



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MATRIMONIAL CAUSE NO. 69 OF 2018 (O.S)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

IN THE MATTER OF SECTION 5,6,7,9 AND 17 OF THE MATRIMONIAL PROPERTIES ACT NO. 49 OF 2013

BETWEEN

N. W. M..... APPLICANT

VERSUS

S.M. KRESPONDENT

JUDGMENT

1. The Applicant herein N.W.M filed the Originating Summons dated 16.11.2018 seeking the following orders:

(i) THAT the Honorable Court be pleased to declare that the immovable and moveable properties listed herein below were acquired by the parties jointly and that the same is held by the Respondent beneficially and in trust for the Applicant;

SCHEDULE OF THE PROPERTIES "SUIT PROPERTIES"

- a) Miotoni Common House No. 3, Karen (the Matrimonial Home) situated on LR. No. XXXX/ Nairobi.
- b) Miotoni Woods House N.10 Karen situated on LR. No. 10 Karen situated on LR. No. XXXX/XXX
- c) Block of flats in Kahawa situated on LR No. RUIRU EAST/BLOCK X/XXXX.
- d) I.R. 64219/1 (Leasehold) 0.2229 hectares
- e) I.R. 84029 situated in Athi River 9.930 hectares
- f) Office Suite No. 2 on 4thNgong Avenue Towers situated on L. R. No. XXXXXX/X Nairobi.
- g) NGONG/NGONG/XXXXX
- h) KBR XXXV
- i) KBR XXXA
- j) Nissan Sunny KAL XXXB
- k) Prado KBK XXXQ
- l) Toyota Fielder KCC XXXB

m) Any other property acquired by the parties during the course of the marriage.

(ii) THAT this Honourable Court be pleased to order that the Applicant is entitled to equal share of the properties listed in prayer 1 above or in the alternative an order that the properties be sold and the Applicant entitled to an equal share of the proceeds of sale.

(iii) THAT Miotoni common house No. 3 situated on LR. No. XXX/XXX be given to the applicant.

(iv) Alimony.

(v) THAT this Honourable Court be pleased to make such further orders as it may deem fit and just in the circumstances of this case.

(vi) THAT the cost of this Summons be provided for.

2. The Originating Summons is supported by the Affidavit of the applicant sworn on 16.11.2018 and a further Affidavit sworn on 1.2.2019 in response to the Replying Affidavit sworn by the Respondent on 13.12.2018.

3. The Respondent S. M. K. in his Replying Affidavit dated 13.12.2018 stated that he got married to the Applicant on 27.12.1997 under Kikuyu Customary Law. He gave detailed account on how he acquired his properties and stated that the Applicant did not contribute a penny towards the acquisition of the said properties.

4. The Applicant withdrew her Notice of Motion dated 16.11.2018 which was seeking conservatory orders and the Respondent also withdrew his application dated 17.12.2018 seeking orders that the applicant vacates the Matrimonial home. I.e. Miotoni Common, House No. 3 Karen Nairobi and to cease carrying out any construction works or renovation work pending the hearing and determination of this suit. The parties agreed to proceed with the main suit by way of viva voce evidence.

5. The Applicant called two witnesses and she also gave oral evidence. The Respondent also gave oral evidence.

6. The two witnesses who are uncles to the Applicant said under Kikuyu Customary Law upon dissolution of the marriage the first wife is left with all the wealth created by the Couple during the subsistence of the marriage and the husband moves away with the second wife.

7. PW 1 R G M said the Applicant called him to their home in KAREN where he found there was a meeting and the Respondent told them to go away with the Applicant.

8. PW 1 said he declined to go away with the Applicant and told the Respondent that under Kikuyu Customary Law, the first wife remains in the Matrimonial home after the breakdown of the marriage.

9. PW 2 P K G who called himself an expert in Kikuyu Customary Law also said that the first wife under Kikuyu Customary Law is called N and after the marriage breaks she remains with the Wealth and the second wife N goes with the husband.

10. The Applicant who testified as PW3 said she is now 61 years old and she retired in the year 2018 as a nurse.

11. She said she got married to the Respondent on 27 12.1997 for a period of 41 years and the couple was blessed with four children, one is now deceased and three are alive and adults.

12. The Applicant said she was 19 ½ years when they got married while the Respondent was 23 years old and a first year at the University of Nairobi. The Applicant was 3 months pregnant at the time of the marriage and they agreed that the applicant stay at home and joins College later.

13. The Applicant said she stayed at home with the baby and joined Murang'a School of Nursing (KMTC) in 1979 and she left the baby with the Respondent's mother.

14. The Applicant said she again conceived their second born child and deferred her studies for one year and stayed home to deliver their second born child.

15. She said the children were left with the Respondent's mother at a place called Mwamba in Yatta near Kilimani area.

16. The applicant said they stayed in a small grass-thatched Simba which had nothing but a bed.

17. In 1981, the Respondent was posted to Machakos Law Courts as a District Magistrate II (Prof) and he started stayed with the children and the Applicant used to visit them.

18. The Applicant finished her Nursing training in December, 1983 and she started working in 1984 earning a salary of Ksh.1, 500 while the Respondent was earning Ksh.2, 500 and he used to stay in Government houses.

19. The Applicant said they had a normal family with no issues. She said they bought their first car in Machakos and went with it to Embu

where the Respondent was transferred.

20. At Embu, the Applicant said they bought a Matatu KXD xxx and also KVF xxx which were Peugeot Station Wagons doing business between Embu and Nairobi.

21. The Applicant said at Embu, they bought 7 ½ Acres of land and she also said they were acting together as husband and wife and they did things together taking care of their children and their siblings.

22. In 1987 they moved to Nairobi where the Respondent was posted to Kibera Law Courts while the Applicant moved to Kenyatta National Hospital and they lived at Kileleshwa in a Government house.

23. The Applicant said her Salary increased to about 10,000 – 15,000/- shillings while the Respondent was earning 14,000 – 20,000/- at that time. She said she was taking care of the family and they did projects together.

24. The Applicant said she used to take loans and give the Respondent to do projects and further that she did not keep records because she trusted the Respondent to whom she was married till death do them part.

25. The Applicant said they bought the Kileleshwa house at Ksh.500, 000 and she contributed to the purchase of the house. They stayed in the Kileleshwa house for 24 years and during those 24 years, she used to maintain the house and in the year 2009, she took a loan of one million to renovate the house.

26. The Applicant said in 2011 they bought their matrimonial home at Miotoni Common House No. 3 where they are staying to date.

27. The Applicant also said they sold the Kileleshwa house at 86 Million in 2012 and bought 50 flats at Kahawa Wendani along Thika Highway for 46 Million and they also bought 241/2 acres of land at Athi River and the 26 Million which remained, they paid for another house at Miotoni Woods house No. 10 at Karen.

28. The applicant said the house at Miotoni Woods was bought for 65 million and it was partly paid for from proceeds from the sale of Kileleshwa and it earns a monthly income of Ksh.350, 000 while the flats bring an income of Ksh. One Million a month.

29. The Applicant said while staying in Kileleshwa, they bought three other vehicles KAL xxx B, KAM and KXD and also Prado Reg. No. KBK xxx Q which the Respondent is using.

30. The Applicant further said in Karen, they bought KBQ 974 V and KBQ xxx and they gave both cars to car hire.

31. She said they also bought KCC xxx 1 B a fielder which they bought for their 3rd born daughter. She said the Respondent gave the said car to their house girl Juliet Ingati while the Applicant uses public transport.

32. The Applicant said she stays in the Library in the Matrimonial Home since the Respondent has locked all the bedrooms and wanted to throw her out of the Matrimonial home yet she has no other place to move to.

33. She said they both stay in the matrimonial home but the Respondent eats supper and breakfast in a house he rented for their house-girl Juliet and he only sleeps in the Matrimonial home.

34. The Applicant said she learnt that the Respondent had sold Miotoni Woods without her knowledge and she demands that the proceeds of sale be divided equally. She said he sold Miotoni woods at Ksh.112,000,000.

35. The Applicant said they have 4 acres in Ngong where they buried their son where they have built a temporary shelter for the worker.

36. She also said they sold the land in Embu GATURI/WERU/xxxx and put the money in the Nairobi Stock Exchange. She said the money from the Stock Exchange should be shared equally. She said she trusted her husband as a lawyer and head of the family to do investments for the family. She demanded that the Respondent makes a full disclosure of the shares at the stock exchange.

37. The Applicant said she used to do a business at Simba Centre of making sweaters apart from working as a nurse. She said she was making sweaters and table cloths and she had employed people to do the business but she was doing the marketing.

38. She said she had 5 knitting machines - 3 for sweaters and 2 for table clothes and she used to give the proceeds to the Respondent for family projects.

39. The Applicant also said she had started selling tyres at Nyamakima and she decided to move the knitting business to Nyamakima.

40. She said when the Respondent filed the divorce cause, he was very cruel to her and he removed all her household goods such as cookers, washing machines and micro waves and put them on the veranda at the matrimonial home.

41. She said her household goods were thrown out and rained on. She also said she was a member of HekaHeka women group where she was a treasurer and she joined the “chamas” to contribute to the purchase of the matrimonial properties.

42. The Applicant said she took a loan of Ksh.500, 000 to enable their daughter travel to Sydney in Australia to do her masters.
43. She said all the properties she listed in the OS were purchased during the subsistence of the marriage and she is seeking full disclosure of all the properties and a 50 % share.
44. In Cross examination, the Applicant confirmed that it was the Respondent who was doing the investments and she said he did it on behalf of the family and that they were married when he did the investments.
45. She confirmed that the 1st property the Respondent bought was KSL xxx Datsun 1200 pickup. She said the Respondent sold KSL xxx and bought KVF 966 and that he converted KVF xxx into a Matatu.
46. The Applicant said the Respondent bought KSL 386 in December 1983 and KVF xxx in 1985. She said in 1986, the Respondent bought KXD xxx which he also converted into a matatu. The two matatus were operating between Embu and Nairobi.
47. The Applicant further said in cross examination that the Respondent sold the two matatus to purchase the GATURU/WERU/xxx at Embu. She also said it was KSL xxx which gave birth to the two matatus whose proceeds bought the GATURU/WERU/xxx.
48. The Applicant also stated that she was involved in all the transactions because she was already married to the Respondent taking care of their children and therefore she is entitled to an equal share of the properties acquired during the Subsistence of the marriage.
49. The Applicant also said during cross examination that she used to take loans and give to the Respondent. She said in 1989 she took a loan of Ksh.30, 000/- which she gave the Respondent when he was doing a hides and skins business with a man called JOSEPH IGOGO who is now late. The Respondent took a loan of 70,000/- for the same. She said she did not mention this in her documents
50. The Applicant said in 1992 she again took a loan of Ksh.50, 000 and gave it to the Applicant and she could not recall what he exactly did with it.
51. She further said in cross examination that in 1998, she took a loan of Ksh.110,000 and she bought a fridge and cooker and in April 2001 she again took a loan of Ksh.237,125 and she could not recall what she did with it as they were doing many things.
52. She further said she trusted the Respondent and all the loans she took were for family welfare and some of the money she used in the house and she did not know it would reach a point where she had to be asked questions on the loans and the projects.
53. The Applicant said she gave the Respondent Ksh.130, 000 for building the temporary structure at NGONG MATASIA and she also said she was doing several things on the land such as cultivation and planting of maize, beans and cassava. She also said the respondent put a mabati structure which has three rooms at Ngong Matasia and put a 10,000 litres water tank and also a pit latrine.
54. The Applicant said in cross examination that while working as a nurse she was doing a knitting business. The respondent took the Applicant to task to prove that she was giving him Ksh.150, 000 per month between 1990 and 1999.
55. She said she was making Ksh.30, 000 per month from the tyre business and she used to give the Respondent the money to invest. She said she stopped both the tyre and knitting businesses in 1999 because she was overwhelmed with work at Kenyatta National Hospital.
56. The Applicant confirmed that the Respondent helped her to start the tyre business and that he lent her money which she said she paid back. She said the Respondent sold Motor vehicle KZM xxx and KAL xxx A Toyota and gave her Ksh.230, 000 to start the tyre business.
57. She said the tyre business had run for a year when she closed both businesses in 1999. She later said she was giving the Respondent Ksh.150, 000 a month only after the knitting business picked in 1997.
58. The Respondent's evidence was that the genesis of this Originating Summons was Divorce Cause No. 6 of 2015 where he had combined the Divorce Petition and the question of distribution of Matrimonial Properties.
59. The Respondent relied on the following Affidavits in his evidence;
- (i) Replying Affidavit dated 13.12.2018**
- (ii) Affidavit dated 12.2.2019**
- (iii) Affidavit dated 13.12.2019 in response to the Applicant's NOM dated 16.11.2019.**
60. The Respondent also relied on the Divorce Petition and Cross Petition and answer to Petition. He said the only property that qualifies to fall under the matrimonial property definition is the Matrimonial home at Miotoni Common and he further said the Applicant did not contribute to the Properties acquired during the marriage.
61. The Respondent said the Applicant shifted in what she stated in the cross petition and answer to petition that she used to utilize her entire income to sustain the family. He said he was the one who was solely responsible for the upkeep of the family and the education of the children in Primary, High School and even in University.

62. The Respondent said he also used to pay all domestic bills such as electricity water and telephone and also DSTV and all other payments. The Respondent attached a big bundle of document showing assorted bills.
63. The Respondent also attached Mpesa statements dating back to September 2011 before he filed the divorce cause showing he used to purchase groceries from Samuel Ndumia and also showing payments he made in Uchumi and Nakumatt Supermarkets.
64. The Respondent said he left Kenya School of Law in August 1981 and he was posted to Machakos Law Courts as a DM II (Prof).
65. He said at that time his two children were staying with his mother at Yatta and the Applicant was a student at Muranga School of Nursing.
66. The Respondent took his two children with his two sisters to stay with him at Machakos and he also employed a house girl.
67. The Respondent said the applicant finished her training in 1983 and at that time, he had already bought his first car KSL xxx Datsun 1200 Pick Up with no contribution from the Applicant.
68. In September 1984, the Respondent said he was transferred to Embu Law Courts as Senior Resident Magistrate.
69. He sold KSL xxx at Ksh.75, 000 to one Mr. Makanga who was area manager of Co-operative Bank and he used the money to purchase Motor vehicle Reg. No. KVF xxx which he converted into a matatu plying between and Nairobi.
70. The Respondent said in 1986, he took a co-operative loan from Sheria Co-operative and using proceeds from KVF xxx he bought another Matatu KXD xxx Peugeot 504.
71. The Respondent said that the Applicant did not make any contributions towards the purchase of KSL xxx since she was in college when he purchased it. He also said the Applicant did not make any contributions to the purchase of KVF 966 because it was a product of KSL xxx.
72. The Respondent said likewise the Applicant did not make any contributions to the purchase of KXD xxx since the Respondent bought it from the Co-operative Loan and proceeds from KVF xxx .
73. In August 1987, he was transferred from Embu Law Courts to Kibera Law Courts. He said at that time he had already bought GATURI/WERU/xxxx which was 7 ½ acres from the proceeds of the two matatus at a total of Ksh.112, 500 (Ksh.15, 000/- per acre).
74. The Respondent said he later on sold the GATURI/WERU farm at Ksh.4, 750,000/- to buy shares at the stock exchange in 2007.
75. The Respondent said the next property was the Kileleshwa Property which he bought at Ksh.500, 000/- which he paid from per diem he received from the Judiciary for attending a conference at Unafei in Tokyo Japan.
76. He said they lived in the home since September 1987 and he said he did everything a man could do and he denied that the Applicant used to repair the house.
77. The Respondent said he is the one who acquired the Kileleshwa house and there were no consultations done before its acquisition.
78. The Respondent said he challenged the profitability of the Applicant's knitting business and he said he had nothing to do with the knitting business.
79. The Respondent however said he gave the Applicant Ksh.500, 000/- to start a tyre business at Nyamakima from the sale of KZM 090 and KAL xxx A in September 1999 but the Applicant closed the tyre business within a very short time and she refused to explain what happened.
80. The Respondent said at the time the Applicant closed the knitting and tyre business in 1999 her net salary was Ksh.5, 800. He said that the Applicant claimed she was making Ksh.50, 000 from the tyre business and 150,000 from the knitting business amounting to a total income of Ksh.200, 000 per month. He said it was unbelievable that the applicant would have closed such a profitable business and settle for a Salary of Ksh.5, 800 from her employer.
81. The Respondent said in 1994 he was appointed Chairman of the Business Premises Tribunal but he used to travel out of Nairobi for short periods as the bulk of the work was in Nairobi.
82. The Respondent also said in the year 2000 he joined KACA and he went on a study tour to Hong Kong, Singapore and Sydney in Australia for only two weeks and he said it is not true that he used to go out of the country for long periods of time.
83. He said he filled a Wealth Declaration Form which is on pages 20-33 of his bundle of documents and he said that his salary was Ksh.125, 050 as at the time he left KACA and at that time he was not doing any other business and his only income was the salary from KACA.
84. The Respondent said he went into private practice in April 2000 following winding up of KACA. He said their marriage went downhill after the Respondent refused to account for Ksh.500, 000/- which he had given her to start the tyre business. He said the issue created a lot

of conflict in a situation that was already bad.

85. The Respondent denied that he was responsible for the condition of their deceased son Dennis and said it was the Applicant who asked him to take her to Nyina wa Mumbi Institution to deliver. He said the Applicant detached herself from Dennis and he is the one who used to take Dennis to Hospital.

86. The Respondent said by the year 2000 the marriage was broken down and he said their marriage was dysfunctional from the start and that the Applicant planted seeds of discord amongst her own children.

87. The Respondent said in the year 2011, he bought their matrimonial home at Karen Miotoni Common House No. 3 out of proceeds of the Stock Exchange.

88. He said in the year 2012 he sold the Kileleshwa house for Ksh.85 Million and out of the proceeds he bought Kahawa Wendani Flats for 46.5 Million.

89. In 2013 the Respondent said he bought Miotoni Woods House No. 10 and he sold it in 2017 for Ksh.83 million. He said there was no contribution from the Applicant for the purchase of Miotoni Woods.

90. In 2012, the Respondent said he bought Athi River Land in a Public Auction with proceeds from his legal practice at 14.5 Million.

91. The Respondent also said the Applicant did not contribute to the purchase of Motor Vehicle KAL xxx or KPK xxx Q. He said KCC xxx B Toyota Fielder is registered in the name of their 3rd daughter M.M and it does not qualify to be Matrimonial Property.

92. The Respondent said that the Applicant mentioned other properties such as the property at Jogoo Road and Ngong Avenue suit and Bishop Mugwe Centre which are not his properties.

93. The Respondent said he bought the Ngong property from proceeds from his private practice. He said two of the cars listed which had Reg. KBV which no longer existed at the time of filing the Divorce Cause. The Respondent also said he has never owned Motor Vehicles listed as (h) and (i) on the Originating Summons (list of Matrimonial Properties).

94. The Respondent said the purchase of Ngong was from proceeds from his private practice but the Proceeds used to go through the stock exchange first. He said all the proceeds from GATURI/WERU went to the Stock Exchange.

95. In Cross Examination, the Respondent said he sacrificed more to the family than the Applicant. He said most of the nights the Applicant was on duty while he stayed at home with the children.

96. The Respondent further said in cross examination that when he bought the first car KSL xxx DATSUN 1200 it was his personal car but for use in the family. He said he sold it and bought KVF 966 which he converted into a Matatu to make money for the family.

97. The Respondent said the Matatu was generating Ksh.300 every day. He said they did not make decisions as a family to do the investments and he said it was his sole decision how to reinvest the money.

98. The Respondent said that the Applicant's attitude was that her money was hers alone and his money was for the family and he said she should tell the Court what she did with her money.

99. The Respondent said the Applicant was not happy that he was supporting his family and he said he always felt trapped in an unhappy marriage. He said the Applicant's role in bringing up the children was minimal.

100. The Respondent said the Applicant was just a joy rider who did not contribute anything to the acquisition of the properties and further that in 2012 he called elders when he wanted the Applicant to move out of the Matrimonial home. He said the marriage ended in 2012 but technically it lasted until October 2018 when the Divorce was granted.

101. The parties filed written submissions which the Respondent highlighted orally. I have considered the evidence adduced by both parties in the Originating summons dated 16.11.2018 together with the Affidavits and annexures thereto filed by both parties and also the written and oral submissions.

102. I find that it is not in dispute that the Applicant and Respondent married on 27.12.1977 under Kikuyu Customary Law.

103. It is also not in dispute that the couple was blessed with four issues and one is now deceased while the three who are adults live outside Kenya.

104. The Marriage was dissolved on 19.10.2018 and subsequently on 16.11.2018, the Applicant filed this Originating Summons seeking distribution of Matrimonial Properties.

105. The Applicant is seeking that the Properties listed in the paragraph 1 of the Originating summons be declared Matrimonial Properties and be divided on a 50:50% basis.

106. The Respondent on his part concedes that it is only the Matrimonial Home at Miotoni Common House No. 3 in Karen which qualifies to be called Matrimonial Property but he testified that the Applicant should get absolutely nothing and that he should remain with 100% share of all the properties listed in the Originating Summons.

107. The issues for determination in this originating Summons are as follows:

- (i) What constitutes Matrimonial Properties in this case?**
- (ii) Did the Applicant contribute to the acquisition of the said Matrimonial Properties?**
- (iii) How should the Matrimonial Properties be distributed?**
- (iv) Who pays the costs of this case?**

108. On the issue as to what constitutes Matrimonial Properties in this case, the Applicant said all the properties she listed in the Originating summons constitute matrimonial properties. The said properties are as follows:

- (i) Miotoni Common House No. 3, Karen (the Matrimonial Home) situated on LR. No. xxxx/xxx Nairobi.**
- (ii) Miotoni Woods House N.10 Karen situated on LR. No. 10 Karen situated on LR. No. xxxx/xxx**
- (iii) Block of flats in Kahawa situated on LR No. RUIRU EAST/BLOCK x/xxx.**
- (iv) I.R. 64219/1 (Leasehold) 0.2229 hectares**
- (v) I.R. 84029 situated in Athi River 9.930 hectares**
- (vi) Office Suite No. 2 on 4thNgong Avenue Towers situated on L. R. No. xxxxxx/x Nairobi.**
- (vii) NGONG/NGONG/xxxxx**
- (viii) KBR xxxV**
- (ix) KBR xxx A**
- (x) Nissan Sunny KAL xxx B**
- (xi) Prado KBK xxxQ**
- (xii) Toyota Fielder KCC xxx B**
- (xiii) Any other property acquired by the parties during the course of the marriage.**

109. The Applicant said when she married the Respondent on 27.12.1977 they had nothing and that they acquired all these properties during the subsistence of their marriage which was dissolved in 19.10.2018.

110. The Applicant said she contributed to the acquisition of the properties by taking loans and giving the money to the Respondent and further that she did not keep records as she completely trusted the Respondent who was the head of her family and a lawyer and who was handling all investments on behalf of the Applicant and the children.

111. The Respondent on his part said the properties were acquired during the subsistence of the marriage but they were not jointly acquired and further that the Applicant did not contribute towards the acquisition of the properties and therefore she is entitled to nothing. The Respondent submitted that Property which is jointly acquired means property acquired by joint efforts of the parties.

112. The Respondent submitted that the fact that property is acquired during the subsistence of the marriage does not mean that it is so jointly owned and jointly acquired.

113. The Respondent relied on section 9 of the Matrimonial Property Act which states as follows;

‘Acquisition of interest in property by contribution where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made’

114. I find that there is evidence which is undisputed that all the properties listed on the originating summons were acquired during

coverture.

115. The parties are in agreement that the first property was M/v Reg. No. KSL xxx Datsun 1200 which the Respondent bought in December 1983. The Respondent said he bought that vehicle solely with his own funds without any monetary contribution from the Applicant.

116. However, there is evidence that the Respondent bought that vehicle for use by his family. At that time the Applicant had staggered her career for purposes of child care and therefore she also contributed in kind to the family progress.

117. Section 6(1) of the Matrimonial Properties Act defines Matrimonial Property as follows...

Meaning of matrimonial property (1) For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

118. Although the Applicant did not contribute to the purchase of that first property in terms of finances, I find that the Applicant had deferred her studies to take care of their two minor children while the Respondent completed his studies and was posted to Machakos Law Courts in 1981 and he was in gainful employment. Her contribution should be acknowledged since parties have equal rights in marriage.

119. Article 45 (3) of the Constitution of Kenya provides as follows:-

Family.

(3) 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.

120. I find that the parties are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage.

121. Section 7 of the Matrimonial Properties Act goes ahead to provide as follows:-

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.

122. I find that the Contribution by the Applicant to the acquisition of the first motor vehicle was indirect in terms of child care when the Applicant deferred her studies to deliver the two children and take care of them.

123. In the same respect, it was stated in the case of NWM v KNM (2014) eKLR stated 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.”

124. I find that both Monetary and Non-Monetary contributions are recognized by the law. Although the Applicant did not contribute directly to the acquisition of the first property, I find that by her indirect contribution, the Maxim “equality is equity” is applicable in this case.

125. As espoused in the case of PWK v JKG [2015] eKLR the Echaria case is not dead. The Court stated thus:

*“We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five-judge bench of this Court in ECHARIA -VS- ECHARIA (Supra) “Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial **contribution either direct or indirect towards the acquisition of the property**. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “Equality or equity” while heeding the caution of Lord Pearson in GISSING -VS-GISSING [1970] 2 All ER 780 at page 788 paragraph c that:*

„No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions otherwise than by way of advancement, by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one quarter, I do not think it is helpful or right for the court to feel obliged to award either one half-or nothing?.”

126. The Court also examined local decisions and came to the following conclusion:-

*“In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see *Essa vs. Essa (supra)*; *Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported)*, *Kamore vs. Kamore (supra)*; *Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001* and *Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported)*). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife’s contribution as equal to that of the husband.”*

127. It is not fair that the Respondent herein has been trying to throw out the applicant from the matrimonial home on the basis that she did not contribute to the acquisition of the Matrimonial Properties herein.

128. The Respondent filed an application dated 17.12.2018 seeking orders that the Applicant vacates the Matrimonial Property.

129. The Applicant recounted to this Court the cruel treatment the Respondent has subjected her to since he filed Divorce Cause No. 6 of 2015.

130. Even before the Divorce Cause was filed, the Respondent had asked the Applicant to vacate the matrimonial home in 2012 after he called Elders and told them to take away the Applicant but they declined and told him that under Kikuyu Customary Law, the first wife is left in the Matrimonial home.

131. However, this court will not determine this case on the basis of kikuyu customary law but in accordance with the law and the evidence tabled before it.

132. The Applicant told the Court that the Respondent locked all bedrooms to their Matrimonial home and that she stays in the Library to date.

133. My finding in this case is that when the Applicant and the Respondent got married on 27.12.1977 the couple had nothing to their names. The Applicant was already three months pregnant and subsequently she deferred pursuing her career to give birth before embarking on her training as a nurse at Muranga School of nursing.

134. When the Respondent bought the first car in December 1983, the Applicant had just finished her training and it is not true that she had not contributed to acquisition of the first property.

135. I find that their wealth grew in leaps and bounds from the first car KSL xxx and it is now a huge empire.

136. However, the Respondent seems so blind to the role of the Applicant in wealth acquisition and in child care to the point of saying that she was a nurse and he is the one who used to look after the children both at night when she was on duty and during the day. The evidence on record is that both were in gainful employment.

137. The Respondent is hell bent to render the Applicant destitute yet she was working all her life and for 41 years she has been by his side.

138. After the Applicant has sired and raised children the Respondent now wants her out of the Matrimonial home without suggesting where he wants her to settle even after conceding that the Matrimonial home where she is staying in Matrimonial Property.

139. I find that there is evidence that the first property KSL xxx which the Applicant purchased for the use of his family was sold in 1985 and the Respondent purchased KVF xxx and he also bought KXD xxx and he converted the two vehicles into Matatus plying between Embu and Nairobi.

140. I find that there is evidence that KSL xxx gave birth to KVF xxx and KVF xxx gave birth to KXD xxx. At this time the Applicant and the Respondent were in gainful employment earning Ksh.1, 500 and 2,500 respectively. There is evidence that the Applicant provided the Respondent with companionship and took care of their children and this gave the Respondent a peaceful atmosphere to invest.

141. As regards non-financial contribution I wish to rely on The House of Lords decision in ***White vs White (200)UKHL 54*** in which the Court cited;

*“The greater awareness of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills, a position that was reiterated in subsequent decisions of the House of Lords in ***Miller vs Miller & McFarlane {2006} UKHL 24*** with courts endorsing the jurisprudence of equality. She argued that any law that advocates for the division of matrimonial property on the basis of proved contributions alone, runs counter to the spirit embodied in the *Maputo Protocol* and that the division of matrimonial property must be effected having due regard to the principle of equality.”*

142. The Court of Appeal relied on ***Francis Njoroge –v-s Virginia WanjikuNjoroge (Nairobi Civil Appeal No. 179 of 2009)*** where it was held as follows:-

“... A division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the court of appeal of Singapore in **Lock Yeng Fun –v- Chua Hock Chye 92007) SGCA 33**, It is axiomatic that the division of matrimonial property under section 112 of the Act is not and by its very nature cannot be a precise mathematical exercise.”

143. In the case of **PAWN vs CAWM [2018]eKLR**, the Court held as follows;

“..... The Constitution and the statute law, herein before referred to as the Matrimonial Properties Act of 2013, protects family property and underpins the principles of fairness and non-discrimination of a spouse who has made contribution in the manner provided in the Act.

144. Article 45 (1) (3) of the Constitution makes provisions regarding the rights of parties during marriage and upon dissolution and anchors the principle of “equal rights” .

145. As stated earlier, 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.

146. The aforesaid Matrimonial Property Act defines with clarity what constitutes “contribution” to mean “monetary and non-monetary contributions 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.”

147. Ownership of matrimonial property is described under Section 7 of the Matrimonial Property Act as;-

“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.”

148. There is also evidence that the Applicant trusted the Respondent to do all investments as the head of the family and as a lawyer. The Applicant said she never kept the receipts or any documents to show her contributions but there is evidence that apart from working as a nurse, she had two businesses she was hassling with to support the family.

149. The Respondent did not table bank statements to show the sources of his money but he agreed that from the first car KSL xxx, he bought another vehicle KVF xxx and then he bought another car KXD xxx and then he sold the two cars which were operating as matatus and bought the GATURU/WERU land which he sold later and the money continued to grow as he invested it in the Stock Exchange. From the Stock Exchange the Respondent bought their current Matrimonial home at MIOTONI Common house NO.3.

150. The largest income came from the sale of their first matrimonial home in Kileleshwa which the Applicant said fetched 86 Million which he invested in the WENDANI flats and the MIOTONI Woods House No.10.

151. The Respondent said he bought the Kileleshwa matrimonial property at Ksh.500,000. The Applicant said she used to maintain it and further that she took a loan of Ksh.1,000,000 to renovate it. Although the Respondent disputed this fact, I find that there is evidence that the Applicant was always a resident of the Kileleshwa property and that she used to cultivate the garden and plant vegetables to supplement the food budget. Her long stay and maintenance of the property entitles her to an equal share.

152. I find that the Principles of fairness and human dignity demand that both direct and indirect contributions be factored in determining the respective contributions of the parties upon dissolution of the marriage. The distribution of Matrimonial Properties should not be a mathematical exercise otherwise Marriage relationships will become Commercial transactions.

153. It was the Respondent who sold the two vehicles to buy the GATURU/WERU/xxxx Property which he sold for over 4 million and invested in the Stock Exchange. I find that he did all this on behalf of his family and his wife is entitled to an equal share.

154. It is difficult for the Respondent to convince the Court that he was in a miserable marriage yet as a lawyer he knew his rights on issues of seeking legal redress.

155. I find that the Applicant is entitled to half of the shares the Respondent is holding at the Stock Exchange as the Applicant contributed indirectly to the acquisition of the said shares.

Concerning the two matrimonial homes i.e. the Kileleshwa and Miotoni Common House No. 3 at Karen, the two properties are Matrimonial Properties by virtue of being Matrimonial homes under section 6 (1) of the Matrimonial Property Act which defines Matrimonial Property as

(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.

156. I find that the Properties which were acquired from the sale of the Kilelesha Property qualify to be classified as “any other immovable or moveable property jointly owned and acquired by the parties” since the said properties were bought from the proceeds of sale of Matrimonial Property (Kilelesha).

157. I accordingly find that the Wendani Flats and Miotoni Woods House No. 10 are Matrimonial Properties.

158. In a nutshell, I find that the Applicant herein was in gainful employment until she retired and although she did not produce documents to show that she directly contributed to the acquisition of the matrimonial properties listed in paragraph one of the Originating Summons, there is evidence that she took several loans and did improvements on the matrimonial homes and further that she trusted the Respondent who is a lawyer to do investments for the family. She said she used to give the Respondent money on trust basis and she did not keep the records.

159. There is evidence that it is the Applicant who bought the household goods which the Respondent threw out of the Matrimonial home. The Applicant stayed in the Matrimonial homes for long periods and she maintained the homes and cared for the children. There is no indication that the Applicant ever left the matrimonial homes but the Respondent used to travel for short periods of time.

160. In the case of **PWK vs JKG 2015 eKLR** the Court said;

“Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788.”

161. After analyzing English authorities, this Court in **Peter Mburu Echaria v. Priscilla Njeri Echaria, (2007) eKLR** stated in part as follows:

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

162. The Applicant trusted the Respondent wholly to the extent that she did not make any side investments. There is no evidence that she was a wasteful or lazy person or a drunkard.

163. There is evidence that apart from being a full time employee of Kenyatta National Hospital where she worked as a nurse, the Applicant was involved in the business of knitting sweaters and selling tyres.

164. The Respondent has no basis for calling the Applicant a joy rider in the absence of evidence that the applicant was a negative or draining mate or that she was living off the Respondent and doing nothing to eke a living.

165. The Respondent took advantage of the Applicant’s ignorance of the law and attempted to rubbish her non-monetary contribution to the acquisition of the Matrimonial Properties herein. I find that the Applicant contributed towards the acquisition of the Matrimonial properties and that her contribution was substantial and unascertainable but was equal to that of the Respondent since both were in gainful employment and the Applicant had side hassles. The Respondent would not have advanced the Applicant money to set up the tyre business if it was not beneficial to the family.

166. The Respondent is not only cruel but unfair to demand that the applicant who was a working class woman with no history of ever having deserted him to be thrown out of the Matrimonial home as a destitute.

167. I find that the mere lack of records does not mean that the Applicant did not contribute directly and indirectly to acquisition of the Matrimonial Properties.

168. I find that the Maxim “equality is equity” is applicable in this case and I accordingly find that the Applicant is entitled to 50% share of all Matrimonial Properties herein.

169. In **Newgrosh versus Newgrosh (unreported)**; in that case Bucknil LJ said of section 17 as follows:

“That section 17 gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time at any rate, they have been using in common are

disputes which may very well be dealt with by the principle which has been described as "palm tree justice". I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case".

170. However, I find that Motor Vehicle KCC xxx B belongs to M.M,their 3rd born daughter. The same is therefore not matrimonial property.

171. I also find that the Athi River land belongs to the Respondent as he bought it after the marriage had broken down. The said property is also not Matrimonial property in this case.

172. I according allow the Originating Summons dated 16.11.2018 in the following terms:

(i) I declare that the Applicant is entitled to 50% share of the following properties:

(a) Miotoni Common House No. 3, Karen (the Matrimonial Home) situated on LR. No. xxxx/xxx Nairobi.

(b) Miotoni Woods House No. xx

(c) Kahawa Wendani Plots LR Ruiru East/Block/x/xxx

(d) Ngong/Ngong/xxxx Upper Matasia

(e) Shares in the Nairobi Stock exchange held by the Respondent.

(f) Motor Vehicle Reg. KBK xxx Q Toyota Prado

(g) Motor Vehicle Reg. no. KAL xxx B

(ii) I apportion the said properties as follows:

(a) THAT Miotoni Common House No. 3 Karen be and is hereby allocated to the Applicant. The same to be transferred to her and the Respondent to move out within 60 days of this date.

(b) THAT Miotoni Woods House No. 10 Karen is allocated to the Respondent. Since he has sold the same he will retain the proceeds.

(c) THAT the rental proceeds from Kahawa Wendani Flats to be shared at 50:50% between the Applicant and the Respondent with effect from the date said flat were purchased.

(d) THAT Ngong/Ngong/xxxxx Upper Matasia to be shared by the parties on a 50:50 basis. The same to be held by the Respondent in trust for the Applicant because they buried their son there.

(e) THAT the Shares at the Nairobi Stock Exchange to be shared on a 50:50% basis between the Applicant and the Respondent.

(f) THAT Motor Vehicle KBK xxx Q Toyota Prado to remain with the Respondent.

(g) THAT Motor Vehicle Reg. No. KAL xxx B to be transferred to the Applicant.

(iii) If the parties do not agree with the distribution mode by the court within 60 days of this date , the said properties shall be sold and the net proceeds shared equally as between the Applicant and the Respondent within six (6) months thereof.

(iv) THAT in that case, the proceeds of sale from Miotoni woods which the Respondent sold amounting to 112,000,000 to be shared equally on a 50:50 % between the Applicant and the Respondent.

(v) THAT the Respondent to pay the costs of this suit.

(vi) That any party aggrieved by the orders made herein has a right of appeal to the Court of Appeal within twenty eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 24TH

DAY OF JANUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.