



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

ORIGINATING SUMMONS NO. 3 OF 2015

EMK alias A.....APPELLANT

VERSUS

SSS.....RESPONDENT

JUDGMENT

1. Before me for consideration is an Originating Summons (OS) dated 31.3.15 filed by the Applicant, EMK alias A against the Respondent SSS. The Applicant sought several orders and declarations, some of which were granted at the interlocutory stage. The following are the pending orders:

i) A declaration that Subdivision No. xxx/x/MN (CR xxxx/x) (the matrimonial home) registered in the name of the Respondent is jointly owned by the Applicant and the Respondent.

ii) A declaration that the following properties registered in the parties' names separately are jointly owned by them:

- a) Plot No. xx, [Particulars Withheld] Development Plan Department, Reference No. LMU/xxx/x/xx;
- b) Plot No. xxxIV/MN, Takaungu;
- c) Sub-division Mabokoni/xxx, Kinondo;
- d) House in Tudor where the first family lives;
- e) [Particulars Withheld] cottage in Kikambala;
- f) Shamba at Vipingo;
- g) Land in Mpeketoni and Hindi;
- h) Land in Lanet, Nakuru;
- i) L. R. No. xxxx Lamu, Hindi;
- j) Motor vehicle No. KAW xxxM, Noah;
- k) Motor vehicle No. KAQxxxJ, Mercedes;
- l) Motor vehicle No. KAQxxxJ, Prado;
- m) Motor vehicle No. KAZxxxM, Nissan Terano;
- n) Motor vehicle No. KAW xxxQ, H. Van;

- o) Motor vehicle No. KAVxxxCRav 4;
 - p) Motor vehicle No. KBNxxxC, Suzuki;
 - q) Motor vehicle No. KBC xxx Landcruiser;
 - r) Motor vehicle No. KBUxxxD Double Cab pickup.
- iii) An order for the sale, division and/or apportionment of the properties between the parties equally;
- iv) In the alternative, in the event that title and ownership of the suit properties has been transferred to any third party, an order that the Respondent accounts for the proceeds and the same be divided between the parties;
- v) An order that the Respondent do execute documents where necessary to transfer the Applicant's portion in the said properties and in default, the same be executed by the Chief Registrar, Deputy Registrar, Lands Registrar or Registrar of Titles;
- vi) An order that the Respondent be compelled to give a full and frank disclosure to the Applicant on all bank statements and financial records and/or reports of the family business detailing all credit and debit entries in the bank accounts from 1995 to date pending the hearing and determination of the OS. The accounts are:
- i) Standard Chartered Bank Limited - KES [...];
 - ii) Standard Chartered Bank Limited – USD [...];
 - iii) Kenya Commercial Bank Limited;
 - iv) Standard Chartered Bank Dubai;
 - v) Lloyds Bank UK;
 - vi) Standard Chartered Bank Limited;
 - vii) Any other bank where funds may have been transferred to from prior existing banks.
- vii) An order to dissolve and/or wind-up the following companies registered in the joint names of the parties herein including all moveable and immovable assets held in the companies' names and proceeds thereof be shared equally or according their shareholding:
- a) [Particulars Withheld] Cables Distributors;
 - b) [Particulars Withheld] Electrical Limited;
 - c) [Particulars Withheld] Limited, a company with Mr. & Mrs. MH.
- viii) An order that the Respondent does render complete statements of accounts, cash flows and profits in respect of all the above companies
- ix) An order that costs be awarded to the Applicant.

2. The undisputed facts are that the parties herein were married on 5.2.94. They have 3 children whose ages in 2015 when the OS was filed, were given as M, 20 years, N, 15 years and I, 13 years. The Respondent has another wife with whom he has a family, referred to by the Applicant as the first family. The Respondent divorced the Applicant by his *talak* dated 11.10.14.

3. It is the Applicant's case that the suit properties were acquired during the subsistence of the marriage and that she directly and indirectly contributed financially to the acquisition of the same. She averred that out of the properties listed, Plot No. xx, [Particulars Withheld] Development Plan Department, Reference No. LMU/xxx/x/xx, motor vehicles KAW xxxQ and KBNxxxC are in her name while the rest are in the Respondent's name. She uses motor vehicle KAW xxxM for herself and the children.

4. The Applicant stated that she worked in government offices in Nairobi and for [Particulars Withheld] company in Mombasa. She resigned to work in their companies. The Respondent worked with [Particulars Withheld] as a general manager in Nairobi. The Applicant claims that she was involved in acquisition, construction and decoration of the matrimonial home in Nyali. She bought all material that the engineer and supervisor needed. She did this because the Respondent was still in Nairobi. The parties also acquired an old house in Tudor into which the first family moved, after renovating using funds from the family business.

5. The Applicant further stated that she engaged in child care and has brought up their 3 children by herself; took them to school; attended school meetings, functions and activities alone; ensured they ate well; took her eldest child to Nairobi for interview for university and on to Malaysia and settled her there. She also took in and took care of the Respondent's son with first wife and his nephew. She also lived with the

Respondent's cousin for 14 years until her demise at the age of 70. The Applicant stated that she made her contribution by supporting the Respondent in his political campaigns in Lamu in 2007 and 2013. She moved to Mpeketoni and campaigned for the Respondent through various activities such as attending fundraisers, distributing t-shirts, caps, funds, aid, crutches. She also accompanied the Respondent to present his papers to IEBC.

6. The Applicant further stated that she and the Respondent parties incorporated the 3 companies listed in the OS. She developed all the accounting and administrative systems as well as the brand for the companies. She also trained all staff in the companies. She further averred that the parties were awarded a tender for a power plant project in Athi River in respect of which she prepared all the tender documents. She also accompanied the Respondent on 2 business trips to China, related to the project. At the [Particulars Withheld] farm, she planted vegetables for sale and for family consumption.

7. The Applicant went on to stated that following the divorce on 11.10.14, the Respondent married a third wife and proceeded to excludethe Applicant from the management of the companies. In spite of the Applicant being a signatory to the family business accounts, the Respondent has excluded her and kept her in the dark on the operations of the same.

8. In his replying affidavit of 8.5.15, the Respondent asserted that the OS is incompetent as the issue of division of property can only be done under Islamic law. He stated that Mvita Cables and [Particulars Withheld] Electronics (K) Limited ([Particulars Withheld]) were not profitable and only lasted a few years. [Particulars Withheld] cables was engaged in selling [Particulars Withheld] Cables exclusively. The business was however closed in 2009. He denied that any funds from these companies were used in the purchase of the suit properties. The Respondent denied that the Applicant was involved in the management of the companies and was only a paper director without any contribution. She did not work, deliver or generate any income for the companies.

9. The Respondent further stated that the suit properties were purchased from his earnings, allowances and savings from his employment as manager, with [Particulars Withheld]. He purchased Plot xxx, Nyali in 1998 and built his house without the participation or contribution of the Applicant. He engaged an architect and a contractor and civil engineer and the Applicant did not engage in the construction. Although he worked in Nairobi, he would travel to Mombasa every Friday to inspect the construction. According to the Respondent, the funds for purchasing and renovating the Tudor house were from proceeds of sale of his house in Lavington, which he sold in 2004 for Kshs. 18,000,000/=. The Respondent further denied that the Applicant was the primary caregiver of the children as they were often with the house help. He also denied that she participated in his election campaigns and further stated that she went to China, not for business, but for holiday.

10. The Respondent denied that the Applicant contributed to the acquisition of any of the properties. Plot No. Mabokoni/xxx/Kinondo was purchased in 1989 before he married the Applicant. He purchased all the other properties with his own finances. The purchase of the motor vehicles was financed from his savings. Motor vehicles KAQxxxJ and KAQxxx do not belong to him but to his son. He purchased Plot No. xx, [Particulars Withheld] Development Plan Department, Reference No. LMU/xxx/x/xx and motor vehicles KAW xxxQ and KBNxxxC for the Applicant. As regards the bank accounts listed by the Applicant, the Respondent denied any knowledge of the bank accounts other than the 2 Standard Chartered Bank Accounts held by [Particulars Withheld] Cables.

11. The matter proceeded to trial and parties presented their evidence by means of their affidavits, documents and oral testimony. Thereafter parties filed their written submissions as directed by the Court.

12. I have given due consideration to the OS, the rival affidavits, documents, testimony as well as the written submissions by the parties. The issues that fall for determination are:

- i) Whether Islamic law is applicable in this matter.
- ii) Whether the Respondent is polygamous and the law applicable in polygamous marriages.
- iii) Whether the Applicant has proved existence of any family businesses.
- iv) Whether the Applicant contributed to the acquisition of the suit properties as to entitle her to the benefit of the same.
- v) Whether the registration and transfer of motor vehicles in favour of third parties is void for want of spousal consent.
- vi) Whether the Respondent is entitled to a refund of moneys paid to the Applicant pursuant to this Court's order of 22.6.15.
- vii) Who should bear the costs.

Whether Islamic law is applicable in this matter.

13. The Respondent's contention is that this matter should be determined in accordance with Islamic law, given that both parties are Muslim. On her part, the Applicant submitted that she opted to file this case in this Court under the Matrimonial Property Act (the MPA). According to her, Section 3 of MPA does not compel a party who professes Islam, to file a matter in the Kadhi's Court, but gives such party a choice. It was submitted that this was in tandem with Article 170(5) of the Constitution of Kenya, 2010. The Applicant further contended that the Kadhis' Courts Act does not oust the jurisdiction of this Court. The Applicant also asserted that she opted to file the case in this Court which has the requisite jurisdiction to deal with the same.

14. For the Respondent, it was submitted that Section 3 of the MPA recognizes the right to freedom of religion guaranteed by Article 32 of the Constitution by allowing the application of Islamic law on issues relating to matrimonial property. As such a Muslim has the discretion to

have issues relating to matrimonial property governed by Islamic law. Since the MPA does not define Court, a party may approach any Court provided that the law applied, is Islamic law. The Respondent submitted that he has all along expressed his wish that the matter be dealt with under Islamic law.

15. The MPA is an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. Section 3 of the Act relied on by both parties provides:

A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.

16. Section 3 is not couched in mandatory terms and gives parties a choice as to which law will govern matters relating to matrimonial property. Looking at the submissions by the Applicant, it would appear that what she opposes, is having this matter dealt with by the Kadhi's Court. The submissions dwell on the choice between submitting to this Court and the Kadhi's Court. The case of S H Hv M H Y [2015] eKLR, relied upon by the Applicant is not very helpful. In that case, Meoli, J. stated that a Muslim may opt not to submit to the jurisdiction of the Kadhi's Court. This, with respect, is not the issue under consideration herein. The issue is whether Islamic law is applicable or not.

17. It is not disputed that the parties herein profess the Muslim faith. The documents on record show that prior to her marriage to the Respondent, the Applicant was a Catholic and known as EN. However, on 17.2.95, she converted to Islam and adopted the name, A. The Certificate of Confessing Islam was issued to the Applicant on 8.3.05 by the Chief Kadhi. The parties' marriage took place on 5.2.94, under Islamic law. On 11.10.14 however, the Respondent pronounced *talak*, and the marriage was dissolved, under Islamic law. For the 20 years they were married, the Applicant lived as a Muslim. Her testimony is that she lives within a Muslim community. The Applicant has since remained a Muslim and indeed when testifying in Court, she took oath by means of the Quran as a Muslim. The foregoing is indicative of a party who by all intents and purposes elected that all matters relating to her personal status, be conducted under Islamic law. It cannot therefore be that when it comes to division of matrimonial property, she abandons the law of her religion and chooses the MPA. My finding therefore is that the law applicable in this case is Islamic law. Chitembwe, J. expressed a similar view in AWA v HDD [2018] eKLR, cited by the Respondent, where he stated:

As held in the case of MSR VS NAB, a dispute involving Matrimonial Property of a Muslim can be heard by either the subordinate court including the Kadhi's Court or the High Court provided that the Islamic law is used as the determinant factor. In this case both parties profess the Islamic faith.

18. Chapter Four of the Constitution of Kenya, 2010 contains the Bill of Rights. Part 2 thereof stipulates the rights and fundamental freedoms guaranteed to all persons. Article 45(3) provides:

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

19. Certain rights and fundamental freedoms are however not absolute and Article 24 places certain limitations thereon. In matters relating to personal status, marriage, divorce and inheritance, the constitutional principles on equality do not apply to Muslims, in the same manner as they do to other persons. Article 24(4) provides:

The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

20. In matters relating to personal status, marriage, divorce and inheritance, Islamic law applies. Accordingly, the equality provisions in Chapter 4 of the Constitution shall be qualified to allow for the Application of Islamic law.

Whether the Respondent is polygamous and the law applicable in polygamous marriages

21. The Respondent submitted that he is married to 2 other wives. Citing Section 8 of the MPA, the Respondent contended that the Applicant excluded his 2 other wives, who he said have played different roles in his life. It is common ground that the parties were in a polygamous marriage. At the time of his marriage to the Applicant, the Respondent was married to his first wife and the Applicant became his second wife. He subsequently took on a third wife. The Quran permits a Muslim to marry up to 4 wives, provided that he is just and fair to all. S?rah an-Nis? 4:3 provides:

And if you fear that you shall not be able to deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hands possess [i.e., slaves]. That is more suitable that you may not incline [to injustice].

22. Although he cited Section 8 which makes provision for property rights of parties in a polygamous marriage, the Respondent did not state what he wishes to Court to make out of his submissions. If he is however claiming any property rights on behalf of the other wives, it was incumbent on him to produce evidence to support the claim. This he did not do. He did not even specify the different roles he claimed his other wives played in his life. Accordingly, the only finding this Court can make is that the Respondent is indeed polygamous and Section 8 of the MPA is indeed the law applicable to polygamous marriages. It must however be remembered that the Court did, at the outset, make a finding that the applicable law in these proceedings is Islamic law. Notably, the Respondent did not address the Court on Islamic law on polygamous marriages.

Whether the Applicant has proved existence of any family businesses

23. The Applicant submitted that the three companies belong to her and the Respondent. She urged the Court to divide them equally between them in equal shares. The Respondent contended that from the testimony of the parties and documents produced, it was clear that no family businesses existed. The Respondent argued that the Applicant failed to prove that [Particulars Withheld] Cables and [Particulars Withheld] are in operation, but he was able to show that there was no ongoing family business. The Applicant was well aware that the companies were closed by both parties as they were loss making ventures. According to the Respondent, [Particulars Withheld] Cables only operated for 18 months between 2008 and 2009, while [Particulars Withheld] was dormant for a long time and its bank accounts were closed in 2004.

24. The documents on record show that [Particulars Withheld] Cables ([Particulars Withheld] Cables Distributors Limited) was incorporated on 20.8.08 with the parties as directors and holding 500 shares each. [Particulars Withheld] (S Electrical Limited) was incorporated on 22.8.03 with the parties as directors and holding 1 share each. No evidence of the existence of [Particulars Withheld] Limited was placed before the Court. The Applicant exhibited a bank statement in respect of [Particulars Withheld] Cables' account number [...] with Standard Chartered Bank, for the period 1.3.14 to 19.3.15, with a closing credit balance of US\$ 5,000 as at 28.2.15. Contrary to the assertion by the Respondent that the company operated between 2008 and 2009, it is evident from the bank statement that the company was active as late as February 2015. Indeed, the Respondent did himself exhibit audited accounts for the period ended on 31.3.2010. The Court therefore finds that [Particulars Withheld] Cables was in existence at the time the OS herein was filed. Further, in his replying affidavit, the Respondent stated at paragraph 23(viii) that **"Land in Lanet, Nakuru bought in 1996 before we had any family business."** Having so stated, he is estopped from saying that there was no family business. What is not clear to the Court however, is the income earned by the companies and how the same was applied, as none of the parties provided any evidence in this regard.

25. The Applicant further prayed for an order for the dissolution and/or winding up of [Particulars Withheld] Cables Distributors, [Particulars Withheld] Electrical Limited and [Particulars Withheld] Limited, a company with Mr. & Mrs. MH, including all moveable and immoveable assets held in the companies' names and the proceeds thereof be shared equally or according to their shareholding. She also prayed for an order that the Respondent does render complete statements of accounts, cash flows and profits in respect of all the companies. The orders sought relate to limited liability companies and cannot be granted by this Court in a matrimonial property cause. Dissolution or winding up of companies is governed by the Companies Act and not the MPA. Any claim or question on the operations of a company by a shareholder who feels excluded therefrom, may only be made under the Companies Act. It is also noted that no details of the listed bank accounts were availed to the Court. Accordingly, these prayers must fail.

Whether the Applicant contributed to the acquisition of the suit properties as to entitle her to the benefit of the same

26. It is the Applicant's case that she made non-monetary contribution towards the acquisition of the suit properties. Specifically, she undertook household responsibilities and was also involved in caring for the children. She participated in school events and activities. There is no evidence that the Respondent ever participated in the children's school activities. The Applicant also actively participated in the Respondent's political campaigns in Lamu. There are pictures of her in a political rally and preparing branded t-shirts for him. She also said that she did the interior design of her matrimonial home as well as supervising its construction. On his part, the Respondent contended that the Applicant made no contribution towards the purchase of the suit properties and he engaged professionals for the construction of the house and supervised it himself. That in fact the funds for the purchase and development of the properties came from his earnings, allowances and savings.

27. There is a dearth of authorities on Islamic law on division of matrimonial property in our jurisdiction. The Court has therefore turned to other jurisdictions.

28. In the Malaysian case of Boto' bteTaha v Jaafar bin Muhamed [1985] 2 MLJ 98 the plaintiff therein, who had only been paid maintenance for the period of eddah upon divorce, sought a declaration that she was entitled as to one-half in all the properties acquired during her marriage to the defendant and to one-half of all the income derived from the properties since their divorce. The plaintiff had accompanied the defendant on his business trip and gave up employment because of the marriage, and this amounted to her joint efforts in the acquisition of the parties concerned. The Court held that although the plaintiff took no direct part in the defendant's fish business, her constant companionship was responsible for the defendant's peace of mind which enabled him to function effectively as a businessman. The share of one-third was awarded to the plaintiff because the evidence showed that she was helping the plaintiff's business indirectly as a partner on his business trip.

29. When spouses live together, it is accepted that they support each other emotionally, socially, financially, materially, etc. Through this support, the family grows numerically and even materially, in terms of assets. Often, the husband goes out to work and his contribution to the acquisition and development of matrimonial property is financial, while the wife stays home and engages in child care as well as improvement and conservation of the family home and ensures its warmth and harmony. This is the situation in the present case. The Respondent's contribution to the acquisition of the suit properties is financial while that of the Applicant is non-financial. The Applicant gave up her employment and was engaged in bringing up their 3 children in Mombasa while the Respondent was working in Nairobi. For 20 years, she kept the matrimonial home and made it conducive for the bringing up of the 3 children and no doubt for the Respondent. This no doubt afforded the Respondent, who worked in Nairobi, the peace of mind necessary to apply himself at work and engage in business, which in turn enabled him to acquire the suit properties. The Applicant also accompanied the Respondent on business trips or pleasure and even actively campaigned for him in his political contests in Lamu. The Applicant thus contributed albeit indirectly and in non-monetary terms, to the acquisition of the suit properties.

30. In an article titled The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change published in The American Journal of Comparative Law, Volume 42, Issue 3, Summer 1994, Pages 543-580, Prof. Donald L. Horowitz of the Duke University School of Law, writing on merging and emerging law on marital property cited H. S. S. bin H. J. Buang who in New Frontiers in Harta Sepencarian 5-9 (1988) stated:

Harta Sepencarian is an institution of marital property. The historical core of the institution holds that property (usually land) acquired or improved during marriage by means of the joint resources or joint labor of husband and wife belongs to both of them and will be divided into shares upon divorce or death. The woman's share in such property, titled in her husband's name, has been variable over time and place, but generally it has been put at one-half, one third, or a fraction directly proportionate to her

contribution.

31. From the foregoing, it is evident that non-monetary contribution by spouses must be taken into account in the division of matrimonial property acquired or improved during coverture, notwithstanding that property is in the name of one spouse.

32. The Court has also looked to the Kadhi's Court for guidance, notwithstanding that that Court is subordinate to this Court. This is because it is recognized that Kadhis are a repository of Islamic law and their opinion can be relied, on even by this Court. The Quran is the primary source of Islamic law and Kadhis are well versed in the teachings of the Quran. This is why Section 65(1)(c) of the Civil Procedure Act provides as follows:

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

(c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”

33. The Quran recognizes that each spouse is entitled to their property. S?rah an-Nis? 4:32 as follows:

“...For men is a share of what they have earned, and for women is a share of what they have earned...”

34. It is clear from this provision of the Quran, that earning, is a key factor in determining each spouse's entitlement to matrimonial property. Put differently, division of matrimonial property must be based on each spouse's contribution. From the evidence in the present case, it is quite evident that the Applicant made no financial contribution towards the acquisition or development of the properties. However, she made her non-financial contribution, which is recognized in Islamic law.

35. In the case of DBD v HDW [2019] eKLR, Abdulhalim H. Athman, Principal Kadhi had this to say concerning regarding matrimonial property:

The concept of matrimonial property as understood in common law has no legal foundation in Islamic law. However Islamic law prohibits consumption of each other's wealth unjustly. It is factual that during the period of marriage, spouses either directly or indirectly contribute to the acquisition of property. Such contribution of each spouse, whatever name given to it, must, of necessity and justice, in the event of divorce, be returned to him or her. To say otherwise is to unjustly consume effort and wealth of others which is prohibited in Islam in the strongest terms possible.

36. The Hon. Kadhi recognized that during the subsistence of marriage, spouses contribute to the acquisition of property either directly or indirectly. Such contribution of each spouse in acquisition of property must be returned to them. Islamic law prohibits consumption of each other's wealth unjustly.

37. And in AGC v SSS [2019] eKLR, the Kadhi's Court considered the issue of division of matrimonial properties between the parties therein. A. Ishaq Hussein, Senior Resident Kadhi stated:

In Al-Turuq al- Hukmiyyah Fi al-Siasah-al-Shariyyah Regarding the property registered under the name of either the husband or wife, during the subsistence of marriage, Al- Imam IbnuQayyim stated that: -

“It cannot be assumed based purely on what is held in hand or having authority over a name by having the name on a land title and the likes becoming the rights of only a single person if the property is acquired during the duration of the marriage, in fact its existence is of no consequence. In relation to this, an allusion can be made to the appliances in the house and other properties for example a house, a piece of land and the likes that are acquired during the time when both are still husband and wife unless there is proof to show that the properties were divided or the rights of each one separately”.

38. According to A- IIQ, registration in the name of one spouse, of a property acquired during the subsistence of the marriage, does not preclude the other spouse from the benefit of the same. It would therefore appear that acquisition during marriage is sufficient to entitle spouses to matrimonial property.

39. In S?rah an-Nis? 4:29 the Quran warns:

“O you who have believed, do not consume one another's wealth unjustly...”

40. After 20 years of marriage, giving birth and raising 3 children and managing and keeping the home, assisting the Respondent in his businesses and in his political campaigns, hosting the Respondent's son and nephew as well as his cousin in her home for extended periods, it would be unjust that the Applicant would leave the marriage empty handed. Accordingly, the non-monetary contribution of the Applicant herein must be recognized and taken into account. Further, that non-monetary contribution by the Applicant, should not be weighted any less than the monetary contribution by the Respondent. To do so would be to act unjustly which is prohibited in Islam.

41. It is common ground that Subdivision No. xxx/xMN (CR xxxx/x) was the matrimonial home of the Respondent and the Applicant. The Applicant continues to reside in this home with her children, even after the divorce. The house in Tudor is the matrimonial home of the Respondent and the first wife. It would appear that the intention of the Respondent has always been that the 1st family resides in Tudor while

the 2nd family resides in Nyali.

42. The evidence further shows that Plot No. 19, Hongwe Development Plan Department, Reference No. LMU/xxxx/xx motor vehicles KAW xxxQ, H. Van, KBNxxxC, Suzuki, are in the Applicant's name. The Respondent stated that he bought these properties for her. The Respondent further stated that he bought motor vehicle KAW xxxM, Noah and registered it in his name, but gave it to the Applicant. My finding is that these are gifts given to the Applicant by the Respondent.

43. Motor vehicles KAZxxxM, Nissan Terano, KAVxxxCRav 4, Suzuki, KBC xxx Landcruiser, and KBUxxxD Double Cab pickup are in the name of the Respondent and it is only fair and just that they remain with the Respondent.

44. Sub-division Mabokoni/xxx, Kinondo was purchased in 1989 before the parties married. There is no evidence that the Applicant made any contribution towards the improvement on the same. Plot Number xxx/IV/MN, Takaungu, [Particulars Withheld] cottage in Kikambala, Shamba at Vipingo, Land in Mpeketoni and Hindi, Land in Lanet, Nakuru and L. R. No. xxxx Lamu, Hindi were all acquired during the subsistence of the parties' marriage. The Court has found that the Applicant made non-monetary contribution towards the acquisition and improvement of these properties. And is thus entitled to a benefit of the same.

Whether the registration and transfer of motor vehicles in favour of third parties is void for want of spousal consent

45. The Applicant contends that motor vehicles KAQxxxJ and KAQxxxJ belong to the parties but were registered in favour of the Respondent's son and his wife. The Applicant contends that funds from the 2 companies were used to import the vehicles. The vehicles were being used by the Applicant and were removed from the compound upon the talak. She further contends that because no evidence was adduced to show where the Respondent's son and wife got the money to purchase the 2 vehicles, the registration of the vehicles in their favour should be declared null and void. The Respondent's position regarding the 2 vehicles is that they belong to his eldest son. He exhibited logbooks and import documents. The logbooks indicate that KAQxxxJ is registered to RC while KAQxxxJ is registered to MSS. S. The import documents for the vehicles are in the name of M. The documents also show that it was his bank account at Lloyds TSB that was debited with the funds for the purchase of the vehicles. It is trite law that he who alleges must prove. Section 107 of the Evidence Act, placed the onus on the Applicant to prove that the allegation that the vehicles were purchased with funds from the 2 companies. There is no evidence from the Applicant to support her allegations. She therefore failed to discharge the burden placed on her by law. Accordingly, the prayer that the registration of the vehicles in the name of Muhammad and his wife be declared null and void must fail.

Whether the Respondent is entitled to a refund of moneys paid to the Applicant pursuant to this Court's order of 22.6.15

46. The Respondent submitted that he is entitled to a refund of the amount paid by him pursuant to the order of 22.6.15. He contends that the order was made on the basis of the allegation by the Appellant that there were ongoing family businesses. The Court should, after finding that there were no family businesses in existence, order a refund of the amount paid.

47. In the order of 22.6.15, Muriithi, J. directed the Respondent to pay to the Applicant the monthly ***"the sum of Ksh. 50,000/-per month, not as maintenance due, but on account of her share in the matrimonial property the full extent of which shall be determined upon the full of the Originating Summons..."*** The learned Judge went on to direct that ***"should the trial Court determine that the applicant was not entitled to a share in the property acquired during her marriage with the respondent and registered in the name of the Respondent or otherwise then the amount paid to her in the interim may be recovered from the properties registered in her sole name."***

48. A plain reading of the order indicates that the recovery of the amount paid to the Applicant by pursuant thereto, was predicated on this Court finding that the Applicant was not entitled to the suit properties registered in the Respondent's name and acquired during the marriage. Contrary to the contention by the Respondent, the order for refund was not predicated on the non- existence of family businesses. In any event, the Court has not found that the Applicant is not entitled to the suit properties.

Who should bear the costs

49. On the issue of costs, it is the Applicant's contention that the Respondent should pay the same as his acts were mainly intended to leave her destitute. She however urged the Court to, in the alternative, exercise its discretion and direct that each party bears own costs. The Respondent denied the allegation and contended that he has been housing the Applicant for the entire duration of the trial. He prayed that he be awarded costs as the Applicant failed to prove contribution, and in the alternative that parties bear their respective costs.

50. The law provides that costs follow the event and the award of costs is at the discretion of the Court. Section 27 of the Civil Procedure Act provides:

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

51. This is a family matter. The parties were married for 20 years and have 3 children together. They have been engaged in this matter since 2015 which has no doubt taken a toll on them. The Court is mindful not to further exacerbate the already hostile relationship between the parties by condemning one party to meet the costs herein. In any event, the OS has only partially succeeded.

52. In the end, after taking into consideration the totality of the evidence adduced in this case and the applicable law as analyzed herein, I make the following orders and declarations:

i) Plot No. xx, [Particulars Withheld] Development Plan Department, Reference No. LMU/xxx/xxx, motor vehicles KAW xxxQ, KBNxxxC and KAW xxxM, are the sole property of the Applicant;

ii) Subdivision No. xxx/x/MN (CR xxx/x) is jointly owned by the Applicant and the Respondent in equal shares.

iii) The following properties are jointly owned by the Applicant and the Respondent in the ratio of 30:70 respectively:

a) Plot No. xxxIV/MN, Takaungu

b) [Particulars Withheld] cottage in Kikambala

c) [Particulars Withheld] at Vipingo

d) Land in Mpeketoni and Hindi

e) Land in Lanet, Nakuru

f) L. R. No. [Particulars Withheld] Lamu, Hindi

iv) The Respondent shall execute transfer documents to give effect to the orders herein and in default, the same shall be executed by the Deputy Registrar of this Court.

v) Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 24th day of July, 2020

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicant**

..... **for the Respondent**

.....**Court Assistant**