



**AMK v DM (Matrimonial Cause E007 of 2023)
[2024] KEHC 8025 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE E007 OF 2023**

G MUTAI, J

JUNE 28, 2024

**IN THE MATTER OF SECTION 7 & 17 OF THE
MATRIMONIAL PROPERTY ACT (ACT NO 49 OF 2013)**

AND

IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

AMK CLAIMANT

AND

DM RESPONDENT

JUDGMENT

1. The Claimant and the Applicant got married on 7th April 2008 under the customary law of the Mijikenda people. The union between the two was not a happy one. The Claimant filed for divorce, and on 20th December 2022, the marriage was dissolved. The Court issued a decree nisi, which decree was made absolute on 7th March 2023. The ground upon which the Court dissolved the marriage was that the union had broken down irretrievably.
2. With the marriage dissolved, the Claimant filed the Originating Summons dated 24th June 2023, seeking to have the matrimonial property divided between her and her former spouse. In particular, she prayed for the following orders:-
 1. That the Honourable Court be pleased to allow the Applicants exclusive possession of property known as Vikwatani, Kachochoroni B;
 2. That the Honourable Court be pleased to exclusively disallow the Respondent from getting in contact and or close to the Applicant in the property known as Vikwatani, Kachochoroni B;



3. That the Respondent be evicted from the property known as Vikwatani, Kachochoroni B as the union has already been dissolved and, therefore the Respondent is a stranger to the Applicant; and
 4. That the costs of the Summons be provided for.
3. The grounds upon which the Originating Summons was brought were that the property known as Vikwatani, Kachochoroni B, was solely acquired, developed, and/or maintained by the Claimant and that the marriage between the Claimant and the Respondent was dissolved vide Divorce Petition No E043 of 2022 between the parties hereto. The Originating Summons was supported by an affidavit sworn on 24th June 2023.
 4. The Claimant deposed that she bought the suit property from Mr Mohamed in February 2015. The Respondent witnessed the signing of the agreement. The Claimant averred that “the Respondent was a witness(ed) to the signing of the said agreement and is aware of the fact that I am the true of the property known as Vikwatani, Kachochoroni B”. She stated that she sold a piece of the said land to Mr Amani Nyungu on 2nd April 2019 and used the sale proceeds to construct a house on the property in which the Respondent opted to live.
 5. The Claimant averred that the Respondent only contributed Kes.20,000/- towards the construction of the house. She deposed that the Respondent refused to vacate the house she constructed even after the divorce proceedings were concluded. The Claimant was apprehensive that the Respondent might never move out of the house and hence was forced to file the Originating Summons for division of matrimonial property and also so that she could have the Respondent evicted.
 6. Although the Respondent was served, he never appeared, nor did he file a response to the Originating Summons. The cause thus proceeded exparte and was heard on 18th April 2024 upon the Court being satisfied, on the basis of the affidavit of Ms Habiba Mudathir Kassim, learned counsel for the Claimant, that the Respondent was served with the hearing notice on 28th March 2024 at around 330 p.m. at his family residence at Vikwatani.
 7. In her testimony, the Claimant reiterated the contents of her Supporting Affidavit. She stated that she is a businesswoman. She further stated that the Respondent mistreated her and thus forced her to file for divorce. The lower Court allowed the divorce petition. It was her testimony that she solely bought the subject parcel of land and put up the home thereon. The Respondent only contributed Kes.20,000/- which amount she was ready to reimburse him. She prayed for the Respondent to be compelled to leave the matrimonial home.
 8. As earlier indicated, the Respondent never appeared. The testimony of the Claimant was, therefore, not challenged.
 9. The Claimant’s counsel filed Written Submissions dated 3rd May 2024, in which three issues were identified as coming up for determination, to wit:-
 1. Whether the property the subject of the suit was a matrimonial property;
 2. Did the Respondent contribute towards the acquisition and the development of the matrimonial property? and
 3. Is the Respondent entitled to an equal share or a higher proportion of the matrimonial property?



10. The learned counsel for the Claimant submitted that the parties hereto were married in 2008 and that the property was acquired and developed during coverture. Because of that, she submitted that the same was a matrimonial property and thus fell under the ambit of the *Matrimonial Property Act*.
11. Regarding contribution, learned counsel conceded that the Respondent contributed little to the construction of the matrimonial home. Reliance was placed on the case of *AWN vs JGK* [2021]eKLR.
12. On each party's entitlement, it was submitted that the Claimant and the Respondent were entitled to a share of the property based on contribution. Reliance was placed on the provision of section 7 of the *Matrimonial Property Act* and the decision of the Supreme Court in *JOO vs MBO & Kenya (amicus curiae)* Petition No 11 of 2020) KESC (KLR) (Family) (27 January 2023) (judgment)
13. Thus, I was urged to allow the Originating Summons in terms of the orders sought based on the pleadings, the evidence adduced, and the submissions.
14. Although the suit was undefended, I must exercise my judicial mind and determine whether, on the balance of probability, a case was made for issuance of the orders sought. The mere fact that the claimant's testimony was not subjected to cross-examination is not enough to warrant the grant of the orders she seeks. This is so because an undefended cause may nevertheless not be supported by evidence or could be based on a misapprehension of the law.
15. What then is the constitutional and legal position? It is important that I set out the relevant provisions of *the Constitution* and the law as these shall determine the decision that I shall make.
16. Article 45(3) of *the Constitution* of Kenya 2010 provides that:-

“parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”
17. Section 6 and 7 of the *Matrimonial Property Act*, Act No 49 of 2013, provide that:-

“6.

 - (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.
 - (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
 - (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
 - (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside



the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

7. 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.”

18. Section 14 of the said Act provides 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 interests in the matrimonial property are equal.”

Issues to be Determined by the Court

19. In my view, there are four issues that this Court ought to determine: -

1. Is the suit property matrimonial property?
2. What contributions did the Claimant and the Respondent make towards its acquisition?
3. What share is due to the Claimant? If the Respondent is entitled to a share, what percent?
4. Who bears the costs of this cause?

20. The evidence shows that the Claimant solely purchased plot number Vikwatani, Kachochoroni B, in February 2015. The Claimant's evidence to that effect was uncontroverted. The Claimant and the Respondent got married in 2008 under the Miji Kenda customary law. Their marriage was dissolved on 7 March 2023. Thus, the purchase of the property took place at a time when the marriage was subsisting.

21. In *TMW versus FMC* [2018]eKLR the Court said as follows:-

“Firstly, I shall determine whether the suit property falls in the category of matrimonial property. Turning the provisions of the Matrimonial Property Act, Section 6 of the Matrimonial Property Act, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Basically for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property. In the instant case, the marriage between parties herein commenced in 1993 and was officiated through Kikuyu Customary Law in 2001. The property in question was acquired in 2010 and the same was acquired during the subsistence of the marriage between the parties herein. There is also evidence that the suit property was acquired for purposes of building a family home. As a result, there is no doubt whatsoever that the suit property including the Juja farm forms part of matrimonial property as far as the parties herein are concerned.”



22. It is thus evident that the Claimant acquired the said property intending to put up a home for herself and the Respondent. In the circumstances, it is a matrimonial property. I, therefore, find and hold accordingly.
23. The Claimant's evidence is that she solely purchased the plot Vikwatani, Kachochoroni B. She also constructed the home on the said property, which home is now under the occupation of the Respondent. She testified that the Respondent made a nominal contribution of Kes.20,000/- which she is willing to reimburse. Her evidence was not controverted.
24. Marriages are relationships of trust. Spouses do not keep records in contemplation of the day when they can use them in matrimonial proceedings. Unravelling contributions made by the parties is, therefore, exceedingly difficult. It is not a scientific venture that can yield mathematically accurate results. Rather it may be said to be an art.
25. The Supreme Court, in *Joseph Ombogi Ongentoto versus Martha Bosibori Ogentoto* [2023]eKLR, whilst agreeing with what Tuiyott J (as he then was) said in *UMM versus IMM* [2014]eKLR, stated as follows:-
- “we find the above opinion and findings persuasive and it is our finding that the stated equity under Article 45(3) means that the Courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed”.
26. I agree wholeheartedly with the holding above. Thus, in this case, I must consider not only what each contributed monetarily but also their non-monetary contributions.
27. In this matter, for want of evidence to the contrary, I find and hold that the Respondent's only monetary contribution was Kes.20,000/-. No evidence was led to show that he made a non-monetary contribution. Without evidence, I cannot make a finding in his favour. In any case, I note that the marriage between the Claimant and the Respondent appears to have been exceedingly unhappy.
28. The evidence adduced in this matter shows that the Claimant made most of the contribution. Justice demands that each party gets what they contributed, not a shilling more or a shilling less. Thus, I find and hold that the Claimant, save for the Kes.20,000/—which she admits the Respondent paid, solely contributed to the acquisition of Plot No. Vikwatani, Kachochoroni B and the construction of the house erected thereon.
29. In civil matters, costs ordinarily follow the event. Given the nature of this matter, however, I am not persuaded that an award of costs would be an appropriate remedy. Each party will, therefore, bear his or her own costs.
30. In the circumstances, I order that:-
1. The Claimant shall have exclusive possession of property known as Plot No Vikwatani Kachochoroni B and the house erected thereon;
 2. The Claimant shall pay Kes. 20,000.00 to the Respondent within 30 days of the date hereof. Upon payment, the Respondent shall have 30 days to vacate the said plot and house, failing which the Claimant shall have liberty to evict him lawfully; and
 3. I make no orders as to costs.



31. Orders accordingly.

DATED AND SIGNED THIS 28TH DAY OF JUNE 2024 AT MOMBASA. RULING DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Muthoni holding brief for Ms Habiba for the Claimant;

No appearance for the Respondent; and

Arthur – Court Assistant.

