



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO.191 OF 2011 (O.S)

CRW.....PLAINTIFF

-VERSUS-

MIO.....DEFENDANT

Coram: Hon. Justice R. Nyakundi

Mathai Maina & CO. Advocates for the defendant

Maurice Oduor & CO. Advocates for the plaintiff

J U D G M E N T

Introduction & Background

1. The Plaintiff commenced the suit herein against the defendant vide Originating Summons dated the 3rd of November 2011 seeking inter-alia for orders that;

a. A declaration be and is hereby issued declaring that the Plaintiff is entitled to whole share or such other share as the court may award of the properties (movable and immovable) acquired by the Plaintiff prior and/or during the subsistence of their marriage and that the Defendant holds title, interest, ownership and/or possession of the said properties in trust for the plaintiff/Applicant in their respective shares as legal owners and cestui que trust respectively namely: -

i. The matrimonial home and rentals and land parcel Number UasinGishu/Kimumu Scheme/xxxx (developed).

ii. Land parcel number Uasin Gishu/ Kimumu/xxxx (developed) rental and lock up shops.

iii. Motor vehicles registration number /KAN xxxx Toyota, /KAT xxxx RVR /and Land Rover xxxx.

iv. Household items and all other properties acquired during the subsistence of the marriage and personal effects full details whereof are well known to the Defendant's knowledge.

b. That an order be and is hereby issued directing that the matrimonial property/home being land parcel number UasinGishu/Kimumu scheme xxxx (developed) be shared in the ratio of 75:25% in favour of the Plaintiff and the Defendant respectively and/or in any other ratio as the court may deem just.

c. That an order be and is hereby issued that Uasin Gishu/ Kimumu/xxxx (developed) be shared in the ratio of 75:25% in favour of the Plaintiff and the Defendant respectively and/or in any other ratio as the court may deem just.

d. That an order be and is hereby issued directing that the three motor vehicles be sold and the proceeds thereof be shared in the ratio of 75:25% in favour of the Plaintiff and the Defendant respectively and/or in any other ratio as the court may deem just.

e. That an order be and is hereby issued directing that the household items be released to the Plaintiff and/or the same be shared in any other ratio as the court may deem just

f. That in the alternative to (b), (c), (d) and (e) above and order be and is hereby issued directing that the Defendant is not

entitled any share of the above said properties being land parcel Number UasinGishu/Kimumu/xxxx (developed), UasinGishu/Kimumu/xxxx the Three Vehicles and all Household items.

g. That in the alternative to (f) above, an order be and is hereby issued directing that a valuation of a report value and/or values acceptable to both parties or to be apportioned by the court be carried out on all the properties captioned in (a) and (f) above and upon such valuation the Defendant to pay the Plaintiff and/or such other share as the court may or the value of the said properties.

h. That upon grant of any of the foregoing, a permanent injunction be and is hereby issued restraining the Defendant by himself, his servants, agents and/or employees from interfering with the Plaintiff's lawful enjoyment and quiet possession of the properties awarded to her.

2. The brief background to the suit as can be gleaned from the OS is that the plaintiff was married to the Defendant on or about the 3rd of December 1994 under the African Christian Marriage and Divorce Act (Cap 151) Laws of Kenya and were blessed with four issues. They later separated in September 2008 due to irreconcilable differences. The plaintiff stated that during the subsistence of the marriage, they both worked with the civil service.

3. She further stated that during the subsistence of the marriage, they both jointly and severally acquired properties which are in the names of the Defendant and only one of it is registered jointly between them. The properties are set out as follows: -

i. Land parcel number UasinGishu/Kimumu Scheme/xxxx (developed).

ii. Land parcel number uasin Gishu/ Kimumu Scheme/xxxx (developed).

iii. Motor Vehicles Registration number KAN xxxx Toyota, KAT xxxx RVR and Land Rover xxxx.

iv. Household items and all other household goods and personal effects

4. She averred further that she substantially financed the acquisition of the said properties through bank loans and averred further that during the subsistence of the marriage, she used to run household chores such as washing clothes for the Defendant, cooking for him and taking care of the matrimonial home and the children at Kimumu. She also stated that she substantially provided all the domestic needs including food during the subsistence of the marriage.

5. The plaintiff's averments were vehemently contested by the defendant through his replying affidavit dated the 17th of April 2012. He stated that he was not guilty of neglect as he had provided reasonable maintenance for both the Plaintiff and their 4 children. He stated that the Plaintiff had abandoned her matrimonial home on her own volition due to no fault on his part and she had therefore forfeited her rights to maintenance. The Defendant further averred that he singlehandedly acquired the properties and made various investments and improvements on the said properties through salary, tenders, business associates and loans.

6. The matter proceeded by way of viva voce evidence where both parties testified in support of their various positions.

THE EVIDENCE

The Plaintiff's Case

7. The Plaintiff testified that indeed she was married to the defendant on the 3rd of December 1994 under the African Christian Marriage and Divorce Act and produced the certificate of marriage marked PEXBH 1. She indicated that their union was blessed with 4 issues and produced their certificates of birth marked PEXHB 2(a)-(d).

8. The plaintiff testified that she alone acquired UASIN GISHU/KIMUMU/xxxx ("Plot No xxxx") and UASIN GISH U/KIMUMU/xxxx ("Plot No xxxx"). She testified that she was informed by a friend about the availability of Plot No xxxx for purchase. She gave a very clear account about how she bought the land from a group known as Mutirithia, how Mutirithia collapsed before the sale was completed, how she, and other purchasers had to look for the original owner to facilitate the transfer and registration. It was her testimony that the Defendant never participated in the decision to buy, or even buy the property. She testified that the defendant did not want her to buy the property and even when the Plaintiff went ahead and bought the land and started construction, the Defendant poured cold water on her efforts.

9. She further testified that, even after the initial semi-permanent house was complete, the Defendant refused to move with the rest of the family and only followed a few days later when the Plaintiff had already moved in to the new house. The Plaintiff noted that she took loans totalling about Kshs 1,850,000 from National Bank of Kenya and a total of about Kshs 2,302,000 on diverse dates from the Moi University Cooperative Savings and Credit Society Ltd (MUSCO) that enabled her to both buy the land, and construct the house. She produced evidence marked PEXHB 10, 12 and 14 being loan agreements between National Bank and the plaintiff and PEXHB 5(a)-(k) for MUSCO loan application forms.

10. The plaintiff further produced agreement for sale of land marked as PEXHB 20 between her and the seller Charles M. Opaka as regards land parcel xxxx. She further produced another sale agreement marked PEXHB 8 between her and one Kurusi Mwangani as regards land parcel xxxx. She also produced a green card marked as exhibit 9 indicating that the Plaintiff obtained title to the land on 8th February 2001.

11. She alleged that the defendant fraudulently transferred the title to his name and produced the title deed indicating the land xxxx being

registered in the defendant's name and which is marked PEXHB 6. She noted that when she realised this, she put a caution on the land on the 9th of April 2002 and produced certificate of official search marked PEXHB 7. She also indicated that she was forced by the defendant to transfer the same in his name through violence which she indicated occurred numerous times during their marriage. In this regard, she produced a police P3 form marked PEXH3 noting that she had been assaulted by the defendant.

12. The plaintiff further testified that on 8th July 2003, the registered proprietor was changed to [Particulars Withheld], a business name that incorporated both the Plaintiff and Defendant. The title was apparently then changed on 29th December 2004 to explicitly reflect both the Plaintiff and Defendant as proprietors of the subject parcel. These changes, the plaintiff testified, that the Defendant forced her through violence and beatings to sign documents for transfer of Plot No xxxx from her sole name, to both her and the Defendant's.

The Defendant's Case

13. The Defendant testified that he is a retired civil servant and currently works as a farmer. He confirmed having been married to the plaintiff from 1986 -2008 and acknowledged that they divorced through a court process.

14. He testified that it is not true that the idea for buying plots was from the Plaintiff because he had plans to purchase the said properties prior to them solemnizing their marriage in 1994. He testified that he took loans from the Harambee Co-operative Society and used the loans to acquire property and do farming. The defendant noted that he took a loan of Kshs 100,000 for construction of plots number xxxx and xxxx at Kimumu and a further Kshs 101,699 for developments of the said properties. He also testified that through their company called Three Lilies, they supplied goods to government institutions which enabled them do improvements on the properties. He further testified that during the purchase of the said properties, he only sent the Plaintiff as his companion at the time to inquire on the properties on his behalf.

15. The Defendant also stated that he was aware the Plaintiff was obtaining loans but she never informed him the intentions of the said loans. As a matter of fact, he testified that the plaintiff concealed her plans from him. It was his testimony that he was the one who gave the car and Kshs 30,000 as consideration for the purchase of land number xxxx and produced D exhibit 6 which is PEXHB 20. He also produced the title deed on land number xxxx marked D-Exhibit 7, indicating him as the absolute owner.

16. On cross-examination the Defendant stated that he purchased parcel UASIN GISHU/ KIMUMU xxxx by way of cash and began constructing a semi-permanent house in 1998 then proceeded to construct a permanent one in 1999 and occupied it in 2002. He stated further that he was in charge of the construction of the house and he was the one who sourced the architect one Simon Khasete. The architect was the one who drew the plan of the house and supervised the construction. He averred further that he was the one who purchased the construction materials from Metipsoi quarry in Eldama Ravine, sand from Malaba and cement from Eagol hardware.

17. It was the Defendant's aversion further that they jointly acquired the parcel UASIN GISHU/KIMUMU xxxx. He stated that both him and the Plaintiff were in agreement after the award of the tender. He averred that the purchase price was Kshs 250,000= which he testified was paid in cash.

18. He further admitted that there was violence within the marriage with the plaintiff being the victim but rejected the allegation that he used to beat the wife. He said that mostly, it was disagreements. He further noted that on several occasions, the plaintiff left the home. He however testified that he did not force the wife to transfer the land to three lilies and insisted that he is the one who developed the rental houses in land number 2104 to a tune of Kshs 1.2 million.

SUBMISSIONS

19. The court directed that the matter be canvassed by way of submissions and parties filed their respective submissions.

Plaintiff Submissions

20. The Plaintiff identified four issues for determination namely Whether the Plaintiff/Applicant herein has proven direct and/or substantial financial contribution towards acquisition of the suit properties; Whether the properties held by and registered in the name of the Defendant are held as such in trust of the Plaintiff herein; Whether the Plaintiff has demonstrated with sufficient evidence that she deserves the 75% share of the suit property as prayed in the Originating Summons and during the oral testimony and lastly; Whether this Honourable Court has the powers to declare proprietary rights in terms of the interest in shares.

21. On the first issue, it was submitted that the Plaintiff had demonstrated that she alone acquired UASIN GISHU/KIMUMU/xxxx ("Plot No xxxx") and UASIN GISH U/KIMUMU/xxxx ("Plot No xxxx"). It was the plaintiff's submission that her testimony was uncontested that she was informed by a friend about the availability of Plot No xxxx for purchase and how she bought the land from a group known as Mutirithia, how Mutirithia collapsed before the sale was completed, how she, and other purchasers had to look for the original owner to facilitate the transfer and registration. In fact, the plaintiff submitted that the Defendant never participated in the decision to buy, or even buy the property and that it was clear that he did not want the Plaintiff to buy the property and even when the Plaintiff went ahead and bought the land and started construction, the Defendant poured cold water on her efforts. She further submitted that, even after the initial semi-permanent house was complete, the Defendant refused to move with the rest of the family and only followed a few days later when the Plaintiff had already moved in to the new house.

22. It was her further submission that Defendant was hard pressed to show such sources of income as would justice the massive investment in both the land and the construction yet the Defendant got his name on the title document for Plot No xxxx. In this regard, she submitted that following the collapse of Mutirithia group, meetings were held with the original owner of the land. Those meetings were usually held in the evening and that the Defendant attended those meetings as the representative of his household, not as the purchaser. She however submitted that the defendant took advantage of his sole presence to record his name alone and on that basis have the title registered in his name. The Defendant did not pay a single cent towards the acquisition and improvement of this property and thus, the plaintiff submitted that it can only

be that he is holding the same in trust for the Plaintiff and the court should so find.

23. As regards Plot No xxxx, the plaintiff observed that it is also very clear that she had everything to do with its acquisition. She reiterated that she was offered the property by one Kurisi Mwanagani, she negotiated with him, signed the agreement for the purchase of the said property (Exhibit No 8) and paid for the land alone. She also stated that she put up all the structures on the land alone including sourcing for all the material for the construction.

24. She noted that her income enabled her to undertake the investment in the property. She was persistent that her evidence is more consistent with the assertion that she is the one who single-handedly bought and improved the land having obtained loans and exhibited all the applications she made either to Moi University SACCO (MUSCO) or to the bank, in this case National Bank of Kenya. The amounts she obtained were consistent with what was required to put up the structures that she did.

25. She thus submitted that on a balance of probabilities, it is more likely that it she is the one who invested in the acquisition and development of this property while, the Defendant was nowhere near the scene. She noted that the defendant did not identify any source of income that was sufficient to support the expenditure ordinarily associated with purchase of land and construction, could not give a consistent story about the construction process and could not explain his alleged loans of less than one hundred thousand were sufficient to build houses worth millions of shillings.

26. She further submitted that her testimony, it is clear that she was initially registered as the proprietor of Plot No. xxxx and relied on the green card (exhibit no 9), to indicate that she obtained title to the land on 8th February 2001. She testified further that on 8th July 2003, the registered proprietor was changed to [Particulars Withheld], a business name that incorporated both the Plaintiff and Defendant. The title was apparently then changed on 29th December 2004 to explicitly reflect both the Plaintiff and Defendant as proprietors of the subject parcel. These changes she easily explained by submitting that the Defendant forced her through violence and beatings to sign documents for transfer of Plot No xxxx from her sole name, to both her and the Defendant's and in fact it is those beatings that led to their divorce and urged court to find in her favour.

27. She noted that the suit properties are properties worth tens of millions to which financial contribution must be demonstrated if one is to believe that the alleging party contributed towards acquisition of such properties and relied on Section 7 of the Matrimonial Properties Act, 2013 Laws of Kenya and the case of *A.K.K vs P.K.W (2020) eKLR* and submitted that she has shown how she made direct and indirect contribution to the purchase and development of the properties while the Defendant was a disruptive influence that kept interfering with the Plaintiff's investment ideas and has not shown any sources of income sufficient to support the nature of the investments that he purports to have undertaken.

28. On the second issue, the plaintiff submitted that through Section 14 (a) of the Matrimonial Property Act, the defendant is holding the properties in trust for the plaintiff. She submitted that she has proved through her pleadings as well as oral evidence that she not only contributed financially to the acquisition and development of the suit properties, but that she solely purchased and developed the same. The only reason the Defendant ended up being on the title of Plot No xxxx was because he injected himself into the register at the time that purchasers from Mutirithia were pursuing transfers from the original owner. The Defendant attended such meetings, which were held late evenings, to represent the family. That's the only reason his name ended up in the title.

29. The plaintiff relied on the case of *Muthembwa v Muthembwa (2002)1 KLR*, submitting that she placed before this Honourable Court copious amounts of documented evidence pointing towards her financial contribution towards acquisition and development of the suit properties unlike the defendant. She submitted further that the Defendant in contrast placed nothing before the court to enable the court determine what his degree of contribution was.

30. The plaintiff thus urged the court to so find, that all the suit properties held and/or registered in the name of the Defendant form part of the matrimonial property and that the same are held in trust for the Plaintiff by the Defendant being the head of the family (as he then was), and that the Plaintiff solely purchased and developed the said properties or made a contribution way more substantial than 75% and relied on the case of *Njoroge v Ngari (1985) KLR, 480* where the court held that even if registration is in the name of one spouse, if it is established that contribution was made by the other spouse towards acquisition of the properties in question, proprietary interest accrue.

31. She concluded by urging court to apportion more than 75% in her favour and 25% to the defendant since the evidence is overwhelmingly in favour of her.

The Defendant's Submission

32. The defendant identified three issues for determination namely; Whether the suit properties form part of matrimonial property despite being registered in the name of the Defendant as the owner; Whether the Defendant contributed solely towards the acquisition of the suit properties and lastly; Whether the Plaintiff is entitled to be given a share of the suit properties registered in the name of the Defendant.

33. On the first issue, the defendant submitted that Section 6(1) of the Matrimonial_ property provides that the Meaning of matrimonial property and that the properties in question do not form part of matrimonial property since he planned to acquire them prior to his marriage to the plaintiff.

34. On the second issue, the defendant submitted that averred that he solely acquired the parcel of land Uasin Gishu/ Kimumu/xxxx though his personal salary, tenders, business associates and loans. He stated further that he was the one in charge of the construction of the matrimonial house and he was the one who sourced the architect one Simon Khasete. The architect was the one who drew the plan of the house and supervised the construction. He submitted further that he was the one who purchased the construction materials and that this constitutes clear evidence that he was the one who solely acquired and developed the property and thus he is the only one entitled to the same.

35. With regards to the motor vehicles, the defendant submitted that he single-handedly purchased and hence registered in his name and the Plaintiff did not make any contribution whatsoever on the said motor vehicles.

36. As for land parcel Uasin Gishu/Kimumu/xxxx, the Defendant submitted that the Plaintiff was aware of his intentions to purchase the said land and that the plan to purchase the same was influenced by the award of the tender that they jointly requested with the Plaintiff. He thus relied on Section 7 of the Matrimonial Property Act and submitted that the plaintiff has little interest, if any, in the properties.

37. On the third issue, it was the defendant's contention that the plaintiff is not entitled to any share for the reason that since Plaintiff left her matrimonial home in 2008 due to her own volition and the parties having been separated for 13 years now, he has made enormous improvements on the said properties. He therefore considers her prayers premature and unnecessary to claim the suit properties which have appreciated in value due to the Defendant's hard work.

38. In this regard, the defendant relied on the cases of **UMM —Vs- IMM (2014) eKLR** and **PA W-M vs C MA W M [20181 eKLR** among others and submitted that from the evidence in court, it is clear that the Defendant's contribution to the acquisition of the property was higher than that of the Plaintiff and that there is no reason for the property to be shared in favour of the Plaintiff.

39. He thus concluded by submitting that it is the Defendant who met all the financial obligations towards the acquisition and development of the property and prayed that from the evidence, the division of the property should be made at the rate of 90:10% in favour of the Defendant.

Analysis and Determination

40. After carefully perusing the pleadings, submissions and annexures of the parties, it is my finding that two issues arise for determination namely;

- a. Whether the suit properties form part of the Matrimonial Property despite being registered in the name of the Defendant as the owner and secondly,
- b. Whether the Plaintiff has demonstrated with sufficient evidence that she deserves the 75% share of the suit property as prayed in the Originating Summons and during the oral testimony.

a. Whether the suit properties form part of the Matrimonial Property despite being registered in the name of the Defendant as the owner

41. **Section 6** of The Matrimonial Properties Act provides that Matrimonial Property include;

- " (a) **The matrimonial home or homes**
- (b) **household goods and effects in the matrimonial home or houses or**
- (c) **any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."**

42. The parties in this cause have disputed what comprises matrimonial properties. On one hand the Plaintiff has listed the following properties as comprising matrimonial properties namely: -

- i. The matrimonial home and rentals and land parcel Number UasinGishu/Kimumu Scheme/xxxx (developed).*
- ii. Land parcel number Uasin Gishu/ Kimumu/xxxx (developed) rental and lock up shops.*
- iii. Motor vehicles registration number /KAN xxxx Toyota, /KAT xxxx RVR /and Land Rover xxxx.*
- iv. Household items and all other properties acquired during the subsistence of the marriage and personal effects full details whereof are well known to the Defendant's knowledge.*

43. On the other hand, the defendant has denied that any of the above properties comprise matrimonial properties insisting that he single handedly contributed towards their acquisition.

44. The above divergent position notwithstanding, it is trite law that whoever alleges must prove. The onus of prove obviously rested on the Plaintiff to prove both monetary contributions made and non-monetary contribution in acquisition and developments of the listed properties. The onus of proof however is subject to a presumption of law under **Section 14** of **Matrimonial Properties Act** as we shall shortly see hereunder.

45. The plaintiff submitted and testified to the effect that she alone acquired UASIN GISHU/KIMUMU/xxxx and UASIN GISHU/KIMUMU/xxxx. She gave in detail how she and others bought the land from a group known as Mutirithia and how the group collapsed forcing her and others to look for the original owner in order to facilitate the transfer and registration. It was the Plaintiff's testimony that the defendant did not want her to purchase the said properties and even when the plaintiff went ahead and bought the land and started construction, the defendant poured cold water on her efforts.

46. In this regard, the plaintiff adduced evidence to show that she took loans amounting to Kshs 1, 850,000 from National Bank of Kenya and Kshs 2,302,000 on diverse dates from MUSCO that enabled her to purchase the land and construct the house. Her evidence is marked PEXHB 10,12 and 14 being loan agreements between NBK and the plaintiff and PEXHB 5(a)-(k) being MUSCO Loan application forms.

47. The defendant on his part noted on cross-examination that he purchased plot no xxxx by way of cash and began constructing a semi-permanent house in 1998 then proceeded to construct a permanent one in 1999 and occupied it in 2002. The defendant also admitted in evidence that they jointly purchased with the plaintiff plot no. xxxx after they won a tender award with various governmental institutions.

48. From the above evidence, it is clear that the plaintiff took loans on diverse dates to purchase and or construct buildings on land. The same is reflected in all of her loan agreements/loan application forms where she consistently indicated the purpose as either purchase of land or construction purposes. I find her testimony to be more coherent, consistent and evidence based as opposed to that of the defendant as regards plot No. xxxx. This is because, whereas the defendant notes that he purchased the same by way of cash, there is no evidence of an agreement or any form of withdrawal slip to indicate that he paid the sum to anyone for purchase of the property. Furthermore, I note that the plaintiff was earning considerably more than the defendant hence was in a position to take much higher amounts of loan as compared to the defendant.

49. In addition, it is clear that though the defendant argued that he planned to purchase the property before contracting the marriage with the plaintiff, the purchase of the same was done during the subsistence of the marriage which would make the property, regardless of its registration status, as matrimonial property. In this regard, I take guidance in the presumption of law under **Section 14 of Matrimonial Property Act** that provides as follows as regards 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 interest in the matrimonial property are equal."

50. The above provision however make is clear that the presumptions therein are rebuttable. They are not absolute. This means that evidence can be adduced to rebut and defeat the presumption that the interest on the property is equal. It is not a fixed presumption. This position was adopted by court in *F.S vs E. Z [2016] eKLR*, where the court noted:

"In the case of VWN V F.N., Nairobi Court of Appeal Civil Appeal No. 3 of 2014, the Court of Appeal distributed a matrimonial property in Karen at 70% and 30% and reversed a High Court decision to have the property shared equally.

It is important to note that there are certain past decisions which are of the view that matrimonial properties should be shared equally. Most of those decisions were made before the coming into force of the Matrimonial Property Act, 2013. In the case of MK V SK [2008] 1 KLR 204 where the Court of Appeal held that where a property is registered in the joint names of husband and wife, it means that each party owns an individual equal share in the property: Such decisions may not represent the current Kenyan status under Section 14 of the Matrimonial Property Act, there is a rebuttable presumption that there is an equal beneficial interest. This means that evidence can be adduced to rebut and defeat the presumption that the interest on the property is equal. It is not a fixed presumption. One spouse can buy a property and have it registered in the names of the other spouse. Whenever an issue of distribution arises, what would count will be the level of contribution by each party, whether monetary or non-monetary contribution.

51. It is for the above reason that the law recognizes that where property is acquired by one of the spouses before marriage but on getting married the other spouse contributes towards development of that property, such a spouse acquires a beneficial interest over the property. This is the essence of Section 9 of the Matrimonial Property Act which provides;

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

52. As such, though **Section 26 of the Land Registration Act** declares that the registered owner of land is deemed to be absolute owner, spousal interests /rights are recognized as attached to the property as some of the overriding interests which need not to be noted on the register or Title document.

53. It is also for the above reason that it is widely acceptable that even where property is registered in the name of the one person, such as the defendant herein, the same does not mean that the property belongs to him. If the plaintiff can establish contribution then she can claim a share. This position was affirmed by court in *Peter Mburu Echaria vs Priscilla Njeri Echaria [2001] eKLR* where the Court of Appeal held;

"... where the disputed property is not registered in the names of the spouses but is registered in the name of one of the spouses, the beneficial share of each spouse would ultimately depend on the proven respective proportions of financial contribution either indirect or direct towards acquisition of the property. However, in cases where each spouse has made substantial but unascertainable contribution it may be equitable to apply the maxim equality is equity"

54. In the foregoing, it is my finding that the plaintiff has established her beneficial interest in Plot No. xxxx and the court finds the same to be matrimonial property since it was acquired during the subsistence of the marriage.

55. As regards Plot No. xxxx, there is no much issue since the defendant admitted that they jointly purchased the property with the Plaintiff through their company [Particulars Withheld] Company. Although the same was not directly disputed by the plaintiff, the said property was

clearly purchased during the subsistence of the marriage and therefore constitutes matrimonial property. What remains the issue and which the court will discuss hereunder is the distribution of the same based on contribution.

56. Finally, as regards motor vehicles registration numbers KAN xxxx Toyota, KAT xxxx RVR and Land Rover xxxx, the plaintiff did not make any submissions on the same. As for the defendant, his argument was that the same should not form part of the matrimonial home as he acquired them without informing the plaintiff and that the plaintiff did not make any financial contribution.

57. There is little information available on the said vehicles since it is not known when they were purchased or who bought them. There is also no evidence on their registration details including ownership. In the circumstances, the court is unable to make any pronouncement on the same.

b. Whether the Plaintiff has demonstrated with sufficient evidence that she deserves the 75% share of the suit property as prayed in the Originating Summons and during the oral testimony

58. Article 45(3) of The Constitution of Kenya 2010 states that;

" Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage."

59. The constitutional provision does not however equate equal rights to a 50/50 sharing of assets but rather to the rights to be treated equally and fairly. In this regard, **Section 7 of The Matrimonial Property Act** provide that;

"Ownership of 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."

60. The law therefore provides that in the event of divorce, the matrimonial property is divided between the spouses according to the contribution of each spouse. It is in this regard that **Section 2 of the Matrimonial Property Act** defines "contribution" as monetary and non-monetary 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

61. As regards Plot No. xxxx and as highlighted above, I find little evidence to support the defendant's argument that he contributed to the property in any way. This is because, on cross-examination by the Plaintiff's Counsel, the defendant was hard pressed to show the sources of income to support the massive investment in both the land and the construction. On the contrary, the plaintiff was able to show through diverse loan agreements and application forms dating back from 1999 that she was able to get loans to purchase the said property and to make developments therein. What puzzles me, is how the defendant was able to register the said property in his name. The plaintiff attempted to explain this situation by stating that the defendant attended meetings after the collapse of the Mutirithia group. This was confirmed by both the plaintiff and the defendant. The defendant attended those meetings it seems as the representative of the family and not as the purchaser of the said land. However, and as clearly highlighted above, even though the parcel is registered in the name of the defendant, the plaintiff has shown that she made meaningful contribution towards the purchase and development of the said land. That is to say, she made way more monetary contribution towards the purchase of the said property.

62. As regards Plot xxxx, whereas the defendant admitted that the same was jointly purchased, the plaintiff averred that she had everything to do with it. In particular, it was her evidence that she was offered the property by one Kurisi Mwanagani and negotiated with him and signed the agreement for purchase of the said property which she annexed as Exhibit 8. She further submitted that she paid for the land alone and put up all the structures alone.

63. On the other hand, the defendant submitted that he paid Kshs 250,000 in cash for the said parcel of land and averred that the said land was initially registered in the name of Three Lilies Company which they jointly owned with the plaintiff.

64. However, it is quite clear from the green Card exhibit 9 that the plaintiff obtained title to the land on the 8th of February 2001. This in my view is consistent with her testimony that she indeed was the one who bought the land. In addition, there is also every evidence to suggest that through the loans she took, she was able to purchase and develop the said properties. Unfortunately, the defendant has not shown through any evidence that he contributed towards the purchase of the property or that he took a loan or any form of agreement between him and the seller of plot No. xxxx to suggest that he contributed towards the purchase of this plot. It is therefore difficult to ascertain the defendant's contribution in the said plot.

65. I notice that registered proprietor of land changed on the 8th of July 2003 from the plaintiff to three lilies and the title was further changed on the 29th of December 2003 to explicitly reflect both the plaintiff and the defendant as the registered proprietors of the land. These changes were indeed explained by the plaintiff to the effect that she was forced through beatings to sign the documents for transfer of the plot from

her sole name to that of both of them.

66. On a balance of probabilities, I find it more probable that the plaintiff is indeed speaking the truth. After all, the defendant admitted that there was violence in the marriage.

67. So how should the properties be divided? This is the elephant in the room. An elephant that has for long been an issue courts have and continue to grapple with.

68. In the case of *Aw vs Mvcmawm [2018] eKLR*, the Court of Appeal grappled with this issue and observed as follows: -

" This now takes us to the crux of appeal; that is whether the appellant was entitled, to a larger share being 50/50 ownership of the suit premises or as cross-appealed by the Respondent the award of Kshs.2 million was excessive. This suit was filed on 30th May, 2015 after the Matrimonial Property Act was in operation.....what proportion or share should the appellant be awarded? It is common ground that the suit premises was inherited by the Respondent and just the learned trial Judge, we appreciate no case is like another and each must be considered on its own merit while bearing in mind the peculiarities, circumstances and the principles of fairness and human worth in each case. Just like the old saying goes, "no one should reap where they did not sow and none should reap more than they planted." That is the basic tenet of equity which follows the law."

69. In another decision in *Civil Appeal No. 142 of 2018 in CWM-VS- JPM [2017] eKLR*, the Court of Appeal held as follows:

" parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of Respondent at the time of such overture. In our view, that contribution, be it domestic work and management of the matrimonial home, child care or companionship falls within the definition of contribution under the Act".

70. I associate myself with the courts view that no one should reap where they did not sow and similarly none should reap more than they planted.

71. As noted above however, there is a presumption of law that where property is acquired during marriage, the same is held in trust for the other spouse. Even so, the presumption is rebuttable. The biggest challenge however is that quantifying interests held under a constructive trust is not straightforward since the court is entitled to approach the matter broadly taking into account the parties' entire course of conduct together.

72. In principle, the parties' interests must reflect their common intention when the property was acquired and all the available evidence must be considered. *See Nigel Lowe and Gillian Douglas, Bromley's Family Law, 9th Edition, Butterworths, 1998 at 148-149.*

73. Indeed, as Waite LJ put it in *Midland Bank Plc vs Cooke [1995] 4 All ER 562, CA*;

"...to determine (in the absence of express evidence of intention), what proportions the parties must be assumed to have intended for their beneficial ownership, the duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that search proves inconclusive does the court fall back on the maxim that 'equality is equity'" [emphasis added].

74. It should be noted therefore that by looking at the whole history of the parties' conduct, the courts are effectively recognizing that the proportions are not fixed at the outset of the purchase.

75. Guided by the above authorities it is imperative that this court conducts an assessment of the parties conduct during the marriage in light of the evidence adduced in court.

76. The plaintiff testified that she is the one who bought plot xxxx and built the matrimonial home therein. It was her evidence that her husband did not make any contributions whatsoever and only moved in 2 days after she and the kids left him alone where they were earlier staying. The plaintiff also testified that the husband used to come home drunk and would beat her resulting in her seeking help from the police but to no success. She only came to get help later on. It was her further testimony that she was solely responsible for improvements in the matrimonial home including by installing ceilings and purchase of construction materials. She says that her ex-husband never contributed to the said improvements.

77. The plaintiff further testified that she bought plot no xxxx from one Kurushi Mwangani after taking a loan from MUSCO for Kshs 50,000 as a first installment. She testified that she finished paying for the plot in 2000 and made an agreement which she produced green card 9 and sale agreement dated the 8th of July 2000 marked as exhibit 8. The card shows that the deed was issued in her name. The plaintiff testified that she is the one who built the residential houses in the said plot by taking loans from MUSCO and National Bank.

78. On cross examination, the plaintiff was unable to produce any receipt of payment to Murithithia Self Help group, where she had indicated she bought the plot xxxx from. The plaintiff also indicated that plot no 2104 was brought through three lilies where they had equal shares. The plaintiff admitted that the defendant used to help her apply for tenders and ensure they get the tenders. She also noted that she did not contribute to the purchase of Toyota KAN xxxx. She indicated that she did purchase KAT xxxx RVR but admitted that she has no copy of

logbook. She also said she has no documentation to show ownership of Mazda KYD xxx.

79. The defendant on the other hand testified that he took loans from Harambee Co-operative Society which he used to acquire the property and do farming. It was his testimony that he contributed towards purchase of Plot no xxxx and xxxx at Kimumu. He also testified that he made developments on the said properties by taking loan of Kshs.101,699. The loan repayment is indeed reflected throughout the period on the payslip marked defence -exhibit 1. The defendant confirmed that he and the plaintiff were equal shareholders of Three Lilies and testified how they got tenders from government institutions to supply inter alia rice and cooking oil. The defendant also noted that they contributed towards construction of the matrimonial home on plot no xxxx and the residential rental houses on plot xxxx.

80. The defendant also indicated that he bought a land for his in-laws by giving out his car a KYD xxx and Kshs 30,000 and produced the agreement D-Exhibit 6 (PEXH-20). The defendant stated that he contributed towards the developments of the properties through their company [Particulars Withheld]. On cross, the defendant testified that he had spent close to Kshs 1.2Million in the development of the residential houses through loans and three lilies. He produced the tender documents.

81. From the above evidence, it is clear in my mind that Plot No xxxx was bought through their company [Particulars Withheld]. This evidence largely remains uncontroverted. The plaintiff did confirm that through three lilies, both she and the defendant got tenders for supply of various goods and this enabled them to contribute towards the purchase of plot no xxxx. Furthermore, it is clear, as the plaintiff confirmed herself, that the defendant assisted her in applying for the tenders and in having them awarded to their company. In my view therefore, the defendant contributed directly towards the purchase of plot no xxxx. I am therefore unable to agree with the plaintiff that she solely purchased the property. Whereas I accept that she has produced documents to indicate that she took loans to purchase the said property, there is little evidence to suggest that the same went directly towards the purchase of plot No. xxxx.

82. Moreover, considering that at the time of the purchase of the said property i.e xxxx, the two were living as husband and wife and were operating a business together and assisted each other in the business, it can easily be construed that they bought plot No.xxxx with the intention that they have equal shares in the same. I say so because there is no other tangible and concrete evidence to allow me depart from the above line of reasoning. I also take guidance from **Section 14 (b) of the Matrimonial Property Act** which is to the effect that where the matrimonial property is in the names of the spouses jointly, there is a rebuttable presumption that their beneficial interests are equal. Considering therefore that the plaintiff and the defendant had equal shares in three lilies and that plot no xxxx was bought through three lilies, and in the absence of any evidence to suggest otherwise, it is my finding that the two intended to have equal shares in plot no xxxx.

83. As regards the matrimonial home plot no xxxx, the plaintiff indicated that she alone bought the property, constructed it and moved in. It was her testimony that her husband contributed nothing. The above claims were supported by the plaintiff's daughter and a friend who testified in favour of the plaintiff. The defendant on the other hand testified that he contributed also through loans towards the purchase of the property and the construction of the house. In fact, it was his evidence that he is the one who hired the architect for the house.

84. I am not able to find concrete evidence that suggest that the matrimonial home was solely built by the plaintiff or the defendant alone. Furthermore, I am unable to find any concrete evidence to suggest that either of them solely made contributions toward the improvements in the matrimonial home. This is because both rely on the fact that they took loans to purchase the plot no. xxxx. However, both fail to indicate whether the loans went directly towards the purchase of the said property. They both have failed to indicate precisely their respective contributions towards the improvements of the matrimonial home. I say so because the Matrimonial Property Act envisages that one must show that his or her contribution is easily identifiable with the improvement in question.

85. There is no evidence for example for purchase of ceilings or paintings or drawings that would suggest that the said improvements were made by for example the defendant or the plaintiff. There is also no agreement for sale of the matrimonial property plot no xxxx that would suggest the same was bought by one and not the other. But even in the existence of such an agreement, there would still be the presumption, rebuttable, that since the property was bought during the subsistence of the marriage, the same was held in trust for the benefit of the other. In the end, the court is unable to find any direct contribution by either the plaintiff and the respondent towards the purchase and development and improvement of the matrimonial home i.e plot no xxxx.

86. That notwithstanding, I recognize that the plaintiff and the defendant were blessed with 3 issues. Indeed, their daughter testified that she went to school at different places from [Particulars Withheld] primary school to [Particulars Withheld] Molo and later to [Particulars Withheld] Primary School. Whereas no evidence was tendered to indicate who paid school fees, it can be construed that both parents made contributions towards their children education. There has not been a single suggestion that the defendant and or the plaintiff neglected their duty towards their children. I also note that the plaintiff and the defendant were married for 19 years having met first in 1986. Although the marriage was rocked with cases of violence during its latter years, there is no suggestion that the same was marred with issues and or violence from the start. As such, it wouldn't be an exaggeration to state that the two enjoyed each others company and shared life together as husband and wife for a considerable period of time. It is clear that their marriage bore not only children but resulted in a successful business venture through the support that they gave each other. Why is this important? It is because the definition of contribution under Section 2 includes domestic work and management of the matrimonial home, child care; companionship; management of family business or property; and farm work. They both therefore offered companionship to the other and which this court takes cognizance of.

87. In the end, I am unable to agree with the Plaintiff claim that she be declared an absolute owner of these particular properties. In the same test, I am neither in agreement with the Defendant's claim that he ought to be declared the absolute owner of the particular properties. I am also unable to agree with the plaintiff that the properties be shared 75:25 in her favour. I am also unable to agree with the defendant that the properties be shared 90:10% in his favour.

88. In my view, the court ought to exercise fairness and equality. As such, even though this court is unable to determine to what extent did the parties herein contributed to the acquisition of the aforementioned properties, it cannot be gainsaid that they indeed the plaintiff and the defendant having been married for almost 19 years worked together towards the acquisition of the properties together with their development.

89. The upshot of this matter is that the Plaintiff's case herein partially succeeds. I hereby make the following orders:

a. A declaration is hereby issued that the matrimonial home being land parcel number Uasin Gsishu/Kimumu Scheme xxxx (developed), be shared in the ratio of 50:50 in favour of the Plaintiff and the Defendant respectively.

b. A declaration is hereby issued that Uasin Gishu/Kimumu/xxxx (developed) be shared in the ratio of 50:50 in favour of the plaintiff and the defendant respectively.

c. An order is hereby issued that the household items of the plaintiff be released to the plaintiff with immediate effect.

90. In the midst of such, I make no orders as to costs of this litigation. Each shall bear their own costs. Each party be at liberty to apply.

91. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16th DAY OF FEBRUARY, 2022.

.....

R. NYAKUNDI

JUDGE

In the presence of:-

1. Amihanda for Oduor for the plaintiff
2. Mathai Maina for the defendant