



JWM v JNM (Civil Case 29 of 2014) [2023] KEHC 3813 (KLR) (24 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3813 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE 29 OF 2014
EM MURIITHI, J
APRIL 24, 2023
N THE MATTER OF SHARING MATRIMONIAL PROPERTY
AND
IN THE MATTER OF MARRIED WOMEN PROPERTY ACT

BETWEEN

JWM PLAINTIFF

AND

JNM DEFENDANT

JUDGMENT

1. On 15/12/2014, the plaintiff filed originating summons for orders that:
 1. The plaintiff contributed to the acquisition of the listed properties as in the schedule annexed herein.
 2. The plaintiff is entitled to equal rights or more in the properties listed in the said schedule as provided in the said schedule and as provided in *the Constitution*.
 3. The court should order that the plaintiff gets 50% or more share of the properties listed in the schedule.
 4. What is the right share of the plaintiff in the properties listed in the schedule herein.
 5. The listed properties as per the said schedule are matrimonial properties acquired during the subsistence of the marriage between the parties herein.
 6. Who bears the cost of this suit.



2. The said schedule of properties consists of:

Kiamuri "A"/2028, Kiamuri 'A'/1830, Kiamuri "A"/1224, Abothuguchi/U-Kiogo/1537, Abothuguchi/Gaitu/2062, Abothuguchi/MARIENE/1428, Abothuguchi/Gaitu/1621, Abothuguchi/Gaitu/2116, Abothuguchi/Gaitu/2106, Abothuguchi/Gaitu/1103, Abothuguchi/Gaitu/1104, Abothuguchi/Gaitu/1716, Ntima/Ntakira/2443, Abothuguchi/Gaitu/1207, Abothuguchi/Gaitu/1208, Abothuguchi/Gaitu/2501, Nairobi/Block 117/14, Abothuguchi/Gaitu/1436, Abothuguchi/Gaitu/1730, Abothuguchi/Makandune/1433, Abothuguchi/Gaitu/624, Commercial business on plot Nos. 42 "A", 42 "B", 43 "A" - Gaitu Market - Chaaria, Plot No. 61 "A" Gaitu Market - Chaaria, Ruri-rwarera Adjudication Section/5628, Plot No. 61B "1" Gaitu Market Chaaria, Plot No. 36 "A" Gaitu Market - Chaaria, Plot No. 39 "C" Gaitu Market- Chaaria, Plot No. 42A. Gaitu - Chaaria, Lodgings on Plot No. 36 "B" Gaitu Market - Chaaria, Rental house on Plot No. 10 "B" Gaitu Market-Chaaria, Plot No. 196 within Zimman Settlement Scheme Society, Plot No. 1265 Zimman Settlement Scheme Society, Market Stall No. 13 within Zimman Settlement Scheme Society, Market Stall No. 11 within Zimman Settlement Scheme Society, Market Stall No. 14 within Zimman Settlement Scheme Society, Market Stall No. 15 within Zimman Settlement Scheme Society, Market Stall No. 12 within Zimman Settlement Scheme Society, Plot No. 477 within Zimman Settlement Scheme Society, Plot No. 37 "A" Zimman Settlement Scheme Society, Plot No. 524 within Zimman Settlement Scheme Society, Plot No. 478 Zimman Settlement Scheme Society, Plot No.29 within Zimman Settlement Scheme Society, Plot No. 956 Zimman Settlement Scheme Society, Plot No.959 within Zimman Settlement Scheme Society, Plot No. 962 Zimman Settlement Scheme Society and Plot No.1569 Zimman Settlement Scheme Society.

3. The grounds upon which the application is founded are set out in the further supporting affidavit of the plaintiff sworn on 20/6/2019. She claims Plot Nos. 42A, 42B, 43A, 43B, 41A, 36B, 10B, 24 not developed Plot No. 41B at Chaaria; Plot No. 7B; Plot No. Ntima/Ntakira/2443 at Gitimbine, Matrimonial home Abothuguchi/Gaitu/250 measuring 0.40 Ha, Abothuguchi/Gaitu/1207 measuring 0.0228 Ha, Abothuguchi/Gaitu/1716 measuring 0.6 Ha, Abothuguchi/Gaitu/1208 measuring 0.0228 Ha, Abothuguchi/Gaitu/1436 measuring 50×100, Abothuguchi/Gaitu/1103, Abothuguchi/Gaitu/2116 measuring 0.91 Ha, Abothuguchi/Gaitu/2062 measuring 0.87 Ha, Abothuguchi/Gaitu/1621 measuring 0.634 Ha, Abothuguchi/Gaitu/3521 measuring 1½ Acre Joint, Abothuguchi/Upper Kaongo/1537 measuring 1.05 Ha, Abothuguchi/Gaitu/1367, Abothuguchi/Mariene/1428, and Abothuguchi/Gaitu/1730. She avers that she customarily got married to the defendant in 1981, which was solemnized in church in 1990. In 1987, she started a general shop wholesale and retail, cereals, posho mill and a hardware while the defendant was a civil servant. The properties in question were purchased through income generated from her businesses. After the defendant resigned from his employment in 1990s, they sold their plot in Nairobi and used the proceeds therefrom to build Ntima/Ntakira/2443 Gitimbine. They also purchased the Isiolo and Nkubu plots and developed them. The defendant sold Plot Nos. Abothuguchi/Gaitu/2132, Kiamuri 'A' 1224 in 2013, Zimman in Nairobi Stall Nos. 13, 11, 14, 15, 21 (under her name) and never gave her any money. She maintains that all the properties are matrimonial properties bought through her effort and during the subsistence of the marriage.

4. The defendant opposed the application vide his replying affidavit sworn on 26/9/2019. After completing his studies, he secured a job as a Technical Range Assistant in the Ministry of Livestock Development. He then put up a business at Chaaria market and allowed the plaintiff to run it, as he



ventured into other income generating businesses. After resigning from his employment in 1992, he purchased a canter Registration No. KAB 980 S without any contribution from the shop business operated by the plaintiff at that time. In 1999, he purchased his first lorries Registration Nos. KXC 598 and KSZ 585, which he later sold and utilized the proceeds thereon to buy his plots at Zimman Settlement Scheme and Gaitu. He later transferred Plot No. 39 C Chaaria Market to the plaintiff, which fetches monthly income of about Ksh.57,000. The plaintiff is the registered owner of Motor Vehicle Registration No. KCE 156 C, Plot No. 39 C Gaitu Market, Plot No. 39 C Chaaria Market, Zimman Settlement Scheme Society Plot No. 1269 and Motor Vehicle Registration No. KZB 929 Peugeot 504 Saloon.

5. The defendant claimed that plaintiff also operates 5 bank accounts, a lodging business, a Cereals Store, Boutique, Posho Mill and Shops, and the plaintiff also bought 4 acres of land at lower Kaongo which is solely registered in her name. He faults the plaintiff for failing to disclose to the court that he has been paying school fees for their 2 children, and urges the court to dismiss the application, for being premature, fatally defective and bad in law as their marriage has not yet been dissolved. In his view, the application is actuated by malice and intended to cripple him financially by keeping him from enjoying his hard-earned income yet she is using her assets without any interference.
6. At the hearing, the parties testified without calling any witnesses, as follows.
7. PW1 JWM testified that-

JNM is my husband. We married in 1981. When we married I lived at my home and he also lived at their home. After the marriage we had 4 children. J, M, E and MW.

When we married JNM was farming with his parents. We lived together for one year. In 1982, he went to college, Egerton College and later Kabete Institute.

When he went to college he left me farming 3 acres. I used to get income from the farming. I used to cater for our children and I also gave money for his pocket and needs at the college.

After he finished college, we lived together. He was employed and he took a loan in 1987 for 16,000/= to start a business. As I was a farmer I had some money and I sold my cows, goats and pigs and I got 25,000/=. I was the one who managed the business. It was a retail shop and green grocery. All this time JNM was at Garissa livestock Ministry. We invested by buying parcels of land. We bought some plots. They were registered in the names of the defendant. I was the one who managed the business. I was the one who was giving the money and as I was busy at the business he would go to get the property.

From 2013, he started beating me and he said he would throw me out as he had all the property in his name.

I filed a case in 2013. He approached me and persuaded me to withdraw the case. I withdrew the case.

I later filed a case for the property as I saw he could sell the property. He said he would sell the property including the house where we stayed.

As of now, I applied for Divorce in 2019 and I was granted the divorce in 2020. It was Divorce No. 15 of 2019 CMC at Meru.

Apart from managing the business and taking care of the children I got the business proceeds and expanded and bought Lorries. The defendant took over transport business Lorries and



I went on with the cereals business. I have a schedule of the assets attached as Affidavit in support of the O.S. I adopt the schedule.

8. On cross-examination, she said:

I started as a farmer on 3 acres. I do not recall the parcel number. It belonged to my father in law. When we married we lived on my husband's family home. We lived on the defendant's home from 1981 to 1987. We have a house, I found the house already constructed by the defendant's father. Except the last born, all other children were born on the property. The loan taken by the defendant for the business was from Ukulima. It was in 1987. My husband was employed. The loan could have been taken while he was at work. I also do not recall the date. The documents of property were registered in the name of my husband. At the time, I was busy and I trusted him. None of the properties except shop 39 Chaaria Market is witnessed by me on the agreement. I contributed as I was the one who carried out the businesses of cereals and wholesale. My husband used to carry out the business of transport. We would get money from the businesses. We once had a joint account. He would ask me to get the money from the shops which I managed and then he would go to write the agreement. The 2013 case was after he started threatening me and beating me. I placed cautions on the property, I then went to court. On the schedule of properties, some he has sold, the proceeds of the sale, he used on a lady he had married. He had left home and lived with another wife. We used to pay for school fees from the business proceeds. He had Lorry business and I had cereals. I am the one who paid for school fees transactions. I do not have any document to show that I paid for the schools. Plot 1269 Zimman Settlement Scheme Society. The property is in the name of my husband.

Only one property is registered in my name.

I have not indicated plot 1269. I did not include the plot with my name.

Plot 39 Chaaria is also registered in my name. We bought it both of us but it is registered in my name.

Plot of 4 acres

It is in my name. My husband told me to get registered. We bought them together.

Motor Vehicles KCE 156P and KZB 929 were registered in our joint names. We bought them together. KCE 156P is still there. KZB 929 was sold.

Bank accounts at Equity, Family, KCB, NIC, ABC and Capital Sacco are in my names, it was not a lot of money. I just operated them. It is only equity that had some money. I used to put money and later put it in the business.

Plot 42 A and 42 B and 33

I am the one who operates the plots. I use the proceeds. When he left home. I have been using the proceeds.

He does not use the proceeds in the property on the list.

My husband has 2 other properties. I have not shown the properties on the list. I only put the ones with title deeds.

Matrimonial home at Abothuguchi . I am the one who lives there. I intend to stay on the property with my children.



9. On cross-examination by Mr. Mwirigi, Counsel for the Interested Party, she said:

“Kiamuri A/1224-

I know Paul Kiugu M’Ruaya. He sold the property to us. I do not know what the agreement was that they would return the money so that he gives them back the land. It is my husband who knows the truth of the matter. I knew them when they came to ask me to remove the caution. I told them it is my husband who would deal with the matter. I have no problem with the said parcel of land.

10. On Re-examination she said:

List of property on the supporting Affidavit dated 20/6/2019 filed under directions of the court.

The properties were recorded on the instructions by the court. Each party had been asked to file a list of property that they wished to keep. I filed the list of properties.

JNM did not file.

After I withdrew the case in 2019, he sold some of the properties. He sold one property. He also sold some properties in Nairobi.

Bank Accounts

The money in the accounts came from, the business which I conducted.

I trusted my husband. I did not seek to be registered on the property. He was registered on behalf of our family.

The children were born in my father in law’s home. We left in 1987 and we started a business at the market. All the children have finished school. We schooled them while we were together except for the last 2 whom we shared responsibilities.

2013 case was a matrimonial dispute.

The transport business. He would bring the money to me and circulate in the business. The property, were paid for by me from the money we got from the business.

I pray for the property to be divided between us as he has left home.

11. DW1, JNM testified as follows.

I filed an affidavit of 26/9/2019. I rely on the Affidavit. I know JWM. She was my wife. We married in 1980.

Divorce was granted on 14/4/2020 by Meru CM Div. Case No. 15 of 2019. It is absolute.

Business at Chaaria Market

I was working with Ministry of Livestock. I am the one who took a loan From Ukulima Co-operative where I used to be a member. According to my shares I took a loan of Kshs. 27,000/=. That was a lot of money at time. I went and looked for a shop and established it for her. I did not receive the proceeds from the business and I had no further interest other than assisting her.

The money was not used to pay school fees. I paid for the schools. The plaintiff also paid schools at times.



At the University. I paid the fees at St. Pauls University where the 1st and 2nd children went. I am the one who paid the fees. I am the one who took them there. I also paid for school fees for the 1st child when she went to a college Augustine College in Nairobi.

When we got married, my father had given me a parcel of land. It is parcel No. 104 where we initially married. I got one acre of parcel 104. It is the one acre that I left the plaintiff cultivating when I went to college.

Violence and threats

There was no violence.

Motor Vehicle

Registration No. KBP 146P. The vehicle is jointly owned by the plaintiff and I bought. I am the one who bought the vehicle.

I do not get rent or proceeds from any of the properties. It is the plaintiff who receives the rent and income.

12. On Cross examination by Mr. Karanja for the Plaintiff, he said:

I left home to go to school in 1981. We had a child with the plaintiff at the time. I left her with the child.

The school was Egerton University. We used to get an allowance of 330 per month. I did not receive any money from the plaintiff.

The Plaintiff was cultivating the 1 acre of the land. I never got any money from the proceed of the cultivation on the 1 acre.

It was not 3 acres. It was only 1 acre.

I had 4 children with the plaintiff, born Jackline 1980; Mercy Karoki; Emma Mwari; Daniel Mwirigi, 1990. I do not know the dates of both of the other two.

The plaintiff was staying with the children before they went to school. I schooled at Kabete between 1980s. I do not recall the years. I had left the plaintiff with the children. When I finished school, I was posted to Garissa. I worked there 4 years. The plaintiff used to come and visit. She did not live with me. She lived with the children.

I have 20 years of diabetes and pressure. I do not remember some of the things.

I married in 1980 in church. We constructed a house at Chaaria. There were 2 houses. One was plot no. 42. It is a commercial property 40x80 -2 plots. I constructed a residential house at the back and 5 shops in the front. That is where we lived for the first time when I came from the rental house. I constructed my house at the back of the plot. One of the shop was a main shop, a tailoring, posho mill and cereals store.

We then constructed a house where the plaintiff lives on plot no. 2501. It is a 1 acre shamba. I am the one who constructed the house while the case progressed. It was before 2013. I remember the case by plaintiff was filed in 2013.

[Witnesses is shown proceedings in HC 25 of 2013]

I am aware of the 2013 case. I filed a Replying Affidavit in the case on 29/1/2013.

I am not aware whether the case of 2013 was withdrawn.



KAV 980S

The vehicle belonged to my brother and I. We had an agreement with my brother. I do not have log book on the vehicle.

KXC 598 and KSZ 585. I used to use the vehicles for business. We were with the plaintiff but everybody was doing their business.

Nairobi Block/117/14. Did you sell the property in 2014? We sold the property together. I see the agreement. I signed the property. It was 21,000,000/=.

White springs Resort, Isiolo

I operate the hotel. The property is not registered. I operate the hotel the properties in Isiolo have no title.

I had a property near Nkubu High School. It is no longer there today.

I used to pay school fees at University. We shared the responsibility. I paid 120,000/=. She used to pay other expenses when required. I paid for fees at the University. The court gave directions. We were directed to state the properties we each would want to take. I gave my list to my advocate. The plaintiff also gave her list.

Nyayo Estate.

There is no property at Nyayo Estate as it was later said to be public land.

Did Jane ever give you any money to buy any property?

Even if she gave me, it is that money which I had given to her. The only money that we had together was the proceed of sale of the Nairobi plot 117/14. We opened a joint account at Consolidated Bank. It was 20 million which I used to construct at Meru Town rental houses and at home a house of over Kshs.10,000,000/= with bedrooms 8 and big kitchens and had special features on roofing and washrooms.

The property is Ntima/Ntakira/ is the rental property with 50 bed sitters and 34 single rooms. There are no tenants on the property. I am the one who take the rentals on this property.

13. On Cross examination by Mr. Mwirigi for the Interested Party, he said:

“Paul Kiugu sold a parcel of land of acres many years back. I paid him full purchase price and we made a transfer. In accordance with the agreement, he was to give vacant possession by August of that year. He did not vacate and the shamba he was selling is where all his children used to live.

We made an Agreement with Meenye and Co, Advocates. He paid back my money and I transferred the shamba back to him. The transfer did not go through because the plaintiff had cautioned the land when she cautioned all my properties.

The plaintiff was aware of the transactions. The number of the shamba is plot 1224 Kiamburi A. I do not have any interest in the land.

14. On Reexamination by Ms. Mukaburu for the Defendant, he said:

I consider our matrimonial home where we constructed our home to be plot No. 42 which is 2 plots of 40X80 at Chaaria Market.



There is a commercial property at plot which is operated by the plaintiff.

KAV 980S Canter is not in existence. We operated it for 2 years with my brother. My brother took the vehicle and he paid my share of the vehicle. I used the money to buy a lorry KXC.

When the children were in school. The plaintiff used to send money for the business that I had established for her. I used to get clothes for the business while I was at Garrisa.

Isiolo Resort.

The Resort is indicated in the plaintiff list of properties that she claims dated 20/6/2019, plaintiff's Affidavit of support.

Kiamburi/1224

I do not have any objection to the removal of the caution on the property.

Nkubu plots and Nyayo Settlement.

The plots are not listed on plaintiff's list of properties.

Joint account.

The Joint account does not exist. We closed it together. We agreed to close the account after withdrawal of all the funds.

The Plaintiff did not make any direct contribution. I used to buy sand and sell. I am the one who bought the properties. The plaintiff was operating her own business of tailoring, mattresses and General shops. I had the business of cereal stores transport and cultivation of mangoes on 34 acres.

I did all the transactions. I asked the plaintiff only to keep the title deeds. We never went to any land board together. I bought shamba of 2 acres from her brother and it is registered in our joint names.”

Submissions

15. The plaintiff submitted that the properties in question are matrimonial properties, as they were acquired during the subsistence of the marriage. She submitted that she made both monetary and non-monetary contribution towards the acquisition of the properties in dispute, by taking care of the children, engaging in farm work, running the family business while the defendant was away studying, and relied on *Muthembwa v Muthembwa* (2002) 1 EA 186, *PBW v JWC* (2017) eKLR and *MW v AN* (2021)eKLR. She submitted that during the purchase of the said properties, she personally paid the purchase price to the vendors. She urged the court to put both parties on equal footing, as they both contributed towards acquiring the properties in dispute, and relied on *Tabitha Wangechi Nderitu v Simon Nderitu Kariuki* (1998) eKLR and *Local Empowerment for Good Governance & 6 Others v Community Executive Member Finance & Economic Planning – County Government of Mombasa & 2 others* (2021) eKLR. She accused the defendant of secretly selling Nairobi/ Block/117/14 for Ksh. 21,000,000 which he solely appropriated. She urged that since their union was dissolved, the court had jurisdiction to grant the orders sought.
16. The defendant acknowledged that their marriage was dissolved in 2019, after unresolvable issues. He urged that it was admitted during oral testimony that some properties listed in the schedule have since been sold and others transferred to the parties' issues. It was submitted that the proceeds from the said sale were put in a joint account for various projects including but not limited to educating their children and developing other properties. He urged that the matrimonial home is constructed in Plot



No. 42A and 42B at Chaaria Market, where the parties brought up their children and conducted business after moving from his ancestral home. He alluded to various properties solely acquired by the plaintiff during the subsistence of the marriage, but which were not included in the schedule of properties. He accused the plaintiff of being greedy and intending to reap where she did not sow, as she has property acquired during the subsistence of the marriage registered under her name which she is in full control of. He maintained that the plaintiff had failed to prove both monetary and non-monetary contribution towards the acquisition of the listed properties. He submitted that both parties testified that the proceeds of Plot No. 39 C, 42 A and 42 B in Chaaria Market generate income which is received by the plaintiff to his exclusion, and relied on *EKTM v ECC* (2021) eKLR, *RK v PK* (2020) eKLR, *TMW v FMC* (2018) eKLR. He cited section 7 of the *Matrimonial Property Act* where it is provided that the ownership of matrimonial property vests in the spouse according to the contribution of either spouse towards its acquisition, and should be divided between the spouses if they divorce or their marriage is otherwise dissolved based on such contribution. He submitted that invoking the 50% principle would be unjust to him since it would give the plaintiff an opportunity to reap where she did not sow, and relied on *AW v MVCMAWM* (2018) eKLR, *MEK v GLM* (2018) eKLR, *EGM v BMM* (2020) eKLR and *UMM v IMM* (2014) eKLR. He urged that the plaintiff had failed to prove her case to the required standard, as her testimony was full of inconsistencies and misrepresentation. He prayed for the dismissal of case with costs.

Issues for Determination

17. The issues for determination are (a) what properties constitute matrimonial properties and (b) how the same should be distributed.
18. The parties recorded a consent on 30/11/2021 excluding LR No. Kiamuri “A”/1224 from the schedule of assets.

Determination

The property dispute

19. The undisputed facts from the pleadings are that the parties herein formalized their marriage in 1990 but the said union was dissolved in 2019 after it irretrievably broke down. Whilst the plaintiff maintains that all the properties are matrimonial properties bought through her effort and during the subsistence of the marriage, the defendant contends that he solely purchased the properties listed in the schedule and the plaintiff had not proved any contribution towards their acquisition.
20. The duty of the court is determine whether the plaintiff has proved her case and or the defendant his defence on the civil standard of proof, on a balance of probability. In an oft-cited case *Re H & R (minors)* [1996] AC 563, [1995] UKHL 16, [1996] 2 WLR 8, [1996] 1 All ER 1, the House of Lords considered the meaning of proof on, and the test of balance of probability and Lord Nicholls of Birkenhead explained:

“The balance of probability standard means that the court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”



21. Section 107 and 108 places the burden of proof on the plaintiff as follows:

“ 107. Burden of Proof.

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. Incidence of burden

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.”

22. On the question of the assertion by the Defendant that the money used by the Plaintiff to pay for school fees for their Children came from money that he had given to her, as proof of particular fact, the Defendant is required by section 109 to adduce evidence as follows:

“ 109. Proof of particular fact.

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.”

Matrimonial Properties

23. The parties did not produce any documentary proof by receipts, invoices, acknowledgement and such documentation to prove the alleged payments. The court must analyze the evidence produced to see whether the facts which the parties rely on are more likely than not to have occurred on the nature of the evidence adduced.
24. The defendant averred that the plaintiff is the registered owner of Motor Vehicle Registration No. KCE 156 C, Plot No. 39 C Gaitu Market, Plot No. 39 C Chaaria Market, Zimmerman Settlement Scheme Society Plot No. 1269, Motor Vehicle Registration No. KZB 929 Peugeot 504 Saloon, 5 bank accounts, a Cereals Store, Boutique, Posho Mill, Shops and 4 acres of land at lower Kaongo.
25. The parties herein are in agreement that Plot No. Nairobi/Block 117/14 was sold in 2014 and there is an agreement of sale to that effect. The defendant purchased Plot No. 42 “A” Gaitu Market from Magdalene Nyoroka Kaburu vide an agreement of sale dated 15/11/1995. Zimmerman Settlement Scheme Society Plot No. 1269 is registered in the name of the plaintiff. According to the copies of title deeds on record, the defendant is the registered owner of Abothuguchi/Gaitu/1207, Abothuguchi/Gaitu/1208, Abothuguchi/Gaitu/2501, Abothuguchi/Gaitu/ 1716, Abothuguchi/Gaitu/2062, Abothuguchi/Gaitu/2106, Ntima/Ntakira/2443, Abothuguchi/U-Kiogo/1537, Abothuguchi/Gaitu/1104, Abothuguchi/Gaitu/1621, Abothuguchi/Gaitu/2116, Abothuguchi/Gaitu/1103, Kiamuri “A”/1224 and Kiamuri “A”/82.
26. The record shows that Abothuguchi/Mariene/1428 is registered in the name of Silas Muthuri M’Likanya.



27. The defendant acknowledged that they raised their children in Plot Nos. 42 A and 42 B Chaaria Market, after relocating from his ancestral home while the plaintiff contends that Abothuguchi/Gaitu/250 is where the matrimonial home is.
28. Matrimonial home is defined under section 2 of the *Matrimonial Property Act* (henceforth called the Act) to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property. The court finds that Plot Nos. 42 A and 42 B Chaaria Market are the matrimonial home within the meaning of section 2 of the Act.
29. The plaintiff contends that in 1987, she started a general shop, wholesale and retail, cereals, hardware and a posho mill while the defendant was gainfully employed, and the properties in the schedule were purchased through income generated therefrom. On his part, the defendant, contends that he is the one who put up the business but left it to the plaintiff to run, as he continued running other businesses. Family business is defined under section 2 of the Act as any business which is run for the benefit of the family by both spouses or either spouse; and generates income or other resources wholly or part of which are for the benefit of the family.
30. This court finds that the business at Chaaria Market was family business within the meaning of section 2 of the Act.
31. Section 6 of the Act defines matrimonial property as the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
32. There is no dispute that all the properties listed in the schedule dated 12/12/2014, save for Abothuguchi/Mariene/1428 and Kiamuri A/1224, were acquired during the subsistence of the marriage between the plaintiff and the defendant, and thus matrimonial properties within the meaning of section 6 of the Act. Plot Kiamuri A/ 1224 was by consent of the parties taken out of the matrimonial property list.
33. As regards Abothuguchi/Mariene/1428, the parties agree that this property was registered in the name of Silas Muthuri M'Likanya, and no issue of trust has been proved and the court shall exclude the property from the list of matrimonial property of the parties.

Distribution of the matrimonial properties

34. It is trite since *PETER MBURU ECHARIA v PRISCILLA NJERI ECHARIA* [2007] eKLR which was approved by the Supreme Court in *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) considering section 17 of the Married Women Property Act 1882 on which section 17 of the Kenya *Matrimonial Property Act* 2013 is based that:

“Section 17 of the 1882 Act gives the courts discretion to grant appropriate remedies upon ascertainment of the respective beneficial interest in a disputed property. The same remedies as are available in law in property disputes in ordinary actions are also available in disputes between husband and wife under section 17. The court has jurisdiction after the adjudication of the dispute, to allocate shares of the disputed property as it may deem just and order the transfer of the share to the rightful beneficial owner to give effect to its decision.”



35. This court’s jurisdiction in distribution of matrimonial property is underpinned by section 17 of the [Matrimonial Property Act](#), 2013 as follows:

“ 17. Action for declaration of rights to property

1. A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
2. An application under subsection (1)—
 - a. shall be made in accordance with such procedure as may be prescribed;
 - b. may be made as part of a petition in a matrimonial cause; and
 - c. may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

36. The jurisdiction of the Court to divided matrimonial property between spouses and former spouses in granted under section 7 of the [Matrimonial Property Act](#), which provides as follows:

“ 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.”

37. Matrimonial property is defined by the Act as –

“ 6. Meaning of matrimonial property

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.”

38. Section 9 of the Act provides for acquisition of interest in property by contribution as follows:

“9. Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

39. Section 14 of the Act provides for presumptions as to property acquired during marriage as follows:

“14. 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.”

40. In *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 approving *Echaria* at para. 76 et seq discussed the law of contribution in matrimonial property:

“76. In *Echaria*, a five-judge bench of the Court of Appeal held that where the property in dispute is registered in the name of one spouse, the beneficial interest of each spouse would depend on the financial contribution by each spouse, either directly or indirectly. The court held:

“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 by Lord Pearson in *Gissing v Gissing* (supra) at page 788 paragraph c that:

“No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing”.



77. We further note that the court in *Echaria* was of the view that where the disputed property is not registered in the joint names of the parties to the marriage, but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective financial contributions, either directly or indirectly in the acquisition of the property. The court in *Echaria* then went on to find that for a wife to be entitled to a share of the property that is registered in the husband's name, she had to prove contribution towards acquisition of that property.
78. To our minds, the finding in *Echaria*, was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse to a specific share of the property. Furthermore, the position taken by our courts following *Echaria* is that as much as section 17 of the Married Womens Property Act gave courts discretion to do what is just and fair under the varying circumstances before them, it did not entitle a court to make an order which is contrary to any well-established principle of law on proprietary interests or ownership of property. The Court of Appeal in this regard held: "The decision of the House of Lords in *Pettitt vs. Pettitt* that section 17 of 1882 Act is a procedural section and did not entitle the court to vary the existing proprietary rights of the parties has often been misunderstood. All that the House said, in simple language, was that if a spouse indisputably owns property alone before the dispute reaches the court, section 17 of the 1882 Act did not give the courts discretion to take that property right away and allocate it to the other spouse. The House did not say that after the ascertainment of a property dispute between husband and wife, the court did not have any power to make appropriate orders as would give effect to its decision."
79. The court in *Echaria* also noted that for one to be entitled to a share of the property, the court should consider the circumstances of each arising case independently in assessing contribution further noting that what amounts to contribution may either be direct and monetary and indirect and non-monetary. The court's holding in that regard was as follows:

"In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this court, the court has invariably given the wife an equal share (see *Essa v Essa* (supra); *Nderitu v Nderitu*, Civil Appeal No 203 of 1997 (unreported), *Kamore v Kamore* (supra); *Muthembwa v Muthembwa*, Civil Appeal No 74 of 2001 and *Mereka v Mereka*, Civil Appeal No 236 of 2001 (unreported)). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and



independently assessed the wife's contribution as equal to that of the husband." [Emphasis added]"

41. It is therefore clarified finally that distribution of matrimonial properties is, therefore, pegged on each spouse's contribution towards their acquisition. Section 2 of the Act defines contribution to include monetary and non-monetary contribution. Non-monetary contribution includes domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work. The plaintiff contends that all the matrimonial properties were purchased with income generated by the businesses she was running whereas the defendant is adamant that he purchased the matrimonial properties without any contribution from either the shop business or the plaintiff. He contends that he transferred plot No. 39 C Chaaria Market to the plaintiff which houses 20 commercial rooms fetching monthly rental income of approximately Ksh.57,000. The plaintiff is said to have used the said income together the income generated from her shop to acquire Plot No. 1269 Zimmerman Settlement Scheme, Motor Vehicle Registration No. KCE 156 C, Commercial Plot No. 39 C Gaitu Market and Motor vehicle Registration No. KZB 929 Peugeot 504 Saloon. The defendant contends that he has solely been paying school fees for their children, without any contribution from the plaintiff.
42. The plaintiff's case on contribution to acquisition of matrimonial assets was that upon marriage to the defendant in 1981, the defendant subsequently in 1982 went to college at Egerton and later Kabete Institute while she was left farming on 3 acres of land given to the defendant by the defendant's father. By the income from farming, she was able to cater for their children and also give pocket money to the defendant. She said that the parties then raised funds for their shop business by a loan of 16,000/- from the defendant and herself raising money from proceeds of sale of livestock from her farming as follows:

"When we married JNM was farming with his parents. We lived together for one year. In 1982, he went to college, Egerton College and later Kabete Institute.

When he went to college he left me farming 3 acres. I used to get income from the farming. I used to cater for our children and I also gave money for his pocket and needs at the college.

After he finished college, we lived together. He was employed and he took a loan in 1987 for 16,000/= to start a business. As I was a farmer I had some money and I sold my cows, goats and pigs and I got 25,000/=. I was the one who managed the business. It was a retail shop and green grocery. All this time JNM was at Garissa livestock Ministry. We invested by buying parcels of land. We bought some plots. They were registered in the names of the defendant. I was the one who managed the business. I was the one who was giving the money and as I was busy at the business he would go to get the property."

43. The defendant admitted the plaintiff's farming on the land given by his father but said it was only 1 acre. He also admitted to the plaintiff paying school fees for their children but asserted that he had paid for the fees at the university. He said he had acquired a loan of Ksh.27,000/- to commence the business for the plaintiff as follows:

"Business at Chaaria Market

I was working with Ministry of Livestock. I am the one who took a loan From Ukulima Co-operative where I used to be a member. According to my shares I took a loan of Kshs. 27,000/=. That was a lot of money at time. I went and looked for a shop and established it for her. I did not receive the proceeds from the business and I had no further interest other than assisting her.



The money was not used to pay school fees. I paid for the schools. The plaintiff also paid schools at times.

At the University. I paid the fees at St. Pauls University where the 1st and 2nd children went. I am the one who paid the fees. I am the one who took them there. I also paid for school fees for the 1st child when she went to a college Augustine College in Nairobi....

I used to pay school fees at University. We shared the responsibility. I paid 120,000/=. She used to pay other expenses when required. I paid for fees at the University.”

44. The parties did not produce any documentation by invoices or payment receipts to show their alleged respective monetary contribution. The court, therefore, is without exact amounts of money contribution not able to fix the respective percentages of contribution indirect monetary terms for each of the parties and it has to interrogate the indirect contribution, if any, of the parties to the assets acquired during their marriage. There was no dispute that the property were acquired during the marriage of the parties. What is disputed was the contribution to their acquisition. The defendant states that he paid for all acquisition of the assets and only gave the titles to the plaintiff for safekeeping, and that he may have received money from the plaintiff for some of the purchases but this was his own money which he had given to her, and additionally that the plaintiff had bought some property in her own name using her funds.
45. On a balance of probability, the court finds it more likely than not that the plaintiff did contribute from proceeds of sale of livestock on their farm to the commencement of the business which expanded into the projects subsequently undertaken by the parties, and she continued to contribute to the business expansion and acquisition of assets using the income from the businesses which she operated. However, this contribution is capable of exact measurement. The evidence proved however that the plaintiff was the manager of the first family business; she lived with the first two children taking care of them and paying school fees from them from income of the businesses, the defendant conceding that she paid some of the fees, and claiming to have paid for their fees at the University; and the plaintiff also managed the family and their home affairs while the defendant worked out of home at Garissa.
46. On the evidence, the court would find that all the assets acquired by the parties herein during their marriage fall to be distributed on the basis that the money used in the acquisition was funded from proceeds of the various businesses conducted by the parties to which the plaintiff contributed by her management of the businesses that she ran, management of the family and care for the children and by her companionship to the husband defendant.

Conclusion

47. The parties were astute business people having generated much income and acquired the assets set out in the list of assets filed by the Plaintiff and admitted by the Defendant, with exception of a few assets only, which were found to have been on road reserve and properties which had been sold, unilaterally or with consent of both parties to acquire other assets. There is counter-allegations as to the sources for the funding for the initial family business, without any receipts of payments being produced.
48. Even if no direct contribution by payment of monies in the acquisition or improvement of the properties, the plaintiff's contribution if shown to indirectly go to the assets in question must be taken into account in terms of section 2 of the Act which recognizes contribution to be

“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.”

49. The court is not able to devalue the significance and value of the modes of indirect contribution by domestic work and management of matrimonial home, child care, companionship, management of family business or property and farm work as to contribute less than the monetary contribution paid by the spouse who makes money payment. Both are important modes of contribution each contributing equally to the whole acquisition and or development. The court will give equal shares to the spouses where the one is shown to have contributed directly to the acquisition of the property and the other indirectly to the development thereof by one or other means of indirect contribution under section 2 of the *Matrimonial Property Act*.
50. In this case, some assets which were acquired during marriage are registered in the names of the spouses; most are registered in the sole name of the defendant. The Plaintiff testified that she paid for the purchase prices of the properties out of the proceeds of business operations in cereals shop, which she managed for the family. The defendant agreed only qualifying that the money came from the businesses which he had established for the plaintiff.
51. How does the court treat the money payments for acquisition of property which the defendant acknowledges but which he claims were the money from the business which he established for the plaintiff. Could such payments as contribution be credited to the plaintiff business manager of the family businesses? Or is the plaintiff to be taken merely as an agent of the husband in running the shop and creating profits which are then used for the acquisition of the properties. If the plaintiff were merely an agent she cannot claim contribution for doing the work she does on behalf of her principal, the husband. In the absence of documentary or other evidence as to how much financial contribution was made by the plaintiffs the Court must look at the non-monetary contribution to establish whether the plaintiff's claim is established.
52. The situation between the parties herein is not a case of spouses making direct payments, from their own resources or savings, for the acquisition or development of previously individually owned assets. It is simply a case of acquisition of property from family funds generated out of business operations of the spouses. In the businesses, while the husband provided the capital by way of land for the farming venture by the plaintiff on one acre, according to the defendant and 3 acres according to the plaintiff, from which profits were generated leading to expansion of the businesses and acquisition of the properties. This happened in a setting of absence of the defendant at college, and upon employment in towns away from home, leaving the plaintiff to carry out the businesses and stay with the children while paying for their upkeep and school fees.
53. At some point the defendant was able to operate a transport business separately and he admits to payments made by the plaintiff for the acquisition of the assets but contends that the funds were monies that he had given to the plaintiff. The want of evidence on the actual payments and amounts thereof leave the court unable to determine the matter on the basis of direct contributions to the acquisition of property.
54. There is evidence of the indirect contribution of the plaintiff to the acquisition of the assets which are registered in the sole name of the defendant. On a balance of probability, the Court finds that the plaintiff, who was upon marriage left with the children when the defendant proceeded to college



for studies and who continued to carry out the family business, initially single-handedly while the defendant was at school and later with supply assistance of her husband who brought in clothes from Garissa where he was posted with the Ministry of Livestock, persuades the court as being more likely than not that she could have paid for the school fees for the children, provided the husband's pocket money while at college and pay for the purchase price for the matrimonial assets and expansion of the family businesses.

55. The plaintiff's engagement in the management of the matrimonial home and family business, the singlehanded child care, the farm work on the one or three acres of the defendant's inheritance and the companionship for the husband and role as wife and mother of their children all count for contribution to the acquisition and or development of the assets acquired by the family during their marriage and registered in the name of the defendant. For the asset registered in the joint names of the parties, section prescribes a rebuttable equal interest in the property and nothing has been shown by the defendant to give contrary indication.
56. The Court is obliged to find that the assets acquired by the family of the plaintiff and the defendant during their marriage and listed in the schedule filed in the suit are matrimonial property, in which the parties the plaintiff and the defendant herein have equal shares at 50:50 ratio, the plaintiff having contributed to their acquisition and development directly by making financial payments with funds, as admitted by both parties, from the proceeds of business ventures of the family, as well as by non-monetary contribution by way of management of family businesses, child care, companionship for the defendant former spouse.
57. The plaintiff was a manager of family business, care provider for the family's children, home manager while the defendant former spouse was away at college and at work out of home, and companion of the defendant former spouse in their marriage since 1981 to its dissolution in 2020. It would be an unconscionable devaluation of the plaintiff's contribution to suggest, even without proof of monetary contribution to acquisition of assets during their marriage, that this marital support was anything less than equal 50% contribution, in the same measure as the spouse who made capital contribution by way of land from which out of efforts of the plaintiff income and profits were generated for the growth and expansion of the business and acquisition of assets during their marriage.
58. The determination of the 50:50 sharing of the assets in this case is not based merely the fact of marriage as suggested by the Defendant in urging a dismissal of the Plaintiff's suit but on an assessment of the plaintiff's contribution even non-monetarily to the acquisition of the assets on the evidence before the court giving her a beneficial interest in the assets registered in the sole name of the defendant. As observed earlier, with regard to the property registered in the joint names of the plaintiff and the defendant, the statutory presumption of section 14 (b) of the *Matrimonial Property Act*, that "there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal" has not been discharged. As regards properties registered in the sole names of the plaintiff and the defendant, the evidence supports the presumption, which has not been rebutted, under section 14 (a) of the *Matrimonial Property Act* "that the property is held in trust for the other spouse".

ORDERS

59. Accordingly, for the reasons set out above, the Court makes the following orders as prayed:
 1. The Plaintiff contributed to the acquisition of the listed properties as in the Schedule filed by the Plaintiff in the Court, as amended by this Judgment.



2. The plaintiff is entitled to share with the defendant in proportion of her contribution, which the Court assesses at 50% on account of her non-monetary contribution to the acquisition of the properties set out in the schedule as amended by this judgment.
3. The properties listed hereinbelow are matrimonial properties acquired during the subsistence of the marriage between the parties:

Immovable Properties

Kiamuri "A"/2028,

Kiamuri 'A'/1830,

Abothuguchi/U-Kiogo/1537,

Abothuguchi/Gaitu/2062,

Abothuguchi/Gaitu/1621,

Abothuguchi/Gaitu/2116,

Abothuguchi/Gaitu/2106,

Abothuguchi/Gaitu/1103,

Abothuguchi/Gaitu/1104,

Abothuguchi/Gaitu/1716,

Ntima/Ntakira/2443,

Abothuguchi/Gaitu/1207,

Abothuguchi/Gaitu/1208,

Abothuguchi/Gaitu/2501,

Abothuguchi/Gaitu/1436,

Abothuguchi/Gaitu/1730, Abothuguchi/Makandune/1433, Abothuguchi/Gaitu/624,

Commercial business on plot Nos. 42 "A", 42 "B", 43 "A" – Gaitu Market - Chaaria,

Plot No. 61 "A" Gaitu Market - Chaaria,

RUIRI-RWARERA ADJUDICATION SECTION/5628,

Plot No. 61B "1" Gaitu Market Chaaria,

Plot No. 36 "A" Gaitu Market - Chaaria,

Plot No. 39 "C" Gaitu Market- Chaaria,

Plot No. 42A. Gaitu - Chaaria,

Lodgings on Plot No. 36 "B" Gaitu Market - Chaaria,

Rental house on Plot No. 10 "B" Gaitu Market-Chaaria,

Plot No. 196 within Zimman Settlement Scheme Society,

Plot No. 1265 Zimman Settlement Society,

Plot No. 477 within Zimman Settlement Scheme Society,

Plot No. 37 "A" Zimman Settlement Scheme Society,



Plot No. 524 within Zimman Settlement Scheme Society,
Plot No. 478 Zimman Settlement Scheme Society,
Plot No.29 within Zimman Settlement Scheme Society,
Plot No. 956 Zimman Settlement Scheme Society,
Plot No.959 within Zimman Settlement Scheme Society,
Plot No. 962 Zimman Settlement Scheme Society,
Plot No.1569 Zimman Settlement Scheme Society,
Plot No. 1269 Zimmerman Settlement Scheme.

Motor vehicles

Motor Vehicle Registration No. KBP 146P,

Motor Vehicle Registration No. KCE 156C,

Motor vehicle Registration No. KZB 929,

Motor Vehicle Registration No. KXC 598,

Motor Vehicle Registration No. KSZ 585.

4. The Plaintiff shall get half (50%) share of the properties listed in the Schedule, as amended by the Judgment and as existing at the date of the Judgment, and for that purpose the said properties shall be divided between the plaintiff and the defendant equally.
5. The parties are at liberty to apply as to the manner of implementation of the Orders of the Court herein.

60. Each party shall bear their own costs.

Order accordingly.

DATED AND DELIVERED ON THIS 24TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mwangi E. G. & Co. Advocates for the Plaintiff

M/S Kiogora Arithi & Associates Advocates for the Defendant.

M/S Elijah K. Ogoti & Co. Advocates for the Interested Party.

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