



**MWK v JKK (Matrimonial Cause 5 of 2016)  
[2024] KEHC 1243 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1243 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MATRIMONIAL CAUSE 5 OF 2016**

**G MUTAI, J**

**JANUARY 19, 2024**

**IN THE MATTER OF SECTIONS 7, 12 & 17 OF THE  
MATRIMONIAL PROPERTY ACT, NO 49 OF 2013**

**AND**

**IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY**

**BETWEEN**

**MWK ..... APPLICANT**

**AND**

**JKK ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Applicant and the Respondent were previously a husband and wife having got married under the customary laws of the Agikuyu people. Their marriage was dissolved vide the decree issued in Mombasa High Court Divorce Cause No. 3 of 2011.
2. Vide an Originating Summons dated 4<sup>th</sup> August 2016 the Applicant sought the division of the Matrimonial Property acquired during coverture. In particular, she prayed for the following orders:-
  1. That this honourable court do declare the property known as Mombasa Municipality Block 2/xxx was acquired through the sole effort of the Applicant;
  2. That this honourable Court do declare that the Respondent did not make any contribution, financial or otherwise, to the acquisition of the property known as Mombasa Municipality Block 2/xxx and thus, he is not entitled to a share of the said property;



3. That this honourable Court do issue an order that the property known as Mombasa Municipality Block 2/xxx be registered in the Applicant's sole name; and
  4. That the Respondent does account for the income derived by him from rents received from the property known as Mombasa Municipality Block 2/xxx and the same be paid to the Applicant.
3. The said Originating Summons was based on the grounds listed in the said Summons as well as the Supporting Affidavit annexed thereto. Briefly, this was that the Applicant purchased Mombasa Municipality Block 2/xxx from one Reuben Mutua Kiema and Florence Wanza Mutua at a consideration of Kes.800,000.00. The property is located in Miritini, Mombasa. She averred that although the sale agreement is in the name of both parties, all the funds used to acquire the property were obtained from her personal account. The Respondent did not make any contribution, financial or otherwise, towards its purchase. The foregoing notwithstanding, the Respondent was the sole beneficiary of the rents accruing from the suit properly.
  4. The Applicant also stated that their marriage was blessed, during its subsistence, with 2 issues, namely JW, born in 2001, and EM, born in 2007. The cause of the breakdown of the marriage was the irreconcilable difference brought by the Respondent's neglect of his parental responsibilities to the said children.
  5. The Applicant averred that the suit property was registered in both their names as, at the time of its purchase, she trusted him. It was not the only property she had purchased and registered in their names; there were also Title No. Mombasa/Block 2/MN/760 and some motor vehicles. These properties are subjects of subsisting litigation between the parties hereto. The Respondent had, however, erected, without her consent, a structure on the suit premises and was deriving rent from it, which rent he wasn't accounting to her.
  6. The Respondent opposed the Originating Summons vide a Replying Affidavit sworn on 31<sup>st</sup> October 2016. The Respondent deposed that he contributed towards the purchase of the suit premises and that "I contributed towards the acquisition of all the properties acquired by the Applicant and myself".
  7. He stated that prior to setting up Jewels Trading Ltd, a clearing and forwarding company, the Applicant was a housewife with no means to raise the minimum monetary requirement for a clearing and forwarding firm and that the capital to do so was raised through a loan he took from Uboru SACCO Ltd and his personal savings. He also stated that the Applicant depended on him for logistics advice in running Jewell Trading Company Ltd.
  8. The Respondent thus prayed that the Applicant be ordered to account for the income received from Jewel Trading Company Ltd for the period from April 2010 up to October 2015 "and that of the proceeds paid to me by the Applicant."
  9. The matter proceeded by way of viva voice evidence before M. Thanda, J on 16th March 2017, 22<sup>nd</sup> June 2017 and 19th October 2017, when the Applicant and her witness testified and were cross-examined. I shall recap the evidence adduced below. On the 11<sup>th</sup> of December 2018, the matter came up for a defence hearing. The counsel for the Respondent, Mr. Shimaka, failed to turn up in Court in the result that the Respondent's case was closed. The Respondent filed an application dated 20<sup>th</sup> December 2018 seeking to re-open the case and for the Respondent to be allowed to prosecute his defence.
  10. The application dated 20<sup>th</sup> December 2018 was, however, dismissed on 5th March 2019 after the Respondent's counsel failed to fix a hearing date. The application dated 30<sup>th</sup> April 2019 seeking to have orders issued on 5th March 2019 set aside and or varied was dismissed by M. Thande J on 20th September 2019 for lacking merit.



11. Being aggrieved by the said decision, the Respondent filed an appeal to the Court of Appeal. The said appeal, Mombasa CACA No. E030 of 2020; Joel Kaburi Kibunja versus Margaret Wothaya Kirweya was heard by Nyamweya, Lesiit and Odunga JJAs. Their Ladyships and His Lordship found as follows as regards the appeal:-

“25: In these circumstances, we are unable to see how the Learned judge can be faulted in her decision in dismissing the said application. We are unable to see any error of law or principle that was committed by the Learned judge. Nor are we satisfied that the Learned judge took account of irrelevant consideration or failed to take account of a relevant consideration. In the circumstances, there is no basis upon which we can find that the decision arrived at by the Learned Trial judge was plainly wrong. We find that the factors that were taken into account in arriving at the decision were all relevant factors and that the Learned judge arrived at the correct decision in the circumstances.

26. we reiterate the well-articulated position that public policy demands that the business of the Courts should be conducted with expedition and that it is of the greatest importance in the interest of justice that actions should be brought to trial with reasonable expedition.

27. we have said enough to show that we find no merit in this appeal which we hereby dismiss with costs.”

12. The effect of the decision of the Court of Appeal was that M. Thande, J.'s decision to close the Respondent's case without hearing the Respondent's case, was upheld.

### **The Testimonies of the Applicant and her Witnesses**

13. The Applicant called 2 witnesses, herself and Ms Rose Mbaika Munupe, the Deputy Director of Land Administration, Mombasa County Government.

14. Ms Kirweya testified that she bought the suit property from Reuben Mutua Kiema and Florence Wanza Mutua for Kes.800,000.00. She paid Kes.700,000.00 by banker's cheque and Kes.100,000.00 in cash. In support of her averment, she produced her bank statement as Exhibit 1. The sale agreement, in the names of both parties, was produced as exhibit 3. She testified that the name of the Respondent was included as he was her husband, and she “wanted to involve him in openness. I did not have secrets.” She produced the transfer as Exhibit 4, as well as other ownership documents.

15. She testified that during marriage, they shared details of their earnings, and that is how she came to be in possession of his payslips. The Respondent used to work for the Kenya Bureau of Standards as a driver earning a net salary of Kes.8,356.00.

16. The Applicant testified that the Respondent developed the suit property and has leased it to a woman who pays rent of Kes.50,000.00 per month, which he uses without accounting to her. The tenant had put up additional structures. It was her prayer that the title should be in her name as the Respondent has no share in the property. She further prayed for a share of the rent he had been getting.

17. On cross-examination, she reiterated that the suit property, identified as plot 25, is hers. She stated that she hadn't done any development on the said plot. The developments were done by the Respondent. She admitted that she hadn't made any payments to the Lands Office or County Government. She testified that there was confusion as to the suit property as there was a mix-up with another plot belonging to Mr Solomon Mureithi Wachiuri.



18. The second witness for the Applicant was Rose Mbaika Munupe. Ms. Munupe is a surveyor then working as a Deputy Director of Land Administration with Mombasa County Government. She confirmed that she was aware of Plot No. 25. The said plot originally belonged to Blandina Shally Mkali. The said individual transferred it to Reuben Mutua Kiema and Florence Wanza Mutua. These two then sold it to the parties hereto. The title was, however, erroneously processed as Title No 2/296 instead of 2/xxx.
19. On cross-examination she reiterated that plot No. 94 does not belong to the parties.
20. The second witness was recalled. She produced the original transfer certificate of plot No 94 Miritini site and service as Exhibit 8 and the original memo dated 9<sup>th</sup> March 2015 as Exhibit 9.

### **The Testimony of the Respondent**

21. On 11<sup>th</sup> December 2018, the matter came up for the hearing of the Respondent's case. As the Respondent and his counsel were absent, his case was closed. I have already referred to what happened thereafter in the preceding paragraphs of this judgment. I need not rehash the same here.

### **Submissions of the Parties**

22. The Court directed the parties to file Written Submissions within 21 days. The Applicant filed Written Submissions dated 7<sup>th</sup> February 2019.
23. The Respondent did not file Written Submissions. On 18<sup>th</sup> July 2023 having not seen the Written Submissions of the Respondent I set down the matter for judgment.
24. In her submissions, the Applicant stated that she wants to be declared as the sole or exclusive beneficial owner of property known as Mombasa Municipality Block 2/xxx. The title to the said property has not been issued to them because the Respondent "blatantly" refused to surrender back a title deed for Mombasa/Block 2/MN/296 for cancellation since it was erroneously issued in their names, so that the correct title deed for the suit property could be issued.
25. It was urged that property in dispute was acquired during the subsistence of the marriage and is thus a matrimonial property. Learned counsel for the Applicant referred me to section 7 of the Matrimonial Property Act.
26. It was submitted that there was no contribution done by the Respondent as the property is undeveloped. Counsel relied on the case of ZJ & SJ versus AIG[2018]eKLR where the Court held as follows:-

"The Court is also aware of the provisions that require contribution in respect of the acquisition of matrimonial property to be established and proved. I will safely find that the defendant did not prove any contribution to the acquisition of the suit property either directly or indirectly. He is therefore not entitled to the suit property".

27. Although section 14 of the Matrimonial Property Act provides that where a matrimonial property is acquired during marriage in the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal, counsel for the Applicant submitted that the presumption had been rebutted by the evidence produced by the Applicant that proved that she singlehandedly provided all the funds that purchased the suit property.
28. The Respondent's counsel did not file written submissions.



## **The Applicable Law**

29. 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”.

30. Sections 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.”

31. 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 a rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

## **Issues for Determination**

32. I have looked at the matter and considered the testimony of the Applicant and her witness, as well as the submissions filed herein. Although the Respondent did not appear for the hearing, nor were



submissions filed on his behalf, I must nevertheless consider whether the Applicant proved her case. In my view, it is not enough that the case was not contested; evidence adduced and the law must support her case. In discharging its duty, the court must make a reasoned, well-grounded decision.

33. It would thus appear to me that I must determine: -

- i. Whether Mombasa Municipality Block 2/xxx, the property claimed by the Applicant, is matrimonial property?
- ii. Did the Applicant contribute towards the acquisition and development of Mombasa Municipality Block 2/xxx?
- iii. Is the Applicant entitled to 100% beneficial interest in Mombasa Municipality Block 2/xxx?
- iv. Is Respondent accountable to the Applicant in respect of all the income derived from the Mombasa Municipality Block 2/xxx?
- v. Should the Applicant be granted the prayers sought?

I will look at each of these issues in turn.

#### **Are the properties claimed by the Applicant matrimonial properties?**

34. The Applicant set out in her Originating Summons the property she is claiming. Is Title No. Mombasa Municipality Block 2/xxx a matrimonial property?

#### **Title No Mombasa Municipality Block 2/xxx**

35. The Applicant produced a sale agreement dated 1<sup>st</sup> October 2007. The parties to the said agreement are Reuben Mutua Kiema and Florence Wanza Mutua as vendors and Joel Kaburi and Margaret Wothaya Kirweya as purchasers. The property being sold is described as Title No. Mombasa Municipality Block 2/xxx, measuring a 1/8 of an acre. The consideration was Kes.800,000.00. The agreement states that the same was settled by way of the banker's cheque number 027195. The Applicant produced her bank statement. The same shows that on 4<sup>th</sup> October 2007, Cooperative Bank debited her account upon issuing a banker's cheque for Kes.700,000.00. The Applicant testified that the remainder sum came from her as well. In those circumstances, it would appear to me that the entire purchase amount came from her.

36. The Respondent's payslips, which she produced, and were marked as Exhibit 10, on the other hand, show that he was a man of very modest means at that particular time. His net pay for the month of August 2007 was Kes.8,356.20. I am not convinced, without evidence from him, that he had the means to contribute towards the purchase of the suit property.

37. At the time the said property was acquired, the parties were married to each other. That being the case, I find and hold that Title No. Mombasa Municipality Block 2/xxx is a matrimonial property.

#### **Unpleaded Claims**

38. Reference was made to other properties, both movable and immovable, that were acquired by the parties. The Court in Independent Electoral and Boundaries Commission & another versus Stephen Mutinda Mule & 3 others [2014] eKLR stated that:-

“... it is now trite principle in law that parties are bound by that pleadings and that any evidence led by any of the parties which does not support the averment in the pleadings, or



put another way, which is at variance with the averments in the pleadings goes to no issue and must be disregarded...”

39. In the circumstances, I am unable to consider any prayer that wasn't in the Originating Summons and accordingly disregard it in this judgment.

#### **Did the Applicant Contribute Towards the Purchase of the Matrimonial Property?**

40. I have looked at the evidence adduced by the Applicant in her supporting affidavit as well as the supplementary affidavit. It is clear that the applicant was the sole purchaser of the suit property. The applicant was categorical that the Respondent made no contribution. As her evidence wasn't challenged, I find and hold that the Applicant solely purchased the matrimonial property.

#### **Is the Applicant entitled to 100% beneficial interest in the suit properties?**

41. The Supreme Court in Joseph Ombogi Ongentoto versus Martha Bosibori Ogentoto [2023] eKLR stated, in agreeing with what Tuiyott J (as he then was) said in UMM versus IMM [2014]eKLR, 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”.

42. As the Respondent didn't testify or submit, the evidence of the Applicant was uncontroverted. I, therefore, find and hold that the applicant is entitled to full ownership of the matrimonial property.
43. The applicant purchased Title No. Mombasa Municipality Block 2/xxx. She is, however, unable to use it, as the same is held by the Respondent. The Respondent has leased the said property to a third party and derives an income from it.

#### **Is Respondent accountable to the Applicant in respect of all the income derived from the matrimonial properties?**

44. The Respondent has possession of the matrimonial property. Title No. Mombasa Municipality Block 2/xxx has been under his control. In my view, the Respondent has been holding the same in trust for the Applicant. As a trustee, he has an obligation to account to the Applicant

#### **Should the Applicant be granted the prayers sought?**

45. In my view, the Originating Summons is merited. The evidence of the Applicant was not controverted. She provided documentary evidence which proved her case. In the circumstances, this Court finds and holds that she is entitled to the prayers that she sought.
46. The Respondent did not tender evidence in support of his case.
47. The Court finds and holds that the Applicant has proved her case on a balance of probabilities. In the circumstance, the Court:-
1. Declares that Title No Mombasa Municipality Block 2/xxx was acquired through the sole efforts of the Applicant;



2. Finds and holds that the share held by the Respondent in Mombasa Municipality Block 2/xxx is held in trust and for the beneficial interest of the Applicant;
3. Orders the Respondent to surrender the certificate of Title of Title No. Mombasa Municipality Block 2/296, for cancellation and to transfer his interest in Title No. Mombasa Municipality Block 2/xxx to the Applicant within 60 days, failing which the Deputy Registrar of this Court will execute the transfer document on his behalf; and
4. Orders the Respondent to account for the income received, as rent, from Title No. Mombasa Municipality Block 2/xxx from the time of its purchase to date, and to pay the same to the Applicant within 60 days of the date hereof.

48. This being a family matter, each party shall bear its own costs.

Orders accordingly.

**DATED AND SIGNED THIS 19<sup>TH</sup> DAY OF JANUARY 2024 AT MOMBASA VIA MICROSOFT TEAMS.**

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**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Ms. Ngigi for the Applicant;

No appearance for the Respondent; and

Arthur – Court Assistant

