



**MO v AJA (Matrimonial Cause E008 of 2022)
[2023] KEHC 21343 (KLR) (Family) (4 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E008 OF 2022
MA ODERO, J
AUGUST 4, 2023**

BETWEEN

MO PLAINTIFF

AND

AJA DEFENDANT

JUDGMENT

1. Before this court is the originating summons dated 20th January 2022 filed by the Plaintiff Dr. Mary Otieno seeking the following orders:-

- “a) Declaration that all that 5 bedroomed mansion built on land reference number SIAYA MULAHA/2257 measuring approximately 0.32 Ha which was at all times material occupied or utilized by the parties as their family home, and includes the swimming pool and pool house built on land reference number EAST ALEGO/MULAHA/3105 measuring approximately 0.53 Ha, including all household goods and effects therein are the matrimonial home of the Plaintiff and the Defendant and form part of their matrimonial property.
- b) Declaration that the Plaintiff is entitled to over three quarters of the value of the matrimonial home built on land reference number SIAYA MULAHA/2257 and EAST ALEGO/MULAHA/3105.
- c) This Honourable Court does order that the 5 bedroomed mansion built on land reference number SIAYA MULAHA/2257 and EAST ALEGO/MULAHA/3105 including the entire lands the mansion is built on be valued, sold and proceeds thereof distributed between parties in the portions of their



contributions towards acquisition thereof, with an option for either party to buy out the other's interests.

- d) Declaration that all the furniture, furnishings and household goods to be found in the 5 bedroomed matrimonial house/home built on land SIAYA MULAHA/2257 and EAST ALEGO/MULAHA/3105 in Siaya County belong to the Plaintiff having been purchase by her through her sole efforts and funds.
- e) Declaration that all those personal effects, items and good in the 5 bedroomed matrimonial house/home built on land reference SIAYA MULAHA/2257 and EAST ALEGO/MULAHA/3105 in Siaya County purchased solely by the Plaintiff are the property of the Plaintiff.
- f) This Honourable Court does order that the Defendant be compelled to return to the Plaintiff all personal effects, items and goods unlawfully and/or illegally removed from the matrimonial home in their actual/original form, shape, quantity and quality.
- g) In the alternative to “f” above; the Defendant be ordered to compensate the Plaintiff in the sum of Kshs.5,000,000.00 for her lost and/or damaged properties herein above.
- h) Declaration that all those immovable properties known as land reference numbers SIAYA/MULAHA/ 3151 measuring approximately 0.45 Ha and SIAYA/MULAHA/2287 measuring approximately 0.06 Ha and SIAYA/MULAHA/3150 measuring approximately 0.45 Ha and all developments thereon are the matrimonial properties of the Plaintiff and the Defendant.
- i) An order that all those immovable properties known as land reference numbers SIAYA/MULAHA/3151 measuring approximately 0.45 Ha, SIAYA/MULAHA/ 2287 measuring approximately 0.06 Ha and SIAYA/MULAHA/3150 measuring approximately 0.45 Ha and all developments thereon be valued, sold and proceeds thereof distributed between parties in the proportions of their contributions towards acquisition thereof, with an option for either party to buy out the other's interests.
- j) That this Honourable court does declare that motor vehicle registration KCD 375V (Isuzu Lorry) and motor vehicle registration UN 3002 CD (Range Rover HSE) belong to the Plaintiff having been purchased by her through her sole efforts and funds.
- k) That this Honourable Court does declare that the motor vehicle (Double Cabin – light grey pickup truck) with an unascertained registration number belongs to the Defendant having been purchased or acquired by him through his sole efforts and funds.
- i) That the Defendant be ordered to render a precise account of the profits made /collected from the commercial use of motor vehicle registration KCD 375V (Isuzu Lorry) with effect from 2018 to date.
- m) That upon rendering the accounts set out at paragraph “12” hereinabove; that this Honourable Court does order the Defendant to reimburse to the



Plaintiff the equivalent or her three quarters share thereof and/or such share as this Honourable Court may deem fit.

- n) That this Honourable Court does order that possession of motor vehicle registration number KCD 375V (Isuzu Lorry) be forthwith transferred by the Defendant, his agents or employees to the Plaintiff.
- o) That in the alternative to “n” above, this Honourable Court does order that the Defendant be ordered to compensate the Plaintiff in the sum of USD.40,000.00 being the purchase price of motor vehicle registration KCD 375V (Isuzu Lorry) aforesaid.
- p) That this Honourable Court does declare that the pension schemes known as the United National Joint Staff Pension Fund (UNJSPF) registered in favour of the Plaintiff and the 401 KIRA funds retained by the Plaintiff solely belong to the Plaintiff having been set up and maintained by her through her sole efforts and funds.
- q) That this Honourable Court does declare that the pension schemes known the 401K retirement plan (mutual funds/stocks) retained by the Defendant, the Employees’ Stock Ownership Plan (ESOP) retained by the Defendant and United States of America’s Social Security \$1,100.00 monthly pension payments solely belong to the Defendant having been set up and maintained by him through his sole efforts and funds.
- r) That the Defendant be ordered to render a precise account of all those funds held in Equity bank Limited under various Bank Accounts/stocks being funds earned and contributed by the Plaintiff to the said Bank accounts during the marriage herein with effect from the date of opening of the bank accounts to date.
- s) That upon rendering the accounts set out at paragraph “18” hereinabove; that this Honourable Court does order the Defendant to reimburse to the Plaintiff the equivalent of her funds contributions towards acquisition thereof or her three quarters share thereof and/or such share as this Honourable court may deem fit.
- t) That this Honourable court does order that all other matrimonial properties except those specifically pleaded hereinabove, being properties acquired during the marriage herein, be valued, sold and proceeds thereof distributed between parties in the proportions of their contributions towards acquisition thereof, with an option for either party to buy out the other’s interest.
- u) Spent.
- v) That this Honourable Court be pleased to grant such further or other reliefs, orders or directives that this court may deem just to grant in the circumstances to uphold the scales of justice between parties.
- w) That the Defendant does bear the cost of this Application.”

2. The summons which was premised upon Article 40 of *the Constitution* of Kenya 2010, Sections 7 and 17 of the Matrimonial Properties Act No. 49 of 2013, Section 93 of the *Land Registration Act* No. 3



of 2012, Order 37 of the Civil Procedure Rules and all enabling provisions of the law, was supported by the Affidavit of even date sworn by the Plaintiff.

3. The Defendant Alloyce Juma Achoki despite having been properly served did not enter appearance in this matter neither did he file any reply to the summons. The matter was canvassed by way of Vive Voce evidence.

Background

4. The Plaintiff and the Defendant got married to each other in the year 1983. The couple later solemnized their union on 16th August 1994. Their union was blessed with two sons Bill Issac Achoki and Gerry Onyango Achoki both of whom are now adults.
5. The marriage between the Plaintiff and the Defendant later ran into problems and the Plaintiff filed Divorce Cause No. E189 of 2021 seeking dissolution of the marriage.
6. Vide a judgement delivered on 9th September 2021 the marriage was dissolved and a Decree Nisi was issued on 7th December 2021.
7. The Plaintiff then filed the present summons seeking various declarations in respect of properties/assets acquired during the subsistence of the marriage. She is also seeking division of Matrimonial Property.
8. As stated earlier the Defendant did not enter appearance nor did he file any reply to the summons. The matter therefore proceeded as an undefended cause.

Evidence

9. The Plaintiff Dr. Mary Otieno told the court that she currently works with the United Nations Population Fund and is based in Kampala, Uganda. She confirms that she knows the Defendant as her Ex-husband.
10. The Plaintiff stated that she was in paid employment throughout the subsistence of the marriage having worked for the United Nations Population Fund in Sudan and Zambia. That she has worked for the Government of Kenya and has also worked in New York USA. A copy of the Plaintiff's extensive Curriculum Vitae is annexed to the supporting Affidavit as Annexure MAO-'3' whilst Annexure MAO-'4' is a copy of her letter of Appointment dated 15th November 2015 with the United Nations Population Fund.
11. The Plaintiff told the court that during the subsistence of her marriage to the Defendant she single handedly purchased the following immovable properties, without any financial support from the Defendant:-SIAYA/MULHAHA/2257 – Matrimonial home (with 5 bedroomed mansion);EAST ALEGO/MULHAHA/3105 – part of Matrimonial home (with a swimming pool and pool house);SIAYA/MULHAHA/3151 – farm land for cultivation and livestock rearing;SIAYA/MULHAHA/3150 – Apartments;SIAYA/MULHAHA/2287;
12. Additionally during the subsistence of the marriage the following movable properties were acquired:Isuzu Lorry Registration Number KCD 375 V;Range Rover Registration Number UN 3002 CD;Toyota Hilux Pick-up truck Registration Number KCA 020RDouble Cabin Pick-up Registration Number not ascertained.
13. That additionally during the subsistence of the marriage the Plaintiff and the Defendant each individually took out and contributed to the following pension schemes:



Defendant

- i. 401 K retirement plan managed by Smith and Barrey
 - ii. Employees Stock Ownership Plan (ESOP)
 - iii. United States of America Social Security
- Plaintiff

- i. United Nations Joint Staff Pension Fund (UNJSPF)
- ii. 401 K IRA funds.

(i) Five Bedroomed Mansion

14. The Plaintiff stated that the couple establish their matrimonial home on the property known as Siaya/Mulaha/2257 where they built a five-bedroomed mansion. That the said plot was acquired in December 2007.
15. The Plaintiff testified that at the time the Defendant was earning a salary of USD 2000 per fortnight. However, the Defendant was effectively left with a net income of 'zero' as he was depositing all his money into his 401 K Savings accounts.
16. The Plaintiff went on to state that at the time construction of the Mansion commenced in 'Mulaha' she was living and working in New York and would regularly send funds to one 'PIUS' who was supervising the construction. That the construction in 'Mulaha' commenced in the year 2009 and was completed in the year 2013. The Plaintiff states that she bought all the furniture for this 'Mulaha' home.
17. The Plaintiff further states that during the course of the marriage she alone paid for the children's fees and maintained the home and regularly sent money to the Defendant for his upkeep. That the Plaintiff also hired and paid for a househelp for the Defendant's mother, paid for the mother-in-law's medical expenses and took care of the educational costs for several of the Defendant's nephews and nieces.
18. The Plaintiff states that she paid the entire cost for the construction using a 'Home Improvement Loan'. She states that the Defendant was unemployed from 2009 to 2013 when the construction was taking place. That the Defendant only managed to secure short term employment in September 2013 which was after construction had been completed.
19. The Plaintiff told the court that she constructed a swimming Pool on Plot No. East Alego/Mulaha/3105, extended the pool house, sunk a borehole and put up a cottage to be used by the Defendant's mother whenever she visited the family.
20. The Plaintiff told the court that from February 2021 when she filed for divorce she has not visited the matrimonial home in 'Mulaha' despite having financed the construction of the same. That the Defendant now occupies the said mansion with his new girlfriend.
21. The Plaintiff went on to state that she fully financed the purchase of all the other listed properties. She explains that she would send the money to the Defendant and he would pay the purchase price. The Plaintiff gives the breakdown of her financial contribution towards the acquisition of the other properties in question as follows:-



(ii)Siaya/Mulaha/3150

22. The Plaintiff states that this land was purchase in 2013. That she fully financed the construction of twelve (12) Apartments on this piece of land; through a personal loan of USD 215,000 which she took from UNFCU. That she repaid this loan without any input from the Defendant.
23. The Plaintiff stated that she would remit funds into the bank account of the Defendant held at Equity Bank in order to finance the construction. That the Defendant made no financial contribution whatsoever to the construction of the said Apartments.
24. The Plaintiff laments that she derives no benefit from the said Apartments as she has not stepped there since 2021.

(iii)Siaya/Mulaha/2287 and Siaya/Mulaha/3151

25. The evidence of the Plaintiff was that there were farmlands on which were purchased in the year 2011. That she planted fruit trees and kept livestock thereon. That she purchased all the livestock reared on said parcels of land.
26. The Plaintiff states that despite her purchasing the two plots she is currently deriving no benefit from the same as the Defendant is currently in possession of both plots.

(iv)Motor Vehicles No. UN 3002 CD and No. KCD 375 V

27. The Plaintiff testified that she single handedly purchased all vehicles. She states that the Lorry was purchased for business purposes. She explains that the Isuzu Lorry was acquired in the year 2016 whilst the Range Rover was acquired during the period when the Plaintiff was working in Zambia and the Plaintiff shipped the vehicle to Kenya in the year 2018. That the Toyota Hilux Pick-up was acquired in 2018.
28. The Plaintiff stated that she remitted the funds used to purchase the Lorry into the Defendant's Equity Bank Account. That the lorry is currently in the possession of the Defendant.

(v)Pension Schemes

29. The Plaintiff explains that both she and the Defendant have a pension scheme from which each expects to benefit. That each party individually made contributions to their respective pension plans. She prays that this court declare that the Defendant is not entitled to receive any funds from her Pension Fund.
30. The court notes that on both dates when the matter was scheduled for hearing the Defendant was properly served as evidenced by the Affidavits of service dated 24th January, 2023 and 20th June 2023 respectively. The Defendant did not appear either in person or through an Advocate on both hearing dates. Accordingly, the hearing proceeded in his absence.
31. Upon close of oral evidence the Plaintiff was invited to file written submissions. She filed the written submissions dated 13th February 2023.

Analysis and Determination

32. I have carefully considered the originating summons before this court, the evidence adduced by the Plaintiff as well as the written submissions filed in court. Although the matter proceeded as an undefended suit the Plaintiff was still required in law to prove her claim. Since this is a Civil matter



the required standard of proof is “on a balance of probabilities” i.e. the court must be satisfied the occurrence of the events was more likely than not.

33. In RE H & C (Minors) 1995 UKHL the House of Lords in defining what is meant by the term preponderance of probability or a balance of probability stated:-

“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....”

34. Two main issues arise in this case:-

(a) Whether the properties in question constitute Matrimonial property.

(b) Whether the Plaintiff is entitled to the orders prayed for.

(a)Matrimonial Property

35. It is not in dispute that the Plaintiff and the Defendant got married in the year 1983. It is also not in dispute that the couple divorced in the year 2021. A copy of the Decree Nisi issued on 20th January 2022 appears as Annexure MOA ‘2’ to the supporting Affidavit dated 20th January, 2022.

36. The Plaintiff told the court that the properties listed in her summons were all acquired during the subsistence of the marriage, but states that said properties were all registered in the name of the Defendant. The Plaintiff has exhibited various e-mail correspondence between herself and the Defendant in which reference to the said properties are made (Annexures ‘MAO12’). I find the said properties were indeed acquired and/or developed during the subsistence of the marriage and is it not in any doubt that the properties known as Siaya/Mulaha/2257 and the five bed-roomed Mansionette constructed thereon was the matrimonial home of the couple.

37. Section 6(1) of the Matrimonial Act 2013 provides as follows:-

“6(1) For the purpose of this Act, matrimonial property means

- a. The matrimonial home or homes
- b. Household goods and effects in the Matrimonial home or homes.
- c. Any other immovable and movable property jointly owned/and acquired during the subsistence of the marriage.”

38. The Plaintiff told the court that although she singlehandedly financed the purchase and/or development of the listed properties the same were all registered in the name of the Defendant who at the material time was her husband. Annexure MAO ‘13’ (Pages 103-107) are copies of certificates of official search in respect of Siaya/Mulaha/3151, Siaya/Mulaha/2257, East Alego/Mulaha/2105 and Siaya/Mulaha/3150 indicating that all the above properties are registered in the name of the Defendant Alloyce Juma Achoki.

39. Section 14 of the *Matrimonial Property Act* sets out two rebuttable presumptions in regard to property acquired during marriage as follows:-

“ 14. Where matrimonial property is acquired during the marriage-



- a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- b. In the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

40. The Plaintiff claims that she made substantial monetary contribution towards the acquisition and development of the suit properties. As such, she insists that the said properties constituted matrimonial property which the Defendant was holding in trust for her.

41. It is trite law that he who alleges must prove. The *Evidence Act* places the burden of proof of any fact on the person who wishes to rely on the same section 107 of the *Evidence Act* Cap 80, Law of Kenya Provides as follows:

“Burden of Proof

1. Whoever desires any court to given judgment as to any legal 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.”

42. In the case of Njoroge vs Ngari [1985] KLR 480 the court stated that where a property is held in the name of one spouse, even if that property is registered in the name of one person but the other spouse made contributions towards its acquisition, then each spouse has a proprietary interest in said property. The Court in that case held thus-

“where a property is registered in the name of one spouse only the other spouse is required to prove contribution towards the acquisition of said property in order to establish beneficial interest thereto”.

By this holding, the court gave effect to section 14 of the *Matrimonial Property Act*.

43. In the case of PWK vs – JKG [2015] eKLR the court stated as follows:-

“where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective properties of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in Gissing vs Gissing [1070] 2ALL ER 780 Page 788” [own emphasis]

44. Similarly in ALM -vs- JNN 920220 eKLR the court held that:

“Further Section 14(a) of the Act provides that where matrimonial property is acquired during the marriage in the name of the one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. In the instant case, the suit properties being matrimonial property as it was acquired during the subsistence of the marriage and



being registered in the name of the defendant it can only be said that the said was held in trust for the Applicant.”

45. Finally in the celebrated case of Peter Mburu Echaria vs Priscilla Njeri Echaria [2007] eKLR it was held thus:-

“It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in *Pettit* are those of English law of trusts. The House of Lords specifically decided so in *Gissing vs. Gissing*. According to the English law of trusts it is only through the wife’s financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property.” [own Emphasis]

46. It manifest that Section 14 of the *Matrimonial Property Act* creates a trust in favour of the Plaintiff with respect to the properties in question. It is not disputed that the properties though registered in the sole name of the Defendant were acquired and developed during the period when the couple were in a marital union from 1983 to 2021 a period of twenty-eight (28) years.

47. The above facts have not been disputed by the Defendant. The Defendant has not effectively rebutted the legal presumption of a trust in favour of the Plaintiff. In the premises, I find and hold that the following properties though registered in the name of the Defendant are in fact matrimonial properties which the Defendant holds in trust for the Plaintiff:-

SIAYA/MULHAHA/2257 – Matrimonial home (with 5 bedroomed mansion); EAST ALEGO/MULHAHA/3105 – part of Matrimonial home (with a swimming pool and pool house); SIAYA/MULHAHA/3151 – farm land for cultivation and livestock rearing; SIAYA/MULHAHA/3150 – Apartments; SIAYA/MULHAHA/2287;

(b) Whether the Plaintiff has proved contribution towards the acquisition of the said properties?

48. Any party seeking division of Matrimonial property is under an obligation to prove their contribution towards the acquisition and development of said matrimonial property.

49. Contribution by a spouse for purposes of sharing matrimonial property may be monetary or non-monetary or both. According to section 2 of the *Matrimonial Property Act*;

“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; [own emphasis]

50. Non-monetary contribution is defined in the Act to include Domestic work, management of the matrimonial home, child care, management of family businesses farm work, and companionship



51. Section 7 of the Act provides that:-

“Subject to section 6(3), ownership of matrimonial property vests in the spouse 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.”

52. In *Federation of Women Lawyers Kenya (FIDA) –vs- Attorney General & another* [2018] eKLR the court stated that:-

“The law recognizes equal worth and equal importance of the parties in marriage. Thus the beneficial share of each spouse as the on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. First, the Act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.” [own emphasis]

53. In *U M M -vs- I M M* [2014] eKLR the court was of the view that:

“As far as I can see it is the provisions of Sections 2,6 and 7 of the *Matrimonial Property Act*, 2013 fleshes out the right provided by Article 45(3). By recognizing that both monetary and non-monetary contribution must be taken into account, it is congruent with the Constitutional provisions of Article 45 (3) of *the Constitution* that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by Article 45(3).” [own emphasis]

54. This issue of how matrimonial properties should be divided was conclusively settled by the Supreme Court of Kenya in the case of *Joseph Ombogi Ogentoto -vs- Martha Bosibori Ogentoto* Petition No. 11 of 2020 where it was held as follows:

“...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 of the purpose of enabling this court to pass property rights from one spouse to another by fact of marriage only...

...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...

...it is our finding that the stated quality under Article 45(3) means that the courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed...

...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 Tuiyot, 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.” [own emphasis]

55. Based on the above legal provisions and a plethora of other decided cases it is clear that despite the constitutional requirement that parties to a marital union shall have equal rights, each party must be able to prove either monetary or non-monetary contribution in order to merit entitlement to a share of matrimonial property.
56. The Plaintiff testified that she single handedly financed the purchase of all the properties acquired during the marriage as she was working whilst the Defendant was busy depositing all his earnings into a 401 K Savings Account. The Plaintiff also stated that from the year 2009 to September 2013 the Defendant was unemployed and was earning ‘zero’ salary. That during that period she lived in New York whilst the Defendant resided in Michigan State and the Plaintiff would regularly send the Defendant funds to cater for the rent and upkeep.
57. The Plaintiff has annexed evidence to prove that the Defendant was depositing all his earning of USD 2000 per fortnight into his 401 K Account. Annexure MAO ‘18’ is the earnings statement for Alloyce Juma Achoki (the Defendant herein) indicating the deposits made into his 401 K Account.
58. The Plaintiff state that during the period when the assets in questions were being acquired the Defendant therefore had no financial capacity to make any monetary contribution as he was earning ‘zero’. From pages 131 – 135 of the Plaintiff’s bundle of Documents are copies of the Defendants earnings statement indicating a balance of USD0.00 on each statement for the period 2008 – 2009.
59. There is no indication that the Defendant derived income from any other source during the period in question. In the circumstances the Defendant therefore could not have made any meaningful financial contribution towards the acquisition of these assets. Infact there is evidence to show that the Plaintiff regularly sent the Defendant funds while he was in Kenya. These transactions records appear as Annexure MAO ‘19’.
60. The Plaintiff on the other hand has annexed proof of her own earnings during the period in question Annexure MAO ‘4’ are copies of Appointment letters issued to the Plaintiff as well as copies of her statements of earnings and deductions all of which indicate that the Plaintiff was earning a healthy



salary during the period in question and therefore had the financial capacity to finance the purchase of the suit properties.

61. The Plaintiff stated that she took out a loan of USD40,000 to finance construction of the matrimonial home on plot SIAYA MULAHA/2257 (See Annexure MO '9'). Annexure 'No. 7' is a series of correspondence between the parties wherein the Plaintiff indicates that she would regularly be sending money towards the construction of this matrimonial home. There is further evidence of an amount of USD10,000 sent by the Petitioner to the Defendant (Page 39).
62. The Plaintiff explained that she paid for the construction of the Apartments on Siaya/Mulaha/3150 using a loan of USD 215, 000. Annexure MAO '11' at page 49 of the bundle is a loan Approval dated 14th April 2016 for USD 215,000 issued to the Plaintiff by the United Nations Federal Credit Union (UNFCU). The Plaintiff told the court that she serviced this loan on her own without any assistance from the Defendant.
63. The Plaintiff further explained that she financed construction of the Apartments on Plot Siaya/Mulaha/3150 by remitting funds to the Defendant to enable him purchase materials. That she would make direct remittances into the Defendant's EQUITY BANK Account. Annexure MAO '19' at Pages 160-210 are statements evidencing the various sums remitted by the Plaintiff from the period 2017 to 2019 through this Equity Bank Account.
64. The Plaintiff further stated that she sent money to the Defendant to develop the farmland and purchase livestock on Plots 3151 and 2287. That during this period the Defendant had retired and was no longer in employment.
65. The Plaintiff states that she solely acquired the Range Rover Registration UND 3002 CD whilst working in Zambia. That she later had the vehicle imported into Kenya in the year 2018 when she left Zambia. Copies of the relevant transportation documents are annexed to the supporting Affidavit (Annexure MAO '21')
66. The Plaintiff also states that she also financed the purchase of a lorry which was to be utilized for their construction projects and for business purposes. Annexure MAO '22' is copy of a wire transfer of USD 10,000 for of purchase of an Isuzu lorry Registration KCD 375V
67. The Plaintiff states that she is deriving no benefits at all from all these business ventures yet the Defendant who made no financial contribution is currently in possession of all the assets Annexure MAO '12' (Pages 99-101) is a series of correspondence between the Plaintiff and Defendant in which reference is made to their various assets including Apartments, Dairy cows, lorry, farming and a salon in Eldoret. They amount to a tacit admission by the Defendant that these assets/properties do actually exist.
68. The Plaintiff also states that she sent USD 36,000 to finance the purchase of Toyota Hilux Pick-Up (see Annexure MAO '24'). The Petitioner claims that having fully financed the purchase of the three above mentioned vehicles the same ought to be returned to her. The Plaintiff makes no claims over the Double Cabin Pick-Up which she concedes was acquired solely by the Defendant. The Plaintiff confirms that she currently has possession of the Range Rover Registration Number UN 3002 CD and Toyota Hilux Registration Number KCA 020R. She prays the Isuzu Lorry be returned to her.
69. Based on the evidence adduced before this court I am satisfied that the Plaintiff made a substantial contribution towards the acquisition and development of the properties in question. The evidence presented by the Plaintiff was corroborated by documents annexed to her supporting Affidavit dated



20th January, 2022. The Plaintiff's evidence remained uncontroverted, as the Defendant chose not to reply to the same and opted not to participate in these proceedings.

70. It is pertinent to note that these assets were acquired during the subsistence of the marriage between the parties. The court cannot discount any non-monetary contributions the Defendant would have made towards their acquisition. The law requires that the court give due consideration to both monetary and non-monetary contribution, towards assets acquired during a marriage.
71. The Defendant was a husband to the Plaintiff and a father to their two (2) sons. I have no doubt he provided companionship to the Plaintiff during the period in question. From the documents annexed it is clear that the parties regularly discussed the acquisition of the various assets and business ventures. Thus the Defendant can be taken to have contributed by way of giving ideas and encouragement in respect of these acquisitions and investments.
72. From the evidence of the Plaintiff it is evident that whereas she would remit funds to cater for the acquisition and development of the various properties, the Defendant was in the country managing and supervising the various projects. Throughout her evidence the Plaintiff repeated that she sent the funds to the Defendant. It was the Defendant who was on the ground supervising the construction and/or development the various investments. The Defendant was also the one on the ground managing the Isuzu Lorry and supervising whatever business was being generated by the said Lorry.
73. The Plaintiff conceded that the Defendant contributed towards the repayment of loan taken from HFCK to purchase a property in Kahawa Sukari. That property was later sold and the proceeds of sale were utilized to fund the acquisition of Plot No. SIAYA/MULAHA/3150. I find that all this amounted to indirect contribution by Defendant which entitles him to a beneficial share in the said properties.
74. In PNN –VS-ZWN [2017] eKLR the court stated as follows:-

“ In determining the distribution of matrimonial properties at the dissolution of a marriage the trial court ought to dispassionately scrutinize the direct and indirect contribution of each party to the marriage in the acquisition and /or development of the suit property...” [own emphasis]
75. The Plaintiff has proved that she made substantial financial contribution towards the acquisition and development of the suit properties. However, it is equally evident that the Defendant made non-monetary contribution towards the acquisition and development of said assets. Giving due recognition to the non-monetary contribution made by the Defendant, I find that the Plaintiff is entitled to an 70% share of the properties whilst the Defendant is entitled to 30% share of the same.
76. The Plaintiff has prayed for orders in relation to the Equity Bank accounts held and operated by the Defendant. The Plaintiff's position is that having remitted various sums of money to the Defendant through this Account during the course of their marriage she is entitled to a portion of the monies held in the said account. The Plaintiff prays that the Defendant be ordered to render precise accounts of all the funds held in his Equity Bank account and to reimburse to the Plaintiff the remittances she made into that Account.
77. It is not unusual for parties in a marital union to remit various sums of money to each other during the course of their marriage. The Plaintiff did not at any time sign a contract with the Defendant providing that he would be accountable to her for any monies she remitted into his account. Once the funds were credited into the Defendant's account these became the funds of the Defendant. If the Plaintiff



wanted accountability then she ought to have insisted that a joint account be opened. I find no merit in these prayers and dismiss prayers r and s of the summons.

78. The Plaintiff in prayer (e) and (f) sought a declaration that the personal effects, items and goods in the five bed-roomed mansion on Siaya/ Mulaha/2257 and East Alego/Mulaha/3105 belong solely to herself and sought orders for the return of all items unlawfully removed from the premises.
79. Firstly, the Plaintiff has not itemized what items belong to her nor has she specified the quantity of the said items. The courts cannot grant orders which are couched in such vague terms.
80. Secondly, if any items belonging to the Plaintiff have been unlawfully removed/taken away then this a matter which the Plaintiff ought to report to the Police for their action. The court cannot make orders regarding properties alleged to have been 'stolen'. In the circumstances I dismiss prayer (d) (e) and (g) of this summons.
81. Regarding the other two motor vehicles being Range Rover Registration UN 3002 CD and Toyota Hilux Pick-Up Registration KCA 020R, the Plaintiff has already stated that the two vehicles are currently in her possession. The Defendant has made no claim over the two vehicles. It is not clear from the record who the registered owner of the two (2) vehicles is. In the circumstances this court will make no orders in respect of the two (2) vehicles.
82. Finally, on the issue of Pension the Plaintiff told the court that both she and the Defendant are members of a Pension Fund. That each has been contributing money into their respective pension funds. She prays that the Defendant be excluded from deriving any benefit from her pension fund and states that she equally will make no claim on Defendant's Pension Fund.
83. A Pension Fund is like a savings scheme which is set up by the employer of the individual. The Pension Fund is therefore pegged to employment and in my view cannot be deemed to be matrimonial property just as the salary earned on a spouse cannot be deemed to amount to matrimonial property.
84. From the evidence it was apparent that the Defendant was during the period in question working towards boosting his own 401 K Saving Account which was in effect his Pension Fund. Since he had no earning at the time, the Plaintiff shouldered the burden of catering for the family expenses from her own salary. Having so enhanced his own pension at the expenses of his wife, the Defendant ought not expect to derive any benefit from her own Pension Fund.
85. Given that each party contributed to their respective pension funds and given that the marital union between the parties has now been dissolved. I find that the common sense approach would be that each party derive full benefit from their own respective Pension Fund.

Conclusion

86. Finally, I find merit in this Originating summons and the same is allowed in the following terms:
 - (1) The following immoveable properties are hereby declared to be matrimonial property:
 - (i) SIAYA MULAHA/2257 measuring approximately 0.32 Hectares and all buildings and developments thereon.
 - (ii) EAST ALEGO/MULAHA/3105 measuring approximately 0.53 Hectares and all buildings and developments thereon.
 - (iii) SIAYA/MULAHA/3151 measuring approximately 0.45 Hectares and all developments thereon.



- (iv) SIAYA/MULHAHA/3151 measuring approximately 0.45 Hectares and all developments thereon.
- (v) SIAYA/MULHAHA/2287
- (2) A Declaration be and is hereby issued that the Plaintiff is entitled to 70% of the value of SIAYA MULHAHA/2257 and EAST ALEGO/MULHAHA/3105 together with all buildings and developments thereon.
- (3) That the properties known as SIAYA MULHAHA/2257 and EAST ALEGO/MULHAHA/3105 together with all buildings and developments thereon be valued and sold. The proceeds of sale to be distributed between the Plaintiff and the Defendant on a 70:30 ratio with either party having the option to buy out the other's interest in the said properties.
- (4) The Defendant is ordered to permit the Plaintiff free access to SIAYA MULHAHA/2257 and EAST ALEGO/MULHAHA/3105 in order to collect her personal belongings.
- (5) A Declaration is hereby issued that the properties known as SIAYA MULHAHA/3151, SIAYA MULHAHA/2287 and SIAYA MULHAHA/3150 and all developments thereon constitute matrimonial property.
- (6) A Declaration be and is hereby issued that the Plaintiff is entitled to a 70% share of SIAYA MULHAHA/3151, SIAYA MULHAHA/2287 and SIAYA MULHAHA/3150 and all developments thereon.
- (7) That the properties named in (6) above be valued and sold and the proceeds thereof be distributed between the Plaintiff and the Defendant on a 70:30 ratio, with an option for either party to buy out the other's interest in the said properties.
- (8) A Declaration be and is hereby issued that the Isuzu Lorry Registration Number KCD 357V constitutes matrimonial property.
- (9) The said Isuzu Lorry mentioned (7) above to be valued and sold and the proceeds thereof be distributed between the Plaintiff and the Defendant on a 70:30 ratio, with an option for either party to buy out the other's interest in the said properties.
- (10) A Declaration be and is hereby issued that the Pension Schemes known as the United Nations Joint Pension Staff Pension Fund (UNJSPF) registered in favour of the Plaintiff and the 401K IRS. Funds having been set up and maintained by the Plaintiff through her sole efforts and funds belong solely to the Plaintiff.
- (11) A Declaration be is hereby issued that the Pension Schemes known as the 401K retirement Plan (mutual funds/stocks) retained by the Defendant the Employers Stock ownership Plan (ESOP) retained by the Defendant and the United States of America Social Security USD1,100 monthly payments belong solely to the Defendant having been set up and maintained by the Defendant through his sole efforts and funds.
- (12) Prayers (d), (e), (f), (g), (j), (l), (m), (n), (o), (r), (s) and (t) of this summons are dismissed.
- (13) This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 4TH DAY OF AUGUST, 2023.

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MAUREEN A. ODERO



JUDGE

