



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

FAMILY DIVISION

OS NO. 7 OF 2015

IN THE MATER OF APPLICATION UNDER MATRIMONIAL PROPERTY ACT

BETWEEN

RWK.....PLAINTIFF

AND

PKK.....DEFENDANT

ORIGINATING SUMMONS

(SECTION 17 OF MATRIMONIAL PROPERTY ACT)

JUDGMENT

PLEADINGS

[1] The Plaintiff/Applicant RWK filed on 23rd February 2015 **Originating Summons** and Certificate of Urgency Notice of Motion. As former wife of the Defendant/Respondent PKK she sought entitlement of the share of the properties in the name and possession of the Respondent and therefore determination of the following questions. The Applicant sought the following orders;

1. That Land Reference numbers; Kijabe/Kijabe Block X/XXXX, Kiambaa/Kihara/T.XX, Kiambaa/Karura/T.XX, Kiambaa/Karura/T.XX, Kiambaa/Karura/T.XX,

Kiambaa/Karura/T.XX, Kiambaa/Karura/T.XXX,

Kiambaa/Karura/T.XX, L.R. No XXXX/XX and

Embakasi Ranching Co.Ltd, R.XXX B, 3 62 seater buses and

Shares in UNA; investments having all been acquired, developed or improved during the period of coverture, though registered in the Respondent's name, what is the extent of the Plaintiff's/Applicant's interest in each of the said properties?

2. That the School built on LR Kiambaa/Kihara/T.XX and Kiambaa/Karura/T.XX initially known as Aloe Vera Preparatory School having been started during coverture and as a family business, what is the extent of the Applicant's interest in the said School?

3. Spent (overtaken by conduct of hearing of the suit)

4. Spent (overtaken by conduct of hearing of the suit)

5. That should the Applicant's portion of the said properties be transferred to the Applicant or how should her said interest be dealt with?

6. That should the Respondent be condemned to pay costs of these summons.

[2] The grounds for the Originating Summons and Notice of Motion under Certificate of Urgency are as follows;

- a) The Plaintiff is the Defendant's wife and are now estranged from each other.
- b) The suit properties were all acquired during coverture.
- c) The Plaintiff/Applicant contributed immensely to the acquisition, improvement and maintenance of the said properties.
- d) The Defendant removed the Plaintiff from the said properties and the Defendant is solely in possession of the same.
- e) That the Defendant has illegally taken over the management of the School in which the Plaintiff is registered as the School Manager and the Defendant fraudulently purported to remove the Plaintiff as owner of the same property.
- f) The Defendant purported to change the name of the School to conceal the fraudulent transfer and the intended sale of the school to other people in order to defeat the Plaintiff's interest in the properties.
- g) That the School which at its height had over 400 pupils was rundown to 20 students
- h) The School had/has a loan with Equity Bank Ltd which while the Plaintiff was School Manager was servicing the loan but the Defendant has been unable to service the Loan and the School was/is in danger of being auctioned.

The plaintiff in her Supporting Affidavit alluded to the following;

- a) The Plaintiff started the School in 1997 by the name A Preparatory School as per the copies annexed **RWK-1**.
- b) In 2010, the Defendant Plaintiff and 2 of their children M K K and Beatrice W Ki decided to convert the School business into a Company as shown by Memorandum & Articles of Association marked **RWK 2**
- c) The plaintiff and Defendant had problems which led to institution of **HCCC 87 of 2011** in which the Defendant was restrained from managing the School. A copy of the Court's Ruling was annexed **RWK 3**
- d)** The defendant fraudulently wrote letters of purported resignation of the Plaintiff annexed as **RWK 4**, and their children and the Defendant brought in new Directors and fraudulently Form 203A annexed as **RWK 5**. The Plaintiff discovered that the Defendant in collaboration with the advocate(s) representing the Defendant in these proceedings were/are in the process of incorporating a Company by the name of Aloe Vera Schools Ltd as shown in the Draft Memorandum and Articles of Association annexed as **RWK 6**.

[3]The Defendant filed Grounds of Objection of 16th April 2019 and deponed that he is the registered owner of the suit properties cited hereinabove. The Defendant acquired these properties.

The suit is malicious and an afterthought, 5 years after the Plaintiff left home and she took off with the Plaintiff's hard-earned sweat and left loans she had taken unpaid and hence were paid by the Defendant. The Plaintiff failed to disclose monies and shares invested in Mutual Capital Companies, which were taken from the Defendant's assets and school before she ran off. The Plaintiff failed to disclose titles and properties bought and the School the Plaintiff started In Ruai with finances siphoned from the Defendant's assets and investments.

[4]The Defendant Filed Replying Affidavit on 30th April 2015 and stated as follows;

The Defendant married the Plaintiff when she was 22years old, he took her to Teachers training College and after 2 years she was a trained Nursey School Teacher.

As a Senior Officer working with the Government then at State House, he could not register the School in his name but in the Plaintiff's name as she was a trained teacher.

The Defendant retired in 1997 from the Civil Service as Engineer, he started building the school in in 1999 and in 2000, they moved the School to his building at no rent at all.

[5]With regard to the suit properties the Defendant deponed;

He was the registered owner of **Kijabe/Kijabe Block X/XXXX** and had sold it 3 years ago to cater for his sustenance, immediate needs and medical expenses as he is /was aged at 75 years then.

He bought **Kiambaa/Kihara/TXX & Kiambaa/Karura/TXX** parcels before he married the Plaintiff in 1970s. These properties are charged to Equity Bank for a loan of Ksh 4,500,000/= which the Plaintiff borrowed and failed to pay. He was forced to pay the loan in order to stop the sale and the charges and interest are/is about Ksh 400,000/-.

The Defendant is the registered owner of **Kiambaa/TXX** and he used his own money to buy the suit property during their marriage.

The Defendant deponed that he did not own **Kiambaa/Karura/T.XXX**

The Defendant confirmed he is registered owner of **Kiambaa/Karura/TXX** and that is where the matrimonial home is situated. He bought it before he married the Plaintiff after he left school in the 1960s. He lives there to date. His son and family reside there too. The Defendant alleged that the Plaintiff stole the Title for the said suit property.

The Defendant is registered owner of **Kiambaa/Karura/TXX** which he bought after the Plaintiff left their matrimonial home in 2009 and went to USA and stayed for 8 months and then went back again in 2010 and stayed for 1 year and she came back in 2010 and went to live in Ruai.

The Defendant admitted he was/is registered owner of **Kiambaa/Karura/T XX** and he bought is in 2007.

The Defendant confirmed that **Land Parcel LR No XXX/XX** was registered in his name and he transferred the same to his daughter Ruth Nguhi as refund of money she gave him to complete the School as he educated her and paid for her way to pursue studies in USA.

The Defendant stated that **Plot No XXXB** he bought the Plot before marrying the Plaintiff but a squatter invaded the Plot and built illegal structures.

The Defendant stated that the School had 3 buses; the Plaintiff sold 2 of the buses and then went to the USA.

[6] The Defendant alleged the Plaintiff has/had 4 acres of land in Ruai/Kamulu which she subdivided and was/is selling for profit. He alleged that the Plaintiff runs a school Ruai Modern. The Defendant alleged that the Plaintiff stole money from the School to pay for her investments. Specifically, the Defendant made reference to Ksh 3,000,000/-that the Plaintiff held in a separate account.

[7] The Defendant alleged the Plaintiff had no interest in the School, he tried to revive it by taking on new partners to help revive the School as the said Partners injected capital. Plot T61 & T62 were almost sold by Equity Bank Ltd on a loan the Plaintiff took and failed to repay.

Since 2014, when he undertook reviving the School its student population is increasing steadily.

HEARING

[8]The Plaintiff/Applicant testified and relied on her pleadings that she was married to the Defendant on 2nd September 1978 in Church in Mbaruk/Nakuru after they cohabited for 3 months.

At the time of marriage she was not working, she started teaching as an untrained teacher in 1979 in MPrimary School, then at Ndereru Primary School and W Primary School. She earned Ksh 800/- a month. At the time the Defendant owned **Karura/ TXX & Kiambaa/Karura/ TXX**.

They developed their home. She resided in the home for 32 years. They extended the bungalow with 3 bedrooms. The other house is where her mother-in-law resided until her demise in 1986. They bought **Karura T XX** from wedding gifts and money that they received. The copy of title deed is registered in 1978. She attached copy of marriage certificate and title deed for **Karura T XX** which shows it was registered in December 1978.

The Plaintiff went Thogoto Teachers Training College for 2 years teachers training. After that she was posted to Kihara and Later W Primary Schools. She was paid Ksh 2,500/- a month, she took loans. She resigned from Government. She taught in Maxwell Preparatory School for 3 years and was paid Ksh 12,000/- a month. Thereafter, for 2 years she sold eggs and milk and then started Aloe Vera Preparatory School in Gachie and later moved to Karura as shown in Plaintiff's list of documents as follows;

- a) Certificate of registration of 21st January 1998,2000& 2006
- b) PIN certificate 2009
- c) Approval and Appointment documents of the school to be launched and the plaintiff's appointment as the School manager by Ministry of Education.

The plaintiff invited her husband the Defendant to join her they both ran the School and purchased properties that were registered in the Defendant's name from profits from the School.

In 2010, they agreed to change the School from a business to a Company each of them with 400 shares each and their 2 children in the business had 100 shares each of the business. The Defendant had the Memorandum and Articles of Association drawn, but the allocation of shares was different from what was agreed. The children and plaintiff refused to sign. The annexed Memorandum and Articles of Association have their written names but no signatures. Problems ensued and the Defendant through purported resignation letters from the Plaintiff and 2 of their children in the business, purported minutes of Shareholders and/or Directors who passed resolutions claimed that the Plaintiff left the School Management and Company. The Defendant irregularly brought in new Directors and there is a new Company and the Plaintiff and the 2 children were left out. The witness testified that the advocate of the Defendant in Court Mr Kahuthu was/is one of the Directors of the Company running the School and had visited the School.

Kijabe/Kijabe Block XXXX (5 acres) was given to the plaintiff and Defendant by her father and she contributed to purchase and

improvement of the said parcel.

Kiambaa/Karura/TXX & TXX and TXX, they bought together and it was bought by the School. This is where the 3 swimming pools are situated at the School.

Kiambaa/Karura/TXX was also bought by the School when both Plaintiff and Defendant ran the School. **Kiambaa/Karura/TXX is across the road but part of the School**

LR XXX/ XX/Limuru/Kimumuri(3Acres) they developed together while they managed the School **Embakasi Ranching Plot R XXX B** they were given by her father K M.

The plaintiff stated that while her husband was away at work she took care of the family. After she went on training, she worked as a teacher and took loans. After she left teaching she kept chicken and cows sold eggs and milk. She started the school, it had 3 buses which were bought from funds from the School. She gave the Defendant money and he added his money and they bought properties that were registered in his name alone. She had no fear she trusted him.

The School is fully developed, there are staff houses, parking, swimming pools and play grounds.

The Plaintiff was School Manager at the time, she ran the School, serviced the loans through Standing Orders from their bank accounts. The Defendant was cruel and violent to the Plaintiff at home and in School. He beat her up in School and the Plaintiff feared for her life. She reported the matter to the Police obtained a P3 Form, which was filled after she was treated and discharged. The Plaintiff filed **HCCC 87 of 2011** where the Court granted her orders to go back to the School and run it. She went back to the School and was beaten up again. She reported to the Police who did not come. The watchman locked the gates and she was not allowed in. The Defendant claimed she came to steal from the School.

The Defendant remained in charge of the School and ran the various accounts of the School.

The Plaintiff stated that they have 5 children, she visited their daughter in USA and stayed on as she gave birth to a child. The Defendant gave consent as she obtained visa from American Embassy. Their daughter, M K a teacher at the School helped run the School. Their son, M K was in charge of the buses/transport.

[9] On 31st September 2017, the Defendant relied on his pleadings and testified he married the Plaintiff in 1978. He had married another wife before the Plaintiff, he acquired **Kiambaa/Karura/TXX** before his marriage to the Plaintiff.

He is a trained Engineer who went to Austria for further studies from 1962-1966. On coming back he joined Kenya Broadcasting Corporation (KBC) and he was attached to Office of the President/State House. While there he travelled all over the world accompanying the President(s). He was paid house/hotel allowances and transport allowances at the time Ksh 2000/- Ksh 5000/- a day; which he saved to educate his children, purchase and develop properties.

The Defendant lived with Plaintiff from 1978 to 2008 when she left to USA and lived for 1 year with one of their daughters N. He went to USA when one of their children was graduating.

The Defendant confirmed that the Plaintiff was not working at the time they were getting married. He took her to Thogoto Training College to study for 2 years. On completion she was posted to Turkana. They had young children and the Defendant approached Ministry of Education and on explaining the difficult situation, the Plaintiff was transferred to W Primary School nearer home. The Plaintiff earned Ksh 3,000/- a month. After 2-3 years she was promoted to S1 teacher. After 3 years she resigned. The Plaintiff taught in a Private School and earned Ksh 12,000/- a month. She left employment as a teacher.

He helped her in getting into farming; bought her grade cows, imported milking machine from Netherlands. He took her to driving School and later bought her a PickUp. The plaintiff was busy selling eggs and milk.

The Defendant stated that the Plaintiff did not contribute to purchase of **TXX & TXX**. The Defendant reiterated the contents of the Repling Affidavit with regard to acquisition development and ownership of the parcels of land and other properties.

The Defendant confirmed purchase of **TXX** which he no longer has but retained **TXX**.

TXXX/TXXX the Plots Ruai he transferred to his 1st born daughter who sent her Ksh 500,000/- he borrowed to build the school.

The Defendant stated he bought the Plots in Ruai/Embakasi Ranching and he paid the Petitioner's father Ksh 300,000/- and her daughter wanted his name on the Plots.

The Defendant confirmed that they started the school on rented premises. The Plaintiff was the Director of the School and he financed the project. Later, he bought the adjacent Plots and they built the School on the land. The Plaintiff wanted to build a swimming pool so she took a loan of Ksh 4.5 million from Equity Bank. The titles of the land the School stands on are with the Bank. He sued the Bank in **HCCC 158 of 2015** and obtained Court orders to stop the auction. He negotiated with the Bank and was able to pay off the loan except the charges and interest. The plaintiff left in 2008 and the School was run down almost closed down in 2012.

The Defendant informed the Court that he did not divorce the Plaintiff, he learnt of the divorce whose proceedings took place behind his

back in 2015. He paid her Ksh 40,000/- a month and bought her a car which she ran the school. She has land in Ruai and Loitoktok.

DETERMINATION

The Respondent filed Written Submissions on 22nd February 2019 and Plaintiff on 23rd January 2019. The matter was mentioned on 20th September 2019 in this Court which went on transfer. The Court has read the submissions which are summaries of pleadings, list of documents and testimonies of the parties in Court. The issues before Court for determination are;

- a) Whether the properties outlined in the Originating Summons constitute matrimonial properties.
- b) Whether the Plaintiff and the Defendant contributed to the acquisition, development /maintenance and ownership of these properties.
- c) What is the resulting division of matrimonial property ratio/matrix between the parties and in the circumstances of this case?

THE LAW

Article 45 (3) of the COK 2010 provides;

“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 ”

Section 2 (a) and (b) of Matrimonial Property Act provides;

In this Act, unless the context otherwise requires-

“Contribution” means monetary and non-monetary contribution 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;

“Family business” means any business which-

- a) is run for the benefit of the family by both spouses or either spouse; and
- b) generates income or other resources wholly or part of which are for the benefit of family;

Section 6 of the Matrimonial Property Act provides;

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.

Section 7 of the Matrimonial Property Act provides;

“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.”

CASE-LAW

In Civil Appeal No. 128 of 2014; Peter Njuguna Njoroge -vs- Zipporah Wangui Njuguna Justice Kiage was of the view with regard to

interpretation of Article 45 of COK2010;

“Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premises that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra.”

In Francis Njoroge –vs- Virginia Wanjiku Njoroge, Nairobi Civil Appeal No. 179 of 2009; the court held;

“... 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 –vs- Chua Hock Chye [2007]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 precise mathematical exercise.”

It is always a process of determination, not redistribution of property, and each case must ultimately depend on its own peculiar circumstances, arriving at appropriate percentages

ANALYSIS

As required by **Section 7 of Matrimonial Property Act**; for parties to engage in division of matrimonial property; the parties must have contracted a marriage and later dissolved it.

In the instant case; the evidence on record discloses that the Plaintiff and Respondent were married on 2nd September 1978 as per copy of marriage certificate annexed to the Plaintiff’s Further Affidavit of 12th April 2015. The couple had 5 children of the marriage and lived together at their matrimonial home. Irreconcilable differences rocked their union and culminated with violent circumstances both at home and at their family school business that the Plaintiff left for USA.

They were engaged in employment, the Plaintiff at the time of marriage was unemployed. The Defendant took her for teacher training course for 2 years and was employed as a trained teacher. She served in various schools until 1995-6. The Defendant supported her and she started farming and selling farm produce until she started the school the subject of matrimonial property division herein.

The Defendant was on his 2nd marriage with the Plaintiff. He was/is Engineer by profession, he travelled a lot and made savings from various allowances he was paid and his salary. He educated his children, purchased and invested in properties while the Plaintiff looked after the home and brought up the children.

The Plaintiff filed **Divorce Cause 106 of 2011 on 21st March 2011** seeking dissolution of the marriage as per Petition filed on 26th August 2015 as Further Defendant’s List of Documents. Decree absolute was granted on 25th July 2011.

The properties acquired during the marriage as argued by parties are;

Land Reference numbers; Kijabe/KijabeBlock1/XXXX, Kiambaa/Kihara /T.XX,Kiambaa/Karura/T.XX,Kiambaa/Karura/T.XX,Kiambaa/Karura/T.XX, Kiambaa/Karura/T.XX, Kiambaa/Karura/T.XXX, Kiambaa/Karura/T.XX, L.R. No XXXX/XX and Embakasi Ranching Co.Ltd, R.XXXB, 3 62 seater buses and Shares in UNA;

The School built on LR Kiambaa/Kihara/T.XXand Kiambaa /Karura/T.XX initially known as A Preparatory School having been started during coverture and as a family business, what is the extent of the Applicant’s interest in the said School?

Kiambaa/Karura/T.XX was/is the property where the matrimonial home was/is. The Defendant stated he bought the property before marrying the Plaintiff and lived in the said house with his 1st wife. The Plaintiff conceded the said property was bought before their marriage but claimed to have contributed immensely to the development of the Plot. During their marriage, they added from the 1 big house another small 3 bedroomed house, they extended both houses by adding living rooms and 3 bedrooms upstairs. The Plaintiff failed to produce any drawings for renovations/extensions, quantities of materials or any payments towards the extensions. The fact that the matrimonial home is one they have resided on for 32 years; the historical background is that the property was bought before she was married. In the absence of any tangible evidence of contribution and/or maintenance/improvement, the Court finds that she cannot claim exclusive of partial ownership or possession of the home. The Plaintiff came into the suit property by virtue of their marriage and her rights to the property are tied to the marriage status. Moreover, she left the home in 2010/2011 and their son and his family reside in the said home. The Plaintiff is entitled to personal effects, documents and appliances that she may have purchased but not the home.

LR Kiambaa/Kihara/T.XXand Kiambaa/Karura/T.XXwhere the School was /is erected, the Defendant deponed to have purchased these parcels of land before marrying the Plaintiff. He also informed the Court that the 2 titles are withheld by Equity Bank for a loan of Ksh 4.5 million which the Plaintiff took and left him with the debt as guarantor. He had to pay to avert the bank exercising statutory power of sale

over the suit properties.

The Plaintiff informed the Court that she took the said loan to expand School facilities by building swimming pools. She serviced the loan while she managed the School until the Defendant violently chased her out of the School. The Plaintiff annexed copies of title deeds for the subject parcels of land annexed to her Further Affidavit filed on 12th May 2015. Kiambaa/Kihara/T.XX was registered on 9th February 1994 and Kiambaa/Karura/T XX on 19th December 1978. The Plaintiff informed the Court during her testimony, that /TXX was purchased from monies given to them during their wedding as wedding gifts/presents. These are matrimonial properties acquired during the marriage of the parties. The loan has been paid by the Defendant back save for Ksh 400,000/- to be paid as Auctioneers Fees and other charges.

The Defendant stated he is registered owner of **Kiambaa/Karura/T.XX**, situated opposite the School, which he bought with his own money during subsistence of the marriage. He is also registered owner of **Kiambaa/Karura/T XX** which he bought in 2007. He is also registered owner of **Kiambaa/Karura/T XX** that he bought after the Plaintiff left the matrimonial home and went to USA.

Section 93 Land Act provides; Co-ownership and other relationships between spouses;

“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.

These properties were bought by the Defendant during the subsistence of their marriage with the Plaintiff and are registered in the Defendant's name. The Plaintiff testified that when the School was running as a family business, money from the School was used to purchase various parcels of land adjacent to the School with expansion of the School in mind. The Plaintiff testified that she was aware and contributed from the School funds to purchase land. She did not mind the same to be registered in his name, she trusted him and had no fear. The parcels of land have been occupied by expansion of the School swimming pools(s) and buildings. Therefore, the parcels of land where the school stands and adjacent parcels cannot be discussed and apportioned separately but in line with assets of or part of the School. They are entitled to equal share of these properties.

Kiambaa/Karura/T.XXX existence was not established and/or confirmed. The Defendant denied knowledge of such parcel, the Plaintiff did not provide cogent evidence to controvert this position. The Court cannot divide matrimonial property that is not proved to exist in the first place.

LR No XX/XX and XXB, the Plaintiff claimed were parcels from her father Kamau Mbugua and annexed relevant documents to her Further Affidavit of 12th May 2015 marked **RWK-S7**;

a) Embakasi Ranching Company Ltd Receipt in the name of **Kamau Mbugua** payment of 6,000/- on 10/11/93 for **Plot RXXX** cancelled **RXXX**.

b) Embakasi Ranching Company Ltd document in the name of **K M Computer Number XXXXXXXX** confirming the documents produced; share certificate number XXXXX Allocation letter R427-B Engineering Receipt Number 778 Survey Receipt Number XXXX and it is signed by **PKK** to confirm that he had seen the beacons and location of the **Plot Number RXXXB**.

The Plaintiff told this Court that her father's documents of **Plot Number RXXX B** disappeared/were lost and he reported to Police and obtained a Police Abstract.

The Defendant stated that he bought **Plot no XXXB** before marrying the Plaintiff. He did not provide any documents to prove this fact or any fact of purchase and/or ownership by purchase.

He also stated that **LR XXX/XX** is his Plot which he gave his daughter in return for money she gave him. He did not provide any documents to prove this fact or any fact of purchase and/or ownership of the Plot, a document to confirm transfer of the Plot to their daughter RN or any proof of Ksh 500,000/- paid to him. Finally, whether the Plot was valued at Ksh 500,000/- to warrant such exchange or transfer of the exact amount of Ksh 500,000/-.

In the absence of any proof of the Defendant's claim of purchase and ownership of these plots **LR No XXX/XX and XXXB** and in light of proof of ownership of **Plot Number RXXXB** by the Plaintiff as belonging to her father and not the Defendant as he claims, it shall remain the property of the Plaintiff. It is not clear /confirmed whether **LR No XXX/XX and XXXB** are one and the same Plot or separate Plots or are also the same as **Plot Number RXXXB**. No documents of ownership were filed in Court or attached. So if they are the same as **Plot RXXXB** they shall remain properties of the Plaintiff. If they are all different Plots, the **Plot RXXXB** shall remain with the Plaintiff. **LR XXX/XX** with the Defendant and **XXXB** with the Defendant subject to proof of ownership documents provided to Court.

The Defendant claimed the Plaintiff had/has plots in Ruai 4 acres; details were not furnished to confirm the same.

The Plaintiff started A Primary School in 1997 as shown by;

a) Certificate of Registration of 21st January 1998 Registration of Business name under Rebecca Wangare w/o Paul Kariuki at title Number Kiambaa/Kihara/XXXX

b) Letter dated 3rd February 1997 by Land lord H.W.M to the Plaintiff to use his premises on rental basis.

c) Application of January 1997 by the Plaintiff to the landlord as tenant to use the premises for A V Preparatory School Nursery/PreUnit & Primary School

d) Provision Certificate(2000) & (2006) of Registration of Schools from Ministry of Education for Aloe Vera Preparatory School and Plaintiff RWK as Manager of the School.

The Defendant after retiring in 1997, he built the buildings currently at the school on the parcels of land that he bought and the school relocated in 2000. The School never paid rent for use of these buildings. In 2010, the Plaintiff and Defendant decided to turn the School business into a Company. According to the plaintiff, the Aloe Vera Preparatory Limited Company was to hold 1000 shares divided into 400 shares to the Plaintiff, 400 shares to Defendant, 100 shares to their daughter, BW K and 100 shares to their son M K K; both who helped run the School. Unfortunately, as exhibited by the Memorandum and Articles of Association of 25th June 2010 marked **RKK2** to Plaintiff's application/OS; the Plaintiff and their children were allotted 100 shares each and the Defendant retained 700 shares of the Company. They refused to sign the documents and only their names are imprinted. So, the shareholding of the Company is contested and not verified by the current CR12 from Registrar of Companies or the filed Memorandum & Articles of Association of the Company at the Company's Registry.

Thereafter, a family feud ensued that adversely affected the running of the School Company and family business. The Defendant physically evicted the Plaintiff through assault from the School Management.

The Defendant opened new bank account(s) for the school and purportedly removed the Plaintiff and their children as Directors and shareholders of the School and Company. He brought on board partners S MW and J O. He caused to be prepared Letters of resignation by the Plaintiff and children purportedly signed by them and caused the same to be filed in the Company's Registry the said letters, purported company resolution(s) and Form 203A marked **RWK4 & 5**.

The Defendant changed the name of the School and purported to incorporate another Company and include the advocate on record Mr Kahuthu as one of Directors of the A V Schools Ltd marked **RWK 6** annexed to the OS; now the same establishment is in the name and style of Mazao School.

The Plaintiff filed HCCC 87 of 2011, on 16th September 2011, L.Njagi J stated in part;

“Even though the 1st Respondent stood as guarantor for the repayment of those loans, that does not necessarily give him a hand in the running of the School unless there is mutual agreement between the parties to that effect.

Although the School is located on his property, the 1st Respondent should be content to see it prosper, it may make enough money for repayment of the loans which will lead to the discharge of his properties. Any dislocation of the process of smooth repayments of the loan could easily lead to statutory sale of those properties which would in turn precipitate a double tragedy for both the School and 1st Respondent.

By forming a Company with the name that resembles the name of the school, and then asking the parents to deposit school fees in the accounts of that Company, the 1st Respondent has clearly engaged in dislocating the School finances which is not beneficial to anybody else except the Company.... I would rather have a situation in which the Applicant continues to manage the way she has hitherto done in order that the School's operations are not dislocated as any dislocation would be detrimental not only to the Applicant but also to the students.”

These orders of the Court were not effected, the Plaintiff remained ousted till to date. These orders were not reviewed, set aside, stayed or appealed against. The Court orders remain valid, regular and lawful orders of the Court.

In Econet Wireless Kenya Limited vs Minister for Information & Communication of Kenya & Communications Commission Of Kenya Misc Appl. 1640 of 2003 the Trial Court observed;

“It is essential for maintenance of the rule of law and good order that the authority and dignity of our Courts are upheld at all times.....”

In Hadkinson vs Hadkinson (1952) 2 All Er 567 it was held;

“It is plain and unqualified obligation of every person against or in respect of; who an order is made by a Court of Competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular even void.”

The chronology of all these events is to high light the advent and development of the main and sole property the school variously named and housed on the suit lands that the Defendant is registered in that is to be divided between the Parties.

The Defendant who had a high profile job and was well remunerated was/is the breadwinner of the family. He purchased titled properties from salary and various allowances from frequent travels all over the world. He brought financial muscle to various family investments during the marriage. As an Engineer by training, he directly constructed the School's building on **Kiambaa/Kihara TXX** and **Kiambaa/Karura TXX** where the school moved to in 2000. The drawings are annexed as **PKK5** of Further Affidavit filed on 22nd July 2015.

On the other hand, the Plaintiff upon marriage gave companionship to the Defendant upto when the marriage floundered. They have 5 children of the marriage, she provided childcare to the 5 children and managed and maintained the matrimonial home. She engaged in farming with support from the Defendant and sold eggs and milk and supplemented family needs and support.

She was taken for training supported by the Defendant and she is a trained teacher. She started the School in contention which grew from strength to strength; from nursery and primary School and had 400 students. The school expanded and shown by attached brochure; learning and boarding facilities, swimming pool(s) staff houses buses etc. The Plaintiff started the School in 1997 obtained the licences and certificates as School Manager. She contributed to the School establishment and growth; she brought teaching skills, management skills and oversaw operations of the school from 1997 to 2011 when she was evicted from the School.

The totality of the evidence on record discloses that the Defendant made financial purchases of the land on which the School stands, purchased materials and built the buildings and the Plaintiff invested her skills and time in establishing, managing and facilitating steady growth of the family business. Although, it is difficult to assess with mathematical precision indirect contribution; the circumstances confirm, the Plaintiff was qualified and certified by Ministry of Education to manage the School and was continuously approved as such as per the certificates issued annually. She was/is the brainchild of the School and was involved in day to day management and operations of the School. The Defendant provided financial support and overall supervision. The Defendant This Court finds that each party provided and contributed equally to the establishment management and growth of the School. The School despite being registered in different names, with different parties and with different accounts the various names do not constitute each a separate legal entity. This is because the new company and its directors was irregularly formed and they were brought in without legal and formal dissolution of the original company Aloe Vera Company Ltd. The **(Memarts)** Memorandum and Articles of Association and company resolution are contested and that is for another Court /Forum to determine. This Court also notes that the alleged removal and resignation of Plaintiff, son and daughter was/is not in accordance with **Companies Act 2015**. The letters of resignation by outgoing Directors and/or shareholders are not signed by the said parties, their signatures and/or names are contested and there is alleged forgery of their consent. The Directors Meeting and Resolution(s) are challenged and contested. No minutes of the said meetings were produced. The parties resigning did not sign share transfers nor did they swear affidavits to the effect that they voluntarily resigned. Any other arrangement to include new partners and/or Directors is illegal as it is not in compliance with the Companies Act 2015. In short, due to the irregular unlawful process, the Plaintiff, Respondent, son and daughter are directors and shareholders of the original Company Aloe Vera Company Limited until the proper legal process is undertaken and proper legal documents are filed with the Registrar of Companies.

The totality of the evidence on record and the applicable law mandates the court to order the following;

DISPOSITION

- 1. Kiambaa /Karura/XX was bought before the Plaintiff was married and was the home of the 1st wife to the Defendant. It does not constitute matrimonial property and no evidence of contribution adduced or provided to Court by the Plaintiff. It shall remain the property of the Defendant.**
- 2. Kiambaa/Kihara/TXX, Kiambaa/Karura/TXX where the school was /is built were bought after their marriage it is matrimonial property. Kiambaa/Karura TXX, Kiambaa /Karura/TXX & Kiambaa/Karura/TXX bought by the Defendant and in the name of the Defendant. The Plaintiff provided funds from the School and gave Defendant and agreed the properties be registered in his sole name. These properties belong to both parties equally as they are where the School is built and/or expanded to and bought with School funds.**
- 3. A V Preparatory School/ A V Preparatory Company Limited belongs to the Plaintiff Defendant Son and Daughter it shall be divided equally between the former couple. A valuation of the School buildings, assets, equipment, vehicles and funds shall be conducted upon agreement by Plaintiff and Defendant or through their advocates. Any party may opt upon valuation to buy out the other party. In the meantime their son and daughter shall continue in the management of the said school.**
- 4. In the meantime the Court order of Justice Njagi of 16th September 2011 was that the Plaintiff was to be reinstated to run the School. That order was not complied with, nor set aside, stayed or appealed against. It shall take effect immediately with supervision by OCS Kiambu Police Station to reinstate the Plaintiff Son and daughter to management of the School until valuation sale and division of matrimonial property of the school.**
- 5. Kiambaa/Karura/TXXX was not confirmed to be in existence by either party and therefore there is nothing to consider as matrimonial property or not.**
- 6. LR XXXX/XX is matrimonial property and in the absence of evidence of transfer of the property to R N daughter of the Defendant as alleged it is to be divided between the Plaintiff and Defendant.**
- 7. Plot XXXB which was left to the Plaintiff by her father through the Defendant is also matrimonial property to be divided equally between Plaintiff and Defendant.**
- 8. Plot XXXB if same as XXX B (7) applies if different (7) applies.**
- 9. Kijabe/KijabeBlock /XXXX sold 3 years ago by the Defendant.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 20TH DECEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE FOR THE PLAINTIFF

NO APPEARANCE FOR THE DEFENDANT

MS

JASMINE-

COURT

ASSISTANT