



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ORIGINATING SUMMONS NO.8 OF 2017(OS)

IN THE MATTER OF: SECTION 6, 7, 9,13,14,17 OF THE MATRIMONIAL PROPERTY ACT NO.49 OF 2013

BETWEEN

MWG.....APPLICANT

VERSUS

DSM.....RESPONDENT

JUDGEMENT

1. The proceedings before me are as a result of an originating summons dated 24th August, 2017 filed pursuant to Sections 6,7,9,13,14 and 17 of the Matrimonial Property Act No. 49 of 2013 seeking orders as follows:

a) That the honourable court be pleased to issue a declaration that the following properties registered in the name of the respondent are owned jointly by the applicant and the respondent:

- i. L.R Number xxxx/xx K, Nairobi County.**
- ii. Certificate of Title CR xxxxx K Kilifi County.**
- iii. Certificate of Title CR xxxxx, K, Kilifi County**
- iv. Kajiado /N /xxxx**
- v. Kajiado/O /xxxx**
- vi. Motor Vehicle Toyota Vitz KBM xxxx**
- vii. Motor Vehicle Voxy KCH xxxx**
- viii. [Particulars Withheld] Holdings Limited**

b) That the honourable court be pleased to order the sale and division of the said properties and apportionment of the same between the applicant and the respondent in equal shares.

c) That further and in the alternative and in the event that title and ownership in any way of the suit properties has/have already been transferred in favour of any third party an order that the respondent does account for the proceeds and the same be divided between the applicant and the respondent.

d) That the honourable court be pleased to order that the Respondent executes all documents where necessary to transfer the applicant's portion, and in the absence or in default the same be executed by the Deputy Registrar, Land Registrar of titles or in the alternative the aforesaid matrimonial properties be valued by a qualified and reputable valuer, sold and the proceeds be shared equally between the applicant and the respondent.

e) That the respondent be compelled to render a full and frank disclosure to the applicant on all bank statements and financial records and /or reports of his bank accounts detailing all credit and debit entries in those accounts from the year 2003 to date pending the hearing and determination of these proceedings.

- f) That the respondent does render complete statements of accounts in respect of all the above properties and provides an account for all cash flows and profits obtained from the family business.
- g) That a temporary injunction be issued restraining the Respondent, his servants, and/or agents from selling, transferring, alienating, wasting, damaging and /or otherwise adversely interfering with the said properties pending the hearing and determination of the originating summons herein.
- h) That the honourable court be pleased to grant such further or other relief orders as may be just in the circumstances.
- i) That the respondent be condemned to pay costs of this suit.

Applicant's case

2. The Originating Summons is premised upon grounds set out on the face of it and further amplified by the annexed supporting affidavit of MWG sworn on 24th August 2017 wherein the applicant stated that; she got married to the respondent on 18th march, 2003 at the Registrar's office Nairobi and that the marriage was blessed with three issues namely;

- a) CWM born on 15th March, 1996
- b) SJW born on 15th December, 2005; and
- c) SKM on 28th September, 2008

3. She averred that during the subsistence of their marriage, they, through their joint efforts either directly or indirectly, acquired the above listed properties. That following their irreconcilable differences, their marriage hit a rock hence their separation culminating to divorce proceedings. She prayed that the subject property be valued and then shared out in equal share. She went further to give a breakdown of her contribution towards the acquisition of each property as hereunder;

4. L.R xxxx/xx KW South Road. This property whose ownership documents she claimed to be in the respondent's possession was allegedly purchased from the Respondent's parents at a subsidized price of Kshs 500,000. That they used their savings to begin construction works on the said property thereby constructing a 3 bedroom massionette. She averred that through her monetary and non-monetary contribution, several improvements were done on the property including erection of servant quarters, cabro blocks, drive way and parking area. That the said property is now leased out to two tenants namely; innovative planning and design consultants at a monthly rent of Kshs 120,000 and Telkom Kenya paying annual rent of Kshs 200,000 for the Telecom booster mast installed therein with the respondent collecting the entire rental income.

5. CR xxxxx and CR xxxxx K, Kilifi County-In respect to these two properties which she claimed to be vacant, but denied access, were jointly acquired after securing a bank loan from commercial Bank of Africa hence matrimonial properties for distribution in equal share. She attached MORTGAGE loan repayment Bank statement between 2014 and 2016 as proof of her contribution (annexture MWG-8a)

6. Two massionettes at [Particulars Withheld] According to the applicant, the two were acquired between 2014 and 2015 through the Kenya projects. That the said properties does generate rental income at Kshs 15,000 per month since 2014 with the Respondent collecting the same. That the said properties were purchased through a loan from commercial bank of Africa which loan she claimed she was still repaying.

7. Kajiado /N/xxxx and Ol OO /xxxx- It was averred that the two properties were jointly purchased through a loan taken by both parties and that she was contributing towards offsetting the same. She attached title deeds reflecting that the two properties are registered in the joint ownership of her name, the respondent and one B her sister in-law (See MWG-4a).

8. Motor vehicle KBM xxxx Toyota Vitz-That it was jointly acquired and currently in her possession. She stated that it is exclusively registered in her name. As to Mv. registration number KCH xxxx it is in the respondent's name and in his possession. She only claimed Mv KBM xxxx in her possession while leaving KCH xxxx for the respondent.

9. Joint account at Cfc Stanbic Bank A/C No. 010xxxxxxxxxxx and 010xxxxxxxxxxx, Accounts for the issues of the marriage at DTB Bank and Money market account with Britam holding joint funds- The applicant claimed that those accounts have since been closed by the respondent and funds transferred to undisclosed location without her knowledge.

10. [Particulars Withheld] Holdings Ltd-It was stated that it was incorporated as family business and both parties are Directors and shareholders. That it was incorporated for the purpose of consolidating all their properties as their legacy to their children.

11. During the hearing, the applicant reiterated the content contained in her affidavit in support of the summons. She claimed that the Karen property was given to her and the respondent the year 2004 by the respondent's parents at a subsidised price as a gift to them. That the year 2006, she got a job working as a manager with [Particulars Withheld] Company Ltd in Mombasa thus necessitating their relocation to Mombasa. She claimed that when she met the respondent, they were both students at [Particulars Withheld] University and when they married they had nothing hence the property in question was acquired though their joint efforts.

12. She however withdrew her interest from the rest of the properties and only prayed for division and a share out of three properties being K property and the two in K Kilifi County (CR Nos xxxxx and xxxxx).

Respondent's case

13. In his response vide a replying affidavit sworn on 22nd September 2018, the respondent did admit that he got married to the applicant as stated and that they were blessed with two children plus C who was born before they got married. He also confirmed that their marriage which could not be salvaged despite every effort led to their separation and later divorce (refer to decree nisi issued on 8th January 2018 vide **Mombasa RMCC Divorce cause no xx of 2017**). He further stated that the properties the subject of these proceedings were acquired during coverture without any contribution whatsoever from the applicant.

14. Regarding L.R xxxx/xx/K, Nairobi County he asserted that; it was a property that he allegedly owned prior to marrying the applicant as a Director of [Particulars Withheld] since 1992; the same was transferred to him on agreement with his Co. Directors who are also his family members at a small token of Kshs 500,000 for the purpose of charging the same with CBA so as to offset loans he incurred from his fellow Directors to develop and improve the property; he signed a conveyance agreement with united general merchants limited on 22nd January, 2004 for a sum of Kshs 500,000 without any contribution from the applicant; the property is part of the company's 5 acre farm and not matrimonial property and that, funds for construction of the property were from a loan advanced by the Directors of [Particulars Withheld] which money he repaid out of rental income realized from the tenants renting the said house.

15. He further stated that he charged the property for Kshs 7,000,000 which was deducted from his salary every month. That whenever tenants paid him rent, he could submit part of the money to his Co-Directors who carry out maintenance activities and manage the property.

16. Concerning Certificate Titles CR xxxxx and CRxxxxx K, Kilifi County, the defendant claimed that they are properties he purchased in the year 2009 solely with part of the proceeds from the loan facility received from CBA. He denied receiving any contribution from the applicant and that he is servicing the mortgage alone.

17. Concerning the alleged acquisition of two massionettes through Kenya projects at [Particulars Withheld], the applicant denied knowledge of the existence of such property. That the [Particulars Withheld] properties have since been sold to off set a credit card loan of Kshs 500,000 and Stan Bic loan of Kshs 750,000 which they jointly acquired but the applicant refused to contribute in repaying the same. As to [Particulars Withheld] Properties, he averred that they were jointly acquired through a loan jointly obtained from commercial Bank of Africa and that it is jointly registered in his name, the respondent and his sister B hence ownership is already determined.

18. Touching on motor vehicle registration NO.KBM xxxx, he concurred with the applicant that it is owned by her. Further, he admitted that they used to own joint accounts at Cfc Stanbic Bank Limited, Diamond Trust Bank and Britam but the applicant never deposited any money.

19. As to the interest in [Particulars Withheld] Holdings Limited, he claimed that the applicant has no interest in the company and that she only enjoys signing powers and shareholding in the same company. During the hearing, the applicant reiterated the averments contained in the affidavit in reply. He stated that the applicant used to buy her own properties and had them registered in her name. That he used to meet all house hold expenses and paying school fees for the children single handedly without the applicant making any contribution. He referred to Karen property as his inheritance from the family hence not matrimonial property. Upon closure of the hearing, parties agreed to file submissions

Applicant's written submissions

20. The applicant filed written submissions dated 10th March, 2021 through her advocate M/s Kipsang outlining the following issues for determination;

- a) **What are the matrimonial properties acquired by the parties during their coverture?**
- b) **What is the contribution made by the petitioner to the acquisition of the matrimonial properties?**
- c) **What percentage of share should be awarded by the honourable court to the petitioner?**
- d) **Who bears the costs of this suit?**

21. With regard to issue No. 1, Mrs Kipsang relied on Section 6 of the Matrimonial Property Act No.49 Of 2013 stating that the properties mentioned above were acquired during coverture a fact which the Respondent has not disputed. That the Respondent admits the Petitioner was gainfully employed and even took out loans to contribute for the purchase and maintenance of the properties.

22. Concerning issue No.2, counsel submitted that the petitioner has made both monetary and non-monetary contribution towards the acquisition of the subject properties in compliance with Sections 2, 9, and 7 of the Matrimonial Property Act No.49 Of 2013. She contended that the respondent had admitted that the applicant took out loans to purchase Certificate of Title CR xxxxx and xxxxx K, Kilifi County which fact is not disputed. That Kajiado/N/xxxx and Kajiado /Ol Choro O /xxxx were acquired by the parties during coverture using proceeds out of a loan purposely taken and therefore jointly owned the properties. Further, that there was indirect contribution of the petitioner who was doing housework and looking after their three young children namely; CW,SJW and SKM.

23. Learned counsel contended that the two motor vehicles subject of these proceedings form part of the matrimonial property and that the Petitioner owns motor vehicle KBM xxxx which is in her possession at the moment. That regarding [Particulars Withheld] Holdings Limited, the petitioner is a Director and shareholder taking into account that it was incorporated together as a family business.

24. Touching on issue No. 3, counsel submitted that the petitioner is entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage. To buttress this proposition, counsel placed reliance on Article 45(3) of the Constitution and the holding in the case of **M.O V J.O.O (2018) eKLR**. Counsel further relied on the decision in **TMW VS FMC (2018) eKLR** to express the point that even though the petitioner's monetary contribution was not proved on a balance of probability, the plaintiff's efforts and contribution in the family cannot be ignored. She further referred to **AKM Vs NNN (2019) eKLR** where the court held that despite the absence of actual contribution, the plaintiff must have made significant contribution towards acquisition of the matrimonial property.

25. As to issue 4, M/s Kipsang submitted that it is trite law that costs follow the event and are granted at the discretion of the court pursuant to Section 27 of The Civil Procedure Act.

Respondent's submissions

26. The Respondent through his advocate Ms Ngugi filed his written submissions dated 5th

March 2021 citing two issues for determination as follows;

- a) **Which properties are to be considered as matrimonial properties?**
- b) **What contribution if any did the petitioner make in the acquisition of the matrimonial properties and how it should be shared out?**

27. Counsel basically adopted the averments contained in the respondent's replying affidavit. She submitted that the applicant in cross examination had confirmed that she was seeking division of 3 properties inter alia; the [Particulars Withheld] Property and the two [Particulars Withheld] properties. Ms Ngugi opined that the applicant failed to prove monetary or non-monetary contribution towards acquisition and development of the three properties. That the claim for division of the said properties in equal shares between her and the respondent is not based on any tangible evidence.

28. Learned counsel contended that the applicant did not submit any bank statements to prove her earnings if any, savings and loans taken for purposes of acquisition of any of the three properties. That the applicant did not claim nor prove whether she ever made any contribution towards paying school fees nor meeting any family expenses.

29. In support of her submission, counsel referred the court to the finding in the case of **EGM VS BMM (2020) eKLR** in which the Court of Appeal stated that the principle of equality espoused in Article 45 of the Constitution on equality of spouses at the time of marriage, during marriage and after marriage does not automatically mean equal distribution of matrimonial property without proof of contribution. Further reliance was placed in the case of **TKM VSMW (2020) eKLR** where the court emphasized on the fact that the burden of proof on contribution lies with the party alleging the same.

Analysis and determination

30. I have considered the originating summons application, responses therein, evidence by both parties and rival submissions by their respective counsel. Issues that arise for determination are;

- a) **Whether the subject properties in this suit were acquired during the subsistence of marriage between the parties herein.**
- b) **What contribution did each party make if any, towards the acquisition of the subject property.**
- c) **What share if any is each party entitled to.**

31. There is no dispute that the parties herein solemnized their Monogamous marriage sometime the year 2003 and had it dissolved the year 2018 after their relationship hit a rock. Equally, there is no dispute that the subject properties were acquired during the subsistence of their marriage. Although several properties were listed for division, the applicant clarified during her testimony that she was only interested in division of three properties namely; the [Particulars Withheld] property and two K plots. However, since counsel have submitted on the other properties, I will make some remarks on them as well.

32. In determining which properties constitute matrimonial property, I will seek to rely on the relevant provisions of Matrimonial Property Act no.49 of 2013 among them **Section 6** which provides that, Matrimonial Property includes:

- (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."**

33. The applicant has listed several properties as comprising matrimonial properties acquired by joint efforts during coverture as follows; **L.R Number xxxx/xx Karen, Nairobi County, Certificate of Title CR xxxxx, K Kilifi County; Certificate of Title CR xxxxx, K, Kilifi County; Kajiado /N /xxxx; Kajiado/Olchoro O/xxxx; Motor Vehicle Toyota Vitz KBM xxxx; Motor Vehicle Voxy KCHxxxx and [Particulars Withheld] Holdings Limited.**

34. According to the applicant, she made both monetary and non-monetary contribution towards acquisition of the disputed properties. Under Section 2 of the Matrimonial Property Act 2013, contribution is defined as;

“monetary and non-monetary contribution 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**

35. In the case of **Agnes Nanjala William vs Jacob Patrius Nicholas Vander C.A NO.127of 2 011**, the court recognized both monetary and non-monetary contribution in the acquisition of matrimonial property. The same position was held in the case of **AKM V NNN**(supra).

33. However, Section 7 of the Act further provides that;

“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”.

34. On the other hand, the respondent has denied that any of the above properties comprise matrimonial property insisting that he either single handedly contributed funds towards their acquisition or that he inherited some from his parents and that some are not his.

35. The above divergent position notwithstanding, it is trite law that whoever alleges must prove. The onus of proof obviously rests with the applicant to prove that she either directly or indirectly made contribution towards the acquisition and development of the listed properties. See **TKM Vs SMM**(supra) where the court of appeal stated that;

“We focus on the claim by the appellant to the other properties and state briefly that, with respect, the learned Judge arrived at the correct decision in rejecting the claim for want of proof. We reiterate what we said at the beginning of this Judgment that the burden of proof rests with the party who desires the court to give judgment in his or her favour”

36. The onus of proof however is subject to a rebuttable presumption of law under **Section 14** of **“Matrimonial Properties Act** which provides;

“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.”

37. Guided by the above quoted legal provisions and case law, I will now consider each property separately and the extent of each party's contribution if any;

L.R xxxx/xx KW SOUTH ROAD

38. There is no contestation that this property was acquired from the parents of the respondent as a gift at subsidized cost of Kshs 500,000. According to the sale agreement attached by both parties between [Particulars Withheld] Merchants Ltd as the seller, the respondent was the buyer of half an acre of land. The respondent claimed that the property was part of a larger five-acre land which was family land owned by a company known as [Particulars Withheld] Merchant to which he was a Director hence a beneficiary and one of the owners even before he married the applicant.

39. According to the respondent, the transfer of half acre was to enable him get a title to secure a mortgage to develop. He alleged that even the Kshs 500,000 for its purchase was facilitated by his parents which money he repaid later. In his replying affidavit, he attached evidence of the loan facility Kshs 7million obtained from Commercial Bank of Africa which money as admitted by both parties was used to develop the property. Both parties also conceded that construction work was supervised by the respondent's father. There is no dispute also that the loan was single handedly repaid partly through the rental income generated from the house constructed and deductions from the respondent's salary.

40. The applicant admitted the property was a gift from the father in-law and that she contributed directly and indirectly in paying the subsidised purchase price. It is worth noting that the parties herein cohabited from 2001 and then celebrated their marriage on 18th March 2003 and the property was bought on 22nd January 2004. The applicant claimed that during that period, they were both engaged in some gainful employment earning kshs 10,000 and the respondent Kshs 16,000 which money used to pass through a joint operated account. She

also deposed stated that they used to operate a car accessory shop. These evidence was not denied by the respondent.

41. From the evidence on record, none of the two parties was able to prove that he or she solely raised the Kshs 500,000 which was used to purchase the subsidized plot in Karen. The claim by the respondent that he got funding from his parents is not proved by any tangible evidence. None of his parents testified to prove that they gave the respondent the said amount to purchase the property. The only logical inference to draw is that, the Kshs 500,000 used to purchase the property must have been raised in instalments using their joint resources as evidenced from their two joint operated accounts (Diamond Trust account & Stanbic bank). If the respondent ever borrowed money which is not proven, then the family must have been running their domestic expenses partly using money from their joint earnings deposited in their joint accounts hence the applicant's direct and indirect contribution towards the purchase of the [Particulars Withheld] property.

42. Regarding the claim by the respondent that the property was a gift from the parents, the same was not absolute but conditional hence subject to payment of some money which the two contributed in the manner explained above hence a joint gift. I am alive to the fact that a gift given by a parent to a child is not matrimonial property for division. See **M v M Civil Appeal No.74 of 2002(2008)1KAR 247** where the court held that gifted property should remain with the gifted party. However, the scenario here is not that of a gift strictly so to say but some appreciation of son and daughter in-law.

43. Having held as above, it is my finding that the applicant is entitled to half share of the value of the ground before or without development. The fact that the respondent is the only registered owner does not perse confer to him exclusive and absolute ownership of the property. There is a rebuttable presumption that he is holding in trust of the applicant.

44. Who and how was the property developed? The respondent adduced evidence on how he obtained a mortgage of Kshs 7Million which he repaid without any support from the respondent. The respondent who by then was also working did not make any contribution. I do not find any evidence to show any contribution made by the applicant towards development. She did not claim that she undertook any family responsibility while the husband was committed to repaying the loan. To be a spouse is not an investment by itself. At least one must be productive in one way or the other before making acclaim out of the family cake.

45. M/s Kipsang contended that under Article 45 (3) of the Constitution, the parties herein are entitled to equality calculated at the time of marriage, during marriage and after the marriage hence the property should be shared equally. I do not think the drafters of the Constitution ever intended to grant an automatic and general benefit to spouses who divorce 50% of the property obtained during coverture regardless of a party's zero contribution. To arrive at that conclusion will amount to a disaster in the marriage institution where the lazy will go shopping for a rich potential husband or wife, get married, and then divorce as quickly as possible in order to get equal share of the property acquired during their marriage and then land on another potential rich innocent candidate for a husband or a wife.

46. In the case of **MEK V GLM (2018) e KLR** the court of appeal demystified the quite often advanced theory that Article 45(5) of the Constitution guarantees divorcing spouses equal share of matrimonial property after divorce. In that case, the court held thus;

“Equality in marriage is not a principle to be applied blindly nor is it intended to encourage dependency by one spouse. It is a situation where each party makes a contribution. In other words, it is not shifting the burden, but the sharing of responsibilities and benefits taking into account the gender limitations”

47. Similar position was held in **EGM V BMM**(supra) where the court stated that;

“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. The stated equality means no more than the courts to ensure that both parties at the dissolution of marriage get their fair share of the property. This has to be in accordance with their respective contribution...”

48. From the evidence on record, I do not find any evidence convincing enough that she indeed contributed directly or indirectly towards the development of the property in question. To that extent, it is my holding that the property herein was solely developed by the respondent without any contribution from the applicant and therefore declare that the development was 100% financed by the respondent. To that extent, the property will be valued into two parts. Firstly, land without development whose value shall be divided equally between the two. Secondly, development without land whose value shall be for the respondent 100%.

Certificate of titles CR xxxxx and xxxxx k kilifi county.

49. The applicant in her pleadings averred that they acquired these two properties after they moved to Mombasa and that the properties are vacant and the respondent has denied her access to the properties. In her evidence in chief, she stated that the two plots were acquired the year 2009 at Kshs 600,000. At paragraph15 of his replying affidavit, the respondent denied that these two properties were jointly acquired. He attached a bank statement (annextureDSM-6) from Stan Bic bank showing their two names as the loanees and payees towards recovery of the loan taken the year 2014 implying that it was possible they managed funds jointly. Although the applicant had lost her Job by 2009, they had three children who were school going implying that she had a greater domestic responsibility looking after children and performing domestic chores which cannot be measured with any mathematical precision hence further non-monetary contribution.

50. There is no proof by the respondent that the money recovered by Stan Bic Bank through their joint account no.010xxxxxxxxxxx was from his pocket alone. The applicant had just lost a well-paying job at Kshs 130,000 per amount hence had the ability to contribute towards the acquisition of the two properties as she said from her savings which went through their joint account at StanBic.

51. From the evidence on record, it is clear that the respondent made both monetary and non-monetary contribution. It is my conviction that they did make equal contribution towards the acquisition of the two plots hence entitled to equal share. The fact that the applicant was the sole registered owner did not disentitle the applicant her rightful share. The applicant was holding title in trust for the applicant for their

mutual benefit.

52. However, there is a claim by the respondent that he sold the two properties the year 2017 in order to repay the outstanding Stan Bic loan of Kshs750,000 and Kshs 500,000 credit card loan. Unfortunately, there is no evidence tendered to show how much the two properties were sold if at all; when were they sold, to whom and at how much; the debts repaid and at whose benefit. The claim of sale of property came up when the respondent gave his evidence in-chief though without proof.

53. Whereas I am alive to the fact that this court cannot cancel title legitimately passed to a 3rd party as a bonafide purchaser for value without notice of any fraud or wrong doing surrounding the sale transaction, the allegation of sale of the two properties herein has not been proven by production of sale agreement or transfer of title to any 3rd party. It would appear that the alleged sale of the two properties if any the year 2017 coinciding with their divorce proceedings filed the same period, was intended to defeat possible future matrimonial property distribution process.

54. Since it was admitted that the plots were sold out, this court's hands are tied up as it cannot distribute what does not exist. She should have lodged a claim before the ELC court for recognition of her beneficial interest as a spouse whose consent was not sought before sale.

KAJIADO /N/xxxx AND KAJIADO /OL CHORO O/xxxx

55. The applicant averred that they took a loan to purchase the same and that she was contributing towards offsetting the loan. It was her evidence that these properties are owned by herself, the respondent and his sisters. That Kajiado/N/xxxx is not her property and the same was subdivided. Further, she stated that Kajiado/OI Choro O/ xxxx is not part of matrimonial property.

56. The respondent in his response stated that this property is not part of matrimonial property as it is jointly owned by himself, the applicant and his sisters. Both parties conceded to the fact that these properties are not matrimonial properties in their evidence as ownership is predetermined by the mode of registration. I thus uphold their views and or position hence no order of distribution is available

MOTOR VEHICLE KBM xxxx AND KCH xxxx

57. It's not in dispute that motor vehicle KBM xxxx which is registered in the applicant's name is in her possession and KCH xxxx in possession of the respondent. The respondent in his replying affidavit stated that motor vehicle KCH xxxx is not in his name as no transfer of ownership has been done in his favour as he is yet to finish paying off the purchase price. He produced a sale agreement and log book as evidence in court which indicates the name of the seller.

58. Parties have generally agreed for the applicant to retain the M/v in her possession. As regards MVKCHxxxx which is still in the name of the seller one Margaret Kajaira who sold it on loan on 10th March 2017 after the two had separated, the same is not matrimonial property hence not subject to division.

[PARTICULARS WITHHELD] HOLDINGS LIMITED

59. The applicant stated that the company was incorporated as a family business for purposes of consolidating all their properties as a legacy to their children and that they are both directors and shareholders. They got separated before the properties could be transferred to the company's name. She doesn't know whether the company is still operational. She produced the certificate of incorporation and form 203 on the Directors of the company.

60. The respondent in response stated that the applicant has no interest whatsoever in the company and still enjoys signing powers and shareholding in the same. That she has refused to refund him the initial costs of setting up the company and should cede her shares as a result of this. It is trite law that a company being a legal entity, is governed by its own Articles and Memorandum of association and any dispute over its operations is independent hence this court cannot declare it as matrimonial property. See **TKM V SMW(supra)** where the court stated that a limited liability company has a separate life from that of any of the shareholders or directors and its assets belong to it. Accordingly, the company herein is not part of matrimonial property capable of distribution.

61. In her supporting affidavit and during the trial, the applicant raised a claim on several accounts namely; **Joint account at Cfc Stanbic Bank 010xxxxxxxxx, 010xxxxxxxxx, children's accounts at diamond trust bank and money market in Britam**. She stated that the respondent has closed the same and transferred the funds to undisclosed account and denied her access. The respondent in response stated that they took a loan in 2014 and after the applicant filed a maintenance case against him, she refused to repay the loan and the burden was left solely on him. That he paid the loan and stopped funding the accounts thereafter which led to its closure by the bank. Both parties agreed that those accounts ceased to operate long time ago hence not available for distribution. I will not make any determination or order regarding distribution on these properties which do not exist. In any event, the applicant did abandon her claim over the same during her testimony.

62. As regards costs, this is a matter of discretion exercisable by the trial court. This being a matter involving close family members, I will order that each party do bear his or her own costs.

63. Having made the above conclusion, I am inclined to make the following declarations and orders;

(a) That Property known as L.R.No. xxxx/xx K Nairobi county without development was acquired through the joint effort of the applicant and the respondent hence entitled to equal share of its value minus developments thereon.

(b) That the respondent is entitled to 100% of the value of the developments done on the K plot above quoted.

(c) That parties shall engage a mutually agreed valuer within 60 days who shall value the ground and developments separately to ascertain their value and each party's entitlement.

(d) Upon valuation as ordered above, the respondent shall have first priority to buy out the applicant's interest by refunding or compensating her the equivalent of the value of her 50% share out of the total value of the ground without development, in default, the applicant to buy out the respondent by refunding or compensating him his interest of 50% out of the total value of the ground without development plus 100% value of the developments done and in default of the two options, the property be sold and each party to get his or her share out of the proceeds.

(e) Motor vehicle Regn No. KBM is hereby declared as matrimonial property and the same is distributed and shared out to the applicant for her own personal use

(f) Each party to bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF
AUGUST,2021**

J.N.ONYIEGO

JUDGE