



**LWK v SKG (Matrimonial Cause E003 of 2021)
[2024] KEHC 11212 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MATRIMONIAL CAUSE E003 OF 2021
DKN MAGARE, J
SEPTEMBER 26, 2024**

BETWEEN

LWK APPLICANT

AND

SKG RESPONDENT

JUDGMENT

1. This Judgment is in respect of the Originating Summons dated 16/4/x021 and filed by the Applicant. The Originating Summons seek reliefs based on a determination of the following issues:
 - a. Whether the property acquired by either spouse during marriage is matrimonial property.
 - b. How should the matrimonial property between the Applicant and the Respondent be divided?
 - c. The costs be provided for.
2. The Originating Summons is supported by the affidavit of LWK sworn on 16/4/x021. Unlike other matrimonial causes I have dealt with, the Applicant did not attach any evidence to the affidavit that has an effect of showing contribution.
3. It is deposed that the Applicant as wife and Respondent as husband started cohabiting as such in 1969 and in fact solemnized their marriage on 21/8/1982.
4. However, the marriage was dissolved by a decree of court on 28/10/x019 after the dissolution was allowed on 1/10/x019.
5. It is further deposed inter alia as doth:
 - a. During the subsistence of the marriage, the parties acquired the following property:-



- i. Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx purchased around 1995-1996.
 - ii. Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx purchased around 1981.
 - iii. Land Parcel No. 330/xxx purchased in 1999.
 - iv. Land Parcel No. Nthawa/Riandu/xxx purchased in around 1979-1980.
 - v. Land Parcel No. Loc 19/Nyakianga/x inherited from their parents in 2000.
 - vi. Land Parcel No. Loc 19/Nyakianga/Gathare/T.xx inherited from their parents in 2000.
 - vii. Motor vehicle Registration No. KAR xxxV – sold
 - viii. Motor vehicle Registration No. KAR xxxD – sold
 - ix. Motor vehicle Registration No. KAS xxxV – sold
 - x. Motor vehicle Registration No. KAK xxxF – sold
6. The Respondent filed a Relying Affidavit dated 10th June, 2021 and sworn by the Respondent as follows:
- a. The Originating Summons was an abuse of the court process as there was another suit in Nyeri HCC No. 108 of 2011 which was later transferred to the Land Court as ELC No. 161 of 2015 (OS) and which was dismissed for want of prosecution on 21/9/2015.
 - b. There was no joined property venture between the Applicant and the Respondent at all.
 - c. The Respondent worked with the police service from 1970 and retired in 1999.
 - d. The Applicant did not contribute to the acquisition of the assets and her fixation on LR No. 330/xxx was intended to thwart the Respondent's development plans on the premises.
 - e. The Applicant can take up LR No. Loc 19/Nyakianga/Gathare/T.xx.

Evidence

7. The Applicant testified in court and relied on her witness statement and produced in evidence a bundle of documents filed in court on 16/4/2021. These were; -
- a. The marriage certificate.
 - b. Replying affidavit by the Respondent dated 1/7/2020.
 - c. Applicant's Passport dated March 2004.
 - d. Search certificates.
 - e. Copy of title for LR 330/xxx.
 - f. Search dated 14/7/2011 for Motor Vehicle Registration No. KAR xxxV.
 - g. Search dated 14/7/2011 for Motor vehicle Registration No. KAR xxxD.
 - h. Search dated 14/7/2011 for Motor Vehicle Registration No. KAS xxxV.



- i. Application letter dated 1/12/1995.
 - j. Allotment for a government house dated 21/1/1999.
 - k. Acceptance of allotment dated 16/2/1999.
8. It was the Applicant's stated case that she earned income as a Copy Typist between 1975 and 1982. She also stated that she was also engaged in business activities between 2004-2005 and so contributed to the acquisition and development of the suit parcels of land.
 9. In respect of Land Parcel No. 330/xxx purchased in 1999, she stated that it is the Respondent who knew how it was acquired. On cross examination, she stated that she claimed it by dint of having been there when it was acquired. It was her case that the suit property should be shared equally.
 10. She testified that she was in marriage for 50 years and stopped working in 1982 but was managing family property and projects. She also stated that her contributions were from business and the farm. She did not produce any evidence of the contributions. She stated that the properties were acquired from loans from the Respondent's cooperative society.
 11. On cross examination, it was her case that she was a Copy Typist from 1975 to 1982 and when she married the Respondent, he was a police officer.
 12. She testified that Plot No. xxx was purchased before 1980. She resided on LR No. 330/xxx since 1999 when the Respondent purchased it. She stated she is now residing in the servant quarters of the same parcel.
 13. On the motor vehicles, it was her case that she did not know that they were sold or were unavailable. She also testified that she had no interest in Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx.
 14. The Respondent relied on his Replying Affidavit and bundle of documents filed in court. These were: -
 - a. Pleadings in ELC 161 of 2015 earlier HCCC 108 of 2011.
 - b. Allocation of government quarters - house No. 195.
 - c. Application for allocation of government Plot LR 330/xxx.
 - d. Allotment for a government house dated 21/1/1999.
 - e. Acceptance of allotment dated 16/2/1999.
 - f. Cheque for Ksh.184,330/=.
 - g. Land rent payment for 2005.
 - h. Receipt for land rent dated 15/9/2004
 - i. Receipt for land rent dated 25/8/2003
 - j. Cheque for 28,000/= dated 15/9/2004
 - k. Rates statement for 36,065.40 for 2005 for government house in Plot LR 330/xxx.
 15. He testified that he was a police officer. He stated that he was in employment as police officer since 1970 to 1999. His testimony was that he acquired all these properties from cooperative society loans. He refuted claims that he travels to Uganda for business but to visit their child who was studying there.



16. It was his testimony that he was willing to give the Applicant LR LOC 19/Nyakianga/Gathare/T.xx. That the Applicant refused Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx as it was next to Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx, where the Respondent stays.
17. It was his case that LR 330/xxx was his own property in Nairobi allotted from the Government by dint of being a civil servant and the Applicant made no contribution at all.
18. On cross examination, it was his case that he stayed on LR 330/xxx with his son. It was his case that when he was away, the Applicant would take care of the children as he took care of the properties.

Submissions

19. The Applicant filed submissions on 19/9/2023. It was submitted that the property was acquired during the subsistence of marriage and was as such matrimonial property. Reliance was placed on Section 6(1) of the Matrimonial Properties Act to buttress the point that matrimonial property meant matrimonial home and movable or immovable property jointly owned and acquired during the subsistence of marriage.
20. She also relied on Section 2 of the [Matrimonial Property Act](#) to submit that contribution included domestic work, child care, companionship, farm work and management of family property or business.
21. The Applicant also submitted that as a mother and farmer, she contributed to the welfare of the family. Reliance was placed on the case of EMN v NM (2018) eKLR. She cited the case of PWK vs JKG 2015 eKLR where the court stated as follows:

“Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in *Gissing vs Gissing* [1970] 2All ER 780 Page 788.”

22. On the part of the Respondent, they filed submissions on 4th October, 2023. It was their submission that the Originating Summons was an abuse of the court process having filed a similar case, being ELC 161 of 2015. They stated that the court allowed parties to come on record but instead of reviving that suit, filed this matter.
23. It was his case that the divorce is not in dispute. He stated that sharing cannot be on 50:50 basis, it is on the basis of individual contribution. He divided the suit property in two sets, that is, real and moveable properties. He stated that motor vehicles were not available as Motor Vehicle Registration No. KAR xxxV was sold.
24. Motor vehicle Registration No. KAR xxxD was lost during post-election violence in 2007/2008. Motor vehicle Registration No. KAS xxxV is grounded and can be disposed as scrap metal.
25. As regards motor vehicle Registration No. KAK xxxF he stated that the same was not matrimonial property as it was a retirement gift from his employer upon retirement for good service. There was no input in respect thereof from the Applicant.
26. In respect of real property, he stated that he bought all the properties from Harambee Cooperative Sacco Society Ltd. This was in particular for Land Parcel No. Nyandarua/Aberdare/Forest/North



Block/1/xxx and Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx. He stated that the later should be inherited by the children.

27. Regarding Land Parcel No. 330/xxx, the same was granted to the Applicant by virtue of his employment as a police officer. He had applied for the same in 1995 but the application was accepted in 1999.
28. There was no mention of Land Parcel No. Nthawa/Riandu/xxx in the evidence and submissions. In respect of Land Parcel No. Loc 19/Nyakianga/x and Land Parcel No. Loc 19/Nyakianga/Gathare/T.xx, the Respondent had no objection to giving Land Parcel No. Loc 19/Nyakianga/Gathare/T.xx to the Applicant as his parents are buried in Land Parcel No. Loc 19/Nyakianga/x.
29. Further, they submitted that though the Applicant had made no contribution, she was entitled to LR LOC 19/Nyakianga/x and LR LOC 19/Nyakianga/Gathare/T.xx which the Respondent inherited from his parents.
30. He stated that he contributed solely to the properties. The Applicant was employed between 1975-1982 as a Copy Typist and thereafter a farmer and looking after children.

Analysis

31. The issue before me for determination is whether the properties disclosed in this suit are matrimonial property acquired during the subsistence of the marriage and so sharable between the Applicant and the Respondent.
32. Before I venture into the merits of this case, I note that the Respondent lamented that this Originating Summons is an abuse of the court process as there was a similar suit filed by the Applicant in Nyeri HCC No. 108 of 2011 which was later transferred to the Land Court as ELC No. 161 of 2015 (OS) and which was dismissed for want of prosecution on 21/9/2015.
33. No evidence was tendered on the case. It remains undetermined as res judicata is a question of fact. The Respondent had a duty to tender evidence to show that the case was determined on merit and the same had been opposed. Further that the subject matter was the same as the current case. Finally, that the same was in a court of competent jurisdiction. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of Res Judicata in the following terms: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

34. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. In the dicta in *In re Estate of Riungu Nkuuri (Deceased)* [2021] eKLR the court stated as follows:

“The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

“(a) The suit or issue was directly and substantially in issue in the former suit.



- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

35. In the case of Attorney General & another ET vs (2012) eKLR it was held that;

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”.

In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....”.

36. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson (1843-60) All E.R 378, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

37. Without merit-based determination, the pleading is otiose and is accordingly disregarded.

38. Turning to merits, the court is aware that marriage is a mystery where parties are productive in a very profound way and then turn on each other and describe the laziest, most sloth and unsavory person that exists. This is seen from the lamentation by Kiage JA in *Walutsachi v Mary's Mission Hospital (Civil Appeal E050 of 2021)*[2022] KECA 1023 (KLR) (23 September 2022) (Judgment) Neutral citation: [2022] KECA 1023 (KLR) as follows: -

“The field of love, no doubt, is littered with the wreckage of many a broken heart. The tears that have flowed, in the wake of betrayal, perfidy and other two- or multiple-timing



adventures of lovers, is beyond reckoning. Thus must one who ventures into love do so alive to the perils that abound.”

16. For the appellant herein, whose sad tale is well-captured in the judgment of my learned sister Mumbi Ngugi, JA, with which I am in full agreement, the lesson learnt is that the wounds of love found scant balm in the courts of law. Love’s ills and woes can only be found in lovers’ return and reconciliation, failing which, in accepting and moving on, while holding onto hope for comfort elsewhere, or leaving love’s threshing floor altogether, paying heed to Kahil Gibran’s *The Prophet*: “But if in your heart you would seek only love’s peace and loves pleasure, then it is better for you that you cover your nakedness and pass out of love’s threshing floor”
39. Marriage is anchored, inter alia, on love, affection and sympathy and exists like a rolling wheel gathering property rights traceable to the spouses individually or collegially, after a stall. This view was also contextualized in the thoughts of Margaret Puxon, in her Article *Ownership of the Matrimonial Home* (1963), 107 Sol. J. 204, thus:

“Marriage is a partnership of love, affection and sympathy which should come to an end when these perish. When the parties wed, the husband and wife vow in the wedding ceremony, “with all my worldly goods I thee endow,” and the joint ownership should be jealously guarded both by written law and by popular sentiments. Consequently, when the husband and wife part, there should be a separation not only of heart and hand, but of goods as well, and unless there is such a separation, there should be no divorce.”
40. From the evidence available in court, it is clear and indeed not in dispute that the parties were married for 50 years. Things fell apart upon retirement of the Respondent in 1999. The Applicant filed for divorce in 2011 vide *Nyeri Divorce Cause No. 4 of 2011*. The parties parted ways from the marriage pursuant to the divorce decree on 1st October 2019.
41. There is no doubt that in the subsistence of the marriage, properties were acquired by either spouses. Though indicating as hard working, there was no properties shown to have been bought by the Applicant.
42. The Applicant subsequently filed this Originating Summons on 20th April 2021. Unfortunately, she treated the same casually and as a matter-of-course-way. I got a feeling that the major interest of the Applicant was LR No. 330/xxx. The Respondent appeared interested in getting the dispute out of hand and to move on. Unfortunately, offers given and not accepted remain for the court’s determination.
43. The court has to work within the framework of the *Matrimonial Property Act*, 2013. The three issues that the court will determine are: -
 - a. Matrimonial properties
 - b. Contribution for each property.
 - c. Apportionment
 - d. Costs.



44. Section 6(1)(c) of the *Matrimonial Property Act*, 2013 defines matrimonial property to include: any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
45. Under Section 7 of the *Matrimonial Property Act*, it is provided as follows:
- “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 ...”
46. The law on the division of the property acquired during coverture in Kenya appears to be anchored on the proof of a party’s claim on the matrimonial property and considers monetary and nonmonetary contributions. A party to a matrimonial dispute cannot base his or her claim on the matrimonial property on 50:50 basis without demonstrating how their respective claims is arrived at.
47. Section 14 of the *matrimonial property act* provide as follows: -
- “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.”
48. None of the properties are jointly registered. In effect, there is no presumption that the properties were equally acquired. Therefore, each of the properties will be weighed in terms of contribution and a just results reached in the circumstances.
49. It is not an automatic entitlement conferred by virtue of the marriage. Article 45 of *the constitution* provides as follows: -
- “45.
- (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.
 - (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.
 - (3) 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.
 - (4) Parliament shall enact legislation that recognizes-
 - (a) marriages concluded under any tradition, or system of religious, personal or family law; and
 - (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such



marriages or systems of law are consistent with this Constitution.”

50. Axiomatically, it is possible for a spouse to acquire property during the marriage that there is every clear intention that it is not joint effort. This include proceeds from succession, illegal activities or gifts that have no input by the other spouse. Improvements will be counted as contribution. This means that marriages are not walk in economic activity but partnerships where rewards largely depend on effort of either spouse.
51. In this case, the Applicant seeks a 50-50 apportionment of the alleged matrimonial property. The objective of this court is to do justice to the parties. As such, the parties must not only state their case but also lead evidence to prove the averments therein. The question of matrimonial property and contribution of the spouses towards acquisition thereof is a matter of fact and which must be proved by evidence to arrive at a fair and equitable division of the acquired matrimonial property guided by the provisions of Article 45(3) of *the Constitution* and the *Matrimonial Property Act*.
52. In the case of *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Petition 11 of 2020)* [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment), the Supreme Court stated inter alia as follows:

“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 45(3) of *the Constitution*. To hold that Article 45(3) has the meaning of declaring that property should *Petition No.11 of 2020* be automatically shared at the ratio 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.”

53. On contribution, I think the law recognizes the presence of spouses in marriage and their contribution whether monetary or non-monetary as part and parcel of their role during the subsistence of marriage. I am alive to the fact that each case must be determined based on its own peculiar circumstances and based on the evidence presented. Indeed, the Court of Appeal had this in mind in *TKM v SMW* [2020] eKLR where it is stated as follows:

“We bear in mind the edict in *Muthembwa v. Muthembwa* (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.”

54. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the *Matrimonial Property Act*, 2013 in the following terms:

“In this Act, unless the context otherwise requires—

“contribution” means monetary and non-monetary contribution and includes—

- a) domestic work and management of the matrimonial home;
- (b) child care;



- (c) companionship;
- (d) management of family business or property; and
- (e) farm work.”

55. It is clear to this court that the *Matrimonial Property Act* of 2013, recognizes and formalizes both the monetary and non-monetary contribution as can be demonstrated from the circumstances of a given set of facts and evidence. In *NWM v KNM* (2014) eKLR, the court stated that the courts must give effect to both monetary and non-monetary contributions that both the Applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property. Similarly, the House of Lords in *White vs White* (200) UKHL 54 underscored the greater awareness of the value of non-financial contributions to the welfare of the family:-

“These considerations are in line with the finding of the court in the English case of *White v White* [2001] 1 AC 596 where Lord Nicholls of Birkenhead held that the court should always ensure a fair outcome in considering the contribution of spouses by stating: Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely ... But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contribution.”

56. It is my considered view that the non-monetary contribution often-times cannot be quantified. It can however be seen in relation not only to one property but each of the properties. It must be remembered that contribution is a question of fact.

57. It is thus imperative upon this court to determine the issues in relation to the properties in this suit that were registered in the sole name of the Respondent; as far as the doctrines of contribution and presumption of trust are concerned.

58. In the case of *PWK vs JKG* 2015 eKLR the Court stated as follows:

“Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in *Gissing vs Gissing* [1970] 2All ER 780 Page 788.”



59. Consequently, on my perusal of the pleadings and evidence filed by the parties, I note that the listed property is all registered in the name of the Respondent. It was upon the Applicant to prove her contribution whether monetary or non-monetary. As was held in *JOO v MBO* (supra):

“ 10. Article 45(3) of *the Constitution* underscored the concept of equality as one that ensured that there was equality and fairness to both spouses. Equality and fairness were therefore one and intertwined. Equality also underscored the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, each party’s contribution to the acquisition of matrimonial property could not have been done on an equal basis as a party could have significantly contributed more in acquiring property financially as opposed to the other party. 11. Equity denoted that the other party, though having not contributed more resources to acquiring the property, could have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. That was what amounted to indirect contribution. Equity therefore advocated for such a party who could seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property. 12. The maxim ‘equality is equity’ had never been truer. Equity was an important principle when it came to matrimonial property since what was fair as it related to equity was not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to acquisition of matrimonial property, even though such contribution was indirect, but nevertheless had in one way or another, enabled the acquisition of such property amounted to significant contribution. Such direct or indirect acts could include:

- a. Paying part of the purchase price of the matrimonial property.
- b. Contributing regularly to the monthly payments in the acquisition of such property.
- c. Making a substantial financial contribution to the family expenses so as to enable the mortgage installments to be paid.
- d. Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.
- e. Caring for children and the family at large as the other spouse worked to earn money to pay for the property.

13. While article 45(3) of *the Constitution* dealt with equality of the fundamental rights of spouses during and after dissolution of marriage, equality did not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither did the reading of that provision lead to the assumption that spouses were automatically entitled to a 50% share by fact of being married.

60. In this case, it was the case of the Applicant that she resided on LR No. 330/xxx situated in Nairobi on and off since 1999 and that her son stayed on it. The Respondent on the other hand maintained the



position that this property was as a result of his sole effort and sought the exclusion of the Applicant. I understand of all, this is the property that the parties strictly appear to capitalize ownership rights with the Applicant seeking 50-50 share while the Respondent craving 100% share. It is registered in the name of the Respondent alone. The Applicant had to prove monetary or nonmonetary contribution.

61. I now turn to each of the properties as listed in the originating summons. As to the alleged motor vehicles, no evidence was produced to show the Applicant's entitlement and the motor vehicle were said to be sold except KAS xxxV said to be grounded. All were registered in the name of the Respondent. Therefore, to the extent and circumstances of this case, the evidence produced by the Applicant in support of her case was not sufficient to establish contribution.
62. From the outset, it is clear that the Applicant was not interested in the Motor Vehicle Registration Nos. KAR xxxV, KAR xxxD, KAS xxxV, and No. KAK xxxF. Having been sold, they cannot remain matrimonial properties. In any case KAK 436 F was never matrimonial property having been a retirement gift. It was not acquired through any effort by the parties.
63. Therefore, the claim over vehicles is untenable. There was no evidence of acquisition at all or ownership. The said properties are nonexistent. I dismiss the claim over the same.
64. The second aspect relates to inherited properties. These were: -
 - a. Land Parcel No. Loc 19/Nyakianga/x
 - b. Land Parcel No. Loc 19/Nyakianga/Gathare/T.xx
65. The two properties were not bought. They were inherited by the Respondent from his father. There are no contributions regarding inheritance. Though the applicant indicates that they inherited from their parents, the Respondent testified that it was from his parents. Though he was willing to give one property, it is a rejected gift which was not accepted saying that in a patriarchal system, she will be uncomfortable staying with the Respondent's relatives.
66. However, the bottom line is that these were not properties acquired during the marriage. The said properties are not and have never been matrimonial properties. There was no contribution from both parties in the inheritance. There was no claim for improvement. In the circumstances I dismiss the claim over L.R LOC 19/Nyakianga/x and L.R LOC 19/Nyakianga/Gathare/T.xx. They are not subject to sharing as they are not matrimonial property.
67. It does not matter that there was an offer to give, that is a gift that the Respondent can still give, if he so wishes. However, this court is dealing only with matrimonial properties, which exclude inherited properties. The inheritance was to happen whether or not the Respondent was married. There was no claim over any improvement thereon. The right to the inherited properties accrued before the marriage, that is, on conception. The Applicant has no right to the same, otherwise, she should have made a claim to the parents.
68. The court sitting as a matrimonial property court, cannot deal with other interests in land, which are not matrimonial. This is because of the narrow jurisdiction over issues of land as ordained in article 165(5) as read with Article 162(2)b of *the constitution*. The said Article 162(2)b provides as follows: -

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

a.



- b. The environment and the use and occupation of, and title to, land.”

69. Article 165(5) provides the jurisdiction of this court as follows: -

“The High Court shall not have jurisdiction in respect of matters-

- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

70. I shall therefore not deal whether there are any interests arising from the inherited land.

71. I now turn to Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx purchased, which was said to have been acquired around 1995-1996 and Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx, which was purchased around 1981 and Land parcel No. Nthawa/Riandu/xxx. The Applicant stated that the properties were acquired at the time she was married. She was working between 1975 and 1982. She said she was taking care of the children. These facts were not disputed.

72. It is also not in doubt that the financial contribution was from the Respondent who bought the same through a loan from his cooperative society. The title to Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx, measuring 4.84 hectares was obtained on 16/6/1987, during the subsistence of the marriage. This was matrimonial property, though the Applicant indicated she has no interest in it.

73. Nyandarua/Aberdare/Forest/North Block/1/xxx was also acquired during the subsistence of the marriage. The Respondent did 100% financial contribution. However, the same was facilitated through some non-financial contribution. Though the Applicant is of the view that it should be inherited by the children, the court has no power to do so, so long as the registered owner is alive. The said parcel was registered in the names of the Respondent. There is no evidence tendered on its size.

74. In regard to Land Parcel No. Nthawa/Riandu/xxx, the same was agreed to be matrimonial property. The Applicant gave scant evidence of this parcel. I shall proceed on the premise that the parcel was bought as testified by the Respondent, that the same was bought through the loans from the cooperative. The Applicant did not dispute this. She indeed agreed that her basis was being there during the acquisition, she farmed on them and took care of the children.

75. The taking care of children was, evidently not a sole duty but a shared duty. Both parties were working between 1975 and 1982. The Respondent continued until he retired as a senior superintendent of police. His contribution was higher than the Applicant. I do not believe the Applicant when she said that she was travelling to Uganda to trade. No evidence was tendered.

76. More importantly, no properties were acquired, during the period between 2004- 2009 when the passport expired. The passport covers a stint between February 2004 and 20th October 2005. The miniature visits do not connote a business lady. It is more plausible that she was going to see a child in the republic of Uganda. Even if she did business in that one-year period, it did not contribute to the purchase of any of the properties being disputed upon.

77. I find the evidence of the Applicant to be untruthful. In her pleadings she indicated that all the motor vehicles were sold but departed from the same at the hearing. She stated she was not aware that the vehicles were sold. This is despite pleading to the contrary.



78. She said that she sold cows, but could not remember when she did this. The only tangible evidence was that she was taking care of the children at some point in their life. The oldest child was 42 years while the youngest was 26 as at 2011, meaning that she was born around 1985, while the oldest was born around 1969. She stated that she started business in 1990 and ceased in 2007. This business does not seem to have contributed in purchase of any of the properties. I therefore find that there was no financial contribution to purchase of any of the above properties.
79. I shall take the non-financial contribution of the Applicant to be 30% in respect of the acquisition of Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx and Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx and Land Parcel No. Nthawa/Riandu/xxx.
80. In effect, Applicant is entitled to 30% of Land Parcel No. Nthawa/Riandu/xxx, Nyandarua/Aberdare/Forest/North Block/1/xxx and Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx.
81. However, to avoid fragmentation, parties agreed that these parcels were in the same locality and similar situations. Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx measures 3.84 hectares. 30% thereof is 1.152 hectares. These same size shall be carved out of the Respondent's interest in Nyandarua/Aberdare/Forest/North Block/1/xxx, in lieu of the Applicant's share in Nyandarua/Aberdare/Forest/North Block/1/xxx.
82. The Respondent will remain with a portion in Nyandarua/Aberdare/Forest/North Block/1/xxx. Instead of taking it up, an equivalent value, shall be carved out of the Applicant's share in Land Parcel No. Nthawa/Riandu/xxx.
83. This will ensure that the Applicant and the Respondent will share Land Parcel No. Nthawa/Riandu/xxx. The Applicant will have the whole of Nyandarua/Aberdare/Forest/North Block/1/xxx to herself. The Respondent will have Nyandarua/Aberdare/Forest/North Block/1/xxx to himself. It is irrelevant that parties do not like each other. They are free to buy out each other to avoid seeing each other in respect of Land Parcel No. Nthawa/Riandu/xxx.
84. Land Parcel No. 330/xxx is said to have been purchased in 1999. However, the evidence tendered was that this was a work related gift. It is true that the Respondent had been pursuing the same since 1995. However, this was an entitlement by virtue of his job. There was no improvement on this property. It is a typical government quarters given to the Respondent at peppercorn rent. The Respondent was rewarded since he was a senior police officer.
85. The Applicant did not provide evidence of contribution in acquisition and development of LR No. 330/xxx. The same was not improved. She contended that she is entitled simply because she was around when it was acquired. That is not contribution. It was clear that the acquisition was meant to be a separate ownership. She did not even know from whom it was purchased.
86. The land was awarded to the Respondent by virtue of being an employee or a civil servant. There was no contribution to its development. The same had no purchase price. It was given out but not on market value.
87. I also do not find a trace for nonmonetary contribution. This property is thus exclusively for the Respondent and I so find. This was not matrimonial property. There is no stretch of imagination that will lead the court to find that there was any contribution. This was the same status as an inheritance. There was nothing the Applicant could do in terms of the receipt of gift. I therefore find that LR No. 330/xxx is not a matrimonial property. It was government property awarded to a senior government employee after relentless pursuit for 5 years.



88. In arriving at this finding, the court is guided that the Applicant, on the facts presented, has to prove her case regardless of whether there is a defence or not. This is set out in section 107-109 of the Evidence Act as follows: -

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. 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.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

89. In the case of Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September, the Supreme Court stated as doth: -

“ 62. On this sole important issue, the law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.

63. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:

1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.



90. The Applicant therefore, partly proved her case to the required standard.

Determination

91. In the upshot, I make the following orders:

- a. The following parcels are not matrimonial properties and as such belong exclusively to the Respondent and the Applicant's claim thereof is dismissed.
 - i. LR No. 330/xxx
 - ii. LR. LOC/19/Nyakianga/x
 - iii. Land Parcel No. Loc 19/Nyakianga/Gathare/T.xx
 - iv. Motor vehicle Registration No. KAK xxxF
- b. Motor vehicle Registration Nos. KAR xxxV, KAR xxxD, KAS xxxV and KAK xxxF were pleaded as sold hence not available for distribution. In any case KAK xxxF was never matrimonial property having been a retirement gift.
- c. The Applicant did not make any financial contribution to the purchase of Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx, Land Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx and Land Parcel No. Nthawa/Riandu/xxx. However, the Applicant is entitled to 30% share for non-financial contribution for the 3 parcels. Consequently, I direct as follows: -
 - i. The Respondent shall have Parcel No. Nyandarua/Aberdare /Forest/North Block/1/xxx wholly.
 - ii. The Applicant shall have Land Parcel No. Nyandarua/ Aberdare/Forest/North Block/1/xxx, wholly.
 - iii. The Applicant's share of 1.152 acres in Parcel No. Nyandarua/Aberdare/Forest/ North Block/1/xxx shall be carved out of the Respondent's share in Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx.
 - iv. Any share remaining in Parcel No. Nyandarua/Aberdare/Forest/North Block/1/xxx shall be taken into consideration in terms of value in Land Parcel No. Nthawa/ Riandu/xxx, where the Respondent is entitled to 70% share while the Applicant is entitled to 30% share.
- d. Each party is at liberty to buy each other out in respect of the shared property – Land Parcel No. Nthawa/Riandu/xxx upon valuation by the county valuer.
- e. This being a matrimonial property dispute, each party shall bear own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented by: -

Kimani & Muriithi Associates Advocates for the Applicant



M. K. Kiminda Advocates for the Respondent
Court Assistant – Jedidah

