REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 15 OF 2014

M W G……..PLAINTIFF

VERSUS

T K G……...…….DEFENDANT

JUDGMENT

The defendant and the plaintiff were respectively husband and wife since 1982 until 2010 when their marriage was dissolved by court. Following this dissolution, the plaintiff filed this suit principally seeking half of the property, both movable and immovable, acquired during their unbroken coverture.

According to the plaint filed in court on 13th June, 2013, the marriage between the plaintiff and the defendant was solemnised under the African Christian Marriage and Divorce Act, Cap 151 on 2nd October, 1982. It was blessed with five issues born between 1983 and 1991.

For the entire period they were married, so it is averred, the parties were both working as primary school teachers and they used part of their income to acquire several properties; these are parcels of land identified as **Title No. Mweiga/Block/1/[particulars Withheld], Title No. Mweiga/Block 2/Ikumari/[particulars withheld]** and **Title No. Mweiga/Block1/[particulars withheld]**. Personal or movable properties acquired in the course of marriage have been listed as a generator, a wall unit a sewing machine, utensils, beds and beddings, three goats and three cows. Others are two steel windows, three water tanks, a television set, a radio and a bicycle.

In his defence, the defendant admitted that indeed there was a marriage between him and the plaintiff and that their marriage was dissolved on 9th March, 2010. He also admitted that they were both teachers but denied that they combined their income to acquire any property.

The defendant contended that the suit was *res judicata* and notified the plaintiff that he would raise a preliminary objection to its hearing on this particular ground; however, the suit was heard without the defendant following this objection through and therefore nothing turned on it.

Both parties reiterated their factual contentions in their respective pleadings when the suit came up for hearing. The plaintiff added that when she married the defendant they initially lived in Baringo for four years before they moved to Mweiga in Nyeri; it is here that the two put their funds together and bought land parcel number **Mweiga Block1/[particulars withheld]** though it was registered in the defendant's name. It is also on this land, according to her testimony, that they constructed their matrimonial home where they lived; they first constructed a semi-permanent house but later they built a permanent one.

Apart from this parcel of land, so the plaintiff testified, they also acquired land parcels **Title No.**

Mweiga/Block 2/Ikumari/[particulars withheld] and Title No. Mweiga/Block 1/[particulars withheld] which again were registered in the defendant's name. She testified that they constructed a permanent residential house and rental houses on **Title No. Mweiga/Block 2/Ikumari/[particulars withheld]** while they constructed a semi-permanent house on **Title No. Mweiga/Block 1/[particulars withheld].**

The plaintiff produced payslips to demonstrate how much she was earning during her marriage to the plaintiff and also to prove that she took loans which she spent on acquisition and development of the these properties.

At her cross-examination, the plaintiff admitted that she separated from the defendant in 1991 when the defendant deserted the matrimonial home and that they never lived together or did anything together ever since.

Apart from contributing to the acquisition of the matrimonial properties the plaintiff also testified that she paid fees for their children and generally maintained the family.

On his part, the defendant admitted that the plaintiff had been his wife and that they lived together until 10th April, 2007 when she left the matrimonial home. He denied having left the matrimonial home in 1991 as alleged by the plaintiff.

The defendant denied that he had any joint projects with the plaintiff because disagreements between them started in 1983, immediately after their marriage, and since then, each of them had their separate projects and held separate bank accounts. They also shared the children with the plaintiff taking care of the girls. He testified that he earned a much higher salary than his wife and that he purchased all the properties on his own. In particular, he purchased **Title No. Mweiga/Block 1/[particulars withheld]** in 1986 at Kshs 9,000; he purchased **Title No. Mweiga/Block 11/Ikumari/[particulars withheld]** on 16th September, 1991 at Kshs 90,000.00 while he purchased **Title No. Mweiga/Block 1/[particulars withheld]** on 7th May, 2007. According to the defendant the plaintiff purchased property of her own in Murang'a. He however, agreed that he lived with the plaintiff on **Title No. Mweiga/Block 1/[particulars withheld]** and that **Title No. Mweiga/Block 2/Ikumari/[particulars withheld]** is developed with residential houses. He also testified that there was a semi-permanent structure on **Title No. Mweiga/Block 1/[particulars withheld]** where he also lived with the plaintiff for some time during their marriage.

The defendant also testified that he developed and constructed a residential house on the property at the cost of Kshs 1.5 million. He started the construction in 1995 and finished in 2008 without any assistance from the plaintiff.

That, in a nutshell, was the parties' evidence.

It is common ground between them that they were husband and wife since 1982 to March 2010 when their marriage was dissolved. It is also not in dispute that after their marriage, and before this marriage was dissolved, they acquired certain properties. The only point in contention is whether each of them contributed to the acquisition of the properties or whether these properties were solely acquired by the defendant. The plaintiff's case is that they both contributed and since they have now gone separate ways, the marriage that bound them together having been broken, they should share equally whatever they acquired together during the coverture. On the contrary, the defendant's case is that the plaintiff has no share in any of these properties because she never contributed to their acquisition.

Counsel for the plaintiff invoked the Constitution of Kenya and also cited several local decisions in support of the plaintiff's case that she is entitled to half of the matrimonial property. One of the decisions he cited in which the provisions of the Constitution were invoked in the distribution of the matrimonial property is the **Nairobi High Court Civil Case No. 43 of 2009 (OS), MWM versus JPM**; in that case Kimaru, J gave the applicant, who was the wife in spousal dispute, 50% of the properties acquired during the marriage coverture but which were registered in the husband's name. In arriving at this decision, the

learned judge applied **article 45 (3)** of the **Constitution** which provides that parties to marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. He also invoked **article 27(1)** of the **Constitution** that guarantees equality before the law; under this article, every person is guaranteed the right to equal protection and equal benefit before the law. The learned judge found as a fact that both the husband and wife were working at the time of marriage and that the latter directly contributed to the acquisition of the matrimonial property since she provided the family with medical cover from which the husband himself benefited and also because she educated their children. The applicant was also held to have indirectly contributed to the acquisition of the property by managing the matrimonial home during her marriage.

Counsel also relied on the decision in **Kitale High Court Civil Suit No. 86 of 2012** between **JAO versus NA** where Obaga, J followed the decision in **Peter Mburu Echaria versus Priscillah Echaria (2007) eKLR,** amongst other decisions, and awarded the applicant wife an equal share of the property acquired during her marriage to the respondent. The learned judge also invoked the international conventions such as the **article 16 (1) (h)** of the **Convention on the Elimination of All Forms of Discrimination against Women**; **article 16 (1) of the Universal Declaration of Human Rights**; and **article 7(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women; he** held that equal sharing of matrimonial property whenever occasion arises is the way to go.

Finally, counsel relied on the decision in **Nairobi Civil Appeal No. 203 of 1997, Tabitha Wangechi Nderitu versus Simon Nderitu Kariuki** in which the Court of Appeal adopted the decision in **Kivuitu versus Kivuitu 2 KAR 241** where it was acknowledged (Omolo, Ag JA as he then was) that a wife's financial contribution to the family income need not be direct; it is sufficient if it can be proved that she catered for the welfare of the family in other ways in which case her contribution is deemed to be indirect. Based on this reasoning, the court overturned the High Court's judgment according to which the husband had been given a larger share of the property and substituted it with an award whose effect was that each of the partners was given an equal share of the property in dispute.

The learned counsel for the defendant, on the other hand, though admitting that the properties in dispute were acquired during his client's marriage to the plaintiff, disputed the fact that she contributed to such acquisition or had a beneficial interest therein. He submitted that the plaintiff's claim is based on the presumption of a trust which, according to him, was not proved to exist. Thus, in the counsel's view, in the absence of an express trust or evidence of direct contribution to the acquisition of the properties, it was apparent that the intention of the parties from the very beginning was to have the properties vested in the defendant absolutely. In this regard counsel relied on English decisions in **Pettit versus Pettit (1969) 2ALL ER 385, Rimmer versus Rimmer (1952) ALL E ER 863, Re Rogers Question (1948) 1 ALL ER 328, Allen versus Allen (1961) 3ALL ER 385** and **Cobb versus Cobb (1952) 2ALL ER 696.**

Again, relying on the decision in **Grant versus Edwards (1986) 2ALL ER** 426, counsel for the defendant submitted that the conduct of the parties was of paramount consideration in the determination of whether a trust in favour of the plaintiff could be implied. If I understood him correctly, the trust could be imputed only if the plaintiff remained in the matrimonial home and performed her wifely role even after her marriage to the defendant was dissolved; instead she deserted the home carrying along her personal belongings.

According to counsel, since the parties never did anything jointly, the only inference that one can draw from their conduct is that they did not share any kind of ownership of the properties in dispute and circumstances were that the properties solely belonged to the defendant. In this regard, counsel relied on decisions in **Backwell versus Blackwell (1943) 2 ALL ER 579**; **Re A Question between Marjorie Sims and John Sims (1946) 2ALL ER 138** and **Lloyds Bank Plc versus Rosset & Another (1990) 1 ALL ER 111**.

That is as far as the counsel's submissions went on this question.

Division of properties between spouses either during or after the dissolution of their marriage is a question that has been litigated in our courts for quite a while. Prior to the promulgation of the

Constitution of Kenya, 2010 and the subsequent enactment of the **Matrimonial Property Act, 2013**, there was little or no legislative guidance on this question, particularly where the marriage had been dissolved, and whenever this question arose, courts would, more often than not, distribute the property in the ratio of each of the spouses' contribution towards its acquisition or divide the property equally between them.

In particular circumstances, where the marriage was not yet broken, courts would turn to **section 17** of the English's **Married Women's Property Act, 1882** which applied in Kenya as a statute of general application by virtue of section 3 of the Judicature Act (cap 8).

Even then, the **Married Women's Property Act, 1882** had its limitations; first, there was the question whether the application of the Act was restricted to division of property between married couples or whether its application extended to those cases where the marriage had been dissolved. In ***Nairobi Civil Appeal No. 2 of 2000, Peter Ndungu Njenga versus Sophia Watiri Ndungu*** the Court of Appeal went as far as saying that in fact the Act did not apply to married couples and that the property acquired in the course of their marriage could only be divided between them after the dissolution of their marriage and not during the marriage coverture.

The second limitation with the **Married Women's Property Act** was that **section 17** thereof which dealt with the question of sharing out of property between spouses did not prescribe any particular formula of allocation of the property to either of the spouses whenever circumstances called for such allocation; rather, it left it to the good sense and discretion of the judge to do what he thought was fit in the circumstances. The pertinent parts of that section provided as follows:-

> ***"In any question between husband and wife as to the title to or to possession of property, either party…may apply by summons or otherwise in a summary way to any judge of the High- Court of Justice in England….and the judge of the High Court of Justice … may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit…"***

The English courts interpreted this section to mean that whenever the court was called upon to divide property between spouses, the judge had a wide power to do what he thought was fair and just under the circumstances. Sir Raymond Evershed made reference to this notion in **Rimmer versus Rimmer** (supra) where he cited with approval a passage from the judgment in **Newgrosh versus Newgrosh (unreported)**; in that case Bucknil LJ said of **section 17** as follows:

> "***That section 17 gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described as "palm tree justice". I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case".***

In resolving this question, our courts appear to have followed this principle of being "fair and just" which, in my humble view, informed a string of decisions that embraced the division of property between the spouses to the extent of their respective contribution in its acquisition. In those decisions, the courts did not apply a general principle of equality in the division of property in dispute but, just like in England, they acknowledged the peculiar circumstances of each particular case. Our court's thinking on this question was best captured in **Echaria versus Echaria EALR (2007) 2 EA 139** where the Court restated the position as follows:

> ***"In all cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this court, the court has invariably given the wife an equal share. However, a study of each of these cases shows that the decision in each case was not as a result of the application of any general principle of equality of***

division. Rather, in each case the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband." (See page 150).

In coming to this conclusion, the court considered its earlier decisions in **Essa versus Essa (1995) LL 384 (CAK), Nderitu versus Nderitu, Civil Appeal No. 203 of 1997 (UR)** and **Kamore versus Kamore (2001) 1 EA 81**. Other decisions which the Court considered along the same lines were **Muthembwa versus Muthembwa (2001) LLR 3496(CAK)** and **Mereka versus Mereka Civil Appeal No. 236 of 2001 (UR).**

The Court in **Echaria versus Echaria** (supra) discounted the notion that a wife's non-monetary contribution could be taken into account when considering the extent of her contribution towards acquisition of the matrimonial property. In taking this direction, the learned judges in the *Echaria case* differed with their brothers in **Kivuitu versus Kivuitu 2(KAR) 241** and in **Nderitu versus Nderitu** (supra); in the *Kivuitu case* Omolo Ag. J.A.,(as he then was) delivered the leading judgment and held, *inter alia*, that even if he had found as a fact that the wife had not made any monetary contribution towards the purchase of the matrimonial home, he would have gone further to assess her non-monetary contribution as a wife and put a value on it. According to the learned judge, it would be extremely cruel to the wife in the Kivuitu case and to other women in similar position if all the court has to consider is the financial contribution before allocating them any share in the matrimonial property.

Justice Omolo's reasoning was adopted by Kwach, J.A. (as he then was) in **Nderitu versus Nderitu** (supra) in which he held that a wife's non-monetary contribution ought to be taken into account. The learned judge held that a wife's contribution and more particularly a Kenyan African wife, will, more often than not, take the form of a backup service on the domestic front rather than a direct financial contribution.

The learned judges in **Echaria versus Echaria** thought that although Omolo's and Kwach's idea of non-monetary contribution was noble and informed by a sense of justice to women, it was contrary to the law on proprietary rights. The position followed by the judges in *Echaria versus Echaria* appear to be similar to that adopted by Bucknil LJ in *Newgrosh versus Newgrosh* (supra) that much as **section 17** of the **Married Women's Property Act** gave a the judge a wide berth to do what he thought is fair and just under the circumstances, it did not thereby entitle him to make an order which is contrary to any well-established principle of law.

The Court noted that although there were deficiencies in the law they could only be cured by a legislative Act rather than by any judicial innovation; in fact, so the court held, the law in England had been changed fundamentally several years back and expressly given proprietary rights to spouses in a marital union. The court revisited its decision in *Kamore versus Kamore (supra)* where it had recommended legislative action be taken to mitigate the gaps in the law on the matrimonial property. In that case the court had said:-

"We would like to add our observations, that is to say, that until such a time as some law is enacted, as indeed it was enacted in England as a result of the decision in Pettit versus Pettit and Gissing versus Gissing to give proprietary rights to spouses as distinct from registered rights, section 17 of the Act must be given the same interpretation as the law Lords did in those two cases. Such laws should be enacted to cater for the conditions and circumstances in Kenya. In England the Matrimonial Homes Act of 1967 was enacted which was later replaced by the Matrimonial Proceedings and Property Act of 1970. The Matrimonial Causes Act of 1973 also made a difference."

The court decried that seven years after it had made its recommendations in *Kamore versus Kamore* Parliament had not taken cue and enacted the appropriate law; it expressed its disappointment in the following terms:

> ***"It is now about seven years since this court expressed itself in Kamore versus Kamore, but there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our Law Reform agenda to keep the country shackled to a 125 year old foreign legislation which the mother country found wanting more than 30years ago! In enacting the 1967, 1970 and 1973 Acts, Britain brought justice to the shattered matrimonial home. Surely our Kenyan spouses are not the products of a lesser God and so should have their fate decided on precedents set by the House of Lords which are at best of persuasive value! Those precedents, as shown above, are of little value in Britain itself and we think the British Parliament was simply moving in tandem with the times."***

The people of Kenya took it upon themselves to resolve this problem; in the Constitution of Kenya which they resoundingly passed and was subsequently promulgated in the year 2010, they clearly and unambiguously expressed themselves on this question and stated that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage. (See article 45(3) thereof).

Not to be left behind, Parliament took cue and enacted the **Matrimonial Property Act, 2013, which in a sense** signified that the cries from the courts had reached the august house and that we need not weep anymore; at last, we now have a written law governing spouses' rights to matrimonial property.

I have attempted to retrace our footsteps from where we have come, if not for anything else, to help us understand where we are in terms of the legal framework on this question of distribution of matrimonial property between spouses. If we can bear in mind that the **Matrimonial Property Act, 2013** was enacted largely because of the inadequacies in the previous law, then it should not be difficult to understand why it is necessary to keep the old law in perspective as we seek to apply the new Act. As to whether this new law has adequately addressed the limitations or weaknesses which featured prominently in the application of the previous law is a question that I cannot pretend to address in this judgment but suffice it to say, having come into force only in January, 2014 the **Matrimonial Property Act, 2013** is relatively recent and at its infancy stages. How strong or weak this law is will become obvious whenever it is applied from time to time to cases it was enacted to resolve.

One such a case to which this law now applies is the instant case, the subject of this judgment. It was filed on 13th June, 2014, only six months after the **Matrimonial Property Act, 2013** had come into force and thus falls under the purview of this Act. It follows that the application of this law limits, to a great extent, if it does not shut out all together, the application of those provisions in the **Married Women's Property Act, 1882,** which have either been expressly excluded from the new Act or are inconsistent with this particular Act. Those decisions that sought to interpret the law as it then existed prior to the coming into force of the **Matrimonial Property Act, 2013** must be looked at from the same perspective and approached with caution; this is because they relate to the law that has been discarded by the English themselves or has been altered in material particular to suit their circumstances. With the enactment of the **Matrimonial Property Act, 2013** we can confidently say those precedents have been overtaken by a written law and may only apply in those instances where they are consistent with this law or their interpretation is in tandem with the object and spirit of this particular law; in all other cases, their application is limited and their relevance is of historical importance only.

One major question that arose in this suit is the extent and the manner of the spouses' contribution to the acquisition of the matrimonial property. Counsel for the defendant cited English decisions most of which arose from cases that were decided in the era of Married Women's Property Act, 1882 for the proposition that the plaintiff was not entitled to any share of the properties acquired during the coverture because she neither proved direct contribution to the acquisition of properties nor proved the existence of a trust under which the defendant could be deemed to have been holding the properties for his own benefit and that of the plaintiff.

The decisions in ***Kivuitu versus Kivuitu, Nderitu versus Nderitu and Echaria versus Echaria*** demonstrate that the question of the manner and extent of the contribution attracted divided opinion amongst judges; while some judges were of the opinion that only direct contribution counted, others

thought that contribution need not be direct in determination of the question whether one is entitled to a share of the matrimonial property. **Section 2** of the **Matrimonial Property Act** has now resolved this question for it has defined "contribution" to include both monetary and non-monetary contribution. It states:-

> ***2. Interpretation***
>
> ***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***

It is apparent that the Act's definition of "contribution" embraces what the judges in Kivuitu versus Kivuitu and Nderitu versus Nderitu thought this word entailed; in a nutshell, contribution for purposes of acquisition and distribution of matrimonial property does not always have to be financial or material; neither does it have to be direct. This definition largely answers the argument on behalf of the defendant that the plaintiff did not prove direct contribution to the acquisition of the property in dispute; under the applicable law, she did not have to.

Must a constructive or resulting trust be implied where no direct contribution is proved? The defendant's counsel thought that proof of existence of some sort of trust is necessary; it was his argument that in the absence of proof of direct contribution, the only alternative available to the plaintiff was the evidence that the defendant held part of the property acquired in the course of their matrimonial union in trust for her. But again under **section 2** of the Act, it does not appear that the plaintiff ought to have gone that far; all she was required to prove, in the event the court was not satisfied with any evidence of direct financial contribution on her part, was that she managed the matrimonial home; or she did some domestic or farm work; or she took care of the children. It would also suffice if she proved that she managed the family business or property or that she provided the defendant with companionship. All these instances comprise what the Act refers to as "non-monetary" contribution.

Omolo JA (as he then was) was prepared to attach some value to this non-monetary contribution in Kivuitu versus Kivuitu but he did not because he found the wife to have made financial contributions towards the purchase of the matrimonial home. Although the Act has expressly provided for non-monetary contribution, it has not gone further to show how such contribution can be assessed in monetary terms; in my humble view, this apparent omission is deliberate because it would be impossible to attach any value to such marital chores as companionship, parental child care and management of a matrimonial home. It may be that because of their place in keeping the family unit together, these tasks are simply priceless.

Rather than attach any value to them, I would say that for purposes of acquisition of family property, a spouse's contribution in the nature of these tasks is no less valuable than the financial contribution made by the opposite spouse; they ought not to be trivialised and, at the very least, they are just as important as any amount of financial or monetary contribution in the acquisition of matrimonial property. I reckon it is in this spirit that **article 45(3)** of the Constitution emphasises 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. The rights the Constitution refers to here would, as a matter of course, include property rights.

Having said that, there was evidence that both the plaintiff and the defendant worked as teachers and earned a salary. It is apparent from the payslips she produced in court that the plaintiff was paying some loans; her evidence was that she used the loans to acquire or contribute to the acquisition and improvement of the family property including the matrimonial property. Although the defendant denied that this ever happened, he did not produce any evidence to controvert the plaintiff's contentions and in particular to support his own counter argument that the plaintiff spent all her salary and the loans to acquire her own property in Murang'a.

It is also important to remember that between them the defendant and his erstwhile wife had five children who were born between 1983 and 1991. Even if the defendant was to successfully contest that the plaintiff never made any monetary contribution towards the acquisition of the matrimonial property, these children are evidence enough that he enjoyed some sort of companionship, recognised as such in law, from the plaintiff. Much as the defendant contended in his evidence that disagreements in the marriage arose immediately after their marriage, the conception and subsequent birth of their children discounts any notion that the differences in the marriage were of such magnitude that could deny him the plaintiff's companionship.

Equally important, the defendant admitted that they shared responsibilities towards the children. The plaintiff herself testified, and her evidence in this respect was uncontroverted, that apart from contributing to the acquisition of the properties, she also educated their children and maintained the family. In the words of the statute, she provided child care.

I also note the admission by the defendant that of the three immovable properties, he lived with the plaintiff in at least two of them; these are **Title No. Mweiga/Block 1/[particulars withheld]** where they settled after they moved from Baringo and **Title No. Mweiga/Block 1/[particulars withheld].** By virtue of the spouses' occupation of these properties they both fit the description of "matrimonial home" as understood under **section 2** of the Act which defines such a home as **"***any property that is owned or leased by one or both spouses and occupied or utilised by the spouses as their family home, and includes any other attached property.***"** By extension they also comprise matrimonial property which is defined under **section 6** to include matrimonial home or homes.

The only parcel on which the plaintiff and the defendant did not live at any one time during their marriage was **Title No. Mweiga/Block 2/Ikumari/[particulars withheld].** Just like the other two properties this particular property was registered in the name of the defendant only; in the absence of joint ownership coupled with the fact that the spouses never lived on it as their matrimonial home, the property is automatically excluded from those properties which the law prescribes as matrimonial properties.

But the matter does not end there; considering that the property was acquired during the marriage the plaintiff's interest in it is not stifled by the mere fact that it is not a matrimonial property. According to **section 9** of the Act, where it is proved that her contribution, whether monetary or non-monetary, went towards improving such a property she would thereby be entitled to it as a beneficial owner. That section provides:-

> ***9. Acquisition of interest in property by contribution***
>
> ***Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other 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.***

I understand this section to imply that where a spouse acquires a property in his or her sole name during marriage but which does not acquire the status of a matrimonial property, he or she holds a share of that property in trust for the other spouse if it can be proved that the latter contributed towards its improvement. The share of the unregistered party's interest would be limited to the extent of his or her contribution.

Coming back to the case at hand, the plaintiff testified that together with the defendant, they constructed a residential house and rental houses on **Title No. Mweiga/Block 2/Ikumari/[particulars withheld].** The defendant admitted that this property is developed with residential houses and it is on this land that he now lives with his current wife. Evidence of the value of the improvements on this particular property was not, however, tabled before court; such value is necessary because unlike in acquisition of matrimonial property, a spouse's interest in non-matrimonial property is only limited to the value of the contributions made towards its improvements. Evidence of the cost of these improvements could easily have been established by say, a competent valuer's valuation report; in this case none was presented at all.

Having considered the material before me, and for reasons I have given, I am satisfied that there is ample evidence to conclude that the plaintiff contributed to the acquisition of the properties referred to as Title **No. Mweiga/Block 1/[particulars withheld]** and **Title No. Mweiga/Block 1/375.** I am also persuaded that though she may have made both monetary and non-monetary contributions in improving **Title No. Mweiga/Block 2/Ikumari/[particulars withheld]** her extent of contribution towards the said improvements has not been established on a balance of probabilities considering that no evidence at all was produced to demonstrate the value of the improvements. The plaintiff's claim on this property fails on this score**.** Her claim on movable assets or personal effects would also fail because there was no evidence that those assets still exist**.**

As for the properties which I hold the plaintiff to have contributed towards their acquisition I hereby order that they be shared out between the plaintiff and the defendant as follows:

1. Title **No. Mweiga/Block 1/[particulars withheld] to** be divided into two equal shares each of which will be transferred into the names of **M W G** and **T KG** respectively.

2. In the alternative to the division and transfer of separate shares in Title **No. Mweiga/Block 1/[particulars withheld],** the property be sold and the proceeds thereof be shared out equally between **M W G** and **T K G**; either of the parties is at liberty to buy out the other under this alternative arrangement.

3. **Title No. Mweiga/Block 1/[particulars withheld] to** be divided into two equal shares each of which will be transferred into the names of **M W G** and **T K G** respectively.

4. In the alternative to the division and transfer of separate shares in **Title No. Mweiga/Block 1/[particulars withheld],** the property to be sold and the proceeds thereof be shared out equally between **M W G** and **T K G**; either of the parties is at liberty to buy out the other under this alternative arrangement.

5. Parties will bear their own respective costs.

Orders accordingly.

Signed, dated and delivered in open court this 30th September, 2016

Ngaah Jairus

JUDGE