



REPUBLIC OF KENYA



**RNK v BOA (Civil Suit 21 of 2020) [2023] KEHC 18064 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18064 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE**

**CIVIL SUIT 21 OF 2020**

**AC MRIMA, J**

**MAY 25, 2023**

**BETWEEN**

**RNK ..... PLAINTIFF**

**AND**

**BOA ..... DEFENDANT**

**JUDGMENT**

1. This judgment relates to determination and distribution of properties allegedly acquired during the currency of a marriage between the parties herein. The parties were legally divorced.
2. Whereas the plaintiff herein, RNK who was the wife, vehemently laid claim on several properties as matrimonial properties and rooted for an equal share of contribution, the defendant, BOA, then the husband, denied the allegations and only conceded to one property to have been acquired during their marriage. On that property, which is a motor vehicle registration number KBN 410Z make Toyota Station Wagon (hereinafter referred to as 'the vehicle'), the defendant offered equal contribution.
3. This judgment, therefore, settles the parties' rights and ascertains their respective entitlements.

**The Plaintiff's case:**

4. In a plaint dated July 10, 2020, the plaintiff pleaded that she was legally married to the defendant and their nuptials celebrated on December 12, 2009. She further pleaded that they remained husband and wife until December 11, 2018 when their union was dissolved through divorce proceedings in Kitale Chief Magistrates Court Divorce Cause No. 11 of 2018.
5. The Plaintiff averred that during the subsistence of their marriage, they jointly acquired and developed several properties including: -
  - a. Kitale Municipality Block 11/129;
  - b. Ariston four (4) burner electric gas cooker;



- c. Doughnut and sandwich makers;
  - d. Juicer;
  - e. Deep fryer;
  - f. Electric heater;
  - g. Key board and key board standing music system;
  - h. Two (2) dinner sets;
  - i. 11 German cookware;
  - j. Food warmers;
  - k. Cool box;
  - l. Regal double flasks;
  - m. Charcoal moveable oven/grill;
  - n. Two (2) wooden/glass movable cabinets;
  - o. Steel book rack and steel outdoor seats;
  - p. Flower glass rack;
  - q. Samsung washing machine;
  - r. 10-seater corner seat;
  - s. 5-seater leather seats;
  - t. 40-inch HD LG TV.
6. The Plaintiff's present action arises from the fact that since the parties are divorced, the listed properties should be declared matrimonial properties and be then valued, subdivided and distributed to the parties equally.
7. It is these facts that form the substratum of the following reliefs as pleaded in the Plaint: -
- a. A declaration that Plot No. Kitale Municipality Block 11/129 and other items were matrimonial properties jointly acquired and developed by the parties during the subsistence of their marriage;
  - b. A declaration that the same be valued and sold so that the proceeds thereof be shared to the parties equally;
  - c. Costs;
  - d. Interest.
8. The case was eventually heard by way of viva voce evidence where the parties solely testified. In other words, none called any witness.
9. In her testimony, the plaintiff stated that their wedding took place at Word of Faith Church in Vihiga District and produced the Certificate of Marriage as an exhibit. She also affirmed that the marriage is now dissolved.



10. She further testified that during their marriage, the plaintiff and the defendant jointly developed properties from loans. She relied on the narratives outlined in her statement of accounts produced in evidence in asserting that she took out loans for such developments.
11. The plaintiff stated that at the time of acquiring the parcel of land measuring 0.2 ha and known as Plot No. Kitale Municipality Block 11/129 (hereinafter referred to as 'the Plot'), she was earning Kshs. 180,000/= monthly. She relied on her pay slips in support of the assertions.
12. The plaintiff also pointed out that her emoluments exceeded that of the Defendant who earned between Kshs. 50,000/= to Kshs. 55,000/= monthly. The plaintiff, however, conceded that the defendant supplemented income by way of side businesses.
13. It was her evidence that the development in the plot remained their matrimonial home. She highlighted that the Plot which was acquired during their marriage still has no final title documents, but a Letter of Allotment. The said letter was dated January 5, 1998.
14. The plaintiff offered an explanation to the date in the letter of allotment (being January 5, 1998) and yet they married in 2009. It was her testimony that in 1998 the defendant was married to his first wife one Betty Alividza Onzere who passed away before her eventual marriage to the defendant. However, the letter was backdated since no letters of allotment were issued by the time they got married and acquired the Plot.
15. The plaintiff asserted that Betty Alividza Onzere (hereinafter referred to as 'the first wife') never lived on the Plot as she had already passed on by the time the Plot was acquired.
16. On the purchase of the plot, the plaintiff stated that it was acquired at Kshs. 2,000,000/=. To fulfil the purchase and development obligations, the plaintiff took out several loans from a SACCO totaling to Kshs. 1,300,000/= while the defendant took out a loan of Kshs. 1,500,000/=. She asserted that she also utilized her loan proceeds to purchase the vehicle at Kshs. 700,000/= and the Sofa set at Kshs. 200,000/=.
17. In further justifying ownership of the plot, the plaintiff relied on a demand notice dated March 7, 2019 (which was produced as an exhibit) from a County Government tabulating a breakdown of outstanding plot rate bills that was addressed both parties herein as payers. She noted that the Notice did not bear the name of the County that demanded the rates payment, but stated that it was the County Government of Trans Nzoia.
18. The Plaintiff further testified that the Plot has a four bed-roomed mansionette house constructed between 2011 and 2012 and two rented shops. She further testified that during construction thereof, the defendant was working in Murang'a.
19. It was her further evidence that when they divorced, the plaintiff moved to Kericho but now resides in mumias while the Defendant lives on the Plot and dis holding on to all their matrimonial properties.
20. The Plaintiff maintained that she has a stake on the properties that were acquired and developed jointly. She valued the household goods at Kshs. 800,000/=. She further testified that she paid Kshs. 123,000/= in land rates and that she continued paying for the same until 2017.
21. Speaking to the vehicle, the plaintiff testified that they registered it in her name. She conceded that if the court ruled that the said vehicle was matrimonial property, she would abide by the court's orders.



22. Now divorced, she sought equal subdivision of the properties. She revealed that she attempted to reach out to the defendant to amicably distribute the assets, but the efforts were met with futility, hence, the present suit.
23. The Plaintiff buttressed her case through written submissions dated August 2, 2022. She submitted that she had discharged her burden of proof to the required standard. She relied on the evidence on record in support.
24. In her submissions, the plaintiff accused the defendant of dishonesty. She pointed out that when asked to furnish the title document, he failed to comply and introduced peripheral non-issues distinct from the issues before court.
25. Based on the foregoing, the plaintiff urged this court to allow the plaint and find that her contribution in the ratio of 70%: 30% in her favor as against the defendant.

**The Defendant's case:**

26. The defendant entered appearance and filed his statement of defence and counterclaim dated May 10, 2021.
27. He denied most of the averments in the plaint.
28. On the plot, the defendant pleaded that he purchased it in 1996 while legally married to his first wife and that the plot was where their matrimonial home was all along.
29. He added that the developments to the property, together with those properties listed in the plaint were obtained from his first marriage. As a result, he posited that the plaintiff was not entitled to any claim thereon. He added that all along, the plaintiff lived in Nairobi since their marriage.
30. The defendant outlined that the plaintiff was previously married to one Tom Oscar Alwaka whose relationship subsisted between 1998 and 2006. Following their union, they sired one issue Nicole Anne Apono on sometimes in October, 2000.
31. In response to the loan obtained by the Plaintiff in December 2010, the defendant averred that its lion's share was paid to one Abdul M. Ali in January 2011. By that time, the defendant alluded that all properties, including the Plot had been acquired and developed. The defendant, therefore, denied that the loan was utilized for the purchase and development of the Plot.
32. The defendant also challenged the authenticity of the Letter of Allotment relied on by the Plaintiff. He rebutted that it was not genuine for the reason that as at the time of its issue in 1998, he was still married to his first wife who would have been the automatic co-owner. Be that as it may, the defendant further averred that the said letter was not conclusive proof of ownership since it purported to have been issued before the parties herein knew each other. Furthermore, he was on course to obtain a lease certificate on the property.
33. In light of the above, the defendant pleaded that he was met with great shock and incredulity to see the contents espoused in the letter of allotment. He stated that, as a result, he was prompted to look for the original documents regarding the Plot, but has never found them.
34. The defendant admitted that during their marriage they jointly acquired the vehicle which was registered in the plaintiff's name on March 17, 2011.
35. Ultimately, the defendant asked this court to dismiss the suit and allow his counterclaim as follows: -



- a. The motor vehicle registration number KBN 410Z Toyota S. Wagon was jointly acquired by the parties during the subsistence of marriage and the same be sold and proceeds shared equally;
  - b. Costs and interest.
36. In his evidence, the defendant did not dispute his marriage to the plaintiff from December, 2009 until 2018 when they were divorced by court. He observed that the Plaintiff and his first husband had cohabited between 1998 and 2006 during which time the defendant was a widower.
  37. The defendant testified that when they met, the plaintiff resided in Riruta Satellite in Nairobi throughout after she separated from her first husband. After their nuptials, the plaintiff moved in with him at his fully equipped house on the Plot. That, the plaintiff joined the defendant with only a suit case in hand. His conclusion thus was that it was gratuitous for the plaintiff to purchase any household items. As such, those items listed in the plaint were not matrimonial properties.
  38. The defendant stated that plot was acquired during the subsistence of his marriage to his first wife who died on May 26, 2008 as evidenced by a certificate of death produced in evidence.
  39. The defendant testified that he was married to his first wife for 18 years and were blessed with 3 children. He further testified that during their marriage, they acquired the Plot and all the properties in the house.
  40. On the letter of allotment, the defendant testified that he had not met the plaintiff in 1998 when the said letter was allegedly obtained. That, he only met the plaintiff in 2009. The defendant contended that at no time did he permit the Plaintiff to be registered as a co-owner on the Plot.
  41. The defendant also testified that when he realized that the documents regarding the ownership of the plot were missing, he reported the matter to the police.
  42. The defendant was emphatic that the loan taken out by the plaintiff did not develop the plot they lived in.
  43. The defendant had no objection to the vehicle being declared matrimonial property and be subsequently valued and sold so that parties share the proceeds equally.
  44. On the earnings, the defendant stated he earned between Kshs. 50,000/= to Kshs. 100,000/= while the Plaintiff earned Kshs. 141,000/= after statutory deductions.
  45. The defendant, nevertheless, maintained that no loan taken out by the plaintiff to develop the plot.
  46. In his submissions dated July 27, 2022, the Defendant defined matrimonial property within the meaning set out in section 6 of the [Matrimonial Property Act](#). In light of this, he submitted that the suit property was not matrimonial property as it was not acquired in the duration of their marriage.
  47. The defendant observed that the plaintiff testified that the property was acquired in 2011 but the letter of allotment backdated to 1996. She failed to prove why the document was backdated. On the issue, the defendant submitted that such a letter ought to have been gazetted first to give notice of backdating. He further disputed the plaintiff's evidence that the letters of allotment were no longer issued.
  48. The defendant further submitted that the plaintiff was in breach of sections 107 and 108 of the [Evidence Act](#) as she did not prove that the items particularized in paragraph 5 of her plaint were purchased during the pendency of their marriage countermanding that they were purchased before 2009.



49. The Defendant further relied on section 7 of the Matrimonial Property Act to hold that the Plaintiff failed to prove her contribution towards the suit land. Although her statement of accounts revealed that she took a loan in December 2010, it is not clear what those funds were utilized for. He also noted that on December 21, 2010, an amount was paid to Abdul M. Ali, unknown to him.
50. On the land rate payment receipt dated March 7, 2019, the defendant observed that it failed to establish where payments were made. He submitted that in cross-examination, the Plaintiff stated that she did not know why the payment did not bear the name of the County Government that benefited from the payments. To the defendant, that document remained mysterious as she further failed to produce receipts proving that she had been paying for the rates until 2017.
51. The defendant then relied on article 45 (3) of the Constitution and several authorities to discount the plaintiff's claim arguing that the properties could not be shared equally since the plaintiff did not contribute to their acquisition.
52. Finally, the defendant pointed out that the Plaintiff did not object to the counterclaim. He prayed that reliefs in his counterclaim be granted as sought.

#### **Analysis:**

53. The court has considered the pleadings, the evidence adduced, the exhibits and submissions filed by both parties.
54. From the evidence, there are issues which are not in dispute. For instance, the marriage between the parties herein which was dissolved by a court as well as the parties' previous marriages.
55. The point of departure is on the properties as listed in the pleadings. As such, this court will ascertain whether such properties are matrimonial ones and if so, how they be shared.

#### **Whether the Plot and other properties are matrimonial properties:**

56. As a precursor, the meaning of matrimonial property ought to be visited. From the reading of various decisions and legal writings, it appears that the term 'matrimonial property' derives meaning depending on the applicable legal regime at hand.
57. On the choice of the applicable legal regime, the Supreme Court of Kenya in JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & Another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment) held that the applicable law is determined from when the suit was filed.
58. In this case, the Plaintiff was filed in August, 2020. The applicable law is, therefore, the Matrimonial Property Act, No. 49 of 2013 (hereinafter referred to as 'the Act') which became operational as from January 16, 2014.
59. Section 6 of the Act defines 'matrimonial property' as follows: -
  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.

(Emphasis added).

60. From the above provision, sub-section 2 is the applicable provision in the circumstances of the case. That is because the parties did not allude to any customs or pre-nuptial agreements.
61. Therefore, this court adopts the definition of ‘matrimonial property’ for the purposes of this case to mean 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.
62. The next consideration is whether the home on the plot and the items listed in the Plaint form the matrimonial properties in this case.
63. Section 2 of the Act defines a ‘matrimonial home’ 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.
64. It is on record that the parties herein lived in a house which was built on the Plot after their marriage. The house became their family home. Deriving from the definition above, the house on the Plot became the matrimonial home whereas the Plot became a matrimonial property.
65. There is no doubt that the items listed in the Plaint are the ordinary ones used for home living. The parties agreed as much. The items, hence, became matrimonial property by virtue of being household goods and effects in the matrimonial home.
66. There is also the vehicle which both parties readily agree to be part of the matrimonial properties.
67. This Court now finds and hold that the vehicle, the Plot, the house thereon and the items in the house constitute the matrimonial properties in this case.

### **Sharing of the matrimonial properties:**

68. The longstanding quagmire on how matrimonial property is to be shared in the event spouses can no longer sustain their marriages and are unable to mutually agree on the distribution, has now been settled by the law and the superior courts.
69. The position is that the distribution depends on the spouses’ individual contributions in the acquisition of the properties.
70. Section 7 of the Act has the following to say: -  
7. Ownership of matrimonial property:



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.

71. Section 9 of the Act also provides as under: -

9. Acquisition of interest in property by contribution:

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.

72. Section 2 of the Act defines ‘contribution’ as follows: -

“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;

73. It is imperative to note that the non-monetary contribution in law is not limited or exclusive to the five categories listed above, but it is rather inclusive. It, therefore, means that a court in determining a party’s non-monetary contribution may consider other inputs by that party.

74. Addressing itself to the above issue, the Court of Appeal in PNN vs. ZWN [2017] eKLR looked into article 45(3) of the Constitution which provides that “Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage” and expressed itself as follows: -

.... Thus, it is that the Constitution, thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.

75. The foregoing was affirmed by the Supreme Court in JOO vs. MBO case (supra). The said case remains the locus classicus in family law for it addressed three pertinent issues of great public interest. The issues are as follows: -

- i. What is the applicable law in the division of matrimonial property where causes were filed prior to the current matrimonial property regime being the Constitution and the Matrimonial Property Act, 2013?
- ii. Should a matrimonial property cause filed prior to the promulgation of the Kenyan Constitution, 2010 be determined under section 17 of the Married Women’s Property Act, 1882 and in accordance with the principles espoused in Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR or should courts follow the new regime as at the time of



determination by applying the provisions of article 45(3) of the Constitution and the Matrimonial Property Act 2013 which underpin the principles of equality?

- iii. Whether article 45(3) provides for proprietary rights and whether the said article can be a basis for apportionment and division of matrimonial property on a 50/50 basis without parties fulfilling their obligation of proving what they are entitled to by way of contribution.
76. On the interpretation of article 45(3) of the Constitution, the Supreme Court variously stated thus: -
97. In this regard our view is that, while article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married....
  104. Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of the Constitution. To hold that article 45(3) has the meaning of declaring that property should 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.
77. The Apex Court also stated as under: -
81. .... the equality provision in article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that article 40(1) and (2) of the Constitution which protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC's language.
  82. While therefore reiterating the finding in Echaria, we also find that article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in the Constitution do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.
78. On the aspect of non-monetary contribution, the Supreme Court held as follows: -
- It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. The learned Judge having appreciated the appellant and the respondent were married for 18 years, and 15 of those years the appellant was in gainful employment; she constantly took loans, having found the only property that was acquired with joint efforts was the matrimonial home where the appellant was residing; the fact that upon separation the respondent was able to purchase another home where he settled. For those reasons,



we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired beneficial interests therein; we also find for the same reasons the learned Judge erred by awarding the appellant a share of 30% of the house she has been in occupation and a mere 20% of the rental units which are in the same premises.

79. Having set the law on the distribution of matrimonial property above, this court will now apply it to the circumstances at hand. The Plot and House thereon:
80. Since contribution is an issue of fact, it calls for evidence. The conduct of this civil matter is guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to civil matters and affidavits in Section 2 thereof. The provision provides as follows: -
1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's Court, but not to proceedings before an arbitrator.
  2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.
81. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state 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.
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.
82. Therefore, the burden of proof squarely lies on the plaintiff. Depending on the nature of the evidence adduced the evidential burden of proof may shift to the defendant and vice versa whereas the legal burden of proof remains static upon the plaintiff.
83. The standard of proof is on a balance of probabilities.
84. The plaintiff alleged that contributed into the purchase of the plot and the building of the matrimonial home thereon. To that end, she produced a letter of allotment and bank statements and stated that she procured a loan towards the acquisition of the plot and the putting up of the house.
85. This court will look at the letter of allotment. It is dated January 5, 1998. Its authenticity was vehemently opposed by the defendant right from the inception of the case. Be that as it is, the letter seems to raise several legal issues. First, it does not disclose which County Council that issued it. Second, it did not avail the alleged attached plan. Third, the letter called upon the two allottees to accept the terms in writing and to pay the charges as prescribed within 30 days of issuance and any failure ascribed an automatic lapse of the allotment. No such evidence was adduced.
86. Four, the aspect of backdating the letter. The explanation rendered by the plaintiff is quite disturbing. She alleged that the letter was backdated since by the time she acquired it, no letters of allotment were being issued. If that was really the case, then inevitable questions arise. They include the circumstances under a sensitive land document was procured during a time when the Government was not issuing such documents, whether the law authorizes the backdating such a document, who authorized the



- backdating, if at all backdating was allowed then whether all required processes were followed, whether the letter is a fraud, among many others. From the evidence on record, none of the above questions were answered or at all.
87. Five, the letter itself was neither certified, nor produced in accordance with the provisions of section 68 of the *Evidence Act* as regards production of secondary evidence.
  88. The net effect of the above lapses renders the authenticity of the letter of allotment extremely doubtful and highly borders on possible fraud. The letter is of very little probative value if at all any.
  89. Next is the demand notice. The Plaintiff referred to the notice as a rate payment receipt. Just like the letter of allotment, a cursory perusal of the demand notice reveals several wanting issues as well.
  90. First and the most glaring issue is the fact that the County Government that demanded the payment is not captured in the notice. Second, no evidence of payment of rates was availed despite the plaintiff testifying that she had been so paying from issuance of the letter of allotment up to sometimes in 2017. Third, the notice was neither certified, nor produced in accordance with the provisions of Section 68 of the *Evidence Act* as regards production of secondary evidence.
  91. The foregoing renders the copy of the demand letter likewise highly doubtful and of very little probative value if at all any.
  92. Going by the centrality of the letter of allotment and the demand notice in this matter, added that she had all along been paying for the land rates but stopped in 2017. Again, nothing proved these assertions by way of documentary evidence.
  93. Could it be that the plaintiff contrived the letter of allotment and demand note with a view to securing a judgment at all costs? I ask myself this question because her explanations regarding the elucidations in the two (2) documents are not efficacious. How does one obtain a document purporting to register two individuals who had never met at that time? If her explanation is anything to go by, can an office backdate the issuance of an allotment letter? How is it that a demand notice from the County Government does not reveal the relevant county office? Sadly, I am convinced that the Plaintiff may have engaged in fraudulent activities. Perhaps the reason that motivated her concession to include the suit vehicle in as matrimonial property.
  94. The Plaintiff additionally stated that she financially contributed to acquisition of the suit property. She produced her statement of accounts evincing that she took out several loans with a view to its purchase and construction of the house therein. It is not clear when she took out those loans and when they were disbursed from her statement of accounts. I have not seen any entries to the effect that she received 1.3 million as testified.
  95. It is however not lost that contribution does not take the format of monetary contribution alone. The court in *NWM vs. KNM (2014) eKLR* stated that a court must consider both monetary and non-monetary contributions both parties made in the marriage when matrimonial properties were acquired. This was holding was similarly applied by the House of Lords in *White vs. White (200) UKHL 54* where the Court upheld the value of non-financial contributions to the welfare of the family.
  96. Similarly so, contribution is defined under Section 2 of the *Matrimonial Property Act* unless the context otherwise requires, monetary and non-monetary contribution. This includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.
  97. While it is unknown where plaintiff's funds were exactly utilized for save when a portion of funds was disbursed to ABDUL M ALI, it is evident that the plaintiff took out several loans during the



subsistence of their marriage. She was also earning a salary higher than that of the defendant who conceded to that effect. It can be deduced that from the activities delineated in her account and the fact of living together as husband and wife, the Plaintiff certainly contributed to the sustenance of the parties living together as husband and wife. Again, I do not hesitate to hold that she garnered a beneficial interest and indirectly contributed although not conclusively proved by way of receipts. She however marginally gave contributions to the wellbeing of the family. This court recognizes that the Plaintiff used her salary for the benefit of their marriage as and when required. It is my finding therefore that the Plaintiff made monetary and non-monetary contribution.

98. Parties herein conceded that the suit motor vehicle registration number KBN 410Z was registered in the name of the Plaintiff. Both parties agreed that it was acquired during the marriage. As a matter of fact, the Plaintiff, although not having listed it, did not oppose its inclusion as matrimonial property. The plaintiff testified that she purchased the suit vehicle at a cost of Kshs. 700,000.00. This evidence was unopposed. I thus find that indeed, the Plaintiff contributed to its acquisition.
99. Although the Plaintiff failed to furnishing receipts or statements disclosing the date and value of the goods, save for the sofa, purchased for the matrimonial home, it behooves this court to bear in mind that the Plaintiff acquired some beneficial interest In the goods irrespective of conclusive proof as set out in Section 107 and 108 of the *Evidence Act*. I will thus take this into account when giving my final orders insofar as the properties listed in paragraph 5 (b) – (t) are concerned.

Whether the Plaintiff is entitled to an equal share or a higher proportion of matrimonial properties?

102. The starting point is to be found in Article 45 (3) of the *Constitution* which provides: “Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage”. It must be remembered that equal rights is not tantamount to equal share or a 50:50 apportionment. The provision adopts the principle of fairness after a court has examined the evidence on record. This view was taken by the Court of Appeal in PNN vs. ZWN [2017] eKLR where Kiage, JA said:

“ Thus it is that the *Constitution*, thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the *Matrimonial Property Act, 2013*, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.”

103. This holding was also adopted by the Supreme Court in JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Supra). Section 7 of the *Matrimonial Property Act* provides that ownership of matrimonial property is based on the contribution of either spouse towards acquisition. In that regard, it shall be divided upon dissolution of their marriage. Section 9 continues: “Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the 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.”
104. Proportionality of the matrimonial property will be assessed from the evidence of both parties. The plaintiff produced a statement of accounts and pay slips to justify that she contributed towards the acquisition and development of the properties. She testified that she took out a loan in the sum of Kshs. 1,300,000.00 towards the purchase of the property valued at Kshs. 2,000,000.00. She stated that the property was acquired in 2011 with construction of the house commencing immediately thereafter.



The defendant denied those allegations maintaining that the matrimonial home was acquired during the pendency of his first marriage. The plaintiff did not respond to the defendant's explanation. It was her duty to support her position with weighty evidence of probative value. I note that no documentary evidence justifies the averments. I am not satisfied that she proved those allegations to the required standard. I cannot thus take the evidence of the plaintiff as cogent on its face value. It is based on this that I find the defendant's explanation more probable. On a balance of probabilities, I do find that the defendant acquired the said property before the subsistence of the marriage with the Plaintiff.

105. On motor vehicle registration number KBN 410Z, both parties contend that the same was acquired during the marriage and registered in the plaintiff's name. The defendant did not oppose as to the evidence that the Plaintiff is the one who purchased the property. I therefore find that the Plaintiff fully contributed towards its acquisition.
106. It is quite difficult for this court to quantify the non-monetary contribution that the Plaintiff was responsible for. In her evidence, the Plaintiff estimated that the items listed as (b) – (t) in the plaint are valued at Kshs. 800,000.00. It is also I observe that based on her earnings, she must have made certain improvements to the matrimonial home and items in the matrimonial home as designated in the definition of contribution under the Act. Considering the evidence and the facts in this case, I note that the Plaintiff is entitled to compensation for her contribution to the matrimonial home bearing in mind that she did not purchase and construct the said home. I exercise my discretion and award a sum of Kshs. 600,000.00 as compensation for her monetary and non-monetary contribution the matrimonial home.
107. In view of the foregoing, my orders and disposition are as follows regarding the plaint and counterclaim:
  - a. The defendant shall retain the suit land namely Kitale Municipality Block 11/129;
  - b. The plaintiff shall be paid Kshs. 500,000.00 as consideration for her monetary and non-monetary contributions towards the matrimonial home;
  - c. The plaintiff shall retain the motor vehicle registration number KBN 410Z;
  - d. This being a family matter, each party shall bear its own costs.

It is so ordered.

Delivered, Dated and Signed at Kitale this..... 25<sup>th</sup> .....day of **May, 2023**.

**A.C. MRIMA**

**JUDGE**

**Judgment virtually delivered in presence of:**

**Miss Munialo, Counsel for the Plaintiff**

**Mr Mukabi, Counsel for the Defendant**

**Regina/Chemutai – Court Assistant**

KITALE HCCC NO. 21 OF 2020 JUDGMENT
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