation of death (mortis causa). In counsel's view the gift allegedly made herein was a gift inter vivos. It was submitted that to advance a case of gift on land successfully, one has to produce a document in writing to support the said allegation. Counsel urged that this Court cannot determine the matter unless there was a written contract, and even then, the proper forum to adjudicate the dispute would be the Environment and Land Court.
24. Counsel relied on Section 7 of the *Matrimonial Property Act* and submitted that a party has to prove contribution, either monetary or non-monetary when claiming a share of the matrimonial property, something the Claimant did not do.
25. In conclusion, counsel submitted that the Originating Summons lacked merit and urged the court to dismiss the same with costs.

### **Analysis and Determination**

26. Section 15 of the *Matrimonial Property Act*, 2013 states that: -

“Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient.”

27. The court in the case of *FS v EZ* [2016] eKLR stated:-

“Regarding the first issue, whereas the applicant maintains that the two properties were given to her as gifts, the respondent vehemently denied that position. The properties were bought at a time when the parties loved each other. That love has completely been eroded and the two are now divorced. The parties testified before me and I noticed that although divorced, their differences are not as extensive as one would expect. There is still some form of respect to each other.

The starting legal provision is Section 15 of the *Matrimonial Property Act*. Section 15 states as follows: -

Gifts between spouses

Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolute to the recipient.

It is crucial to note from the above provision that there is a “rebuttable” presumption. The Blacks Law Dictionary defines rebuttable presumption as follows: -

“An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.”

The Black's Law Dictionary defines a gift as the voluntary transfer of property to another without compensation.”



28. In dealing with the issue of gifts, the court in the case of Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others [2021] eKLR stated:-

“In Halsburys Laws of England 4<sup>th</sup> Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

Adherence to the rule based-model on transfer of immovable property involves an inquiry on the Law of gifts inter vivos or causa mortis featuring in Odunga’s Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) e – 1 thus:

“Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in Re Fry Deceased {1946} CH 312 Rose: and Trustee Company Ltd v Rose {1949} CL 78 Re: Rose v Inland Revenue Commissioners {1952} CH 499 Pennington v Walve {2002} 1WLR 2075 Maledo v Beatrice Stround {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See Shell’s Equity 29ED Page 122 paragraph 3)”

It is evident that where there is an imperfect gift having regard to the requirements, of the necessity for the same must be by way of written memorandum, registered transfer and or declaration of trust



in writing, the gift may nonetheless be perfected by the conduct of the parties.”

29. Further the court in the case of LIO v AOO [2020] eKLR faced with a similar issue held:-

“The fact that the plot was registered in the name of the applicant as a gift tends to support the respondent’s case that the plot initially belonged to him and that he gave it her as a gift. Be that as it may be, the effect of the respondent gifting the plot to the applicant was that the plot ceased to be matrimonial property. The plot absolutely belonged to the applicant as provided by Section 15 of the Matrimonial Properties Act 2013. The respondent has not rebutted the presumption that the gift was absolute. The property cannot therefore be the subject of distribution between the parties.”

### **Disposition**

30. I have considered the entries in Part B of the Green Book regarding each title. My findings are as follows:

- a. Entry No.1, dated 17 February 2021, in respect of A9, is in the name of the Claimant. Vide entry No.3, dated 16<sup>th</sup> February 2022, the property was transferred to the Respondent;
- b. Entry No.1, dated 2 February 2021, in respect of G2, is in the name of the Claimant. Vide entry No.3, dated 16<sup>th</sup> February 2022, the property was transferred to the Respondent;
- c. Entry No.3, dated 4 November 2020, in respect Of G6 is in the name of the Claimant. Vide entry No.5, dated 16<sup>th</sup> February 2022 the property was transferred to the Respondent.

31. It is common ground that the Claimant made little contribution towards the purchase of the suit properties. That notwithstanding, they were registered in her name. Is the fact of registration evidence of the alleged fact that the Respondent gifted them to her? As defined above, a gift is a voluntary transfer of property to another without compensation.

32. From the evidence adduced, the Respondent freely and voluntarily transferred the titles to the three properties to the Claimant. There was no compensation of any sort, nor did the parties enter into a written memorandum setting out the terms under which the Claimant was to hold the 3 titles.

33. I do not agree with the Respondent that the Claimant had the burden of proof to show that the properties were gifted to her by producing contractual documents. I say so because property transfers require the production and lodgement of registration documents. The mere fact that the titles were registered in the name of the Claimant is sufficient proof of the existence of the requisite transaction documentation.

34. It was incumbent on the Respondent to prove that the gifts he made to the Claimant were not meant to give absolute ownership of the same.

35. Section 108 of the *Evidence Act* provides that, “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 15 of the Matrimonial Properties Act creates a presumption it was incumbent on the Respondent to show that the presumption was inapplicable in this case. In my view, he did not discharge this burden. In the circumstances, I declare that the three properties are gifts given by the respondent to the applicant during the subsistence of marriage.



36. Although I have found that the property belonged absolutely to the applicant, I note that they were transferred to the Respondent on 16 February 2022. The Claimant urged this court to find that the transfers were fraudulent. Further, she has averred that the transfers are under criminal investigations and or proceedings.
37. The Claimant did not seek to have the transfers revoked or for the cancellation of the titles. Given that such prayers would have required this court to ascertain the validity of transfers, if any, entered into by the parties, it is doubtful if this court has the requisite jurisdiction. In the circumstances, I find and hold that the determination of the validity of transfers is an issue that should be determined by the Environment and Land Court.
38. Apartment No. 10 on Mombasa/Block XVII/606 located in Tudor, Mombasa is owned by a company. As a company asset, the respective rights of the parties would be best determined by the commercial court.
39. In the circumstances, I find and hold as follows:-
- a. I declare that Apartment G2 on Mombasa/Block XVII/809, Apartment No. A9 on Mombasa/Block XVII/809 and Apartment No. G6 on Mombasa/Block X/307 Tudor, Mombasa, were gifts made by the Respondent to the Claimant and were hers absolutely;
  - b. The validity or otherwise of the transfers of the Apartment G2 on Mombasa/Block XVII/809, Apartment No. A9 on Mombasa/Block XVII/809 and Apartment No. G6 on Mombasa/Block X/307 Tudor, Mombasa, from the Claimant to the Respondent is a matter within the jurisdiction of the Environment and Land Court; and
  - c. The claim in respect of Apartment No. 10 on Mombasa/Block XVII/606 located in Tudor, Mombasa is dismissed as this Court lacks jurisdiction.
40. As this is a family matter, each party shall bear its own costs.
- It is ordered.

**DATED AND SIGNED AT MOMBASA THIS 29<sup>TH</sup> DAY OF MAY 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Kebaso for the Claimant;

Mr Mwanzia for the Respondent; and

Arthur – Court Assistant.

