



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL MISC CASE NO. 65 OF 2014

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

M M.....APPLICANT

-VERSUS

J K M.....RESPONDENT

JUDGMENT

1. The Applicant herein MM (hereafter referred to as the Applicant) filed this originating summons dated 9.10.2014 and later amended it on 1.4.2016. The Applicant is seeking the following orders in the amended originating summons;

i. THAT this Court be pleased to declare that the property known as LR NO. 5989/[Particulars Withheld] and all the portions resulting from its sub-division namely LR Nos. 5989/[Particulars Withheld] was held by the Respondent on his behalf and in trust for the Applicant.

ii. THAT this Court be pleased to declare that the Property known as LR. 5989/[Particulars Withheld] resulting from its subdivision were held by the Respondent on his behalf and in trust for the Applicant.

iii. THAT this Honourable Court be pleased to declare that any disposition of portion (s) of land resulting from sub-division of LR No. 5989/[Particulars Withheld] without the Applicant's Consent is illegal null and void and that the Applicant is entitled to a 50% share of the proceeds thereof.

a. That this honourable Court be pleased to declare that the properties known as LR No. 5989/[Particulars Withheld] are held by the Respondent on his behalf and in trust for the Applicant.

iv. THAT the Chief Registrar of Government Lands be ordered to register the Applicant and the Respondent as joint owners of 5989/[Particulars Withheld].

v. THAT in the alternative this Honourable Court be pleased to apportion 5989/[Particulars Withheld].

a. That the proceeds of sale realized from the sale of LR. No. 5989/[Particulars Withheld] be shared equally between the Applicant and the Respondent.

b. That in the sum of money held in the joint bank account number [...] [Particulars Withheld] & Co. Advocates and J. /[Particulars Withheld] & Co Advocates be released to the Applicant as part payment of her share of proceeds of sale of LRI No. 5989/[Particulars Withheld].

vi. THAT the Respondent be restrained from interfering with the Applicant's free access and peaceful occupation of the matrimonial home situate on LR No. 5989/[Particulars Withheld].

vii. THAT the Deputy Registrar of this court be empowered to sign any documents that the Respondent may refuse to sign to give

effect to any orders the Court may issue

viii. THAT this Honourable Court be pleased to make such orders as will meet the ends of justice.

ix. THAT the Respondent be condemned to pay costs of this suit and incidental thereto.

2. The Application is supported by the Affidavit of the Applicant in which she deposed as follows:

i. THAT she got married to the Respondent JKM (hereafter referred to as the Respondent) on 4.11.1967 at [Particulars Withheld] Church at Kiambu.

ii. THAT the marriage was blessed with (3) three Children who are all adults namely:

i. KK

ii. MM

iii. CM

iii. THAT at the time of their marriage the Respondent was working as a technician with the Department of [Particulars Withheld] while the Applicant was a teacher.

iv. THAT thereafter, applicant secured a job with [Particulars Withheld] Limited where she worked from 1968 until her retirement in 1996. The respondent also secured a job with the [Particulars Withheld] now (...) as a Technician until his retirement in 1994.

v. THAT on or about 1986 through their joint financial contribution, they purchased a property known as Lr 5989/[Particulars Withheld], (the property) situate off Kiambu Road Nairobi and measuring about (4.044) Hectares. Annexed herewith and marked as Exhibit MM 2 is a copy of the Deed Plan for the Property.

vi. THAT the Property was however registered in the sole name of the Respondent

vii. THAT they built their matrimonial home on the said property and lived there.

viii. THAT in the late 1990's serious matrimonial differences arose between the applicant and respondent which were caused by the Respondent's acts of cruelty and infidelity with several women.

ix. THAT the Respondent was also drinking a lot and would spend most of the nights away and get home in the early hours of the morning.

x. THAT Applicant was traumatized by the Respondent's behavior and the health and financial risks that it was exposing to them and she left the country for the United States of America in 2000 in search for work.

xi. THAT since 2006, she has made frequent trips into the country and into their matrimonial home but her efforts to reconcile with the Respondent have not been successful.

xii. THAT on 15th September 2014, she arrived into the country and unfortunately, the respondent was very hostile to her and sent her son to inform her at the airport that it was she was not welcome at home.

xiii. THAT Applicant was quite shocked at the Respondent's conduct since, despite their differences, he had never excluded her from their home, all the years before.

xiv. THAT Applicant has since established that Respondent is in the process of disposing off portions of their matrimonial property without her consent and his refusal to allow her into the home must have been intended to conceal the disposal.

xv. THAT she is aware that in the year 1998, the Respondent caused sub-division of the property into LR. Nos. 5989/[Particulars Withheld]. The first three were smaller portions measuring 0.2 ha each which he had sold to 3rd parties while the remaining LR No. 5989/[Particulars Withheld] where their matrimonial home stands, was left in his name.

xvi. THAT again in 2007, she is aware that the Respondent caused sub-division of the land known as LR No. 5989/[Particulars Withheld] Nairobi into fifteen(15) sub-plots being LR Nos. 5989/[Particulars Withheld] THAT although she protested the multiple sub-division when she became aware of the same, he assured her that he would not sell and would keep them for the family.

xvii. THAT she was alarmed when she found out that the respondent was in the process of negotiating a sale with a third party of a Five (5) acre portion of their matrimonial property was in the process of seeking amalgamation of several of the sub-divisions so that he can sell them off as one portion.

- xviii. *THAT in fact confirmed from a Senior Officer in the County Government that the Respondent has applied for amalgamation.*
- xix. *THAT on 6th October 2014, she had gone to stop the proposed amalgamation at the County Officer's Office and by coincidence the Applicant showed up in the same office apparently on a mission to follow up on the amalgamation. The officer listened to us and said that he would need to seek legal advice on how to deal with the matter.*
- xx. *THAT she immediately instructed her advocates on record to write a letter to the county government to communicate her protest to the planned amalgamation and sale and she is aware that no response has been received yet. Annexed herewith and marked as Exhibit 5 is a copy of her advocate's letter.*
- xxi. *THAT at the meeting the respondent made it clear that he intended to proceed with the sale and that nothing applicant said or did would stop him.*
- xxii. *THAT she then found out that the Respondent had entered into an agreement with a third party for the excision and sale of 2.023 Hectares (About 5 acres) of land. To allow for the same, the Respondent caused amalgamation of some of the portions and alteration of the character of the initial sub-division of LR No. 5989/[Particulars Withheld] from the 15 portions aforesaid to seven (7) portions known as LR No. 5989/[Particulars Withheld]. THAT on 8th December 2014, a Consent Order was recorded in Court which inter-alia allowed the Respondent to complete the sale of a portion of the Matrimonial property known as LR. No.5989/[Particulars Withheld]*
- xxiii. *THAT the Respondent then sold the aforesaid LR No. 5989/[Particulars Withheld] and has already exclusively benefited from over 60% of the proceeds of sale of the same and the balance of the proceeds amounting to Ksh.103,625,000.00 deposited into a joint account of the parties advocates.*
- xxiv. *THAT though the Respondent sold the said LR. No. 5989/[Particulars Withheld] for Kshs.275,000,000.00 he misrepresented to the Court that he had sold the same for Ksh.150,000.00. In fact this Honourable Court in its ruling delivered on 26th June 2016 noted that the Respondent had indeed withdrawn from his bank account, a sum of Ksh. 108,500,000.00. Annexed herewith and marked as Exhibit 6 is a copy of the said Ruling.*
- xxv. *THAT she stands to suffer irreparable loss if the Respondent is not prevented from disposing off the remaining properties.*
- xxvi. *THAT she believes that she is entitled to the sum of Ksh.103,625,000.00 deposited in the joint account of the parties advocates being part settlement of her share of the proceeds of LR No. 5989/[Particulars Withheld].*
- xxvii. *That in fact the Respondent is benefitting from the share of the proceeds that he withheld and has made substantial income generating investments as confirmed by the annexed copies of documents marked as exhibit 7.*
- xxviii. *That she has been informed by her advocates on record that though the property is registered in her husband's name, she has an interest in the same as his spouse and also having contributed to its acquisition and development.*
- xxix. *THAT she is further advised by her advocates that under the law, her consent ought to be sought and obtained before matrimonial property can be disposed and the court has power to avoid any transfer done without her consent.*
- xxx. *That the Court also has power under the law to declare parties' right to matrimonial property and protect such rights.*

3. The Respondent filed a Replying Affidavit in response to the Originating Summons in which he deposed as follows:

- i. *THAT it is true that he got married to the Applicant as stated in her affidavit and that time he was working as an assistant engineer with [Particulars Withheld] while the applicant was working as an untrained teacher at [Particulars Withheld] Primary School.*
- ii. *THAT soon after the wedding, he paid for the applicant's college fees in a private Commercial College to be trained in operation of Burroughs Accounting Machines and the course immediately paved way for her employment by [Particulars Withheld] Bank and she worked for this bank until retirement in November 1996.*
- iii. *THAT he had also changed the employment to join the [Particulars Withheld] as an engineer from 1970 to 29th August 1994 when he retired.*
- iv. *THAT during his employment with the Government, I bought two houses as follows:*
- a. *Plot No. LR No. 60/[Particulars Withheld] Estate phase 1, he was financed by HFCK*
- b. *Plot No. LR No. 82/[Particulars Withheld] Estate and he was financed by Savings & Loans Kenya Ltd.*
- c. *The third house bought and registered in joint names as their Matrimonial Home was plot No. 209/[Particulars Withheld] Nairobi. This house was financed by [Particulars Withheld] Bank*

- d. THAT he had to sell plots mentioned above in order to raise funds to buy plot Nos. 5989/[Particulars Withheld] after failing to procure the loan from AFC. He later took mortgage from Savings and loan to construct a house.
- v. THAT when differences arose between him and the Plaintiff, he asked Kamonde advocates to sell the house in South C in Paragraph 3 (iii) above and all the monies were given to the plaintiff except commission and legal fees and the Plaintiff used the money to construct a block of flat on plot at Marurui/Roysambu (annexed and marked JKM –AA is a photograph of the flat) worth Ksh.70,000,000 or thereabouts.
- vi. THAT the Applicant was not able to complete the construction and his son pleaded with him to change one of the subdivisions to get a loan for the Applicant to get a loan.
- vii. THAT the only salary the applicant disclosed to him was Ksh.600/- she was paid by [Particulars Withheld] as her first salary and all her subsequent salaries have been used by her for her personal use notwithstanding that she had a big salary as a bank official.
- viii. THAT regrettably the Plaintiff deserted her marriage on 11th December, 1999 when she proceeded to USA to attend the graduation Ceremony for their son and she never returned home until seven (7) years. She later asked the late. G and his eldest brother to take her to his house but he was reluctant to accept her back.
- ix. THAT the applicant has never contributed to the purchase of the land and being a woman or wife does not in itself create property rights in his land or generally.
- x. THAT;
- (a) He did not evict the applicant from his home but as a matter of fact, she deserted him in order to get married to an American one RLB (annexed and marked JKM-BB (I) is a Court Document)
- (b) the applicant was comforting men in America as shown on photos marked JKM-BB (ii)
- xi. THAT through her marriage to RLB, she is a permanent resident/citizen of America while he remains clinging to his lovely Kenyan citizenship (annexed and marked JKM-CC is a resident card).
- xii. THAT during their happy marriage, they were blessed with three sons all of whom are adults and over 21 years who are graduates and two of them have given them beautiful grand children.
- xiii. THAT the applicant did not contribute to the family as she did not even contribute to the education or upkeep of their children.
- xiv. THAT he has never been cruel to M an if he were cruel, she would have reported him either to the police of to both our family members for him to be cautioned.
- xv. THAT desertion for fifteen years is too long for her to imagine that she can get share of his properties
- xvi. THAT the applicant's suit borders on extreme dishonesty in that she has not disclosed her assets.
- xvii. THAT her marriage to RLB automatically reduced his marriage to her as NULL and VOID.
- xviii. THAT the Applicant was not able to complete the construction and his son pleaded with him to charge one of the subdivisions to get a loan for the Applicant to get a loan.
- xix. THAT he guaranteed the Applicant a loan of Ksh.5,000,000/- and she repaid the loan and his property was discharged (annexed and marked JKM-DD is a copy of discharge).
- xx. THAT the applicant is the wife of RLB and her claim should be rightly be directed at Mr. RLB.
- xxi. THAT it is clear the applicant has committed the offence known as bigamy as she got married to RLB while their marriage was not dissolved.
- xxii. THAT he is surprised by the Applicant's dishonesty as the reason he told his son he would not entertain her was because she was the wife of RLB.
- xxiii. THAT he wrote her a text to inform her that he would not welcome her (annexed and marked JKM –FF is a copy of text) and this is what has catalyzed this suit.
- xxiv. THAT he has sought funds to develop his land but the banks are unwilling to do so as I have no regular income.
- xxv. THAT he has now got partners who want him to contribute and he has decided to sell part of the land to get his share of

money for development.

xxvi. THAT the process of amalgamation which the application seeks to stop is now complete and the application is overtaken by events.

xxvii. THAT he is only selling part of the land and the applicant is at liberty to place an order against the rest which is more or less a half of the suit premises and which will go to her in the event that she is successful in her suit herein (annexed and marked JKM – GG (i) and (ii) bordered green is the portion he is selling and the remainder is bordered yellow and letter from National Land Commission showing portion on sale as A and balance as B.

xxviii. THAT the issue of orders will cause him big losses as it means the applicant has an income of about Ksh.400,000/- per month and she has to micromanage my life and he cannot do anything to get sustenance.

xxix. THAT the application and the suit is against all known tenets of the constitution, the law, human rights and morals as it appears his work in this life is to work for the applicant and whatever little is to benefit him to personally is an aberration and it must be fought at all costs.

4. The parties gave viva voce evidence. The Applicant said that she lives at [Particulars Withheld] off Kiambu Road. She said she got married to the Respondent on 4.11.1967 at [Particulars Withheld] Church.

5. The applicant said during the Subsistence of the marriage she was working at [Particulars Withheld] Bank and prior to starting working at [Particulars Withheld] Bank in April 1968 she was an untrained teacher.

6. The Applicant also said she was in charge when she retired and she used to use her money to buy food and utilities in the house. She said in 1999 she went for the graduation of her son in the USA and she found it was peaceful there and she decided to stay .

7. She said she had missed the graduation of her older son and she went for the graduation of the younger son. She said during the subsistence of her marriage to the Respondent, he used to leave the house at 4pm everyday and he would not come back until 6am in the morning. She said that happened every single day.

8. The Applicant said while in the USA she was informed that the only way to get a job was to enter into a "commercial marriage" and that is what she did. She said she entered into a "commercial marriage" with RB to enable her get citizenship in the USA to enable her to secure a job.

9. The Applicant said she flew from Boston to California where the marriage took place and she flew back the following day. She said she got papers and started working and in 2006 she returned to Kenya but the Respondent did not want to see her.

10. The Applicant said she looked for her eldest brother – in – law and a neighbor to take her to the Respondent but he refused to listen to them and accused her of wanting to kill him.

11. The applicant said during her stay in the USA, she used to send money to the Respondent. She also said she discovered while she was in the USA that the Respondent had sired a child called CW with another woman.

12. The Applicant said in 1984, she acquired a house at South C which she registered in both her name and that of the Respondent because the bank could not allow a woman who is married to register a property in her own name.

13. In the year 2008, she sold the house. She said they never lived in the said house. In 1984 they were living at Donholm. She said they sold the Donholm house and [Particulars Withheld] house and acquired their [Particulars Withheld] matrimonial home. The acreage was 10 acres.

14. She said sometimes in 1998, the Respondent sub-divided the [Particulars Withheld] Property into half acres and she sold three plots which amounted to 1½ acres. She said 3½ acres remained and that the matrimonial home stands on ½ an acre.

15. The Applicant said again in 2014, the Respondent amalgamated five acres in order to sell them. She said at that time the respondent had called him to go and collect her belongings from the matrimonial property.

16. The Applicant said when she arrived in the country, her son M went to pick her from the Airport. She said he did not take her home as usual and he told her the Respondent had told him not to dare to take her home.

17. The applicant said she learnt that the Respondent had sold 5 acres out of the matrimonial property for 300 million and he had been paid 10% of the purchase prize. When she went to City Hall the following day, the Respondent met her in an office at City Hall.

18. The Applicant said she instructed her lawyer to file this case. She said the Respondent told the court he had sold the property at Ksh.150 million but she said she knew he was lying as she had learnt that he sold the property for 300 million Kenya shillings.

19. The Applicant said the 103 million held by Bank should be declared her money. She also asked the court to declare that the remaining unsold property should be divided between the two of them. She said there are six properties remaining. The Applicant also asked the Court to allow her to go back to her home.

20. In Cross examination, the Applicant said she owns flats at Marurui where she collects rent of Ksh.250,000 per month. She also said when she started working at [Particulars Withheld] Bank she was earning Ksh.600 per month but at the time of retirement, she was earning Ksh.50,000 per month.

21. The Applicant also said in cross examination that due to her marriage to RB she acquired American Citizenship. She denied that she presented herself as a single person. She said she did not give the Respondent B conjugal rights. She said the marriage to B was dissolved in 2009. She said her marriage to B was a Sham. She said it was arranged by an Ugandan living in the USA. She said it was a marriage only on paper.

22. The Applicant also said in cross examination that he contributed to the purchase of the Matrimonial property by taking care of the children while the Respondent paid for the house. She said her salary was enough for her to pay her mortgage and maintain her home.

23. The Applicant said she collects pension of Ksh.120,000 per month from the USA Government, she said the Respondent did not assist her to build the [Particulars Withheld] flats.

24. The Respondent said he lives at [Particulars Withheld] off Kiambu Road. He said he is a Senior Citizen (74 years old) and a retired engineer. He filed a..... dispositions herein which he adopted as his evidence in chief.

25. The Respondent said the applicant deserted him and returned after seven years. He said he lawfully wedded the Applicant and he never evicted her from the matrimonial home. He said he is the one who purchased the matrimonial property. He said he was the one who bought the Ngei and Donholm Properties by loan. He said the Applicant has nothing to show that he contributed to the purchase of the [Particulars Withheld] property.

25. The Respondent also said after the South C Property was sold, he gave all the money to the Applicant and further he gave her a bank guarantee and she got a loan to complete the [Particulars Withheld] Property. He said the Applicant is not entitled to the property at Ridgeway. He said he has never received any money from the Applicant and further that the orders obtained by the Applicant occasioned him loss.

27. The Respondent said the Applicant caused him pain which was too much to bear. He said she left him, got married to RLB and committed bigamy. He asked the court not to award the applicant anything. He said he was into process of selling the property to construct an estate called [Particulars Withheld] when the Applicant stopped him from dealing with his property.

28. The Respondent said he suffered a stroke when he collapsed in his house and lost speech. He said he has suffered for 18 years since the Applicant deserted him.

29. In Cross examination, the Respondent said he financed the Applicant's training. He said both the Applicant and himself were working during the subsistence of their marriage.

30. The Respondent said in cross examination that when he travelled, the applicant used to look after the children. He said he worked as an Engineer and not a Technician as the Applicant alleged. He said he sold the first three properties and bought a property as H.

31. The Respondent also said the Applicant bought a property at Marurui. He said he is not claiming the [Particulars Withheld] Property as he did not contribute to it. He said the Applicant bought it secretly and registered it in her name and that of her brother. He said he filed a Divorce Cause which he withdrew when he learnt that he did not have a wife. He said he did not see any cross petition and he is not aware that any decree nisi or absolute has been issued in that petition he withdrew.

32. The Respondent further said in cross examination that he sold the Ridgeway Plots at Ksh.150 million. He said the Applicant ceased to be his wife when she married RB.

33. The Respondent also said in cross examination that the Applicant lost her right to share his property when she married RB.

34. The Applicant filed written submissions in which he stated as follows;

i. That the Parties in this case got married on 4.11.1967 at [Particulars Withheld]; Church Kiambu and they cohabited in several places until 1991 when they moved to the suit property.

ii. That both the Applicant and he Respondent were working during the subsistence of the marriage. The Applicant was initially working as an untrained teacher and later at [Particulars Withheld] Bank.

iii. The Applicant submitted that the Character of the suit property has changed over time. At the time it was acquired it was LR. No. 5989/[Particulars Withheld]. The respondent carved out three portions which he sold and the remaining property changed to LR no. 5989/[Particulars Withheld]. The respondent then caused subdivisions of 5989/[Particulars Withheld] into 15 portions. In 2014, the respondent again changed the character of the portions again by amalgamation of several of them into five acre piece of land known as LR No. 5980/[Particulars Withheld] which he sold to [Particulars Withheld] Hotel Ltd.

iv. The applicant submitted that the remaining matrimonial properties for the court to make a determination are as follows:

1. LR No. 5989/[Particulars Withheld]

2. LR Nos. 5989/[Particulars Withheld]

3. LR No. 5989/[Particulars Withheld] (Where the home is built)

4. LR Nos. 5989/[Particulars Withheld]

5. A sum of Ksh.103,625,000 held in a joint account by the Advocates for the Applicant and the Respondent.

v. The Applicant submitted that the marriage between the Applicant and the Respondent did not terminate when the Applicant married RLB and that a marriage substitutes until it is determined by

- a. the death of a spouse
- b. A decree declaring the presumption of the death of a spouse
- c. A decree of annulment
- d. A Decree of divorce
- e. A decree of Divorce or annulment obtained in a foreign Country and recognized in Kenya.

vi. The Applicant submitted that the suit property comprises Matrimonial Property as it was acquired during the subsistence of the marriage. The applicant submitted that Section 14 of the Marriage Act provides that where matrimonial property is acquired during the marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.

vii. The applicant also submitted to the acquisition of the matrimonial property as she was working during the subsistence of the marriage and further that the Respondent confirmed that his job took him away from the Matrimonial home for long hours. The Applicant also submitted that the Respondent collected property from her property at South C until it was sold.

viii. The Applicant relied on Civil Appeal No. 128 of 2014 where Justice Waki said that taking care of the Children and the matrimonial home and the farm amounted to non-monetary contribution.

ix. The Applicant submitted that the Respondent sold the matrimonial property at Ksh.275,000,000 and not Ksh.50,000,000 as he told the court and since only Ksh.103,625,000 is available the said sum should be released on the Applicant.

x. The Applicant relied on Article 45 (3) of the Constitution which provides as follows:

“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”

xi. The Applicant also submitted that section 12 (3) of the matrimonial property Act 2013 provides that:

“A spouse shall not during the subsistence of the marriage be evicted from the matrimonial home by or at the instance of other spouse except by order of a Court”.

The Applicant submitted that she is entitled to an order to re-occupy the house as the Respondent’s acts of excluding her from the house are illegal in view of the clear provisions of the law.

35. The Respondent did not file submissions as directed. This Court will therefore rely on the eleven dispositions filed by the Respondent to make a determination in this case.

36. The Respondent filed written submissions dated 14th December 2018 in which he submitted as follows:-

i. That the Applicant/claimant did not produce any certificate of title in confirmation of the ownership of the specific properties cited in the amended originating summons and that the burden of proof of proprietorship is upon the Applicant and does not shift to the Respondent.

ii. The Respondent relied on **section 107(1)** of the **Evidence Act** which states as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the extent of facts which h asserted must prove those facts exist”

iii. The Respondent further submitted that the Applicant relied upon uncertified Survey Maps produced as “MM3” and “MM4” in paragraphs 17 and 18 of their supporting affidavit sworn on 1st April 2016. The Respondent also submitted that the Applicant talked about “subdivisions” and amalgamations without exhibiting a single certificate.

iv. The Respondent said in his submissions that the Applicant claims that she is entitled to the relief she is seeking on the basis of the marriage between her and the Respondent and she also claimed that the suit property was acquired through her contribution but she did not prove what specific contribution she made in the acquisition of LR No 5989/[*Particulars Withheld*].

v. The Respondent also relied on the Court of Appeal case of **PNN –v- ZWN [2017]eKLR** where the court dismissed the blanket claim of 50% claim of matrimonial property without proof of contribution. In that a case, non-monetary contribution is defined as including:-

- 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

vi. The Respondent submitted that the Applicant did not prove any of the above non-monetary contribution as she was a full time employee of Barclays Bank of Kenya and was servicing a loan granted to her to purchase a house at South C which she later sold and she purchased her property at Marurui.

vii. On the issue of companionship the Respondent submitted that the Applicant deserted the Respondent in a most cruel way and engaged in bigamy and her contribution was negative. Finally on the issue of management and purely business of property, the Respondent submitted that the Applicant did not prove that she contributed to any aspect of the property and neither did she prove that she hired a single farm worker to tend the property.

viii. The Respondent also said in his submissions that the Applicant conceded that she has a property at Marurui from where she receives rent of Kshs.250,000/= per month which she does not deem as part of the matrimonial property” available for distribution.

ix. The Respondent submitted that **section 26** of the **Land Registration 2012** protects the Respondent’s title when the mandatory terms of **section 7** of the **Matrimonial Property Act** are not met.

x. It was submitted that the Applicant is seeking her specific relief and orders over property she expressly claims have already been sold to third parties would fail since the third party has not been enjoined to this suit and their specific shares of such properties identified.

xi. Finally the Respondent stated in his submissions that the Applicant committed the offence of bigamy which is an offence under **section 171** of the **Penal Code**. The Respondent urged the court to punish the Applicant for admitting on oath that she had committed the offence of bigamy.

37. I have considered the originating summons filed herein by the Applicant which she amended on 9th October 2014 together with the depositions in support of the same. I have also considered the depositions filed by the Respondent in opposition to the originating summons. I have taken into account the evidence adduced by the parties. My findings are as follows:-

i. I find that it is not in dispute that the parties got married on 4th November 1967 at [*Particulars Withheld*] Church Kiambu. There is also no dispute that there are three issues of marriage namely KK, MM and CM who are all grownups.

ii. There is no dispute that the parties stayed in several places during the subsistence of the marriage and finally settled on the matrimonial property which now stands on LR No. 5989/[*Particulars Withheld*].

iii. The claimant/Applicant submitted that on 11th October 2018, a *decree Nisi* was issued before Hon. D.A.Ocharo in **Divorce Cause No. 28 of 2015**. The Respondent did not dispute this issue in his submissions. During the proceedings, the Applicant's counsel asked the court to take judicial notice of the same. I find that the said issue is not disputed.

iv. I also find that it is not in dispute that the Applicant herein went to the United States of America and entered into a “commercial” marriage with one RLB. The said marriage was subsequently dissolved.

v. The issues in dispute in this case and which this court must determine are as follows:-

- i. Whether the Applicant was married to the Respondent at all the material times;
- ii. If the answer is in the affirmative, whether the Applicant has proved the existence of the claimed properties as matrimonial properties.
- iii. If the answer is in the affirmative, whether the Applicant contributed to the acquisition of said matrimonial properties;

iv. If the answer is in the affirmative, what percentage is she entitled to?

v. Who should pay the costs of this suit?

38. On the issue as to whether the Applicant was married to the Respondent at all the material times of this case, I find that this case relates to the matrimonial property which was acquired during the subsistence of the marriage. There is no dispute that the Applicant and the Respondent got married on 4th November 1967 at *[Particulars Withheld]* Church Kiambu. The Applicant left for the USA in December 1999 to attend a graduation ceremony for their son.

39. The Applicant decided to enter into a “commercial” marriage in the US there after which enabled her to get American citizenship. She used to visit the Respondent at the matrimonial home until the year 2014 when she said Respondent excluded her from the matrimonial home.

40. I find that there is evidence that during the subsistence of the marriage the parties stayed in various places. There is evidence that both the Applicant and the Respondent were in gainful employment. The Applicant started as an untrained teacher and from 1968 to 1996 she worked at *[Particulars Withheld]* Bank.

41. There is evidence that the matrimonial property was purchased by the Respondent on or about 1986 when the parties were married.

42. There is evidence that the Respondent sold two properties one at *[Particulars Withheld]* Estate and the other at *[Particulars Withheld]* Estate in order to raise funds to buy the suit property which he stated in his replying affidavit sworn on 21st October 2014 that it was initially Plot No. 5989 *[Particulars Withheld]*.

43. I therefore find that the Applicant and the Respondent were legally married when the matrimonial property was acquired by the Respondent.

44. On the issue as to whether the Applicant has proved the existence of the claimed properties as matrimonial properties , I find that he Respondent did not deny that he purchased the said properties while he was married to the Applicant.

45. The Respondent said the Applicant deserted him in 1999 and returned in 2014 and put an injunction which stopped him from dealing with the properties.I find that the Respondent’s submissions that the Applicant has not proved existence of the properties does not hold as there is no dispute that the parties were living in the matrimonial property at Ridgeways before subdivision until the Applicant left for the United States of America.

46. There is also evidence that the Applicant continued to visit the Respondent until the year 2014 when the Applicant’s son went to pick the Applicant from the Airport and he told her that the Respondent did not want her at the matrimonial home.

47. The Respondent on his part said the conduct of the Applicant caused him anguish. He did not say how he discovered that the Applicant had entered into another marriage in America but it is very clear from the Respondent’s depositions that he became a very bitter man.

48. I find that although the Applicant did not produce title deeds to the said properties there is undisputed evidence that the properties do exist and that the Respondent lives in the matrimonial home which stands on one of the properties to date.

49. I also find that the Respondent did not challenge the averments by the Applicant that the following matrimonial properties are available for this court to make a determination

i. LR No. 5989/*[Particulars Withheld]*

ii. LR No. 5989/*[Particulars Withheld]*

iii. LR No. 5989/*[Particulars Withheld]*

iv. LR No. 5989//*[Particulars Withheld]* (where the home stands)

v. LR No. 5989/*[Particulars Withheld]*

vi. LR No. 5989/*[Particulars Withheld]*

vii. Kshs.103,625,000/= in an Escrow account

50. I therefore find that the Applicant has proved the existence of the claimed properties as matrimonial properties as they were purchased during the subsistence of the marriage.

51. On the issue as to whether the Applicant contributed to the acquisition of the said properties, I find that there is evidence that it is the Respondent who purchased and build the matrimonial home.

52. I find that at the time of the acquisition of the property, there is evidence that the Applicant and the children of the marriage stayed at the

matrimonial property. The law now takes into consideration the non-monetary contribution to the acquisition of matrimonial property.

53. The **Matrimonial Property Act, 2013** which came into force on 24th December 2013 and commenced on 16th January 2014, **section 7** provides as follows;

“subject to sections 6(3) ownership of matrimonial property vests in spouses according to the contribution of either spouse towards its acquisition, and should be divided between the spouses if they divorce or their marriage is otherwise dissolved”

54. **Section 2** defines contribution to mean monetary and non-monetary contribution. Non-monetary contribution includes

- i. Domestic work and management of the matrimonial home;
- ii. Child care
- iii. Companionship
- iv. Management of family business or property; and
- v. Farm work

55. I find that there is evidence that the Applicant was always at home. It was the Respondent who used to travel. The Applicant left home in 1999 and that was when the Respondent said she deserted him and went to the United States of America. Although her contribution was not direct, I find that there is no evidence that the Applicant abdicated her management of the matrimonial home and raising her children while working at the Bank on a full time basis.

56. The conduct of the Applicant after she travelled to the United States embittered the Respondent. However I find that the same does not negate the contribution of the Applicant to the acquisition of the matrimonial property.

57. **Article 45(3)** of the Constitution of Kenya 2010 stipulates as follows:

“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.”

58. I accordingly find that the Applicant contributed to the acquisition of the matrimonial property. The Applicant placed an injunction in this court on the dealings with the said properties which embittered the Applicant especially in view of the conduct of the Applicant when she stayed in the United States of America.

59. There is evidence which the Respondent did not dispute that on 19th January 2016 during the pendency of this suit, the Respondent filed Divorce Cause No. 28 of 2015 which he later withdrew but the Applicant who had filed a cross-petition proceeded *ex parte* and was granted a divorce on 11th October 2018.

60. The Respondent in his submissions stated that his marriage to the Applicant was reduced to null and void when she entered into another marriage in America. In my opinion, the Applicant did not have the capacity to enter into another marriage while her marriage to the Respondent was still subsisting. The subsequent relationship does not negate her contribution to the acquisition of the matrimonial property.

61. On the issue as to what percentage the Applicant contributed to the acquisition of the matrimonial property, I find that her contribution was not direct as she did not produce evidence that she contributed to the purchasing of the land on which the property stands or to construction of the matrimonial home.

62. I rely on this case of **PNN –v- ZWN [2017]eKLR**. In that case, the Court of Appeal relied on **Francis Njoroge –v-s Virginia Wanjiku Njoroge (Nairobi Civil Appeal No. 179 of 2009)** where it was held as follows:-

“... A division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the court of appeal of Singapore in Lock Yeng Fun –v- Chua Hock Chye 92007) SGCA 33,

“it is axiomatic that the division of matrimonial property under section 112 of the Act is not and by its very nature cannot be a precise mathematical exercise.”

63. In the current case, I find that both parties were in gainful employment during the material time when the property was acquired. The Applicant was a banker while the Respondent was an engineer. According to the Respondent, the Applicant contributed nothing to the acquisition of the property. I find that the Applicant did not prove direct contribution.

However, I find that the Applicant contributed indirectly and her contribution should be recognized despite that in 1999 after the acquisition of the matrimonial property, she deserted the Respondent and relocated to the United States of America.

64. The conduct of the Applicant after she relocated to the United States of America is not acceptable but as stated earlier in this judgment, the same did not negate her contribution to the acquisition of the matrimonial property.

65. The law is very clear that parties enjoy equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. According to the Respondent, his marriage to the Applicant ended when she married another man while they were still married. The *decree nisi* obtained by the Applicant has not been disputed by the Respondent. I find that the marriage between the parties does not exist.

66. I find that during the subsistence of the marriage, there is evidence that the Applicant purchased a house in South "C" and registered it in the names of the Respondent. When the Respondent sold the house he gave the Applicant all the money and she purchased a property at Marurui where she has a block of flats and earns an income of Kshs.250,000/= every month.

68. I also find that there is evidence that the Applicant's said property has not been claimed by the Respondent. The Applicant is also a US citizen who enjoys a pension of Kshs.120,000/= every month.

69. In accessing the percentage the Applicant is entitled to, I have taken into account the fact that during the subsistence of the marriage, she was able to acquire her own property through a mortgage facility. She was able to acquire a house at South C which she sold and build the block of flats at Marurui. The Respondent has not placed any claim on the Applicant's property. The Respondent said he does not want her property and he submitted that she is not entitled to anything from him because she deserted him and married RLB and she is now enjoying dual citizenship and a pension by virtue of the said act of bigamy.

70. As I have already stated earlier in this judgment, the issue before me is the distribution of the matrimonial property which was acquired during the subsistence of the marriage between the Applicant and the Respondent.

71. I have taken into consideration the peculiar circumstances of this case. The Applicant contributed indirectly to the purchase of the matrimonial property by her companionship, raising the children and managing the home. I have also considered the fact that she has her own property which she acquired during the subsistence of the marriage. I apportion her contribution at 20:80% as against the Respondent. I assess the Applicant's contribution at 20% and the Respondent 80%. I accordingly order as follows:-

(a) I declare that the matrimonial properties herein known as –

i. LR No. 5989/[Particulars Withheld]

ii. LR No. 5989/[Particulars Withheld]

iii. LR No. 5989/[Particulars Withheld]

iv. LR No. 5989/[Particulars Withheld] (where the home stands)

v. LR No. 5989/[Particulars Withheld]

vi. LR No. 5989/[Particulars Withheld] be and are held by the Respondent on his own behalf and on behalf of the Applicant who has a twenty percent interest.

(b) I order that the proceeds of the sale realized from LR No. 5989/[Particulars Withheld] be shared between the Applicant and the Respondent on a 20:80% basis.

(c) The Applicant said the Respondent sold LR No. 5989/[Particulars Withheld] at Ksh.275,000,000/=. The Respondent did not dispute this fact and neither did he disclose the amount he sold the property. I take it that the property was sold at Kshs.275,000,000/=. The Applicant is therefore entitled to Kshs.55,000,000/= which is 20% of Kshs.275,000,000/=

(d) I order that Kshs.55,000,000/= be released to the Applicant out of the balance of the purchase prize held in A/C No. [...] held jointly by the advocates for the Applicant and the Respondent. The balance of the money being Kshs.48,625,000 after deducting the Applicant's 20% share to be released to the Respondent.

(e) I decline to give an order for the Applicant to go back to the matrimonial property for reasons that the parties are now divorced.

(f) on the issue of costs, I order that each party bears its own costs of this suit.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 20th day of DECEMBER 2018

A.N. ONGERI

JUDGE