



**SJM v MK (Matrimonial Cause 4 of 2020)
[2023] KEHC 24355 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE 4 OF 2020**

HM NYAGA, J

OCTOBER 30, 2023

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

AND

IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

AND

**IN THE MATTER OF ENFORCEMENT OF RIGHTS TO
MATRIMONIAL HOME AND MATRIMONIAL PROPERTY**

BETWEEN

SJM APPLICANT

AND

MK RESPONDENT

JUDGMENT

1. The Applicant commenced this suit by an Originating Summons dated 5th March,2020 in which she seeks the following Orders: -
 - i. A declaration that Land Parcels No. Nakuru Municipality Block 4/25, L.R 10013/4 Njoro and L.R No. 9038/36 Kabarnet are registered in the name of the Respondent for his benefit and as trustee of the Applicant.
 - ii. A declaration that all the properties known as Nakuru Municipality Block 4/25, LR 10013/4 Njoro and L.R NO.9038/36 Kabarnet are the matrimonial properties of SJM and MK and therefore are held by the Applicant and the Respondent in equal shares.



- iii. A declaration that the Applicant has a right to live and use any of the properties known as Nakuru Municipality Block 4/25, L.R. 10013/4 Njoro and L.R No. 9038/36 Kabarnet .
 - iv. An injunction restraining the Respondent, whether by himself, his servants, employees, agents, assigns or otherwise to remove the Applicant’s household goods, effects and children and/or evicting the Applicant and her children from parcels of Land Numbers Nakuru Municipality Block 4/25, LR 10013/4 Njoro and L.R NO.9038/36 Kabarnet and more particularly land parcel Nakuru Municipality Block 4/25 which has the matrimonial house.
 - v. An Order directing the Respondent to give ½ share of the Rental income from the properties in (d) above.
 - vi. Costs of the Originating summons to be provided for.
2. The summons are supported by the Applicant’s affidavit sworn on the even date.

The Petitioner’s Case

- 3. It is the applicant’s case that she got married to the respondent in the year 1972 and that they were blessed with 8 children. Namely; Sophia Jepkoskei, Zakiah Jepkurui, Jamila Chelangat, Fauzia Jemutai, Abdul Ghani Komen, Abdul Khadir Komen, Abdul Karim Komen (deceased) and Abdul Khalid Komen.
- 4. She avers that during the pendency of marriage, they inherited the aforementioned properties from her late father in law one Kibowen Komen but the same were registered in Respondent father’s name for the benefit of the family and the Respondent.
- 5. She states that the Respondent kicked her and her children out of the matrimonial homes using brutal force and she settled in a rental house, which she does to date.
- 6. It is her averment that one of their matrimonial homes Nakuru Municipality Block 4/25 is fully developed at the heart of Nakuru Business District with a monthly income of more than Ksh. 700,000/= (Kenya Shillings Seven Hundred Thousand) which is collected by the Respondent for his own benefit and for the benefits of his other wives.
- 7. She contends that during her stay in the matrimonial homes she used to do agribusiness with an income of not less than Ksh. 500,000/= per month from Kenya Co-operative Creameries Ltd and Kenya Grain Growers, Co-operative Union Ltd.
- 8. She asserts that the Respondent has effortlessly tried to disinherit her and her children after locking her and her children from their matrimonial homes and later filing Nakuru Kadhi’s Court Case No.1 of 2007 which he abandoned and was later dismissed for want of prosecution.

The Respondent’s Case

- 9. Opposing the originating Summons, the respondent filed Grounds of Opposition dated 4th January,2021. The grounds of opposition are:
 - i. That the Application is hopelessly incompetent as it offends the mandatory provisions of Rule 40 of the Matrimonial Causes Rules, under Section 39 of the Matrimonial Causes Act, Chapter 52 Laws of Kenya.



- ii. That the claim for beneficial interest in Land Parcel numbers Nakuru Municipality Block 4/25, LR 10013/4 Njoro & LR No. 9038/36 Kabarnet is time barred by dint of provisions of Section 4(1) (e) of the Limitation of Actions, Cap 22 Laws of Kenya.
 - iii. That the claim for land parcels numbers Nakuru Municipality Block 4/25, LR 10013/4 Njoro & LR No. 9038/36 Kabarnet offends provisions of Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 - iv. That the property claimed is in no way Matrimonial Property within the parameters provided under Section 6 of the *Matrimonial Property Act*.
 - v. That the property claimed as Matrimonial property falls outside the definition under Section 2 of the *Matrimonial Property Act*.
 - vi. That the Application is brought under wrong provisions of the Law.
 - vii. That further and without prejudice, the instant Originating Summons ignores the crucial provisions of Section 8 of the *Matrimonial Property Act* which governs property rights in polygamous marriages.
 - viii. That the Originating Summons is fatally incompetent, it discloses no reasonable cause of action in law, is scandalous, frivolous or vexatious; and is otherwise an abuse of the process of court.
10. In addition the respondent filed a replying affidavit, in which he deposes that he divorced the Applicant under the Islamic law on 2nd April, 2009 at the Kadhis Court in Nakuru.
 11. He avers that the property the Applicant is seeking to have a share were bequeathed to him from the estate of his late father in Succession Cause No. 500 of 1997 and that one of the alleged matrimonial homes was bequeathed to him by his late sister.
 12. He contends that he built his house in 2013 several years after he had divorced with the Applicant and therefore she has no claim whatsoever over it.
 13. He avers that the Applicant's children were catered for in Succession Cause No. 500 of 1997 as the court awarded them 100 acres carved out of his portion of 418 Acres and that the said children have already sold the entire 100 acres to third parties and are using the Applicant to make claims of additional property.
 14. It is his deposition that the Applicant is not entitled to anything from his father's estate as she does not rank in priority and that the application is a total waste of court's time as it does not raise any triable issue.
 15. The parties appeared in court and gave oral evidence, which is summarised as follows.

The Petitioner's Oral Testimony

16. The Petitioner testified as PW1. She adopted her witness statement dated 16/05/2023 and filed on 17th May,2023. It was her testimony that she got married to the respondent in 1969 through Kalenjin traditional ceremony and later they solemnized their marriage under the Islamic Law and registered it on 26th April,1973.
17. According to her, she has never been issued with any Talak by the Respondent and their marriage is still subsisting. She reiterated that the aforementioned properties were inherited during the pendency



- of their marriage from her late father in law but the same were registered in the Respondent's father's name for the benefit of the family and the respondent.
18. She testified that her father in Law Kibowen Komen passed away in February, 1997 and in November 1997 the Respondent forcefully chased her and her children out of the matrimonial homes and she settled in a rental house to date.
 19. She contended that she had made considerable financial contribution towards developing the said properties and also in maintenance of the issues in their marriage solely. She stated that to protect the interest of her family she lodged a caution against the matrimonial property after receiving information that the respondent was discreetly looking for buyers. It was her testimony that they used to carry out farming of wheat and maize on all that parcel of land known as LR 10013/4 Njoro and also one of their children Abdul Karim Kipkurui Komen and one of their grandson were buried there.
 20. She stated that L.R No. 9038/36 Kabarnet had been partly developed by her father in law and a business shop was built thereon.
 21. She believed that the purported Talak delivered on 31st October 2007 has no legal effect for reasons that proper procedure of delivering Talak was not followed as no reasons for Talak were stated; the purported witnesses of the Talak who were brothers to the respondent's other wife were still minors by then; payment of Mahar and other debts due to her were not paid by the Respondent; and maintenance order for her and her children were not issued.
 22. She confirmed that the Respondent married another woman after she left.
 23. In support of her case the applicant produced the following documents : -
 - a. Certificate of marriage- Exhibit No.1
 - b. K.E.E.C.U membership card- Exhibit 2
 - c. K.C.C statements- Exhibit No.4(a)
 - d. Additional statements of KCC & KEECU- Exhibit No. 4(b)
 - e. Rent payment receipts – Exhibit No. 5
 - f. Green card – Exhibit 6
 - g. Photographs- Exhibit No.7
 - h. Caution and Order – Exhibit No.8
 - i. Pleadings in Kadhi's Court Case No.1 of 2007- Exhibit No. 9
 24. In cross examination, she confirmed that she left the matrimonial home in 1997 after the death of her father in law. She stated that she filed a Maintenance Case No. 7 of 1998 in the Kadhis Court and the Respondent never complied with the orders of Maintenance. She stated that she was aware of the divorce cause filed in 2007 but she did not know of the outcome. She confirmed that her sons were given 100 acres of land pursuant to a court order, which were from their grandfather's estate. It was also her testimony that they were living along Kenyatta avenue on a land that belonged to her father in law. She said that they used to visit Njoro to check on the farm and that she never lived in Kabarnet but the business there was registered in her name. She said that she found the structure in Nakuru when she got married. She confirmed that all her children are adults now and that the Land in Njoro and Kabarnet belong to the deceased, her father-in law.



25. PW2, was Magambo El Hassan, an Imam and marriage officer under Islamic law. He produced a letter dated 20th May,2023 regarding the marriage certificate which he translated from Arabic to English as Exhibit No. 3.

The Respondent's Oral Testimony

26. The Respondent adopted the replying affidavit sworn on 19th June,2020 as his evidence in chief. He produced the following documents in support of his case: -
- i. Pleadings in Kadhis Court- DExh.1
 - ii. Pleadings in suit No. 7 of 1998-DExh.2
 - iii. Certificate of Divorce- DExh.3
 - iv. Court of Appeal Judgement- DExh. 4
 - v. Certificate of confirmation of grant- DExh. 5
 - vi. Grant in Succession No. 457 of 2011- DExh.6
 - vii. Rectified Certificate of Grant in Succession Cause No.457 of 2011- DExh.7(a)
 - viii. Kenya Gazette Extract- DExh. 7(b)
 - ix. Certificate of Title for Njoro /10013/39- DExh.8
 - x. Memorandum of understanding between Respondent and his 3 sons- DExh.9
 - xi. Bundle of sale agreement- DExh.10
27. In cross examination, the respondent confirmed he had not availed the proceedings in the divorce cause, but insisted that he divorced the Applicant under Islamic law and remarried.
28. He said he gave his sons 100 acres but could not give any to the Applicant as he had already divorced her. He testified that he educated all his children and that some of them now live in the U.S.A.

The Applicant's Submissions

29. The Applicants framed four issues for determination. Namely;
- i. Whether the Applicant and the Respondent are husband and wife married under Islamic marriage.
 - ii. Whether the Applicant and the Respondent established their matrimonial homes and/or properties at Nakuru Municipality Block 4/25, L.R 10013/4 Njoro & L.R NO.9038/36 Kabarnet before the Respondent married the 2nd and 3rd wives and that the Applicant contributed towards their development.
 - iii. Whether the Applicant is entitled to the orders sought in the summons.
 - iv. Who should bear the costs of the suit?
30. Regarding the first issue, the applicant submitted that the respondent had filed Nakuru Kadhi's Court No.1 of 2007 and abandoned the said suit which was later dismissed for want of prosecution therefore any certificate of divorce issued thereafter is a sham and offends the Islamic laws of Marriage and Divorce.



31. She argued that during the hearing no judgement, decree or proceedings arising out of the divorce petition was produced and therefore the purported dissolution of the marriage between her and the respondent is null and void.
32. With respect to the second issue, the applicant submitted that they inherited the properties in question from the Respondent's late father but the same were registered in the Respondent's father's name for the benefit of the family and the respondent.
33. The applicant referred this court to the provisions of Article 45(3) of *the Constitution*, Section 6 of the *Matrimonial Property Act* and the following cases:
 - a. E N K vs. J N K [2015] eKLR, where Musyoka J. pronounced himself in regards to Section 5 of the *Matrimonial Property Act* thus: - "From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property. Indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property (sic) is where the inheritance was before the marriage..."
 - b. AMM vs SMN (Civil Suit E019 of 2021) [2022] KEHC 367 (KLR) (5 May 2022) (Judgment) - where the court opined that a home inherited during the subsistence of marriage constitutes a matrimonial home.
34. The Applicant then submitted that the aforesaid properties form part of the Respondent's inheritance and the same was held for the benefit of the Applicant and the children of their marriage as they were inherited after the parties had solemnized their marriage.
35. On the third issue, the applicant submitted that where a party successfully proves his/her claims they should be entitled to the relief's sought. In support of this proposition reliance was placed on the case of *Tinyefuze v Attorney General of Uganda* [1997] UGCC3 where it held that-

"If a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course"
36. The applicant further referred to the provisions of Section 17 (1) (2) (1) (c), Section 14 ,9,2 (a)-(e) and the case of *AKK vs PKW* [2020] eKLR for the proposition that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act.
37. She then submitted that she has established that they inherited the properties in issue and resided on parcel known as Nakuru Municipality Block 4/25 during the pendency of marriage.
38. She also argued that she made substantial monetary contribution towards developing and improving the matrimonial properties especially the matrimonial home. She further contended that she also made non-monetary contribution and on a balance of probabilities she has proved her case.
39. In support of an order for an injunction, the applicant relied on the case of *M O vs A O W* [2017] eKLR where the court discussed the principles for grant of an injunction.
40. On the last issue, the Applicant citing the case of *Jasbir Singh Rai & 3 others vs Tarlochan Signh Rai & others* {2014} eKLR the applicant argued that costs follow the event and that the same ought to be borne by the Respondent for necessitating the filing of this suit.



Respondent's Submissions

41. The respondent submitted that this summons offends Rule 40 of the Matrimonial Causes Rules under Section 39 of the Matrimonial Causes Act since the time limit for filing this application is 12 months.
42. The respondent argued that a certificate of divorce was issued on 2nd April, 2009 is an equivalent of decree absolute and that the divorce took place during the subsistence of the Matrimonial Cause Act and Rules.
43. The Respondent cited the provisions of Section 9 of Mohameddan Marriage and Divorce Registration Cap 155 [repealed] and Section 98 of the *Marriage Act* No.4 of 2014 and submitted that this suit was filed 11 years after issuance of a final Certificate of Divorce without leave of the court and as such the same is time barred and fatally defective.
44. The respondent submitted that claim for land parcels numbers Nakuru Municipality Block 4/25, LR 10013/1 Njoro & LR No. 9038/36 Kabarnet offends the provisions of Section 7 of the Limitation Act since the Applicant admitted having left the matrimonial home over 15 years ago and there is no evidence of steps she undertook to assert her rights over these properties within 7 years of her departure.
45. To bolster his submissions, the respondent referred this court to the case of C W M vs J P M [2017] eKLR where the court held inter alia that;

“...We must on the onset state that civil litigation has a shelf life under the *Limitation of Actions Act*, although a claim under the Matrimonial Properties Act is not particularly defined as a civil claim, in our view it is a claim in land which should fall within the ambit of Section 7 of the *Limitation of Actions Act*. It cannot also be in public interest that a party can sleep on their rights and wake up one day after 30 years to pursue a claim in land...”
46. It was the Respondent's submissions that the property claimed are not matrimonial property within the parameters provided under Section 6 of the *Matrimonial Property Act* as they were inherited by the respondent from his late father vide certificate of grant dated 31st July, 2017, 8 years after he had divorced the Applicant.
47. He submitted that property claimed as Matrimonial home falls outside the definition of Section 2 of the *MATRIMONIAL PROPERTY Act* as the applicant admitted having left the matrimonial home over 15 years ago before he owned the suit properties.
48. The respondent submitted that Applicant neither constructed the matrimonial house nor made any improvements thereon.
49. The respondent contended that the Applicant also did not contribute to the construction of shops attached to Nakuru Municipality Block 4/25 and that they were built way after she had separated with him.
50. The respondent argued that the instant summons ignores the crucial provisions of Section 8 of the *Matrimonial Property Act* since the Applicant admits to be in a polygamous marriage yet she seeks half share of the Respondent's property to the exclusion of his other wives and children.
51. The respondent also argued that the applicant has not proved contribution to the required standard and that the receipts and letters adduced by the Applicant do not prove contribution as defined in the *Matrimonial Property act* because at the time, the suit property had neither been acquired by the Respondent nor developed.



52. The respondent also contended that the statement of monies being paid into the applicant's account is not proof that the monies emanated from family business or that the funds were generated therefrom were for the benefit of the family.
53. The respondent also argued that the figure of Ksh. 350,000/= claimed as rental income has no factual basis as there are no audited accounts to prove the same.
54. The respondent, in buttressing his submissions, relied on the case of EKTM vs ECC [2021] eKLR for the proposition that for the property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties and that contribution to the acquisition of the property must be proved directly or indirectly rather than merely waving the source of income since financial muscle alone is not necessarily proof of contribution.
55. On costs, the respondent relying on section 27 of the *Civil Procedure Act* submitted that the costs of the application should be borne by the Applicant for filing a frivolous suit.

Analysis & Determination

56. I have considered the pleadings herein by both the Applicant and the respondent as well as the witness statements, necessary affidavits, viva voce evidence and submissions as filed. I have also considered the exhibits filed and produced in evidence and submissions and authorities cited. It is my considered view that the following issues fall for determination;
 - a. Whether the summons has been brought under the wrong provisions of the law.
 - b. Whether the parties are legally divorced or no.
 - c. Whether the instant suit is time barred.
 - d. Whether the properties in issue comprise Matrimonial Property.
 - e. Whether the Applicant has proven contribution towards the development of the matrimonial properties.
 - f. Whether the Applicant is entitled to a 50% share in the suit properties.
 - g. What orders should this court make?

Whether the summons has been brought under the wrong provisions of the law

57. The Respondent in ground No.6 of his grounds of opposition, stated that the instant summons has been brought under the wrong provisions of the law.
58. The Originating Summons has been brought under Section 12 (1) (3) and (4) of the *Matrimonial Property Act* No.49 of 2013. The said section provides as follows: -
 - “12. An estate or interest in any matrimonial property shall not, during the
(1) subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.
 - 12 A spouse shall not, during the subsistence of the marriage, be evicted from the
(3) matrimonial home by or at the instance of the other spouse except by order of a court.



- 12 Subject to subsection (3), a spouse shall not be evicted from the matrimonial
(4) home by any person except— (a) on the sale of any estate or interest in the matrimonial home in execution of a decree; (b) by a trustee in bankruptcy; or (c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.”

59. The Applicant, in her supporting affidavit, averred that the Respondent kicked her and her children out of the matrimonial property and that he was discreetly looking for a purchaser to buy the matrimonial home. If the court establishes that the properties in issue are matrimonial property then it has to find that the respondent did not have a right to take the purported actions.

60. The summons has also been brought under Sections 7 and 17 of the *Matrimonial Property Act*. The two provisions provide as follows;

“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.’

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.”

61. The Petitioner/ Respondent is seeking the division of the matrimonial property, which she has listed. If there is no divorce cause or the divorce cause was still pending, then only a Declaration under Section 17 of the *Matrimonial Property Act* would have issued. Such a declaration is not necessarily pegged on the extinction of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce.

62. However, by virtue of Section 7, this court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. The position in law was set out in *AKK vs PKW* [2020] eKLR where the Court of Appeal stated as follows;

“A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce



cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act. In PNN vs. ZWN [2017] eKLR, Waki, JA stated that:

An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in *Petit vs. Petit* [1970] AC 777:

“One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?”

The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant’s prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.”

63. The applicant’s contention is that she is still married to the respondent. The latter says that the parties are divorced. Looking at the evidence and the orders sought, I am of the considered view that if I am to agree with the applicant on the existence of the marriage, then she cannot seek relief under section 7 of the Act. She can only seek the relief provided under section 17, for a declaration of her rights.
64. If on the other hand I am to find that the parties were divorced, then the court will consider the matter under section 7 of the Act. A relief under section 7 does not preclude a declaration under section 17.
65. I am therefore of the finding that the Originating Summons has been brought under the right provisions of the Law.

Whether the parties are legally divorced.

66. The Applicant averred that the Respondent filed Divorce Cause No.1 of 2007 before the Kadhis court but he abandoned it and the same was subsequently dismissed for want of prosecution. She attached her memorandum of appearance and response to the petition of divorce but did not attach a court order dismissing the matter for want of prosecution.
67. The Respondent, on his part, contended that he divorced the Applicant under the Islamic law and the marriage was annulled in the said matter on 2nd April, 2009. He attached copies of the petition, verifying affidavit, summons to enter appearance, Talak document duly executed by him and his two witnesses, his talak letter dated 16th September 1998 addressed to the Applicant and a certificate of divorce issued by Nakuru Kadhis Court on 2nd April, 2009.
68. According to the Applicant, the purported Talak has no legal force and is null ab initio. The Applicant however did not apply to the Kadhi’s Court to set aside the proceedings of the court and the subsequent certificate of divorce.



69. The court in *J N N vs P M M & another* [2018] eKLR in regards to a divorce judgement that had not been set aside held as follows:

“The judgment in respect of that divorce cause is still subsisting. The same has not been varied nor set aside on appeal. For all purposes and intents, the Petitioner and Respondent are regarded as former husband and wife. Until the orders made by Milimani law courts being a court of competent jurisdiction on the dissolution of their marriage whether bad or not are set aside, the same are binding.”

70. Applying the principles enunciated in the above precedent, I hold the view that the divorce certificate issued on 2nd April, 2009 having not been set aside to date is valid and binding on all parties.

71. The Respondent therefore is deemed to have officially divorced the Applicant on the aforesaid date.

Whether the instant suit is time barred

72. It was submitted by the respondent that the petitioner’s claim was time barred as the same was filed 15 years later after the Applicant had left the matrimonial home. Based on the divorce certificate the parties were divorced on 2nd April, 2009 and this cause was filed in 2020. That is 11 years later after the dissolution of marriage.

73. This claim herein affects land which is an immovable property being claimed as matrimonial property. As such it is within the ambit of Section 7 of the *Limitation of Actions Act* that provides that;

‘An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

74. The Court of Appeal has dealt with the issue of time in this type of case. In *CWM vs JPM* [2017] eKLR it held that;

“We must on the onset state that civil litigation has a shelf life under the *Limitation of Actions Act*, although a claim under the Matrimonial Properties Act is not particularly defined as a civil claim, in our view it is a claim in land which should fall within the ambit of Section 7 of the *Limitation of Actions Act*.”

75. The suit was filed on 5th March, 2020 that is 11 years after the dissolution of marriage. In my opinion, the claim is not statute barred as it was brought before lapse of 12 years as provided for under Section 7 of the *Limitation of Actions Act*.

Whether the properties in issue comprise Matrimonial Property.

76. Section 6 of the *Matrimonial Property Act* provides that: -

- “(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...”

77. Musyoka J. in P.O.M vs M.N.K(2017) eKLR stated that:

“This is a suit for division of matrimonial property...The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made...”

78. Similarly, in the case of T.M.V. vs F.M.C (2018) eKLR, Nyakundi J. opined that: -

“...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”

79. In the Ugandan High Court, Mwangusya J. in Paul Kagwa vs Jackline Muteteri (Matrimonial Cause-2005/23) [2006] UGHC 17 (18 May 2006) while citing Bossa, J. in John Tom Kintu Mwanga vs Myllious Gafafusa Kintu (Divorce Appeal No. 135 of 1997) (unreported) expressed himself as hereunder: -

“On the last issue of whether the petitioner is entitled to matrimonial property, I clearly believe that she does and I so hold. Matrimonial property is understood differently by different people. There is always that property which the couple chose to call home. There may be property which may be acquired separately by each spouse before and after marriage. Then there is property which the husband may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse is entitled is that property which the parties choose to call home and which they jointly contribute to.”

80. It is not in doubt that the properties in issue were inherited by the Respondent from his late father. The applicant contended that the said properties were registered in the respondent father’s name for the benefit of the family and the respondent. It was her position that her late father in law distributed the said properties during his life time.

81. The respondent on his part disputed that the aforementioned properties constitute matrimonial property since he was bequeathed the same from the estate of his father vide certificate of grant dated 31st July, 2017, 8 years after he had divorced the Applicant.

82. I have perused the Court of Appeal decision of Grace Samson Komen vs William Kiprop Komen & 2 others [2015] eKLR that was cited by the Respondent and I note that the deceased distributed L.R NO.10013/4 Njoro 418 ACRES & Nakuru Municipality Block 4/25 to the Respondent during his lifetime. At paragraph 7 of the said decision, the Court of Appeal stated as follows: -

“It was established during trial that the deceased distributed the bulk of his assets during his lifetime and his free property constituting this estate was inter alia – L.R NO.10013/4 Njoro 418 ACRES occupied by Mohammed, Nakuru Municipality Block 4/25 occupied by Mohammed...”

83. It is not clear whether Kabarnet Municipality L.R No.9038/36 was also distributed to the Respondent by the deceased during his life time. However, during hearing the Applicant said that this land was partly developed by the deceased and had a shop constructed thereon. She said she never lived on this



parcel but the business there was in her name and that when the deceased died, the respondent brutally chased her from the matrimonial homes. This position was not sufficiently proved by the Applicant.

On a balance of probability, I also hold that the deceased did not distribute this property to the Respondent during his life time.

84. Section 5 of the *Matrimonial Property Act* provides: -

“Rights and liabilities of a person

Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property.”

85. While interpreting Section 5 (supra) in E N K vs J N K [2015] eKLR, Musyoka J. pronounced himself thus: -

“From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property. Indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property (sic) where the inheritance was before the marriage...”

86. Mabeja J. on his part in SN vs. FM [2019] eKLR held that: -

“The net effect of the foregoing is that any property acquired during the subsistence of the marriage, including that which is inherited forms part of matrimonial property. The only time that inherited property is excluded from matrimonial property is if it was acquired before marriage. Property that is inherited during the subsistence of the marriage is not excluded from matrimonial property except if it was acquired before marriage.”

87. Based on the evidence and the above legal provisions and authorities I find the two aforementioned properties namely Nakuru/Municipality Block 4/25 and LR No. 10013/4 Njoro though they still registered in the name of the deceased before his demise, had been distributed to the Respondent for his benefit and the benefit of his family and as such the properties were acquired during the subsistence of the marriage and constitute matrimonial property.

Whether the Applicant contributed towards the development of the matrimonial properties

88. Section 2 of the *Matrimonial Property Act* defines contribution to include: -

- 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

89. Further, section 14 of the Act provides that:

“Where matrimonial property is acquired during marriage-

- a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and



b. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

90. From the above provision it is clear that there is a rebuttable presumption that the property acquired in the name of one spouse is being held in trust for the other spouse.
91. In the case of *Njoro ge vs Ngari* [1985] KLR, 480, the court held that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property.
92. The Act therefore takes into account the monetary and non-monetary contribution and provides that a party may acquire beneficial interest in property by contribution towards the improvement of the property equal to the contribution.
93. In the same vein, it was stated in the case of *NWM vs KNM* (2014) eKLR that the court must give effect to both monetary and non-monetary contributions that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.
94. The Applicant testified that during their stay in their matrimonial homes she used to do agribusiness with an income of not less than Ksh. 500,000/= per month from Kenya Co-operative Creameries LTD and Kenya Grain Growers Co-operative Union Ltd. She produced statements from the two organizations. Those statements only support the assertion that she was engaged in agribusiness but does not support the figure quoted as monthly income. Be it as it may, the Applicant during hearing did not demonstrate how she used the said money in development of the matrimonial properties. I concur with *GV Odunga Sentiments in EKTm v ECC* (supra), cited by the Respondent, that it is necessary for spouses to prove their respective proportions of financial contribution either directly or indirectly rather than merely waving the source of income.
95. It was incumbent upon the Applicant therefore to prove her direct or indirect financial contribution towards development of the matrimonial properties but she did not do so.
96. Having said that, it was uncontroverted that the parties lived in Nakuru Municipality Block 4/25 during subsistence of their marriage. Despite lack of evidence of the Applicant’s contribution towards the development of this property, the parties herein were blessed with 8 children which is a demonstration that there was companionship, child care, domestic work and management of their matrimonial home for the period they lived together.
97. In regards to LR 10013/4 Njoro the Applicant testified that she used to carry out farming of wheat and maize on this parcel and also one of their children Abdul Karim Kipkurui Komen and one of their grandsons were buried there. The Respondent did not controvert this position.
98. There was no evidence that the Applicant ever lived on Parcel known as L.R No. 9038/36 Kabarnet or made any development of the property.
99. In the circumstances, I find that the Applicant’s contribution is in the realm of non-monetary contribution towards the improvement of Nakuru Municipality Block 4/25 & LR 10013/4 (Njoro).



Whether the Applicant is entitled to a 50% share in the suit properties

100. The law governing division of matrimonial property is contained in [Constitution of Kenya, 2010](#) and the [Matrimonial Property Act](#). Article 45(3) of [the Constitution](#) provides:

“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.”

101. In *P B W vs. J W C* [2017] eKLR, the Court of Appeal held: -

“By dint of section 7 ownership of matrimonial property is vested 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.

102. In an increasing line of authorities, Courts have held that the equality of parties in Article 45(3) does not translate to equal proprietary entitlement. In the oft cited case of *P N N vs Z W N* [2017] eKLR, Kiage, JA succinctly stated:

“First, while I take cognizance of the marital equality ethos captured in Article 45 (3) of [the Constitution](#), I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough;”

103. The learned Judge went on to state:

“Does this marital equality recognized in [the Constitution](#) mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra.”

104. And in *EGM vs BMM* [2020] eKLR the Court of Appeal faulted the trial court for finding that equality of parties in Article 45(3) means that the fact of marriage gives spouses an automatic 50% share of the matrimonial property. The Court opined:

“We think it was erroneous for the learned judge to assume and hold that [the Constitution](#) gives spouses an automatic 50% share of the matrimonial property simply by being married’.

105. The findings in the cited decisions of the Court of Appeal appear to be a departure from the previous holding in *Agnes Nanjala William vs Jacob Petrus Nicolas Vander Goes*, (Civil Appeal No. 127 of 2011) where the Court of Appeal interpreted the equality of parties thus:

“Article 45 (3) of [the Constitution](#) provides that parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a



marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day.”

106. The Court of Appeal in the EGM vs BMM case (supra), went on to state:

“The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed.”

107. Finally, this issue was settled by the Supreme Court in JOO vs MBO; Federation of Women Lawyers (FIDA Kenya) & Another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (Judgment). The court held as follows;

‘In agreeing with the above decisions, we must note that, in a marriage, the general assumption is that both spouses share everything, and on the face of it, both parties contribute towards the home or family, in one way or another, to whichever extent, however big or small. Again, and further to this, both spouses may also work and earn income, which inevitably, at most instances, always ends up being spent on the family unit. It may be the whole income, or a substantial part of it, but ultimately, a percentage of it goes into the family. This is the essence of section 14 of the [Matrimonial Property Act](#), 2013.

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.

We should only add that this position is not unique to our realm because the Supreme Court of Zambia in the case of Penelope Chishimba Chipasha Mambwe v Mambwe (Appeal 222 of 2015); [2018] ZMSC 317 also questioned the rationale of sharing property at the ratio of 50:50 where a spouse fails to offer any financial contribution with the court noting: “In this jurisdiction, as many others in the commonwealth, the prevailing position is that a spouse who contributes either financially or in-kind to the home earns an interest in the property of the family acquired during the subsistence of the marriage. In numerous authorities, the holding has been consistent that family property should be shared on a 50/50 basis... Although indeed many marriages are built on happiness and mutual support, there are still many others where one spouse may be perpetually wasteful, uncooperative, distant and providing absolutely no warmth of companionship let alone financial contribution. It is



debatable whether such spouses should be taken to have earned the entitlement to 50% share of the property of the family at dissolution of the marriage.”

In light of the above findings, we are of the view that the question of what amounts to a fair and equitable legal formula for the reallocation of matrimonial property rights at the dissolution of a marriage and whether the same can be achieved by a fixed means of apportionment at a 50:50 ratio or whether such apportionment should be done in light of the circumstances of each individual case is one best answered again by the finding by the court in Echaria and we have explained why.”

108. Taking cue from these authorities, I have taken into consideration that the aforementioned properties were a bequest to the Respondent from his father. None of the parties proved their respective contribution towards improvement and or development of the suit properties. In the view of the foregoing, it is my opinion that pursuant to the provisions of Section 2 of the Matrimonial Property Act, both parties contributed towards development of the matrimonial home on land parcel number Nakuru Municipality Block 4/25. Dividing the said properties between the parties on a 50-50 basis would result in unjust enrichment for the applicant. A ratio of 25% to 75% to the applicant and respondent respectively is reasonable.
109. As regards L.R 10013/4 Njoro , measuring 418 acres, there is evidence that 100 acres was given to the couple’s children. It was not clear what is left of that land at present. The respondent ought to distinguish between the bequest to his children and the right of his former spouse to his share. This is an extremely difficult task to undertake but I am of the view that a reasonable provision for the applicant would be the fairest way to go. I believe that 10 acres from that property would suffice. I must stress that I have not made any arithmetic calculations. I have just given the applicant what I think is sufficient for her to make a living after the divorce. It would be the highest degree of injustice if the applicant was to walk out with nothing.
110. The contention by the Respondent that this summons ignores the provisions of Section 8 of the Matrimonial Property Act is untenable. This is because the properties in questions were obtained prior the respondent married his other wives. The subsequent marriage by the respondent cannot be a ground to deny the applicant a right in the property acquired during the subsistence of the earlier marriage to the applicant. However, the court has to take into consideration that the respondent has remarried.
111. In the upshot in regard to the applicant’s Originating Summons, I make a finding as follows;
 - a. The applicant is entitled to 25% of Nakuru Municipality Block 4/25.
 - b. The applicant is entitled to 10 acres in L.R 10013/4 Njoro .
 - c. In the event that it is not possible to grant the applicant the 25% in Nakuru Municipality Block 4/25 due to the remarriage by the respondent or for any other reason, a further provision of 10 acres be made for the applicant in L.R 10013/4 Njoro in lieu thereof.
 - d. The applicant is not entitled to any portion of L.R NO.9038/36 Kabarnet .
 - e. All other prayers are not granted.
 - f. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF OCTOBER, 2023.

H. M. NYAGA

JUDGE



In the presence of;

C/A Jeniffer

Mr. Konosi for Applicant

Ms Sabaya for Respondent

