



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MATRIMONIAL CAUSE NO. 10 OF 2017 (O.S)

SNM.....PLAINTIFF

VERSUS

MMT.....DEFENDANT

JUDGEMENT

1. By Originating Summons for Revocation dated 18th May, 2017, the Applicant/Plaintiff herein, **SNM**, seeks the following orders.
2. According to the Plaintiff, she was married to the Defendant in 1954 under Kamba Customary Law which marriage was later formalised under the *African Christian Marriage and Divorce Act* (now repealed) on 17th December, 1977 and a marriage certificate issued. During the subsistence of the marriage, the Plaintiff and the Defendant acquired many properties together one of which they built their matrimonial home and some of which they devolved to their children. According to the Plaintiff she has actually contributed to the purchase, maintenance and/or improvement of all the properties and accordingly, they form part of the matrimonial property in the marriage between the Plaintiff and the Defendant.
3. It was her case that before they got married in 1977 they had lived together since 1954 and since none of them was in formal employment, they started businesses in order to support their growing family. In that respect, they started a hotel in a place called Kamuthanga, Machakos County and they assist each other in running it. She disclosed that in 1963, she used to walk for 4 km to white settler's **Mr. Wiliam**, a farm where she would buy milk and take it to their hotel. Subsequently, they expanded their business venture by opening a butchery in Athi River, Mavoko Municipality which business was successful and the Defendant looked for properties for them to acquire since as a man he knew where to get the best deals. The Plaintiff also expanded their income stream by opening a business of selling cooking oil which he bought from Kenya Meat Commission and sell for a profit in Kaloleni Market, Machakos County, which business was flourishing since most people could not afford to buy branded cooking oil bought from her. The Plaintiff also started poultry business where she kept chicken and sell eggs. She was also involved in the sale of sisal fibre.
4. Through all these income generating ventures, it was her case that she had her own money and the Defendant would sometimes borrow or use her money whenever the other businesses required money. All these period she took care of their children while the Defendant managed the affairs of some of the businesses like the butchery in Athi River.
5. The Plaintiff averred that in 1974 they bought shares of Lukenya Ranching and Farmers Society from her sister in law **TFM** and her husband for Kshs 11,000/=, the Defendant paid Kshs 6,000/= and she paid the balance paid at later of Kshs 5,000/=. Out of the sale of their shares, they were allocated by the Society Mavoko Town Block xxx, xxx and xxxx.
6. It was therefore her plea that the properties acquired by them from 1974 be divided equally and the Defendant be ordered to compensate her half of the proceeds the Defendant was paid for the properties he has sold without his consent. It was her case that they had even agreed with the Defendant that LR Mavoko Town Block xxxx be divided in blocks of 5 acres to their children.
7. It was disclosed by the Plaintiff that on 28th June 2017, she filed Machakos Divorce Cause Number 13 of 2017 against the Defendant and the said **DMM** as a Co-respondent and that the said suit crystallised to a Judgement dissolving their union and a *Decree Nisi* was issued on 8th March 2018 and made absolute on 10th August 2018.
8. It was contended that the Defendant has been disposing off properties subject of this suit in an attempt to prejudice the Plaintiff's interests in the properties should the court find merit in her claim. According to the Plaintiff, the Defendant recently he sold L.R No. Mavoko Town Block x/xxxx to Dee Properties Limited for a consideration of **Kshs. 23,500,000/=** without sanction of the court in violation of the common law principle of *les pendens*. Further, the Defendant also sold off L.R No's Mavoko Town Block xxxx and Mavoko Town Block xxxx. The Plaintiff therefore urged the court notwithstanding the said sales to draw an adverse reference against the Defendant and to determine her

share is in the said properties and to factor in the huge payouts the Defendant has received from the sales.

9. It was pleaded that the Defendant has, on several occasions intimated that he intends to dispose of some of the properties without the Plaintiff's information and/or consent and specifically, has already disposed of the property known as Machakos Town Block xxxx to third parties without the Plaintiff's knowledge or consent. Subsequently, it was averred that the Plaintiff has in the past lodged caveats and cautions against the properties known as Mavoko Town Block xxxx, Mavoko Town Block xxxx and Muka Mukuu Farmers and Co-op Society Plot Noxxxx.

10. According to the Plaintiff, on 23rd February, 2017, the Defendant moved to the court to have the said cautions discharged which application was allowed by the court on 11th May, 2017 on the ground that the Plaintiff had not instituted divorce Proceedings to warrant her claim on the matrimonial property and the same were discharged.

11. The Plaintiff averred that during the subsistence of the marriage, she and the Defendant she acquired the following properties which in her view form part of the matrimonial property:

- (a) Mavoko Town Block xxxx measuring approximately 16.15 Ha,
- (b) Machakos Town Block xxxx measuring approximately 0.8255 Ha
- (c) Mavoko Town Block xxxx measuring approximately 2.140 Ha
- (d) Mavoko Town Block xxxx measuring approximately 8.090 Ha
- (e) Plot No. xxxx Membership No. xxxx Muka Mukuu Faremers Co-op Society measuring approximately 8 acres.
- (f) L.R xx Athi River Town Fully developed plot with 26 Residential Units,
- (g) A Quarter (¼) Plot at Katelembo,
- (h) A Quarter (¼) Plot at Kinanie.
- (i) Commercial Plot at Kinanie Market developed with shops,
- (j) 75 shares at Muka Mukuu Farmers Co-op Society Membership No. xxxx,
- (k) Shares at Lukenya Ranching and Farming Co-op Society Membership No.xxxx,
- (l) Shares at Katelembu Athiani Muputi Farming and Ranching Co-op Society Membership No. xxxx
- (m) Shares at Ngomano Business Group with Plots at Kaloleni Market developed with Commercial building and plots
- (n) Property at Kyamwilu-Ngelani Land bought from Mwilu/Nduva approximately 2.5 Acres,
- (o) Inherited properties,
 - i. Kwa Mavala,*
 - ii. Kyamwilu (with the Matrimonial Home).*

12. In pursuit of her determination of the division of matrimonial properties, the Plaintiff filed Matrimonial Cause No. 169 of 2009 in which the Defendant had voluntarily agreed to have the court order the sale of Mavoko Town Block xxxx and the proceeds thereof be shared equally with the Petitioner, but the same was dismissed on 16th March, 2017 for non-attendance. The Plaintiff therefore averred that the said events have left her interest in the said matrimonial properties exposed to possible sale or alienation and there is imminent apprehension that the Defendant shall proceed with the disposal of the properties with the withdrawal of the cautions.

13. It was averred that the Defendant deserted the matrimonial home around 1998 and he has established another home with a lady called **Mx** and they live in Kinanie, Athi River, Machakos County.

14. Since the marriage between the Plaintiff and the Defendant is monogamous, it was the Plaintiff's position that she is the only spouse to the Defendant.

15. In her oral evidence, the Plaintiff who testified as PW1 stated that they had 9 children – 7 sons and 2 daughters and that at the time the Defendant deserted the family, she left the Plaintiff where his parents were. She stated that at the time of their marriage she was selling paraffin and was also involved in poultry keeping. Her evidence was that the Defendant was not working and that they were both engaged in butchery and hotel business in which she was helping. While the Defendant was engaged in purchasing the animals for slaughter, the Plaintiff would take care of them before they were slaughtered in their slaughterhouse in Nairobi West in a rented premises before they

moved to Athi River. However apart from one parcel of land which was occupied by the Defendant's parents, at the time of their marriage, the Defendant had no other property.

16. It was her evidence that she approached her brother who sold to her a piece of land at Lukenya at the reduced cost of Kshs 11,000/= based on the family relationship though the actual costs was Kshs 15,000/=. They also had 4 shares in Lukenya Ranching Society, Mukaa Mukuu, at the costs of Kshs 5,000/= together with her brother. According to her evidence she sold the goats she got during their wedding for the sum of Kshs 4,000/= which she gave to the Defendant to pay for the shares. Apart from the said shares, they had other properties in Machakos, Athi River and Mavoko as itemised in the Originating Summons as well as plot xx Athi River. She disclosed that they also had rental houses which they put up together though it was the Defendant who was collecting rents accruing therefrom and was not sharing the same with the Plaintiff. In support of her case the Plaintiff produced the certificate of official searches, copies of the title documents and allotments and the decrees both nisi and absolute.

17. The Plaintiff averred that though she hears that the Defendant has secretly sold land in Lukenya - Mavoko Town Block xxxx - she was never given any money. In this regard, she produced the sale agreement in respect of the said property. With respect to land parcel No. Mavoko Town Block xxxx, she disclosed that she lodged a caution stopping the Defendant from selling the same. She referred to the letters addressed to the department of lands regarding the same and a letter evidencing the fact that the Defendant was a shareholder in Ranching Society since the Plaintiff was illiterate and did not know how to write. She in support of this fact produced the membership card and agreement for sale in respect of Mavoko Town Block xxxx showing that the property was sold at Kshs 4,000,000/=

18. The Plaintiff testified that all the properties were in the Defendant's name since they were living very well and she did not know how to read. According to her, she was the one taking care of the children with the help of her parents. However, they together distributed 40 acres of the Lukenya land to their 8 children with each child getting 5 acres and one of them, **Mutuku Makato**, was in fact staying there in a house constructed for him by the Defendant. The said children, she averred were all educated to university level with the 9th being a married daughter.

19. It was the Plaintiff's case that upon their marriage they stayed at Mutituni, a place now called Kyamwilu Ngelani which the place where she still stays, the same place the Defendant's parents were buried.

20. It was therefore her claim that she is entitled to all the properties she bought since she has never sold any of them. According to her all the properties registered in the Defendant's name are also hers since the Defendant was not working and they got all the said properties during the existence of their marriage and apart from one property occupied by the Defendant's parents which they were given as a gift and the cows belonging to the said parents, the Defendant had nothing as he was still very young. As regards the properties sold by the Defendant, the Plaintiff sought an order for the refund of the monies realised therefrom as well as a share of the same. She reiterated that she used to perform casual jobs for sustenance.

21. In cross-examination the Plaintiff denied that the Defendant educated the children and insisted it was her brother and her parents who did so.

22. In support of her case, the Plaintiff called **TFM**, who testified as PW2. The said witness had recorded and filed an affidavit in which she deposed that she was the wife of the late **FMW**, who was the Plaintiff's brother. By the time she got married, the Plaintiff was already married and she had known the Plaintiff for 54 years.

23. It was her deposition that she together with her husband owned shares in Lukenya Ranching and Farming Co-operative Society. In 1974, her husband's parents, **WM** and **NW**, implored them to sell to their daughter, the Plaintiff herein, their share in Lukenya Ranching Society and along with the three Plots under it at a discounted price of Kshs 11,000/= since they were selling to a family member. Pursuant thereto, she was paid by the Defendant Kshs. 6,000/- and the Plaintiff paid the balance of Kshs 5,000/= at a later date. While she did not know the plot number, it was her evidence that it was the plot which her husband shared with the Defendant and that they also shared a plot at Mukaa Mukuu both of which plot now belong to the Defendant and were never included in the estate of her deceased husband when she applied for grant of letters of administration. She however testified that all the properties of the Defendant he got while they were together with the Plaintiff.

24. It was her deposition that the Plaintiff who used to be a business lady ran a business of selling cooking oil and items woven from sisal. The Plaintiff and the Defendant were also running hotel and butchery businesses since the Defendant has never been in any employment. As the It was disclosed that she went with the Defendant the Society and she signed as a witness to the sale though the Defendant only wrote his name. To the Plaintiff, she assumed that they had agreed he would hold it in trust for the family.

25. It was averred that out of the sale of the said shares, the Maingi's who were their neighbours at Kyamwilu Village, Machakos County, ran businesses together as the Defendant was never been employed and as a result of the said transaction, benefited from being allotted Mavoko Town Block xxx, Mavoko Town Block xxxx and Mavoko Town Block xxxx.

26. It was however averred that the Defendant deserted his home at Kyamwilu village and went to live with another woman. According to PW2, all the Defendant's children were educated by her husband.

27. In reply to the Originating Summons, the Defendant stated that the properties mentioned by the Plaintiff are not matrimonial property as the same were acquired by himself with his sole efforts without any input of any nature by the Plaintiff in their acquisition. It was his case that the Plaintiff has not demonstrated that she contributed financially or by any other material means in the acquisition of the said properties. In any case, he averred, most of the properties listed therein are not his properties hence the Plaintiff cannot lay a claim to them.

28. It was his case that he disposed of most of the properties while educating the children born out of his marriage with the Plaintiff who are now adults, some of whom have settled on some of the properties. According to him, he did not require the consent of any one to dispose of

his properties. The Defendant, while conceding that the Plaintiff has lodged cautions against some properties which he owns, was of the view that the Plaintiff's intention is to enrich herself at his expense as she has never contributed any material thing(s) in their acquisition hence the cautions lodged have no basis and should be removed.

29. The Defendant however admitted that the Plaintiff filed a civil suit being Machakos Civil Suit No. 169 of 2009 which was dismissed. He therefore reiterated that the Plaintiff has no valid claim(s) over any of the properties stated in the supporting affidavit. And the Originating Summons should be dismissed with costs.

30. In his evidence, the Defendant stated that he did not buy any of the properties that the Plaintiff with her since the Plaintiff found him with the land, the house and the cattle. According to him, he used to do business of buying cattle at Kitui which he would sell to Mavoko Kenya Meat Commission. Accordingly, they did not buy any property together. He however confirmed that they had 9 issues of the marriage, 7 boys and 2 girls all of whom were educated by him to university level. However, after completing their education, the said children ganged together with the Plaintiff and brought his home down.

31. According to the Defendant, his said children built a house for the Plaintiff, connected power to it and chased him away. They took his cattle and his 40 acres' land. After that he went away and remarried since he was not being supported. He stated that the pieces of land which he bought was the one at his home while some were left to him by his parents. However, his children have barred him from using the said lands and it is the Plaintiff who is using all the lands including the one he inherited from his parents. He lamented that though the Plaintiff receives dowry from their daughters, he does not share the same with him. He disclosed that he had 5 acres of land at Kinani which he got through the Society but upon his getting injured, he sold 3 of the said 5 acres. He therefore requested the court to direct the said children to stop dragging him to court since he had no property.

32. In cross-examination, the Defendant stated that he only sold at parcel of land at Katelembo in order to educate his children. He insisted the property he has been selling are those which he acquired on his own after he was chased away. He denied that in one application he sought orders that the properties be sold and the money be subdivided equally. He however confirmed that he bought land from Lukenya from Francis Muindi and that he fully paid for the same. He asserted that neither the Plaintiff nor PW2 was present when he was buying his properties. It was his assertion that the Plaintiff was not engaged in any income generating activity.

33. On behalf of the Plaintiff it was submitted that the crux of the Plaintiff's suit is for division of the matrimonial property under the **Matrimonial Property Act (Act No.49 of 2013)** and **Article 45(3)** of the **Constitution**. The Applicant seeks *inter alia* the following Orders:-

(a) A Declaration that the properties outlined in the Summons be regarded as matrimonial property;

(b) A Declaration that the Applicant is entitled to an equal interest in the said properties;

(c) An Order do issue that the properties herein be shared equally and if incapable of being shared that the same be sold and the net proceeds be shared equally between the Applicant and the Respondent.

34. It was submitted that the Applicant submits that she solemnized her marriage with the Defendant on 17th December 1977 at A.I.C Yakamete Church, Mitaboni Location. The marriage was stable until 2000 when the Defendant deserted their matrimonial home by which time the parties had stayed together for 23 years. The marriage was dissolved on 20th February 2018 *vide a decree Nisi* dated 8th March 2018. The same was made absolute on 10th August 2018.

35. The Applicant's Claim is that the properties listed in the O.S were acquired during the subsistence of the marriage and that the Applicant contributed to their acquisition both directly and indirectly. The properties are thus;

(a) Mavoko Town Block xxxx-(16.15Ha);

(b) Machakos Town Block xxxx- (0.8255 Ha);

(c) Mavoko Town Block xxxx- (2.140 Ha);

(d) Mavoko Town Block xxxx- (8.090 Ha);

(e) Plot No.xxxx membership No.xxxx Muka Mukuu farmers Co-operation Society -8 Acres;

(f) L.R No.81 Athi River Town-with 26 residential 11 units;

(g) ¼ Plot at Katelembo;

(h) ¼ Plot at Kinanie;

(i) Commercial Plot at Kinanie Market;

(j) 75 Shares at Muka Mukuu farmers Co-operative Society- Membership No. xxxx;

(k) Shares at Lukenya Ranching & Farmers Co-op Society- membership No.xxxx;

(l) Shares at Kalembu Athilemi Maputi Farming & Ranching Co-op Society Membership No. xxxx;

(m) Shares at Ngomani Business within Kaloleni Market developed Commercial buildings and Plots;

(n) Property at Kyambu-Ngelani- 25 Acres;

(o) Property at Kwamawala, Kyamilu village (with matrimonial Home)- inherited.

36. It was submitted that the Applicant produced the requisite bundle of documents in prove of ownership of the said properties comprising of bundle of searches, copies of title deeds, Allotment letters, registered cautions, Membership Certificates/Cards & Sale Agreements. According to the Plaintiff, she led evidence in support of her case in which she told the Court that when she married the Defendant she found him with only one parcel of land which was ancestral land. She further testified when they got married she was in the business of selling paraffin and poultry farming. At the time, the Defendant was not working. They started a butchery and hotel business. She was actively involved in the business. They had a slaughter house in Nairobi West. She testified that she approached her brother, the late **FMW**, to sale to them land in Lukenya at Kshs.11, 000/=. Her brother agreed to sell them his shares at *Lukenya Ranching C-operative Society*. She sold the goats she got as a wedding gift and from the sale she gave the Defendant Kshs. 4,000/=. She extensively highlighted her efforts in acquisition of the properties registered in the Defendants name and also took care of the children.

37. From the shares sold to the parties by the Applicant's brother they were allotted Three parcels of land; L.R Nos. Mavoko Town Block xxxx, Mavoko Town Block xxxxx and Mavoko Town Block xxxx. PW2 testified in support of the Applicant's case and told the Court that she was aware that her husband, the late **FM** sold the Applicant and the Defendant his shares at Lukenya Ranching Co-operative Society and corroborated the PW1 testimony of contribution towards the purchase price of the said shares. She further confirmed PW1's evidence that she was engaged in business together with her husband. They ran butchery and a hotel. She was categorical that all the properties that the Defendant owned were acquired jointly with the Applicant. She even confirmed that the Defendant did not educate his children as they were educated by her deceased husband.

38. The court was invited to take into account the demeanour and the incredulous testimony tendered by the Defendant and conclude that he had the mind set of denying everything in order to buttress his case. His testimony was controverted by that of **PW2** who corroborated the evidence of **PW1**. He acknowledged knowing her as the wife to the late **FW**. The Court was also invited to consider the fact that in acknowledging the Applicant's entitlement to 50% of one of the properties L.R No. Mavoko Town Block/xxxx, he applied to court in Machakos HCCC NO.169 OF 2009 for leave to sell Mavoko Town Block xxxx and have the proceeds divided equally.

39. It was submitted that the Applicant has been fighting a seemingly long drawn battle for her entitlement since 2009. In the while, the Defendant has been expending equal energies in frustrating the Applicant's pursuit which has culminated in alleged sale of the properties especially the ones which the Applicant had direct financial input which were **Mavoko Town Block xxxx**, **Mavoko Town Block xxxx** and **Mavoko Town Block xxxx**.

40. According to the Plaintiff, it is instructive to note that at the time these properties are alleged to have been sold, they were subject to active litigation. The Defendant knew this but he chose to connive with the would be buyers. The Plaintiff invoked the common law doctrine of *lis pendens* and invited the Court to determine that notwithstanding the alleged sale, the outcome of these proceedings binds them and called upon the court to determine the Applicant's interest, among the others, in the aforesaid three properties.

41. In support of the submissions, the Plaintiff relied on the case of **Bernadatte Wangare Muriu vs. National Social Security Fund Board of Trustee & 2 Others [2012] eKLR** where **Nambuye, J** [as she then was] held that:

“The Court has done so and in its opinion the aforesaid assessed decisions made a correct construction of the said doctrine or maxim. The principles extracted there from by this court are as follows:-

i. The applicability of the doctrine or maxim of Lis Pendens starts right from the time the proceedings are initiated and remains applicable until the initiated and remains applicable until the initiated proceedings are finally determined and decree issued and executed.

ii. It operates to prevent the initiated proceedings from being rendered null and void by protecting and preventing the subject of the proceedings from becoming extinct.

iii. It binds not only parties to the litigation but 3rd parties who may acquire an interest in the subject matter of the proceedings during the pendency of the proceedings irrespective of they had notice of the litigation or not.”

42. It was submitted that the Defendant has not disputed ownership of the listed properties. He however did not lead concrete evidence to disprove the contribution and equal ownership of the Plaintiff. Part of his argument is that some of the properties were bought before they married in 1977. However, the court should note that the parties started living together in 1954 and their first born son, **JMM** was born in 1957.

43. According to the Plaintiff, the Defendant's conduct has been nothing but dishonest. During the pendency of this suit, he has purported to sell L.R NO. Mavoko Town Block xxxx to *Dee properties Limited* through a sale agreement dated 16th December 2017 in an outright attempt to defeat the course of justice. It was the Plaintiff's position that Article 45(3) of the Constitution is the cornerstone of the rights of the parties to a marriage and also cited sections 2, 6 and 7 of the **Matrimonial Property Act, 2013**.

44. From the foregoing, it was submitted that the properties listed in the Originating Motion are matrimonial properties and that the Plaintiff

has demonstrated her contribution as evidenced by the testimony of PW1 & PW2 that the Plaintiff made financial Contribution to the purchase of the shares in *Lukenya Ranching Co-operative Society*. The said shares resulted in allotment of three properties L.R No. Mavoko Town xxxx, L.R No. Mavoko Town Block xxxx and L.R No. Mavoko Town Block xxxx. Though all the properties are registered in the name of the Defendant, it was submitted that the Plaintiff has demonstrated her beneficial interest since in the testimony of **PW1 & PW2** it was apparent that the parties to the suit jointly managed a hotel and butchery.

45. The reasonable presumption, it was submitted is therefore that the proceedings from the business were utilized in purchasing or increasing their property port-folio hence the same can be regarded as family business as defined under the Act. According to the Plaintiff, her contribution can therefore be gleaned from the items comprising the definition of contribution. It was further submitted that to extent that Plaintiff made contributions to the acquisition of the matrimonial properties, the Defendant became a *constructive trustee* of the Plaintiff and relied on sections 9 and 14 of the Act.

46. The Court was therefore urged to find that the said rebuttable presumption has not been discharged by the Defendant.

47. On constructive and resulting trust in respective of the Matrimonial Property, the Plaintiff relied on **Falconer –vs- Falconer [1970] 3 All ER, L.N-vs- S.M.M [2013] eKLR, NWK –vs- JKM [2013] eKLR, and TMW –vs- FM [2018] eKLR**. In regard to the alienation of matrimonial property, the Court was referred to section 28 of the *Land Registration Act [2012]* and was urged to find that the Plaintiff acquired overriding interest in respect of the sold properties and the purchasers bought them subject to her interest. On this score, reference was made to the case of **Mugo Muiru Investments Limited -vs- E W B & 2 Others [2017] eKLR** where the court of Appeal held that:

“Elizabeth’s interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth’s interest.”

48. Further reference was made to **MWK vs. SKK & 5 Others [2018] eKLR** where Kemei, J held that:

“Even before the Land Registration Act came into force on 2nd May 2012, the equitable beneficial interest of spouse in a matrimonial home *occupied by such spouse* was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property. In this appeal, the Appellant acquired the title registered in the name of S.B subject to the interest of Elizabeth. In effect, the Appellant neither obtained legal title of the property as notionally it was overridden by Elizabeth’s overriding interest nor was the Appellant entitled to possession. The transfer to the Appellant was subject to Elizabeth’s unregistered overriding encumbrance.”

49. Accordingly, it was prayed that the O.S be allowed in terms of the proposed orders and any other order as the court shall deem fit and just.

Determination

50. The case revolves around the application of Article 45(3) of the Constitution as read with section 7 of the *Matrimonial Property Act, 2013*. The former provides that:

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

51. What this provision provides, in my view, is that parties to a marriage do not lose their rights merely because they have entered into a matrimonial union but they continue to enjoy equal rights at the time of the marriage, during the marriage and at the termination of the marriage. What I understand by the said Article is that spouses may be in a union, each one with his or her rights which are not necessarily pegged on the said relationship. With respect to the present case, it is possible for the husband and wife to enter into a relationship with each one of them owning his or her separate property in his or her own rights without necessarily ceding the right merely because of the fact of their marriage.

52. Section 7 of the Act, on the other hand provides as follows:

Ownership of the matrimonial property vests in the spouses according to the contribution of other spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

53. What then is matrimonial property? Section 6 of the Act defines ‘*matrimonial property*’ as:

(a) the matrimonial house (s); (b) household good and effects in the matrimonial home or homes; (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

54. Based on section 7 aforesaid, it is my understanding that where the contribution towards the acquisition of matrimonial property can be identified, in the event of divorce or dissolution of the marriage, the said property will be divided between the spouses in accordance with their respective contribution towards the acquisition. In that event, there is no presumption of 50:50 ownership of the said property. In my view, the 50:50 presumption is only to be invoked where there is evidence that both spouses contributed towards the acquisition of the property and there is no way of determining each spouse’s contribution thereto. It is in that light that I understand the position in **Falconer – vs- Falconer [1970] 3 All ER** where Justices of Appeal held that:

“And the principles applicable to whether a matrimonial home standing in the name of the husband belonged to them both jointly (in equal or unequal shares) were that the law imputed to the husband and the wife an intention to create a trust for each other by way of inference from their conduct and the surrounding circumstances ; an inference of trust would be readily drawn when each had made a substantial financial contribution to the contribution was stated to be such or indirectly as where both parties went out to work and one paid the housekeeping and the other paid the mortgage instruments; but whether the parties held in equal shares would depend on their respective contributions.”

55. It is however clear that contribution need not necessarily be in financial terms since section 2 of the Act defines ‘contribution’ as:

(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.

56. It therefore follows that the mere fact that one spouse is not engaged in any income generating venture does not necessarily mean that the said spouse is not contributing to the acquisition of the matrimonial property.

57. In this case the Plaintiff’s evidence is that at the time of their marriage, the Defendant had no property save for the property he inherited from his parents. Accordingly, all the properties they had and which were, due to the Plaintiff’s illiteracy, registered in the name of the Defendant were jointly acquired by both of them and that they both contributed towards their acquisition.

58. In this case, it was not contested that the Plaintiff and the Defendant got married in 1954 under Kamba Customary Law which marriage was later formalised under the *African Christian Marriage and Divorce Act* (now repealed) on 17th December, 1977. According to the Plaintiff, the said marriage subsisted till 2000 when the Defendant deserted their matrimonial home by which time the parties had stayed together for 23 years. The marriage was dissolved on 20th February 2018 *vide* a *decree Nisi* dated 8th March 2018. The same was made absolute on 10th August 2018.

59. In support of her case, the Plaintiff produced several documents. However, from the exhibits produced the properties which are registered in the name of the Defendant are Mavoko Town Block xxxx which was registered in the name of the Defendant on 27th October, 2005, Mavoko Town Block xxxx which was registered in the Defendant’s name on 27th January, 2017 and Mavoko Town Block 3/5785 which was registered in the name of the Defendant on 27th January, 2017. There is evidence that the Defendant entered into an agreement for sale of 30 acres excised from Mavoko Town Block xxxx to **PKN, JGM** and **GK** for the sum of Kshs 4,700,000/=. This property was registered in the Defendant’s name on 27th October, 2005. However, the title was closed on 27th January, 2017 following its subdivision that gave rise to parcels 5785 and 5786. While land parcel 5785 was still as at 27th January, 2017 registered in the names of the Defendant, there is no indication as to what happened in respect of parcel no. xxxx. There is also a sale agreement entered into between the Defendant and Dee Properties Limited in respect Mavoko Town Block xxxx in the sum of Kshs 23,500,000/=. According to the agreement, the total purchase price was to be paid upon transfer of the same which was effected on 2nd February, 2018. There is also an agreement between the Commissioner of Lands and the Defendant herein in which the Defendant acquired interest in Plot 81 situated in Athi River Trading Centre on 1st January, 1968.

60. From the evidence adduced before me, the Plaintiff’s contribution towards the purchase of the aforesaid properties was not seriously challenged apart from bare denials from the Defendant. On the other hand, the Plaintiff’s evidence was supported by the evidence of PW2 whose husband sold to the parties herein one of the parcels of land. The Defendant’s evidence on the other hand was rather incredible. He for example testified that his tenants in respect of Plot No. xxxxx and having 24 houses, were paying him Kshs.40 per month as rent which is clearly unbelievable.

61. Having considered the evidence on record, I find the evidence tendered by the Plaintiff more believable than the Defendant’s which was unsupported unreliable, incredible, uncorroborated and not cogent.

62. I therefore find that with respect to the properties where there was evidence that their acquisition was after the marriage between the Plaintiff and the Defendant and before the said marriage was terminated, the Plaintiff contributed towards their acquisition. Although the properties were registered in the names of the Defendant, the Plaintiff’s uncontroverted evidence was that the said registration was effected due to the fact that the Plaintiff was illiterate and did not know how to write. In this regard, it was held in **L.N-vs- S.M.M [2013] eKLR** where the court held thus:

“Resulting trust are legal presumptions where an intent to create a trust is presumed by the person who buys the property in the name of another. The property is deemed to be held in trust for the purchaser. The presumption is applicable to both personal property and real estate. Being a presumption, it can be rebutted if he shows that the money was a gift or a loan. Indeed, ‘resulting’ and ‘constructive’ trusts have been imposed by the courts the world over to cure injustices where someone has benefited or has been enriched at the expense of another and the enrichment is unjust and without legal justification”

63. It was similarly held in **TMW –vs- FM [2018] eKLR** that:

“In the case of NJOROGE -V- NGARI [1985] KLR, 480, the court held that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property. Thus, it is important to mention that the Act takes into account non-monetary contribution and provides that a party may acquire beneficial interest in property by contribution towards the improvement of the property equal to the contribution. 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.”

64. In the premises I adopt the presumption that each party contributed 50% towards their acquisition. In arriving at the said decision I am guided by section 9 of the said Act which provides that:

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

65. In this case, there is uncontroverted evidence of acquisition of the said properties during the subsistence of the marriage and section 14 of the Act provides that:

Where matrimonial property is acquired during marriage; (a) in the name of the spouse, there shall be rebuttable presumption that the property is held in trust for the other spouse.

66. These properties are Mavoko Town Block xxxx, Mavoko Town Block xxxx, Mavoko Town Block xxxx which was registered in the name of the Defendant on 27th January, 2017, Kshs 4,700,000.00 being the proceeds of the sale of part of Mavoko Town Block 3/2117 to **PKN, JGM and GK** for the sum of Kshs 4,700,000/=, Kshs 23,500,000/= being the proceeds of the sale of Mavoko Town Block xxxx by the Defendant to Dee Properties Limited and Plot xxxx situated in Athi River Trading Centre.

67. Regarding the properties sold by the Defendant to third parties, while this court cannot nullify the said dispositions as the said third parties are not before me hence have not been afforded an opportunity of being heard, in the case of **Mugo Muiru Investments Limited -vs- E W B & 2 Others [2017] eKLR** the Court of Appeal held that:

“E’s interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that E was in possession would take the property subject to E’s interest.”

68. Similarly, **Kemei, J** in **MWK vs. SKK & 5 Others [2018] eKLR** held that:

“Even before the Land Registration Act came into force on 2nd May 2012, the equitable beneficial interest of spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property. In this appeal, the Appellant acquired the title registered in the name of S.B subject to the interest of E. In effect, the Appellant neither obtained legal title of the property as notionally it was overridden by Elizabeth’s overriding interest nor was the Appellant entitled to possession. The transfer to the Appellant was subject to Elizabeth’s unregistered overriding encumbrance.”

69. In the premises I make the following orders:

- a) A Declaration that the properties mentioned hereinabove are matrimonial property;
- b) A Declaration that the Plaintiff is entitled to an equal interest in the said properties;
- c) An Order do issue that the properties herein be shared equally and if incapable of being shared that the same be sold and the net proceeds be shared equally between the Plaintiff and the Defendant. Pursuant thereto, the said properties will be valued in order to determine their worth. The cost of the valuation to be shared between the Plaintiff and the Defendant equally.
- d) It also follows that the sums which the Defendant received from the aforesaid dispositions of the matrimonial properties, the law deems him to be a trustee of the funds which ought to have been receivable by the Plaintiff. Accordingly, the Defendant holds a sum of Kshs 14,100,000.00 in trust for the Plaintiff.
- e) Liberty to apply granted to the parties.
- f) Each party will bear own costs.

70. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 26th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Munywoki for Mr Kituku for the Plaintiff

Defendant in person

CA Geoffrey