



REPUBLIC OF KENYA



KENYA LAW
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GKI v MW (Civil Suit E083 of 2022) [2024] KEHC 7608 (KLR) (Family) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7608 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT E083 OF 2022
HK CHEMITEI, J
JUNE 27, 2024

BETWEEN

GKI APPLICANT

AND

MW RESPONDENT

RULING

1. This ruling relates to the application dated 4th April, 2023 filed by the Applicant, Geoffrey Karanja Ikundu seeking for orders that:
 - a. The Respondent/Applicant to release the Karen home LR No. 1XXXXXXX to the Applicant/Respondent for his sole occupation while the Respondent/Applicant returns to the (Details withheld) matrimonial home LR No. Ngong/Ngong 2XXXXX where she chose to live following the separation and subsequent divorce of the parties.
 - b. The Respondent/Applicant to reimburse and or compensate the Applicant/Respondent the cost of rent, motor vehicle and furniture acquired by him as a result of the Respondent/Applicant's hostility and lack of compassion that forced the Applicant/Respondent out of all the matrimonial properties and make orders as hereunder.
 - i. The Respondent/Applicant to pay the Applicant/ Respondent for the rent paid since July 2021 to date, currently totaling Kshs. 1,155,000/=.
 - ii. The Respondent/Applicant to reimburse the Applicant/respondent the cost of the furniture he bought in 2021 at Kshs. 350, 000/=.
 - iii. The Respondent/Applicant to reimburse the Applicant/Respondent the cost of motor vehicle (Details withheld) he acquired in 2021 costing Kshs. 1,200,000/=.



- iv. The Respondent/Applicant to reimburse the Applicant/Respondent for the cost of insurance for the said motor vehicle (Details withheld) at 4% of the value per year for 3 years (2021–2023) totaling Kshs. 144,000/=.
- (c) This Honourable Court do direct further that the balance of the proceeds from rent and farm produce already collected by the Respondent/Applicant from various matrimonial properties be shared in the ratio of 70% to the Applicant/Respondent and 30% to the Respondent/Applicant after the payment of the above rent of Kshs.1, 155,000/=, the cost of the furniture Kshs.350,000/=, the motor vehicle (Details withheld) Kshs.1,200, 000/= and its comprehensive insurance of Kshs.144,000/= totaling Kshs.2,845,000 pending the determination of this matter or further orders of this Honourable Court.
 - (d) The Respondent/Applicant do pay the Applicant/ Respondent 100% of the rent income collected by the Respondent/Applicant from all the rental properties every month totaling over Kshs. 220, 000 per month with effect from 1st March, 2023 till further orders are issued by this Honourable Court.
 - (e) The Respondent/Applicant be directed to desist from continuing to let out or enter into any agreements with other third parties or tenants in the management of the matrimonial properties hereof without the express consent of the Applicant/ Respondent.
 - (f) In the interest of goodwill, the furniture, fittings and fixtures in Karen worth over Kshs. 600, 000/= be shared equally between the parties.
 - (g) The sum of Kshs. 2,600,000/= raised from the sale of the four motor vehicles sold by the Respondent/ Applicant be shared equally between the parties.
2. The application is opposed vide replying affidavit sworn by M.W on 9th June, 2023. She avers inter alia that G K seeks to divide the matrimonial properties before determination of the parties share of contribution to their acquisition. The issues raised in the instant application are the subject of determination in the main suit where each party should be given a chance to prove their case during the hearing.
 3. She said that the Applicant abandoned the Karen matrimonial home (L.R. No. 1XXXX/XXX) in 2021 and she and the children have been living there since then to date. She has maintained the house in good condition, hired servants, paid land rates, bills and kept the household in good condition without any contribution from him.
 4. That he was paying rent out of his own free will because there are other matrimonial properties that he has refused to occupy. He has refused to occupy or rent out L. R. No. Ngong/XXX/ (Details withheld) after he chased away the tenant in 2021 and he has also prevented her from renting it out thus allowing the property to waste away. He earns annual bonuses of about Kshs. 300, 000/= from KMA Sacco and dividends from equity shares in KMA Housing Investment which he utilizes alone.
 5. She deposes that he has no basis to demand for reimbursement of the alleged rent or cost of furniture pending hearing and determination of the main suit. The net income generated from the matrimonial properties is subject to hearing and determination in the main suit and cannot be a subject of distribution at interlocutory stage. Further she has not sold the motor vehicles and he has previously refused to engage on distribution of the matrimonial properties.
 6. The Respondent has filed written submissions dated 5th April, 2024 placing reliance on the following:
 - a. *Giella vs Cassman Brown & Co. Limited* [1973] EA 358 where the court stated as follows:



- “(a) Show that they have a prima facie case with a probability of success.
- (b) Show that unless the orders sought are granted they will suffer irreparable loss and damage.
- (c) Convince the court that if there is any doubt on (a) and (b) above, the balance of convenience.

7. The Applicant’s submissions dated 1st April, 2024 avers that Margaret has failed to prove her contribution to the acquisition of the matrimonial properties. He has placed reliance on the following:

a. Section 3A of the *Civil Procedure Act* where the court stated as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

a. *NN v ZWN* [2017] eKLR where the court stated as follows:

“To my mind. All *the Constitution* declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words all forms of gender superiority – whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage covered into silence by sheer might of the other flowing only from that other’s gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest – all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law.

Does this marital equality recognized in the *Constitution* mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.”

b. Petition No. 11 of 2020 *Joseph Ombogi Ogentoto vs Martha Bosibori Ogentoto* where the court held as follows:

“Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of Article 46 (3) of the *Constitution*. To hold that Article 45 (3) has the meaning of declaring that property should be automatically shared at the ration of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into



marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.”

Analysis and Determination

8. I have carefully considered the applications, the responses thereto and the rival submissions filed by the parties.
9. The issues raised in the application has to do with the contributions made by either of the parties while their marriage was subsisting. At this level it is not possible for instance to agree with the applicant or not that his entitlement is 70% and 30% to the Respondent.
10. At the same time, it is not possible to know who has sold what and at what price and how he or she should contribute to each other. Neither can this court know which is the matrimonial home and which are commercial properties.
11. All that I am attempting to underscore is that based on the affidavit evidence alone the court cannot make a proper interlocutory orders. The issues raised must be subjected to *viva voce* evidence. The court risks going ahead of itself to determine the main suit if at all it proceeds to share out the properties in the manner suggested by the Applicant.
12. In the premises I do not find the application merited at the moment and the same is hereby disallowed with no orders as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 27TH DAY OF JUNE 2024.

H K CHEMITEI

JUDGE.

