



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MARSABIT

MATRIMONIAL CAUSE NO.1 OF 2017

M A A.....PLAINTIFF

VERSUS

A R.....DEFENDANT

JUDGMENT

The plaintiff in her originating summons dated 4th August 2017 is seeking the following orders:-

- 1) That it be presumed that there is irrefutable presumption of marriage between the applicant and the respondent.**
- 2) That it be declared that the properties (movable and immovable) acquired by the joint funds and efforts of the applicant and the respondent during the subsistence of marriage and registered in sole name of the respondent and in possession more particularly shown in the annexed affidavit of the applicant are held in trust for the applicant and the same be subdivided and/or sold and the proceeds of sale or subdivision be shared equally to each party's contribution towards its acquisition.**
- 3) That the respondent be restrained by an order of injunction from alienating, encumbering, and disposing of, selling or in any manner dealing with properties known as PLOT NO. [particulars withheld] MARSABIT TOWN, MOSQUE ROAD & PLOT NO. [particulars withheld] MARSABIT TOWN, MOYALE ROAD.**
- 4) That the Honourable Court be pleased to grant such further orders for reliefs as it may deem just to grant in the circumstances and in the interest of justice.**
- 5) That the costs of the Originating Summons be paid by the respondent.**

The defendant filed cross originating summons dated 4th September 2017 which seeks the following orders:-

- 1) That there be a declaration that the Applicant was married to the Respondent under Islamic Law in the year 1981 and the marriage was blessed with three children who are all adults, are married and independently living with their families and not dependent on the Applicant or Respondent.**

2) That there be a declaration that the marriage between the Applicant and Respondent was lawfully dissolved by the Kadhi's Court at Marsabit as Cause No.10 of 2017 and the two are now formally divorced.

3) That there be a declaration that the Properties known as Plot No. [Particulars withheld] Marsabit Town, Mosque Road and Plot No. [Particulars withheld] Marsabit Town, Moyale Road were inherited by the Applicant from his parents the Late Mr. M A H and his elderly wife Mrs. A A.

4) That it is declared and required that the Respondent renders accounts for rent she has collected from the tenants of Plot No. [Particulars withheld] and Plot No. [Particulars withheld] for a continuous period of 36 years at an average rate of Kshs. 80,000 and the same be deemed to be held in trust for the applicant.

5) That it is declared that the Respondent collected the rent from the Applicant's parents' properties as a trustee and is obligated to render accounts to the Applicant herein.

6) That there be declaration that the Respondent renders accounts for the livestock acquired during the subsistence of the marriage but sold by the Respondent and any property acquired from the said funds be deemed to be held in trust by the Respondent for the Applicant.

7) That the Honourable Court be pleased to grant such further orders for the reliefs sought as it may deem it just to grant in the circumstances and in the interest of justice.

8) That the costs of this Cross-Originating Summons be met by the Respondent.

The matter proceeded through oral evidence. The parties herein were married but they divorced through the Kadhi's court. A divorce certificate was issued. **PW1 M.A.A** is the plaintiff. She used to have a milk depot and a café in Marsabit. The defendant was her husband. They were married in 1982 and they were divorced on 16th June 2017. During their marriage they lived on plot number [Particulars withheld] Marsabit. They had three children. The defendant has another child from his second wife. His father-in-law, the late **A** left plot number [Particulars withheld] which was in the defendant's mother's name. The defendant later transferred the property to his name. Plot No. [Particulars withheld] has 11 rental houses; three of them are in good condition. The houses were built by the defendant's mother who is her mother in law. Sometimes in 2009 her mother in law became sick. The Plaintiff started collecting the rent from the premises. Before then it was her mother in law who was collecting the rent. The monthly rent is about ksh.70,000. She uses the money to pay electricity and water bills and other related expenses. The respondent has another wife.

The defendant's mother has been sick since 2009 and she has been on pampers. She takes care of her. The plaintiff further testified that she pays the electricity bills for plot number. [Particulars withheld] She lives on plot number [Particulars withheld] At one time the defendant had three wives but one left. All the two wives live on plot number [Particulars withheld] The defendant is absent most of the times but when he comes to Marsabit he lives on plot number [Particulars withheld] She left doing her business in May 2013 as her mother in law became bed ridden. The defendant only sends money for pampers and milk. It is her evidence that the defendant inherited the two plots while they were married. She lives on the plot and the rent is the only source of income. The defendant want to sell one of the plots. She divides the rent between the two wives. She was married while she was a class 6 pupil. Although she is divorced under the Islamic law, they are from the Rendille tribe and according to Rendille customs she is still the defendant's wife. For 26 years the two were not living as husband and wife. She was married when she was 14 years old. Since then she has lived on plot number [Particulars withheld].

The Plaintiff also testified that the house where they have been living was built by her in laws. These are mud houses. She used her money to do repairs on the houses. Plot number [Particulars withheld] is still in the name of her deceased father in law. Her father in law was initially a Christian by the name **A**. He converted to Islam. The defendant's mother assisted in building the rental houses. Her father- in-law left a

wholesale but the defendant misused the money. Part of the proceeds from the wholesale was used to build some of the rental houses. During their marriage they did not buy any land with the defendant. The two plots were bought by her in laws before they got married. Her mother in law mainly takes milk and it is bought from the rental income. The mother in law is also diabetic and the defendant buys the medicine for her. The second wife is working and most of the time she is at her place of work. Her mother in law also has high blood pressure and she has taken care of her for ten years. Her father in law left cattle but the defendant sold them. Only ten cows were left. She did not sale the remaining cows.

PW2 F K alias **F H S** lives in Marsabit . She is a cousin to the defendant. Her mother died while she was young and she was brought up by the defendant's mother. By the time her mother died the defendant was not yet born. The defendant found her living with his parents. She lived with her aunty until when she got married. The defendant is the only child from his parents. She was present in 1982 when PW1 got married to the defendant. The defendant's parents owned two plots. One plot 1st owned by his mother and has rental houses. The defendant's mother used to collect the rent but she is now mentally unstable for the last 8 years. During this period PW1 has been collecting the rent. The defendant has two other wives. He has one child with one wife and two children from the other wife. The late A was like her father. She is also entitled to inherit the late A property. The defendant sold the cows. The late A was a member of parliament and a minister. The defendant's mother is alive but bed ridden. Her father was called **A S** who is deceased. Initially the late A was a teacher. He used to be called **A K** and was a church elder before he became a Muslim. The late A was at one time detained and he built the house on plot number [Particulars withheld] after he was released from detention. She brought up the defendant. The Plaintiff and the defendant did not purchase any property together. She is now married but usually visits her aunt. There is a house help who also assist PW1. PW1's children are now adults.

PW3 S G is related to the defendant through their grandparents. He knows the parties as well as the plots in dispute. The defendant has two wives who live on plot number 11. The plaintiff did not sell any cows. He also used to stay in the plots in dispute whenever he was on leave. He uses the same family name. The defendant was born alone. His mother is old and sick. **PW4 N M** testified that he lives in Huluhula. He knows the defendant. He saw the defendant selling the cows. The cows were put in a vehicle and were taken to Nairobi. He was with the defendant when the cows were ferried in seven vehicles. He worked for the late A for many years. He lived with the deceased in the same plot. Initially the family was living in both plots but now lives in one plot. The cows were being kept at a plot in Huluhula. The cows were sold after the death of A.

PW5 I A is a cousin brother to the late A. Their fathers were brothers. The defendant father used to be called A before he became a Muslim. He used to be a teacher. He died as Muslim. The two parties conducted a Rendille wedding first before they got married through a Muslim wedding. **PW6 A S** was a co-wife to PW1. It is her evidence that she is aware about the properties in disputes. The defendant had three wives namely PW1, herself and **M A**. They were all living in the same plot with their children. She left the defendant. She had one child with him who still lives in the property. She stayed on the property for about 10 years. For almost 9 years she did not see her husband. She has since remarried. The defendant's mother used to collect rent but she is now sick. Her child who is now 25 years old still lives in the property.

PW7 M A A is the party's son. He is a business man in Marsabit. He was born and brought up on Plot No. [Particulars withheld]. His mother, step mother and grandmother live on that plot. His father comes once in a while. His mother improved the property by buying water tanks, putting wardrobes and painting it. His step mother has two children who live on the plot. They are **A** and **A**. Plot number [Particulars withheld] belongs to his grandmother. The plot has rental houses. The rent is the source of the families' livelihood. His grandmother was the one collecting the rent until when she lost her memory about 8-9 years now. It is his mother who is the one collecting the rent. Plot No. [Particulars withheld] is now registered in his father's name. His mother is the one who has been paying school fees for all the children including the children of his step mother. It is his wish that the Plot No. [Particulars withheld] should not be sold. Her grandmother entirely depends on that property. His father has property both in Nairobi and Mombasa. His father was born alone in his family. Plot No. [Particulars withheld] belonged to his grandfather. His grandmother gave Plot No. [Particulars withheld] to both his mother and his father. For a

long time his parents have not had good relationships. He has two sisters who are all working. The family was at one time called by his father and told that he want to sell the plots. The divorce of his parents was brought about by the decision to sell the plots.

The defendant **A R H** testified that he married PW1 in 1982 under Islamic principles. They had three children together. They separated over 26 years ago and got divorced. She continued living at his place. The house they have been living belongs to his late father. During their marriage they did not build any house. They have not added anything on the plot. The two did not buy anything together. The plaintiff, his wife M and his mother live on plot number [Particulars withheld]. The plot is still in his father's name. He has no brother or sister and he is the only child from his parents. Plot No. [Particulars withheld] belonged to his mother. He was given the plot by his mother and it is now registered in his name. As a family they discussed and wanted to improve the property as the houses are made of mud. It is not true that he wanted to sell the plot. They talked of improving the property. There is no buyer. His mother did not include the Plaintiff's name when she transferred the property to him. The houses on Plot No. [Particulars withheld] are made of mud and very old. The two parties were divorced by the Kadhi. The Plaintiff has been collecting the rent and has not accounted for it. Even his mother used to send the plaintiff to collect the rent. He has not benefitted from the rent. The plaintiff has not made any developments on the two plots. He left the plaintiff with more than 500 cows and camels but he does not know where they are. His mothers' medicine costs Kshs. 30,000 monthly and he has been buying the medicine. He lived with the plaintiff for about 8years before the marriage broke down. A was his second wife but she is now married. The two former wives have no claim over his father's property. He should be left free to manage his property. All his children with the Plaintiff are married. He did not sell any cows. Plot number [Particulars withheld] was transferred to him in 2012. He supports his mother. His wife Mariam lives there and there are workers. The whole idea was to upgrade the property and there was no intention to sell it. His child R from his second wife was brought up by his mother and the Plaintiff. He lives in Mombasa in a rented house. He does not have any other properties. Even when he divorced the plaintiff he left her to live on plot no. 11. When they got married they found the property already developed. PW2 is his cousin. Their mothers are sisters. He admit that the plaintiff has always assisted his mother.

Miss M appeared for the Plaintiff. Counsel submit that the house on Plot No. [Particulars withheld] was the parties' matrimonial home although it was not transferred to the defendant. It qualifies to be the matrimonial home under section 6 of the Matrimonial Property Act. That is where the two brought up their children. The children from the other wives also lived there. That is the home the plaintiff has known for 37 years. The property ought to be distributed to the two after the dissolution of the marriage. Plot No. [Particulars withheld] was in the name of the defendant's mother but was transferred to the defendant in 2012. By then the marriage had not been dissolved. The defendant acquired the property during the marriage. There is a rebuttable presumption that the property belongs to the two. The defendant is holding the property in trust for the Plaintiff. The property was inherited during the subsistence of the marriage. The marriage was dissolved in 2017.

Miss M further submit that Section 7 of the Matrimonial Property Act provides for contribution by spouses. The plaintiff made contribution towards the acquisition of the property. She took care of the children, did domestic work and also took care of the defendant's ailing mother. Since 2009 the plaintiff has been collecting the rent but the same has been used to pay daily expenses. Counsel relies on the case of **UMM Vs IMM** where the court stated as follows:-

The provisions of that Statute ameliorate the harshness that was associated with Echaria (supra). Statute now recognizes the non-monetary contribution of a spouse. It however does not go far as what the Court of Appeal had suggested in N W where it argued that Article 45 (3) was perhaps "a Constitutional Statement of the principle that marital property is shared 50-50 in the event that a marriage ends." As far as I can see it is the provisions of Sections 2, 6 and 7 of The Matrimonial Property Act, 2013 fleshes out the right provided by Article 45 (3). By recognizing that both monetary and non-monetary contribution must be taken into account, it is congruent with the Constitutional provisions of Article 45 (3) of The Constitutional 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. I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by Article 45 (3).

It is submitted that an order of an injunction should issue against the defendant. The plaintiff lives on Plot No. 11. Since the plaintiff has been using the money to cater for the home expenses there is no account to be rendered. Miss M maintains that the transfer of Plot No. 37 to the defendant does not indicate that it was a gift.

Mr. Wangira appeared for the defendant. Counsel submit that the dispute involves two properties. It has been admitted that plot no. [Particulars withheld] still belong to the late father to the defendant. It is a property which is the subject of succession. It is an estate. It has not been transferred to the defendant. Under Section 35 of the law of Succession Act the defendant's mother enjoys life interest in the property. It cannot be sub divided now. It is also submitted that if the defendant passed on before his mother then the property will be taken by his mother. Section 29 of the law of Succession Act does not make a daughter in law to be a dependant. The parties were not depending on their father in law for their livelihood. The plaintiff was depending on her husband. Counsel relies on the case of **JOSHUA ORWA OJODE (Deceased). Nairobi Succession cause 2015 of 2012**. The property on Plot No. 11 is a Swahili house and the parties were allocated a room. There are several rooms. The late A was an Assistant Minister in the 1960s. The plot cannot be separated as it is one house.

With regard to Plot No. [Particulars withheld] counsel submit that it was gifted to the defendant by his mother. The gift was made about 6 years ago. There is no improvement on the property. There is no contribution by both parties. The plaintiff did not make any contribution towards the acquisition and development of the property. Counsel relies on the case of **EJT Vs SKT. ELDORET CIVIL CASE NO 21 OF 2007**. It is contended that the Plaintiff has been taking care of the children through the use of rent collected from Plot No. [Particulars withheld]. There is no evidence that she used her own funds. By 2012 the parties had been estranged for over 20 years. The law requires proof of contribution. There was Zero contribution by the Plaintiff. The children are now married adults. The defendant filed cross originating summons and he is seeking an account on the collected rent from the plaintiff. She did not tabulate how much rent she collects and what she pays in form of expenses. She has also not accounted for the animals that were left with her. There was no use of matrimonial resources. The 3rd wife also takes care of the defendant's mother.

The dispute involves two properties which are located in Marsabit town. These are plot numbers [particulars withheld] and [particulars withheld]. The parties were lawfully married in 1982. They were formerly divorced at the Kadhi's Court on 16th June, 2017. Both parties confirm that before they were divorced, they had separated for quite some time but the plaintiff kept on residing on the same premises.

The issues for determination are:-

1) Whether plot numbers [Particulars withheld] and [Particulars withheld], Marsabit town are Matrimonial properties.

Whether the plaintiff made any contribution towards the acquisition of the properties.

2) Whether the plaintiff should render any account on the rent collected monthly.

Section 6 of the Matrimonial Property Act No. 49 of 2013 defines Matrimonial Property as follows:-

- 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.**
- 2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.**

Section 7 of the same Act stipulates that ownership of Matrimonial Property depends on each spouses' contribution. Section 7 states as follows:-

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.

Section 9 of Act No.49 of 2013 recognizes contribution through improvement of a property acquired before or during the marriage. Section 9 states as follows:-

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

There are two properties. Plot No. [Particulars withheld] is still in the name of the defendant's deceased father. A copy of the title deed was produced. Succession has not been done. Although parties have lived in the premises for over 37 years, the property is yet to be acquired by the defendant. It forms part of the estate of the late A. The defendant cannot be held to have acquired that property. The current proceedings cannot be deemed to be a citation upon the defendant to formerly inherit the property.

Section 35 (1) and (2) of the Law of Succession Act states as follows:-

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) The personal and household effects of the deceased absolutely; and

(b) A life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

Since Plot No. [Particulars withheld] is yet to undergo the normal Succession process, it is a not Matrimonial Property. The defendant's mother has life interest in the property. I do agree with the submissions by Mr. Wangira that Plot Number [Particulars withheld] is yet to be inherited. PW2 can

make a claim to the property if the defendant and his mother decide to file a Succession cause. The deceased died many years ago and it is not clear why they have not inherited the property. The defendant cannot sell Plot number [Particulars withheld] without his mother's consent. She is entitled to live on the property until she passes on. The Plaintiff as of now is not entitled to claim plot No. 11 as the defendant has not lawfully acquired any interest on the property.

The next property is Plot No. [Particulars withheld]. This is where the rental houses are. The Plaintiff contends that the defendant intends to sell the property which is the source of their livelihood. On his part, the defendant maintains that he only wanted to improve the property. Both parties agree that they did not buy any property during their marriage. Plot Number [Particulars withheld] belonged to the defendant's mother. Parties also agree that the houses standing on the plot were built by the defendant's mother. PW7 contends that his mother improved the property by painting it, making wardrobes and buying water tanks. It is clear to me that any improvement on the properties was done using the proceeds from the rent.

The record show that Plot Number[Particulars withheld] was transferred to the defendant on 23/02/2012. This was before the marriage was dissolved. Even if parties were estranged, they were still living as husband and wife. The defendant maintains that the property was given to him as a gift by his mother. Can it be held that the defendant acquired the property and it should be considered a Matrimonial property acquired during the marriage and therefore subject to distribution after the dissolution of the marriage.

The defendant acquired Plot Number[Particulars withheld]during the subsistence of the marriage. This property was not bought. The Plaintiff's position is that she was all along been taking care of the family including the defendant's mother. That forms part of her contribution to the family and that is why she is claiming part of the property. The word "**acquire**" can be interpreted to mean "**own**" or "**possess**" or become the owner of what has been acquired. The defendant is now the owner of Plot Number[Particulars withheld], Marsabit. Whether the property is a gift or not, he has acquired it.

The defendant had three wives, **PW5 A S** was the second wife but she left. Currently the defendant has one wife. The Plaintiff is not his wife although she contends that under the Rendile customs she is still a wife. There is no evidence that she has remarried. Section 11 of the Matrimonial Property Act recognizes customary Law. Customary Law relating to divorce or dissolution of marriage can be taken into account when matrimonial property is divided. No one testified on how the Rendile custom on marriage operate.

Counsel for the defendant maintains that there was zero contribution by the Plaintiff. Section 2 of the Matrimonial Property Act defines "**contribution**" "to mean 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 the family;

"matrimonial home" means any property that is owned leased by one or both spouses and

occupied or utilized by the spouses as their family home, and includes any other attached property;

The defendant did not make any monetary contribution towards the acquisition of the property. He is the only child from his parents. Similarly, the Plaintiff did not make any financial contribution towards the acquisition of the property. The two are now divorced. The Plaintiff has been taking care of the family. Even before the defendant's mother was incapacitated, she used to send the Plaintiff to collect the rent. The defendant has always been absent. PW6 did not see her husband (defendant) for nine years. According to the Plaintiff, the defendant used to appear after every five years during elections. It is clear to me that the Plaintiff has always been there for the family. Their son testified that the defendant was the one paying their school fees. PW6 left her daughter in the hands of the Plaintiff. I believe PW6 left when her daughter was about 8 to 9 years. They were married for ten (10) years and the child was born during the first year of the marriage. The defendant did testify that the Plaintiff has been taking care of his ailing mother. It is the Plaintiff's evidence that she has been sleeping with the defendant's mother who is on pampers for ten (10) years now. The domestic worker is the Plaintiff's relative.

It is true that the Plaintiff has been using the rent to take care of the family. She also paid school fees to the children of her co-wives. She ensures that the defendant's mother is well taken care of. It is my finding that the Plaintiff's efforts cannot be ignored. Despite their long period of bad relationship, the Plaintiff dutifully took care of the family. Even after the divorce, the Plaintiff has continued to take care of the defendant's mother. The defendant's wife is working and may not take care of the defendant's mother. Apart from that, the Plaintiff has been the focal point in the entire family. She was entrusted by her in laws to collect the rent. She shares part of the rent with the defendant's wife. She ensured that the children are taken care of. Although her children are now grown up and married, it took her effort to bring them up and ensure that they went to school.

Plot Number [Particulars withheld] was not purchased by the parties. The defendant is now the owner of the Plot. The Plaintiff's efforts and contribution in the family cannot go unnoticed. It is true that the Plaintiff did not make any monetary contribution. However, the many years of working for the family in form of domestic work and management of the matrimonial home, management of the Plot [Particulars withheld] and taking care of the children is a worthy contribution.

There is no formula for distribution of Matrimonial Property. What the court should consider is the contribution by the parties towards the property which is the subject of distribution. Where the financial contribution of each party is known, it becomes easy for the court to distribute the property in line with Section 7 of the Matrimonial Property Act. However, where the contribution is non- monetary, the situation becomes difficult. The court has to estimate the efforts by the spouse who did not make any financial contribution and give it a value, either as a percentage or as a lump sum. The current situation is that the defendant equally did not make any financial contribution.

The property was acquired in 2012. The defendant has another wife. It is not indicated when he got married to the current wife. Section 8 of the Matrimonial Property Act provides for property rights in polygamous marriage. Section 8 states as follows:-

(1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the—

(a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and [Rev. 2014] Matrimonial Property No. 49 of 2013 M9A - 7 [Issue 3]

(b) matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives.

(2) Despite subsection (1)(b), where it is clear by agreement of the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then any such wife shall own that matrimonial property equally with the husband without the participation of the other wife or wives.

The Plaintiff has lived with the defendant for a longer period than the other wives. Although the property was acquired in 2012, it is only the Plaintiff who has dealt with the property among the defendant's wives. The Plaintiff has been collecting the rent for over ten (10) years. Her contribution in the family is higher than that of the other wives. Given the circumstances of this case, I do assess the Plaintiff's contribution towards Plot No. 37 to be 30%. The Plaintiff is entitled to 30% of the property. I am aware that the defendant may claim that the plaintiff will also inherit property from her parents. However, that is not the issue at hand.

The other issue involves the cows. It is not known when the cows were left with the Plaintiff. The defendant was within his right to sell any cattle left by his late father. The Plaintiff was equally entitled to sell any remaining cows in order to take care of the family.

With regard to the defendant's request for a statement of account for the rental income, it is my finding that such a statement cannot be rendered. Before 2012 the property belonged to the defendant's mother and the rent has continuously taken care of the family. Even after the property changed hands, the Plaintiff continued to use the rent proceeds to take care of the family. There is no evidence that the Plaintiff is misusing the rent.

The marriage is lawfully dissolved and I find no reason to make a declaration to that effect. The Plaintiff was collecting the rent initially through the permission of the defendant's mother. She was the defendant's wife and was not collecting the rent as a trustee.

In the end, the parties' respective originating summons are determined as follows:-

- 1) Plot No. [Particulars withheld] Marsabit is part of the estate of the late A (formerly known as A K) and is not Matrimonial Property.**
- 2) Plot No. [Particulars withheld], Marsabit was acquired by the defendant during the existence of the marriage and forms part of their Matrimonial Property.**
- 3) The Plaintiff is entitled to 30% of Plot Number [Particulars withheld] being her contribution towards the property.**

Since the dispute involves family members, I do hold that parties shall meet their respective costs.

Dated, signed and delivered at Marsabit this 23rd day of July 2018

S.J. CHITEMBWE

JUDGE