



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**  
**MATRIMONIAL CAUSE NO. 1 OF 2015**

**M W M ..... APPLICANT**

**VERSUS**

**W E L ..... RESPONDENT**

**JUDGMENT**

1. By an originating summons dated 16<sup>th</sup> October, 2015 M W M seeks the following prayers.

***THAT it be presumed that there is irrebutable presumption of marriage between the Applicant and the Respondent***

***THAT it be declared that the movable property acquired by the joint funds and efforts of the Applicant and the Respondent during the subsistence of marriage and registered in the sole name of the Respondent and in the efforts of the Applicant and the possession more particularly shown in the annexed affidavit of the Applicant is held in trust for the Applicant and the same be subdivided and/or sold and the proceeds of sale or subdivision be shared equally or according to each party's contribution towards its acquisition.***

***THAT the Honourable Court be pleased to grant such further orders or reliefs as it may deem just to grant in the circumstances and in the interest of justice.***

Those prayers were based on the grounds that there was a marriage between **M W M (the applicant)** and **W E L (the respondent)**, that the spouses have separated; that the applicant contributed both directly and indirectly towards the acquisition of the Matrimonial property, and that the title No. **Nanyuki/Naibor Block [particulars withheld] Kariunga** (the property) is solely registered in the name of the respondent.

2. The respondent failed to file any papers in response to the suit and also failed to attend the hearing of this matter. The hearing proceeded through affidavit and written submissions.

3. According to the affidavit evidence the applicant deponed that she was married to the respondent under the Turkana Custom in the year 2004. The couple separated in the year 2014. In the year 2006 the couple purchased the property for Kshs. 45,000/-. They each raised Ksh. 10,000 towards the purchase price and the respondent's father advanced them Ksh. 25,000/-. The applicant deponed that she raised her contribution from her personal saving which she had accumulated from her previous employment and income from a shop she was running. That after the couple purchased the property they established their matrimonial home by constructing their home thereon. The matrimonial house was built from the applicant's savings and income from the shop she was running and also from the salary of the respondent. The applicant did domestic chores, cooked for the workers and fetched water for construction of that house while the respondent went to work. The couple also built a wooden house for the respondent's

father who later vacated.

4. The couple were blessed with two children one born on 30<sup>th</sup> June 2005 and the other on 25<sup>th</sup> June 2012. The applicant stated that she paid school fees of the two children after the respondent engaged in politics and was finally elected as Councilor between the years 2008 and 2013.

5. The applicant shifted her shop to the matrimonial property and from the proceeds of that shop they built two other shops which earned them rental income of Ksh. 3,000/= per month.

6. The applicant deponed that the respondent in the year 2014 engaged in domestic violence which led to the applicant deserting the matrimonial home.

7. It is on the basis of the above evidence that the applicant seeks the prayers in her originating summons.

### **ANALYSIS AND DETERMINATION**

8. The applicant's evidence that she was married to the respondent according to Turkana custom was uncontroverted. It follows that on a balance of probability the court accepts that evidence. Even if the applicant had not pleaded that she was married under the Turkana custom she would have succeed on her prayer for presumption of marriage of the account of their long co-habitation. In **R N N v P S [2006] eKLR** the court discussed how presumption of marriage would arise as follows:

**HORTENSIA WANJIKU YAWE VS PUBLIC TRUSTEE COURT OF APPEAL NUMBER 13 OF 1976** where the court held:

*“By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for 9 years before the deceased died..... and during that time the Appellant bore the deceased 4 children .... long cohabitation as man and wife gives rise to the presumption of marriage in favour of the Appellant only cogent evidence to the contrary can rebut such a resumption.....”*

The same position is amplified in the case of:

**CHRISTOPHER NDERI GATHAMBO VS SAMUEL MUTHUI MUNENE NAIROBI HIGH COURT CIVIL CASE 1372 OF 2001**

The court observed:

*“The claim is [presumption of marriage] on the basis of cohabitation and friendship, agreement and love. They lived together in Nairobi and had a daughter together..... anyone of those actions cumulatively prove the parties intended to marry and held themselves as married hence presumption.”*

9. On the first prayer the applicant does succeed. This court does hereby presume the applicant and the respondent as married under the Turkana custom and by virtue of their long co-habitation, ten years, and coupled with the birth of two children.

10. Since the court does now presume the parties as husband and wife **Section 14 of the Matrimonial Property Act (the Act)** presumes that property acquired during marriage but registered in the name of one spouse is held in trust for the other spouse. The full text of that Section is as follows:

Where matrimonial property is acquired during marriage-

***a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse: and***

***b. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.***

11. Section 2 of the Act defines contribution towards acquisition of matrimonial property as:

***“Contribution” means monetary and non-monetary contribution and includes-***

***a. domestic work and management the matrimonial home;***

***b. child care***

***c. companionship;***

***d. management of family business or property; and***

***e. farm work***

12. The applicant from her uncontroverted evidence demonstrated that she not only made non-monetary contribution to the purchase of the matrimonial Property but also made direct monetary contributions.

13. Section 7 of the Act provides that at divorce or dissolution of the marriage the matrimonial property shall be divided amongst the spouse according to the contribution of either spouse.

14. It follows that in respect to the second prayer of the originating summons this court does declare that the property was acquired by joint funds and contribution the parties and accordingly the respondent holds the title in trust for the applicant.

15. In the interest of justice and of fairness this court shall order that the property be subdivided into equal share between the parties. The orders of the court are as follows:

**a. This court declares that there was a marriage between the applicant and the respondent;**

**b. This court further declares that Title No. NANYUKI/NAIBOR BLOCK [particulars withheld] (KARIUNGA) is held in trust for the applicant.**

**c. Title No. NANYUKI/NAIBOR BLOCK [particulars withheld] (KARIUNGA) shall be subdivided into equal shares between the applicant and the respondent.**

**d. The Deputy Registrar of this court is hereby authorized to sign all the necessary documents on behalf of the respondent which will be required to put into effect the order of this court.**

**e. The respondent shall pay the applicant’s costs of this suit.**

***Dated and Delivered at Nanyuki this 25th day of May, 2017***

**MARY KASANGO**

**JUDGE**

Before Justice Mary Kasango

Court Assistant Njue/Mariastella

Applicant .....

Respondent .....

Mr. Chweya for applicant .....

Judgment delivered in open court

**MARY KASANGO**

**JUDGE**