



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 10 of 2004

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

Z. W. N.....APPLICANT

VERSUS

P. N. N.....RESPONDENT

J U D G M E N T

The plaintiff herein Z.W.N. moved to the seat of justice by way of an originating summons dated 22nd day of April, 2004. The originating summons is brought against P.N.N. The reliefs sought by the applicant are: -

- (1) That a declaration do issue that the properties known as**
 - (a) Nyahururu/Gilgil West/31 approximately 20.Ha.**
 - (b) Bahati/Kabatini Block 1/2338 approximately 0.65 Ha.**
 - (c) Bahati/Kabatini Block 1/2339 approximately 0.065 Ha.**
 - (d) Donholm LR No.Nairobi Block 82/181.**
 - (e) Bahati/Kabatini LR No. T.B.A and with developments therein known as Njugumo.**
- (2) That a declaration to issue that the respondent holds the said property in trust for the applicant.**
- (3) That the said property be settled for the benefit of the applicant in such manner and proportions as this Honourable Court deems fit and just.**
- (4) That the respondent himself, his agent and or servant be restrained from alienating or encumbering or in any other manner disposing of the said properties.**
- (5) That the respondent be condemned to pay the costs of this application and incidental thereto.**

The originating summons is grounded on the grounds in the body of the application summed up assertions by the applicant that the properties enumerated were acquired through joint efforts by the disputants; that

most of the said properties are either registered or in the possession of the respondent who left home in the year 2001 and has put up a house in Nakuru where he reside with another woman.

The originating summons is also grounded on the content of the supporting affidavit deponed by the applicant and filed simultaneously with the originating summons salient features of the same are as follows: -

(i) The disputants married each other on the 16th day of December, 1961 at C.M. Marira under the African Christian Marriage and Divorce Act; they were blessed with seven children who were all grownups as at the time of presentation of the originating summons; both disputants had been in gainful employment with the Civil Service with the applicant having been employed as a Teacher starting off with the salary of Kshs.207.00 while the respondent who was employed by the Ministry of Public Works as a painter and sign writer was earning about Kshs.350.00.;both rose through the ranks till their retirement from the civil service during which time they earned salary increments and had retired with their respective pensions; it is the stand of the applicant that from the joint efforts they acquired the properties enumerated in the body of the originating summons. Both contributed directly and indirectly towards the acquisition of the afore mentioned properties; both had a happy marriage and that is why most of the acquired properties were registered in the name of the respondent; it is the stand of the applicant that due to the nature of the respondent's employment he worked away from home leaving the plaintiff staying at home with the children and taking care of their daily needs as well as their educational needs.

Their first property was Plot Number Nyandarua/Gilgil West/31 jointly purchased in the year 1965 at a price of Kshs.5, 000.00. Upon purchase of the same, both parties embarked on its development. They opened a joint account number 1000022890 with KCB Nakuru into which they banked income from the initially generated by a loan acquired from the farm settlement fund trustees and subsequently from proceeds generated from sale of farm produce. In the year 1990, they decided to put up a house on the said property and since the respondent was away on duty stationed at Bungoma and other places it is the applicant who looked after the farm.

From the same activities engaged in by the plaintiff on the said family land, the couple raised a deposit to enable them access a mortgage loan which was used to purchase property at Donholm namely LR No. Nairobi Block 82/181/262. The mortgage loan was repaid using proceeds from the farming activities afore said and from the respondent's salary.

Financial responsibly was initially shared between them whereby the respondent serviced the mortgage loan while the plaintiff met the household expenses and general maintenance expenses for the family.

All developments on the Donholm property were from joint efforts with the plaintiff contributing Kshs.50, 000/= from the retirement benefits. This property currently generates income of Kshs.82, 000.00 monthly which the respondent puts to his own use to the exclusion of the plaintiff.

- Parcel number Bahati/Kabatini Block 1/2338 was jointly acquired in 1983. But the first two semi-permanent structures on the same were solely put up by the plaintiff.
- LR. Bahati/Kabatini Block 1/2339 was acquired through the rent proceeds from the Dolholm property. Developments currently standing on this property which include a large four(4) bed roomed Bungalow with a large water tank have been undertaken jointly in that the timber used to built the house came from Tumaini farm Nyandarua/ Gilgil West/Scheme/31 which the applicant used to tend. There is also presence of milk cows on this parcel of land whose income has been concealed from the applicant by the respondent.
- It is further the plaintiff's stand that the disputants also acquired two other plots at Tena and Savanah in Nairobi.
- It is her contention that they had a good marriage till 1987 when trouble started in their marriage

leading to the respondent leaving the matrimonial home at Tumaini farm with all the documents relating to the acquisition of the afore stated joint properties. The respondent moved to Nairobi and is allegedly cohabiting with a mistress known as M. G.

- The plaintiff has knowledge that after the respondent staying away from home since 1987 and fearing losing her property rights over the said properties, she placed caveats against the titles but was then persuaded by the respondent that their removal was conditional to his returning home to which demand the plaintiff yielded and withdrew the caveats to and indeed the respondent returned home in 1999 but for a short while and during the said short while the respondent was very hostile to the applicant and would go to the extent of physically assaulting the plaintiff. During this respondents violent stay at the matrimonial home, the respondent ceased communicating with the plaintiff but she has knowledge that the respondent sold most of the cows the plaintiff was rearing on the Tumaini farm and used the sell proceeds as well as the Timber from this Tumaini farm to construct a house on land parcel number Bahati/Kabatini/Block 1/2338 at Ngacure where he settled with his mistress after leaving the matrimonial home in the year 2001 cutting off all communications from him.
- In addition to the afore set out complaints, the respondent has also banned the plaintiffs from accessing the Dohholm property in order to access income from the said property to apply the same towards her treatment and general maintenance for herself.
- By reason of what has been asserted above it is the plaintiffs assertion that she is apprehensive that the respondent might dispose of the subject properties and apply the proceeds to himself and his mistress to her detriment hence her request that she be adjudged to be the owner of 50% of the said property.

The plaintiff filed further affidavits in support. There is one deponed on the 9th day of December, 2008 and filed the same date. A perusal reveals that the same reiterates the content of the supporting affidavit and then reiterated the existence of a valid marriage between the disputants despite presence of a pending divorce proceedings filed by the respondent vide divorce cause No. 169 of 2004 which was still pending; confirms existence of children of the marriage; reiteration that the properties subject of the originating summons was indeed matrimonial properties acquired during the marriage which were registered in the name of the respondent with the consent of the plaintiff in good faith and trust. The said properties were acquired through their joint direct or indirect contribution. Further that earlier on, the disputants used to pay fees and general maintenance of their children jointly but when the respondent took on a mistress he left to the plaintiff the payment of school fees and general maintenance of three of their children namely K., J. and N.; reiterates the historical background information on how each property was acquired as contained in the supporting affidavit filed simultaneously with the filing of the originating summons. The said properties were also developed through the disputants joint efforts which among others included but not limited to construction of the matrimonial home, engaging in beneficial financial activities such as growing of food crops and rearing of cows, construction of water tank, bore hole, two bed roomed guest house, garage, stores and water troughs, installation of solar power and systems of energy using the plaintiffs retirement benefits. It is further the plaintiff's deponement that the day to day management of the running and supervising of the activities on the matrimonial home were executed by the plaintiff because she was deployed in nearby schools namely Tumaini Primary School and Murindati Primary School. The deponement goes further to reiterate that both were in gainful employment earning a salary and when they retired they were paid their retirement benefits which were used to supplement earnings from rental property and proceeds of sell of farm produce which were pooled together either to acquire more properties or develop and improve on the said properties. One source of grievance is that without the plaintiffs knowledge the respondent transferred property number Bahati/Kabatini Block 1/2338 and 2339 to himself jointly with his mistress to the exclusion of the plaintiff which transfers were done after the initiation of these proceedings with the sole reason of frustrating the plaintiffs entitlement rights to the said properties considering that these proceedings had been filed on the 22nd day of April, 2004 and its pleadings already served.

The deponement goes further to reiterate her earlier stand that the properties had been registered in the names of the respondent in good faith and upon trust during the subsistence of the marriage. When the relationship became sour and the respondent left home he left with the title documents relating to the

subject properties forcing the plaintiff to place caveats on the properties but was persuaded to remove them as a condition for the respondents return to the home which he did but shortly left after disposing off some family property. The plaintiff deponent stands aggrieved because the respondent has blocked her access and control of all the properties which were acquired jointly inclusive of the matrimonial home. Some of these actions complained of include but are not limited to refusal of access to Donholm property, refusal of access to rental income from Donholm property denial of control and rights of cultivation of the Nyandarua land; continues to sell farm produce such as animals and trees and produce, chasing away the plaintiff from home, uprooting the plaintiff's fruit orchard, stopping the plaintiff from picking fruits, assaulting the plaintiff's nephew who was milking the cows for no reasonable cause, breaking doors of the main house and attempting to assault the plaintiff, forcing the plaintiff to call help from neighbours an incident reported to police. He has also threatened to kill the plaintiff which threats have been reported to the police at Olkalau police station. Finally reiterates her entitlement to 50% of the matrimonial property being sought herein.

The affidavit has annexures and scheming through them reveals the existence of a marriage certificate showing that the disputants were indeed married under the African Christian marriage and divorce Act in 1961 vide marriage certificate number {*particulars withheld*}; land tile Nyandarua/Gilgil West/31 registered in the name of P. N. shown to have been registered in the name of the said title holder on the twentieth day of July, 1974 plus the accompanying search certificate. Official search regarding Nairobi Block 82/181; certificate of search for Bahati/Kabatini Block 1/2338/, search certificate for Bahati/Kabatini Block 1/2339.

All the search certificates show that all those properties are registered in the name of the respondent. There is also employment documents showing that indeed the plaintiff was an employee of Teachers Service Commission, school fees records. Documents from the settlement Funds Trustees with regard to plot No. 31 Gilgil West in the name of the Respondent showing that items were taken from the settlement Fund Trustees and Settlement Fund Trustees loan repayment receipts and loan statement. There is a bank statement in the joint names of the disputants in respect of account number 100022890 and a sample of deposit receipts from the said bank account. A power of Attorney from the respondent to the plaintiff dated 26th day of May, 1969. Photographs of a permanent structure. Documentation on the retirement and payment of retirement benefits to the plaintiff, a bank account No.045-198001374 in the name of the plaintiff. There is also exhibited green cards for Bahati/Kabatini Block 1/2338 registered in the name of the respondent firstly on 19/9/84 and then caveated by the plaintiff on 7/1/94 which was withdrawn paving the way for the registration of the said title in the name of Margaret Gathiru Njuguna ID NO.09817358 and Peter Njuguna Njoroge ID NO. 1394629. Also a green card for land parcel number Bahati/Kabatini Block/2339 also registered in the name of One Joseph Githinji Njuguna on 5/6/86 and subsequently registered in the name of the respondent on 19/7/2000 and then subsequently registered in the names of Margaret Gathiru Njuguna ID/0987358 and Peter Njuguna Njoroge ID NO.1394629 registered on 7/6/2004.

Further there are supporting affidavits. One such affidavit is from one Josephine Wambui deposed on the 9th day of December, 2008 and filed the same date. The salient features of the same are that she is a niece of the disputants. She used to reside with the plaintiff on the Nyandarua farm. She has knowledge the plaintiff used to carry out farming activities such as growing various crops and keeping livestock. She recalled from the year 1999 the respondent used to come to the family home only for short moments and she recalls on one such occasion and upon his departure in the year 2000, 2001 he took with him 8 cows, 11 sheep, and 3 bull calves. She also has knowledge that the plaintiff used to pay workers.

There is also a supporting affidavit deposed and filed simultaneously with that of J. W., deposed by D. W. N. The salient features of the same are that he was an employee as a milk receiver in the employment of Gilgil West co-operative Society. He has knowledge that the disputants used to deliver milk to the society's depot in their capacity as registered owners of plot number 31 Gilgil West. The deponent is also aware that the disputants took a development loan in the form of dairy cows, fencing wires and iron sheets as well as a loan. The disputants undertook to repay the said loan with proceeds of sale of farm produce from the plot. Both loans were repaid through sale of farm proceeds whose balance was paid into the joint account of the disputants by the society.

There is also a further affidavit deposed by the plaintiff on the 11th day of May 2009 and filed the same date. The salient features of the same are that indeed she was an employee of the Teachers Service Commission and worked in various schools, inclusive of one positing at Kamukabi primary school in Muranga to protect the respondents' inheritance rights over his father's land in his ancestral home which land the respondent has transferred to the respondents' brother B. G. without the knowledge and consent of the plaintiff. She later moved to schools closer to their Tumaini home. Reiterates taking good care of the respondents nephew W. K. who still visits the plaintiff to date; confirms account No.100022890 was a joint account operated jointly for all purposes, inclusive of farm produce generated by them; maintains as asserted earlier on she contributed fully both financially and in kind and indirectly towards the acquisition of all the properties; she was a home maker while the respondent was away in his employment Tour in various stations such as Bungoma, Nairobi and Kisumu among others. Reiterates her earlier stand that all developments on the Tumaini farm were undertaken using joint financial contributions from earnings as well as from proceeds of sale from the land. Indirect contribution to the common good of the family included home keeping, taking care of children, general supervision of farming activities on the farms. Still maintains parcel number Bahati/Kabatini/Block 1/2338 was purchased in 1977 while Block Kabatini/Block 1/2339 was purchased in the year 2000 with her knowledge and involvement in the registration of the titles in the names of the Respondent. That the two properties were erroneously transferred to the respondent and another woman who never contributed to their acquisition during the pendency of these proceedings with the aim of defeating the plaintiff claims herein. Still asserts that she took care of the children especially the first three who did their primary Education at home and only the last three who went to boarding schools at an early age with the last one schooling in Nairobi. Denied that the alleged mistress of the Respondent is a business partner as they have a son and in any case if that had been the position then the respondent would not have transferred matrimonial property to her.

In opposition to the plaintiffs claim, the respondent on the other hand filed a replying affidavit deposed on the 5th day of July, 2004 and filed the same date. The salient features of the same are that the respondent trained at Thika technical and Trade School where he undertook a three year course as a painter and sign writer leading to his employment with the Ministry of works in 1952 at the Ministry's Mechanical Branch at Nakuru. Thereafter passed Trade Test Examinations as a painter motor vehicle mechanic grade 1 after under going a course at the Kenya Polytechnic. The said training earned the respondent promotion to Foreman mechanical, inspector mechanical, senior inspector mechanical, super intendment mechanical between 1967-1979. The said promotions came with salary increments leading to a salary increment of up to Kshs.8, 335.00 as at the time of retirement. In contrast to the plaintiff who was employed as a P3 teacher and was promoted only once during her working tour and retired with the salary of Kshs. 2,500.00 in 1990. It is the respondents contention that while the properties subject of these proceedings were acquired during the subsistence of the disputants marriage, the respondent denies the plaintiffs contribution towards the said property acquisition. Denied allegations of the relationship between them having been harmonious alleging hostility towards his relatives by the plaintiff, citing the case of a nephew Nelson Waweru whom the plaintiff never wanted the respondent to sponsor his Education. As for their money matters, it is the respondent's stand that each had his/her own bank accounts and for this reason it was impossible for them to do anything which required money jointly together. That he solely purchased land parcel number Nyandarua Gilgil West/31 on which he constructed a two roomed permanent house settled his parents on this land. The father died in 1972 and was buried on this land. The plaintiff was hostile to the mother forcing the respondent to remove the mother to live on his property in Donholm where he employed a maid to look after his mother who died at the age of 105 years. With regard to land parcel number Bahati/Kabatini Block 1/2339 the respondent personally purchased the said property from one Peter Muiro Njoroge. The respondent is a stranger to the alleged property number Bahati/Kabatini L.R. NO. T.B.A. with shop development known as Njugumo. Denied knowledge of the so called power of Attorney notwithstanding its in admissibility on account of non-registration. Denied knowledge of the plaintiff's payment of school fees for their children as him respondent has solely undertaken that role without any assistance from the plaintiff.

- Denied allegation of him having a mistress and instead asserted that M. G. is the one who looked after his mother from 1986 to 1999 when she died.

With regard to the disposal of family property, it is the contention of the respondent that it is the plaintiff

who has been cutting trees and selling them to timber merchants, burning charcoal to sell and had also sold cows and sheep without the respondents consent and for this reason the plaintiff is in a position to support herself financially from the proceeds of the sale of the said farm produce. By reason of the afore said content of the respondents deponement, the court has been urged to dismiss the plaintiffs claim with costs.

The replying affidavit has annexures to it. A perusal of them reveals existence of the respondent letters of appointment into the Public Service, letters of promotion and or appointment to high grades, pay slips showing earnings from the civil service as a reflection of savings with the cooperative society, charge on LR. Nairobi Block 82/181 to savings and loan for a loan of Kshs.105, 000.00 made on the 22nd day of November one thousand nine hundred and seventy nine, documentation and receipts for payment of the Kabatini plots inclusive of an affidavit showing that one parcel was purchased from Paul Muiro Njoroge and transferred to the Respondent by the company Deffo Company Limited. While the second plot was paid for directly by the respondent.

For purposes of assessment only the court has traced on the record orders made by consent of the parties on 15/12/2005 these read:-

“By consent

- 1. The parties are hereby ordered not to sale, remove and or otherwise dispose of any of the movable and immovable property in respect of the suit premises.**
- 2. The applicant Z. is at liberty to continue farming.**
- 3. Mention 21/12/2005 but parties to move the vacation judge for leave to have the matter be mentioned during the vacation.**

The second set of consent orders is that which were made on the 23/7/2009 and these read:-

“By consent the respondent do provide 4 litres of cow milk to the applicant on a daily basis until this matter is heard and determined. That the applicant do maintain and enjoy the crop for ½ of the orchard on the same nearest to the house which she occupies. That the applicant do cultivate a portion of 5 acres on the field which is shown on the attached sketch map being the area opposite the orchard and that she will cut one blue gum tree from which she will make posts for purposes of fencing the said five acres of her portion. That she shall continue farming the portion of ¼ acres which she currently cultivates.

On 9/11/2009 when the parties appeared before Nambuye J (as she then was) they were impressed upon to respect the orders which had been made on 15/12/2005 and 27/7/2009”

On 4/2/2000 parties recorded another consent between them:-

- 1. Applicants to file and serve their written submissions within 10 days from today.**
- 2. Respondent to respond within 10 days from the date of service.**
- 3. Response to respondent’s submissions by the applicant within 7 days from the date of service.**
- 4. Mention on 11/3/2010 to confirm compliance”**

The written skeleton submission of the applicant are dated 26th day of April, 2010 and filed on the 28th day of April, 2010. The salient features of the same for purposes of assessment are as follows;-

(i) The applicant relies on all the affidavis filed by her in support of the main originating summons, filed in support of interlocutory applications filed herein and the supporting affidavit from J. W. and D. W. N.

(ii) There is no dispute that applicant and respondent were husband and wife having married each other in the year 1961 and had been blessed with 7 children.

(iii) That the applicant seeks from this court orders on division of matrimonial property and by reason of which she is required to demonstrate the existence of the following:-

1. Whether the parties were married at the time of filing of the proceedings herein?
2. Whether the suit properties were bought during the marriage?
3. The applicant's contribution to the suit property?
4. What share is the applicant entitled to?
5. Who should bear the cost of this suit?

(iv) In response to the afore set out own framed questions the applicants' counsel submitted that:-

(a) Marriage has been proved by their exhibition of the marriage certificate which had not been brought to an end as at the time the plaintiff moved to this court to present the originating summons.

(b) There is demonstration that all the properties subject of these proceedings were acquired during the subsistence of the disputants marriage. This is evidenced by the fact that Nyandarua Gilgil West/31 was registered on 27th day of October,1973 and title issued on 20th July,1974; Nairobi Block 82/181 was registered in the respondents name on the 6th day of December,1979 and a certificate of lease issued on the 8th day of January,1980; Bahati/Kabatini Block 1/2338 was registered in the respondents name on the 23rd August,1985 and the land certificate issued on 30th August,1988; and later transferred jointly to the respondent and one M. G. on the 22nd April, 2004; Bahati/Kabatini Block 1/2339 was registered on the 19th day of July,2000 and title deed issued on the same date and then transferred jointly to the respondent and one M. G. on the 22nd day of April,2004. The two parcels are adjacent to each other and the said transfers were effected during the pendency of these proceedings. Whereas Bahati/Kabatini LR. NO.T.B.A and with shop developments therein known as Njugumo is indeed a property belonging to the disputants whose documents are in the custody of the respondent.

(v) With regard to the issue of contribution towards the acquisition of those properties the plaintiff has the following to say in support of her stand on contribution:-

(a) With regard to the acquisition of Nyandarua Gilgil West/31 the deponements of the applicant as well as the supporting affidavits have all gone to demonstrate that the initial deposit for the purchase of this property came from the accumulated savings of both parties considering that both were employed in the civil service with the plaintiff working as a teacher a fact admitted by the respondent. The balance of the purchase price as well as initial development loans were financed by the Settlement Fund Trustees as confirmed by the content of the affidavit of David Waweru sworn on 9th December, 2008 which the respondent has not countered. The court is therefore invited to believe the said content of the said affidavit of David Waweru firstly that he worked at the said corporative society, handled financial affairs of the disputants and has knowledge that the disputants indebtedness to the Settlement Fund Trustee was repaid through sell of farm produce with the balance of the said proceeds finding their way into the joint account held at KCB Nakuru branch by the disputants as confirmed by the sample deposit slips exhibit.

(b) With regard to production of the said farm produce the court is invited to hold that production of the farm produce was solely the responsibility of the plaintiff as the respondent has not disputed that he worked away from home a fact confirmed by the respondent himself that he worked in Kisumu , Nakuru, Nairobi and Bungoma among others. As opposed to the plaintiff whose assertion that she worked from the matrimonial home, has not been countered.

(c) The court is further invited to believe the content of the supporting affidavits that indeed the plaintiff used to rear animals as well as grow the various types of crops on the Nyandarua farm. By virtue of this location the court should believe that it is the plaintiff who was better strategically placed to supervise activities dealing with improvements on the said farm than the respondent.

(d) As for the Donholm property L.R. No. Nairobi/Block 82/181, the court is invited to believe the plaintiff's testimony that this property was acquired through joint financial contribution, developed by proceeds of sell of farm produce comprising both crops and animals and the balance coming from the sell of a family property in Tena and the retirement benefits from the plaintiff which were partly used to off set the loan secured by this property to savings and loan.

(e) With regard to the acquisition of Bahati/Kabatini/Block 1/2338 the court is invited to believe the un ousted assertion of the plaintiff that the said plot was in exchange with another owned by the couple in Kahawa and was developed by the proceeds of sell of farm produce from the Nyandarua farm as well as rental proceeds from the Donholm property and in order to defeat the plaintiffs' claim with regard to the same, the respondent transferred the property into the joint names of himself and his mistress who have put up a home and are now settled on this property.

(f) As for Bahati/Kabatini Block 1/2339 it was acquired in the same manner and developed in the same manner as its counter part in (c).

(g) Rental proceeds from the Donholm property which was acquired through joint efforts should be shared equally between the disputants and the respondent who has been keeping the same to himself should be asked to account for the same to the plaintiff.

(h) The court is invited to believe the deponements of the plaintiff with regard to general contribution to the common good of the family by way of payment for the childrens' school fees and general upkeep of the children.

(i) With regard to the credibility of the witnesses the court is invited to believe that of the two disputants the plaintiff is the more credible than the respondent because the respondent denied an obvious fact of joint holding of a bank account in Nakuru, there is no evidence to show that the respondent was paid Kshs.150,000.00 as insurance benefits from old mutual which he used to construct a water tank in order to oust the plaintiffs assertion that the said water tank was constructed from joint efforts as supplemented by proceeds from the sell of farm produce from the Nyandarua farm which fact accounts for failure of the respondent to account for the sources of an amount of Kshs.93,000.00 and kshs.85,000.00 on the 12th and 14th day of March,1986 respectively. The respondent also contradicted himself with regard to the status of Margaret Gathiru whom the respondent alleged to have been the one who took care of his late mother and then later changed and said She is his business partner but he is silent as to how and why she came to be a joint owner of family property.

(vi) With regard to the shareholding, the court is invited to note that the respondent has been receiving rental income from the Donholm property and selling farm produce and apply the same to his own use to the exclusion of the plaintiff and for this reason the plaintiff should be compensated for that loss and be awarded 60% share.

(vii) The plaintiff who has succeeded in her claim should be awarded costs of the proceedings.

The Respondents' submissions are dated the 23rd day of July, 2010 and filed on the 27th day of July, 2010. The salient features of the same are as follows:-

(i) The court to ignore affidavits filed by both parties with regard to interlocutory applications.

(ii) It is undisputed that the plaintiff/applicant and the defendant were married on the 16th day of December, 1961.

(iii) That it is now settled law and trite that the provisions of the law relied upon by the plaintiff applicant to anchor her claim herein is law which is applicable to such disputes within this jurisdiction.

(iv) The applicable principles or parameters within which a relief anchored on this provision can be accessed were set by the court of appeal of this jurisdiction in the case of **ECHARIA VERSUS ECHARIA (2007) 2EA 139**, and the court is invited to revisit the English case law which had construed the said provision in the originating jurisdiction, extract those principles and then apply them to the dispute herein as the said decision being a court of appeal decision is binding on this court.

(v) They concede the subject property namely Nyandarua/Gilgil West/31 Nairobi Block 82/181, Bahati/Kabatini Block 2338 and Bahati/Kabatini Block 2339 were all acquired during the subsistence of the marriage of the disputants.

(vi) As deponed the respondent is a stranger to the property allegedly known as Bahati/Kabatini LR. T.B.A with shop developments there on known as Njugumo.

(vii) The burden to prove contribution towards the acquisition of the subject properties lie on the claimant who is the plaintiff and in the respondents' opinion she has not discharged that burden for the following reasons:-

(a) Parcel numbers Bahati/Kabatini Block 1/2338 and 2339 are registered in the joint names of the respondent and one M. G. who is not a party to these proceedings.

(b) It is conceded that the same were registered in the said joint names during the pendency of these proceedings but that fact alone does not give a licence to the court to make orders disturbing that status quo in the absence of a move made by the plaintiff to amend her originating summons and then bring the said M. G. on board and hear her story before any adverse orders can be made against her.

(c) Their assertion in number (b) above notwithstanding the plaintiff's claims have been ousted by the documentary evidence adduced by the respondent to show that he solely purchased those properties using his own funds.

(d) The court is invited to believe the respondent's assertion that joint investment was impossible because the applicant was opposed to the respondent educating his nephew one N. W. K.

(viii) By reason of what has been asserted in vii (a) (iii), the court is invited to hold that the respondent solely acquired the subject properties and rightfully had them registered in his name. This is confirmed by the fact that land parcel number Nyandarua/Gilgil West/31 which was solely acquired by the respondent bears his name, all the documents in support of the acquisition also bear his name inclusive of those which are alleged to have been tendered in evidence by the plaintiff.

(ix) The plaintiff on her own has not tendered any documentary proof to show that she made any contribution towards the acquisition of those properties as she has not exhibited any documents in her name.

(ii) By reason of failure of the applicant to produce documentary proof of her claims, the court is invited to find that she has in the process failed to discharge the onus placed on her by section 107,108 and 109 of the evidence Act and for this reason the court is invited to hold that land parcel number Nyandarua Gilgil West/31 was solely purchased by the respondent who is solely entitled to its use and his rights guaranteed by section 27 and 28 of the registered land Act cap 300 laws of Kenya cannot be and should not be allowed to be defeated by the wild allegations of the plaintiff and this court is urged to accord the respondent the legal protection enshrined in the afore said section.

(x) As for Nairobi/Block 82/181 the respondents' deponements as well as annexures exhibited all go to show that the respondent is the sole registered owner of the said property, the property was purchased vide a loan advanced to the respondent by savings and loan (k) limited; his pay slip indicates that he had a

co-operative loan; the respondent applied for cooperative loan of Kshs.93,000.00 from Ufundi Co-operative to enable him repay the loan out of which amount the respondent transferred Kshs.85,000.00 to Savings and Loan (K) limited to clear the outstanding balance. The loan advanced was completed in the year 1988 just before the respondent retired.

(xi) The court has been urged to reject the wild allegations of the plaintiff that the said property was acquired from joint efforts and proceeds of sale of farm produce as she has not shown the existence of this state of affairs by way of documentary proof; the same plaintiff has not demonstrated that she was even involved in the generation of the alleged income from the farming activities.

(iii) The court is urged to ignore the plaintiff's wild allegation that that she contributed Kshs.50, 000.00 of her retirement benefits towards payments for this loan as there is nothing to show that the said money left the plaintiffs bank to the respondent or the loan account in respect of the said money.

(xii) In further support to the acquisition of the subject property and in particular Bahati/Kabatini Block 1/2338 and Bahati/Kabatini Block 1/2339 the court was invited to have regard to the content of the respondents affidavit of evidence deponed on the 26th day of November, 2008 and filed the same date.

A perusal of the same reveals that there is a reiteration of the content of the earlier replying affidavit assessed herein. In summary, the deponent states that he is a retired civil servant and respondent herein; affirms his earlier deponement with regard to the training he received before joining the civil service, sequence of promotion earned in the course of his Tour in the civil service and the years when promoted.

With regard to Tour stations, he depones that in 1967 he was posited to police workshop in Bungoma and Busia, in 1969 he was based at Armed Forces Branch front 1969-1972. In 1973 while stationed at the same place he was promoted to senior inspector mechanical while still based at Kahawa barracks where he worked till 1979 and upon being promoted to superintendent mechanical, he was transferred to the ministry of transport and communication and posited to Nyanza Province Kisumu for one year and then rerouted to Eastern province for two (2) years; in 1981 for a Tour of 2 years and assigned the role of being in charge of government vehicles both in Machakos and Kitui District. In 1981 he was transferred to Laikipia and then in 1984 transferred to Mechanical and transport workshops in Nairobi where he worked till July, 1990 when he retired.

He confirmed the existence of the marriage between them and upon the said marriage they settled in Nakuru in house allocated to the respondent by virtue of his employment. Confirmed the plaintiff was a primary school teacher from 1962 upto 1991 when she retired having been employed as a P3 teacher rising to the rank of PW2 earning a maximum salary of Kshs.2,500.00 being the highest as P.2 teacher. The respondent has knowledge that in the course of her Tour she taught at St. Mary's Primary School within Nakuru, Township and then Tumaini Primary school. Reiterates the earlier deponements that following the plaintiffs objection to the respondent Educating his nephew, they never ventured into joint financial ventures, never had a joint account but recalls the account held with Nakuru KCB was his bank account into which his farm produce was paid.

With regard to acquisition of property Nyandarua Gilgil West comprising 20 hectares, reiterates the earlier submissions that it is the respondent who did the interview with a view to being allocated the suit land; and upon being successful he withdrew Kshs.5, 000 from his post office savings account and paid deposit and then acquired a loan from the Settlement Fund Trustees which he solely paid and was issued with a Title deed to the exclusion of the plaintiff. He thereafter constructed a three bed roomed house under his supervision.

With regard to other developments, it is the respondents' assertion that he received a tree supply of seedlings 240 in number for pears which the respondent planted, he also received 150,000.00 as insurance benefits from old mutual which he used to construct a water tank and gutters. Upon his retirement, his employer gifted him with gifts of one Dining table with six chairs, one steel gate, one steel door which he fitted in the main house and one coffee table with four stools.

With regard to supervision of farming activities, the respondent had this in mind when he went back to his rural home in Kigumo and brought his father N. N., elder brother G. and mother L. N. N. The intention of the respondent was to have the brother head the farming activities on the Nyanduaru farm while the parents were to look after his six cows. The father died in 1972 and was buried on this land. Whereas the plaintiff refused to take care of the mother forcing the respondent to take the mother to Nairobi to live with him from 1986 up to 1999 when she died.

With regard to acquisition of property, reiterated the earlier deponements that the Donholm property was solely purchased by him from a loan acquired from his Sacco (Internal) followed by that from savings and loan which he fully repaid on his own as per the documentation exhibited.

With regard to Bahati/Kabatini/2339 it is the respondents' stand that this was purchased by him and one Margaret Gathiru in the year 2000 after selling their property Nairobi Block 82/6269 plot at Donholm 5G at a price of Kshs.850, 000.00 and paid Kshs.620, 000.00 from the previous owner and used the balance to construct a permanent house at Bahati/Kabatini Block 1/2338. It is further his stand that the respondents' daughter Ann Njogu an advocate who handled the transaction of sale in advertently omitted to include the name of M. G. in the title and when he discovered the mistake is when he caused the said name to be included as per the documents exhibited. As for plot number Bahati/Kabatine Block 1/2338 it was purchased from one Paul Muiru Njoroge way back in 1977 as per the documentation exhibited.

With regard to the supervision of farm work, he maintained he employed workers to do the work as the plaintiff was also away at work leaving the home at 6.00 a.m. and only coming back to the home at 6.00 p.m. That by reason of what has been stated above it is a clear demonstration that there is no way the respondent and the plaintiff could have entered into joint investment ventures and is demonstration that all her deponements are nothing but lies. It is his stand that though he worked away from home he was home on weekends to give instructions to the workers on what to do for the rest of the week and check on the progress of the work. He is a stranger to the plaintiff's allegation that she paid school fees for their children. He did that solely on his own. All the respondent knows is that the plaintiff used to claim inability to meet the school fees for the children because her salary was so low that it could do nothing and that it was only enough for her upkeep like buying clothes. This was in addition to what the respondent spent in her. That she plaintiff was not even available for the children and that is why they went to boarding school from STD. 3 up to the university reiterates that one M. G. is not the respondent's mistress but a business partner who took care of the respondent's mother from the moment he brought his mother from Nyahururu in 1986 and in the process they became business partners.

The said affidavit has annexures and for purposes of assessment only a perusal of the same reveals presence of employment documents for the respondent already assessed, title deed in respect of land parcel number Nyandarua/Gilgil West/31 registered in the name of the respondent approximate area 20.0 Hectares approximate 50 acres registered on the twentieth day of July, 1974 already assessed. Documentation from the Settlement Fund Trustees in the name of the respondent indicating that indeed the balance of the loan on the Nyandarua property was Kshs.8,801.00; a document from old mutual bearing the name of P.N.N. but other entries are in eligible save the amount of Kshs.450.70 whose purpose is not indicated, certificate of lease for Nairobi/ Block 84/181 issued on the 8th day of January,1980 in the sole name of the respondent; the charge document created over land parcel number Nairobi/Block 82/181 in favour of savings and loan (K) limited already assessed; pay slips for the respondents already assessed; payments into the loan account of savings and loan (K) Limited bearing the name of the respondent among them a cheque deposit of Kshs.93,000.00 documentation from Ufundi CS&CS limited confirming the issuance of the said loan to the respondent and repayment of the loan to Ufundi; title deed in respect of Bahati/Kabatini Block 1/2339 in the joint names of M. G. N. and the respondent registered on the 23rd day of June, 2004; a document from continental Developers limited dated 20th day of May,1998 addressed to the respondent and one M.G. informing them that title documents for land parcel Number plot 2828 Title number 82/6269 were ready for collection; affidavit deponed by the Respondents on the 17th day of1981 in regard to the Ndeffo shares purchased from one Paul Muiru Njoroge, documentation on the transfer of shares from Paul Muiru Njoroge to the respondent and then the resulting title of Bahati/Kabatini Block 1/2338 registered in the joint names of

the respondent and Margaret Gathiru on the 23rd day of June, 2004 already assessed.

Turning back to the advocate's submission the court has been urged to hold that land parcel number Bahati/Kabatini Block 1/2338 was solely acquired by the respondent after buying the share from one Paul Muiro Njoroge whereas number Bahati/Kabatini Block/2339 was purchased with the proceeds of sale of another property jointly held with M. G. No.2/6269.

Both sides have cited principles of case law on the subject to the court for guidance. Those of the plaintiffs comprise the case of **ECHARIA VERSUS ECHARIA (2007) 2EA 139, TABITHA WANGECI NDERITU VERSUS SIMON NDERITU KARIUKI NAIROBI CA NO.203/1997, MARY ANN MATANU KIVUITU VERSUS SAMWEL MUTUA KIVUITU (1991) 2KAR 240, ROBERT FRANCIS SHAW VERSUS JUDITH DEBORAH CAREN SHAW NAIROBI CA 157 OF 2004 AND KAMORE VERSS KAMORE (2005) 1EA 80.**

The respondent on the other hand cited to court the case of **ECAHRIA VERSUS ECHARIA (SUPRA) KIVUITU VERSUS KIVUITU (SUPRA).**

The parties also gave oral high lights of their submissions. The plaintiffs' counsel reiterated their written submissions and wished to stress that the pleadings are very clear; the principles set by the court of appeal are the principles of law to be applied by this court in the determination of this dispute. The issue that this court should concern itself withinin the disposal of this matter should be the determination of a marriage between the parties, identification of the properties forming the dispute, and determination as to whether these are indeed matrimonial properties or not and if matrimonial properties, the contribution of each claimant towards the acquisition of the subject properties and then determine the share entitlement of each claimant and followed by the issue of costs. Their stand is that on the basis of the facts as well as documentation presented herein, the party who has been disadvantaged is the plaintiff and for this reason she should be adjudged owner of 60% of the subject property on apportionment and that the respondent should pay costs.

The stand of the respondents high lights is that the onus to prove direct contribution towards the acquisition of the subject property is on the plaintiff. Content that the plaintiff has not discharged that onus as all she has put forward are mere allegations. In contrast, the respondent has ousted all those allegations by documentary proof on how each and every property in contrast herein was acquired. On case law the court is invited to apply strictly the principle in **Echaria versus Echaria** to the effect that in the absence of proof of contribution towards the acquisition of the mentioned properties, the plaintiff stands non suited and dismiss her claim.

In response the plaintiff's counsel urged the court not to lose sight of the special circumstances which surrounded a marriage relationship whereby there are other contributions parties make to each other, other than financial contribution. The court was also invited to be guided by what they have stressed in their supplementary submissions dated the 28th day of September, 2010 and filed on the 30th day of September, 2010. A perusal reveals that what has been stressed are as follows:-

(i) In **Echaria versus Echaria (Supra)** the CA acknowledged the fact that in England where the Married Women Property Act 1882 is a statute of general application, the said law has not stagnated. It has undergone changes which have come to recognize the none monetary contribution by the spouse towards the acquisition of matrimonial property and which forms a basis for quantification when it comes to determination of issues of shareholding of each spouse.

(ii) It is conceded **Echaria versus Echaria (Supra)** is a court of appeal decision binding on this court but the court is invited to note that the decision has been roundly criticized both locally and internationally and to correct the position, there is in waiting the Matrimonial Property Bill of 2007 and the court is invited to be guided by the ideals informing the said Matrimonial Property Bill.

(iii) The court is also invited not to ignore other principle of case law cited herein.

This court has given due consideration to the afore set out rival pleadings, submissions, documentary exhibits, principles of case law cited which have been set out in extensor and in this courts' opinion the portion here invited the court to make findings on the matter on two fronts before making a determination namely the factual aspect of the case and the principles of case law applicable to those facts and then draw out conclusions which will assist to determine the issues between the disputants herein.

Bearing all the relevant factors herein, the court proceeds to make the following findings on the factual aspect of the dispute namely:-

1. It is common ground that indeed both disputants were legally married as man and wife under the African Christian and marriage Act as demonstrated by the copy of the marriage certificate exhibited.
2. That the said marriage had not been brought to an end as at the time the proceedings herein were initiated and even as at the time the parties made the final submissions and invited the court to make final determination on the dispute.
3. The couple have seven children between them who have not featured anywhere in these proceedings for obvious reasons because as children of both parties they are expected to take a neutral position unless the dispute affects them directly and in a personal position.
4. There is a 3rd party who has also featured in these proceedings with regard to two of the properties subject of these proceedings and one who had not been brought on board. This party is one M. G. The plaintiff asserts she is a mistress of the respondent. Whereas the respondent has asserted that she is the person who took care of his late mother from 1986 when the plaintiff objected to taking care of his mother M. G. did so up to the time of her demise in 1999.
5. The properties which have featured prominently in the assessment are 4 namely:-
 - (a) Nyandarua/GILGIL West/31
 - (b) Bahati/Kabatini Block 1/2338.
 - (c) Bahati/Kabatini/Block1/2339.
 - (d) Donholm LR. NO. Nairobi Block 82/181.
6. Property known as Bahati/Kabatini LR. NO.T.B.A. and with shop developments therein known as Njugumo has not featured prominently because neither party has exhibited documentation in the form of search certificates or any other documents on the history of how the same was acquired.
7. It is undisputed that two of the disputed properties namely Nyandarua/Gilgil West/31 and Donholm LR. No. Nairobi Block 82/181 are solely registered in the names of the Respondent to the exclusion of the plaintiff.
8. Whereas parcel number Bahati/Kabatini Block 1/2238 and Bahati/Kabatini/Block 1/2339 which had initially been solely registered in the names of the respondent as at the time of the initiation of these proceedings subsequently underwent registration changes and are currently registered in the joint names of the respondent and one M. G. the 3rd party who has not been brought on board in these proceedings.
9. It is not disputed that at the initiation of these proceedings the plaintiff took precautionary measures in order to protect her interests in the said properties and placed caveats against change in the status of the registration or title holding of the said property before the determination of the proceeds. It is her stand that she was persuaded by the respondent to remove them as a consideration for reconciliation which she did so and the respondent allegedly reconciled for a short while but then left the matrimonial home again and in the year 2004 since the said properties is acquired a new joint owner in the name and style of M. G.

10. Parties have taken opposing stand with regard to the position of this 3rd party in relation to the aforesaid properties. The stand of the plaintiff is that since the change came after the initiation of these proceedings the presence of M. G. as a joint owner does not affect her claim which had crystallized as at the time the proceedings herein were initiated. Whereas the stand of the respondent is that in the absence of her being brought on board no adverse orders can be made against her.

11. It is undisputed that both parties were in gainful employment as civil servants with the respondent working with various ministries while the plaintiff only worked as a teacher employed by the Teachers Service Commission.

12. Both disputants worked and retired from their respective employments during the subsistence of the marriage.

13. It is undisputed that the matrimonial home was set up on the property named as Nyandarua/Gilgil West/31 and it is where the plaintiff currently resides. It is apparent that the respondent also resided on this land allegedly until 1987 when he left.

14. On the issue of management of the matrimonial home, it has been the stand of the plaintiff throughout her depositions inclusive of the initial one that she is the one who has been managing the matrimonial home and supervised all the developments on the same. The stand of the respondent in the initial replying affidavit filed earlier on did not appear to have disputed this supervisory role having been played by the plaintiff. But in the subsequent replying affidavit the respondent has challenged that supervisory role and instead said that when the plaintiff declined to have the respondents' parents take care of his six cows, and his elder brother G. to oversee the operations of the farm, the respondent had no alternative but to turn to the help of employees.

15. The mention of existence or presence of employees on the Nyandarua farm brings to the fore the issue of supervision of those employees. The stand of the plaintiff is that since she was living on the farm she is the one who oversaw the farm operation and supervision of the farm workers on a daily basis as well as paying their wages while the respondent who worked away from the home never did that. It is undisputed that the plaintiff taught in nearby primary schools and used to operate from home to work. Whereas the stand of the respondent is that indeed he worked in various parts of the country away from home but he was home on each weekend to supervise the work to the exclusion of the plaintiff.

16. No farm records were produced to show how many employees the disputants had on this farm, and how these were supervised. Neither called any of them to depone affidavits save the two supporting affidavits, in favour of the plaintiff assessed herein.

17. The issue of the history of the acquisition of these properties has featured prominently, in these proceedings. The version of each has already been assessed herein save that the plaintiff claims to have contributed towards the acquisition of the said properties while the respondent claims to have acquired them solely on his own. The respondent has deamed the earnings of the plaintiff alleging that these were so low that they could not be tapped to act as a booster for the funds used by the respondent to acquire the properties in dispute. Further that they were not even available for the general upkeep and maintenance and the school fees of the seven children of the marriage and even if she applied the same to the general upkeep of her children, then these went to cover the plaintiff's parental responsibility towards those children and she cannot claim compensation from the respondent.

(ii) The documentation relied upon by either party to support their stand have been assessed. These will be revisited during the determination of the respective parties' rights with regard to each property.

18. Proceeds of farming activities on the Nyandarua/Gilgil West/31 which is the matrimonial home have featured prominently. It is the stand of the plaintiff that it is these proceeds which went to purchase and develop both the two Kabati properties as well as the Danholm property. The respondent has denied this assertion and relies on the loan applied for and granted from savings and loan as the source of funds which were used to develop the property in question.

(ii) The court has no record of the earnings from the farm save the joint account in Nakuru KCB which the respondent has disowned.

19. There is also no details of how much the development on the Donholm property cost in order to determine whether these were within the loan applied for and received by the respondent or they were beyond that figure and if so call upon the respondent to disclose the source of the balance of the funds used to top up the loan and his earnings in order to develop the Donholm property.

20. It has been asserted by the plaintiff that the Donholm property is rental, a fact not disputed by the respondent but no records have been given to show the extend of this rental income. What the court has is an estimate given by the plaintiff.

21. There is an assertion on the part of the respondent that Bahati/Kabatini Block1/2339 was developed with the proceeds of sale of another property jointly owned by him and the mentioned Margaret Gathiru namely Nairobi Block 82/6269 Donholm phase 5G but all that the respondent has exhibited is a letter from continental Developers Limited addressed to the two informing them that the title was ready. The respondent who has been meticulous in proving ownership of the various property by production of title documents has not exhibited the said title document, a sale agreement to show that it was indeed sold, to whom sold and bank statements that the alleged sale yielded sell proceeds which were kept in a bank account from which funds were drawn and applied towards the alleged developments on the Bahati/Kabatini properties. The respondents failure to exhibit the said documents is clear proof that the inclusion of the said Margaret Gathiru as a joint holder in the Bahati/Kabatini properties was meant to tilt the tables of entitlement towards the respondent. The reason for the court saying so is because if indeed she was on the scene as early as 1986 as a business partner then why didn't she feature in the documentation in support of the respondents claim of sole entitlements forming annextures to the first replying affidavit. The only inference that can be drawn from the said silence is that the later developments of joint ownership not supported by documentary proof is nothing but an after thought.

22. The plaintiff has portrayed herself as a hard working woman who was mindful of her family's welfare and was conscious of the roles she was obligated to play in the family both as a wife and a mother. Whereas the Respondent has portrayed her as a joy rider in marriage and the family and for this reason her matrimonial and parental responsibility were of no consequence to her. But nowhere in his deponements does he say that this situation was of concern to him. No explanation was given as to why he never raised complaint with any of his relatives or with the plaintiff such as writing letters of complaint to the plaintiff expressing concern over her indifference towards her responsibilities as a wife and mother.

23. It is also to be noted that the only attempt made to show or depict the plaintiff as an indifferent person came in the last deponement of the respondent.

Turning to the principles of case law relied upon by the parties since these are common to both sides they will be assessed globally. It also has to be noted that the historical back ground of litigation and the court of appeal decisions to crystallize the position of law in this area was explored in the case of **ECHARIA VERSUS ECHARIA (SUPRA)** heavily relied upon by both sides.

(a) The case of **KIVUITU VERSUS KIVUITU (1991) 2 KAR 241** a court of appeal decision laid down the principle which recognized that:-

“The law presumes equal ownership of the matrimonial property from the fact of registration in joint names; recognized the wife’s indirect financial contribution towards the purchase of the matrimonial home and the fact that both parties held the property as a joint venture.”

(b) **Gissing versus Gissing (1970) 2A11er 780** where in the court held that **“where both spouses contributed to the purchase of matrimonial property but the property is registered in the name of one spouse only, then in the event of a dispute arising with regard to the same then the law applicable is the law relating to trusts.”**

(c) In **KAMORE VERSUS KAMORE (2000) 1EA31** where in the court of appeal held inter alia that “where property is acquired during the course of coverture and is registered in the joint names of both spouses, the court in normal circumstances must find that such property being a family asset is actually held in equal shares.

(d) **NDERITU VERSUS NDERITU (1995-1998) 1EA 235** the same court of appeal held inter alia that:-

(i) The married women property Act did not discriminate between statutory and customary law marriage....All that a wife needed to prove under the Act was that she was married to the husband at the time of lodging her application, that the property subject of the proceedings was acquired during the subsistence of the marriage and that she had contributed directly or indirectly to the acquisition of the assets.

(ii) That when determining the issue of contribution the court has to assess the value of a wife’s’ – none monetary contribution in order to determine her interest in the disputed property.

(iii) Child bearing is also a contribution to the common good of the family and in spite of this being an indirect contribution it none the less entitled the wife to an equal share of the family property.

(e) In **ECHARIA VERSUS ECHARIA (SUPRA)** the same court of appeal laid down the following principles:-

(i) That time was opportune for the court of appeal to depart from its own decision in the case of **KIVUITU VERSUS KIVUITU (SUPRA)** with regard to the proposition that joint tenancy connotes equality. The reason being that there is a rebuttable presumption that where 2 or more people contribute the purchase price of property in equal shares they are in equal joint tenants. Equal contribution results in a joint tenancy unless there is contrary evidence to show that irrespective of the registration there was no equal contribution.

(ii) Where the disputed property is not registered in the joint names of the spouses but it is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective preposition as financed contribution either direct or indirect towards the acquisition of the property.

(iii) In cases where each spouse has made substantial but unascertainable contribution it may be equitable to apply the maxim is Equity.

(iv) That previous decisions of the court of appeal on the subject before the decision in the case of **ECHARIA VERSUS ECHARIA (SUPRA)** in all proven disputes between husband and wife over beneficial interest in the property acquired during marriage which had come to the court of appeal, the court of appeal had invariably given the wife an equal share but a study of the said decisions reveals that the said decisions were not as a result of any general principle of equality of division save that 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.

(v) That the “Kivuitu” case (Supra) was carefully decided both on law and facts as it is a case where the husband and wife had a joint legal interest and a resultant equal beneficial interest in the property. The court did not lay out any principle on equal division as suggested.

(vi) That when dealing with disputes between husband and wife over property, the court applies the general principle of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. According to the English law of trusts it is only through the wife’s financial contribution direct or indirect towards the acquisition of the property registered in the name of her husband that entitled her to a beneficial interest in the property.

(vii) A wife’s non-monetary contribution cannot be taken into account when determining the total

amount of contribution from the wife towards acquisition of the property.

This court has given due consideration to the afore set out principles of case law relied upon by both sides and in its opinion the court proceeds to make the following findings on the same;-

1. The case of **ECHARIA VERSUS ECHARIA (SUPRA)** has carried out an extensive survey of case law of its own decisions on the applicability of the provision of section 17 of the 1882 married women property Act of England which case law has ruled that the said legislation being a statute of general application in England forms part of the received law from England to this jurisdiction and the principles on the interpretation of the said provision in England form persuasive law to the courts of this jurisdiction when interpreting the said provision in relation to disputes over property rights by spouses both married under the statute and customary law so far as applicable to the peculiar circumstances of this case.
2. It therefore follows that the plaintiff who had been married under statute law has properly anchored her claim herein on the said statute and is entitled to a merit decision on her claim.
3. The decision of **ECHARIA VERSUS ECHARIA (SUPRA)** being a court of appeal decision is binding on this court as submitted by the defence counsel and accepted by the plaintiffs counsel. The court also confirms that this is the correct position in law.
4. It is apparent that properties which are proper candidates for adjudication under the said statute are those which are proven or qualify to be contested as matrimonial properties. With regard to the dispute herein the court has discounted property No. Bahati/Kabatini LR.NO T.B.A. with shop developments thereon known as Njugumo as neither party produced documentary proof firstly to prove its existence and secondly that its acquisition has its origin from the respondent herein since the plaintiff did not assert that she was its originator.
5. The court makes a finding that up to and exclusiveness of the date when **ECHARIA VERSUS ECHARIA (SUPRA)** was decided the court of appeal had recognized the following as the ways in which a wife could gain entitlement to matrimonial property namely:-
 - (a) By way of a gift whereby a husband solely acquires the property but intends to give a portion of it as a gift to his wife and registers the property in the joint names of both of them. The extent, value percentage of the gift may be specified. But where there is no specification of the wife's ratio of entitlement but the property is joint then the presumption of equal share holding applied.
 - (b) By way of a direct contribution towards the acquisition of the home by the spouse either contributing to the entire purchase price or meeting of equal mortgage installments.
 - (c) By way of indirect contribution by reason of the wife off-loading from the husband the burden of child care and up keeping and general management of the family and the home as well as child bearing and in the process creating room for the husband to save money to meet the costs of capital investment.
 - (d) By way of a wedding gift.

The decision of the court of appeal in **ECHARIA VERSUS ECHARIA (SUPRA)** did away with the issue of recognition of indirect contribution in the manner shown in (c) above and stressed direct financial contribution as the overriding criteria in determining spouses' entitlement to matrimonial property. Another notable principle of importance is that the court has jurisdiction to declare whatever percentage comprises of the wife's shareholding in the subject property and then go further and avail that percentage to the wife by ordering that the property be valued and either sold and the proceeds shared out as per the percentages adjudged or alternatively that the incumbent spouse or the spouse who wishes to keep the property can buy out the percentage share entitlement of the other spouse.

It is observed that in addition to the foregoing set and now accepted standards the plaintiff's counsel has stressed the issue of equal entitlement citing the provisions of the matrimonial property Bill 2007 as well

as the prescriptions in the CEDAW which guarantees women equal shareholding in matrimonial property as a basic human right. It is trite that a bill is not law and for this reason its prescriptions howsoever favourable they may be to the plaintiff's case. They cannot be applied to confer a benefit onto the plaintiff. However it is clear that what the learned counsel is agitating is entitlement through the avenue of human rights an aspect not explored and or interrogated by the court of appeal in the case law assessed.

This court is however alive to the fact that as at the time of drafting this judgment there are operative constitution as provisions on matrimonial property contained in the current Kenya constitution 2010. The court appreciates that the proceedings herein were initiated before the promulgation of the constitution aforesaid but final submissions were made after the promulgation of the constitution and the proceedings are therefore subject to the provisions therein which cannot be ignored.

The relevant article is Article 45 (3) of the constitution of Kenya 2010. It provides:-

“Article 45(3) parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage”

The above being the position there is no way this court can sever the proceedings and apply the constitutional provisions aforesaid to the judgment and fail to apply it to the proceedings from which the judgment stems. To resolve this the court will draw inspiration from the provision of section 23(3) of the Interpretation and General Provisions Act (cap 2 Laws of Kenya). It provides:-

“Section 23(3) where a written law repeals in whole or in part another written law then unless a contrary intention appears the repeals shall not:-

(c) Affect a right, privilege, obligation or liability acquired accrued or incurred under a written law so repealed”

This court is alive to the fact that the prescription in Article 45 (3) was not part of the prescription in the defunct or retired constitution. It is a new innovation taking effect after the competing rights of the parties herein had crystallized at the time the plaintiff made the first move to come to court and seek reliefs in the year 2004. This finding notwithstanding, the court has judicial notice of the fact that the provision of Article 45(3) (supra) has been lifted from Article 16(1) of the Universal Declaration of Human Rights to which the court has judicial notice that Kenya is a signatory and has undertaken to uphold those ideals for the benefit of its citizenry. Article 16(1) of the UDHR provides:-

“Married women of full age without any limitation due to race, nationality or religion have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution”

A similar prescription is found in Article 7(d) of the Protocol to the African Charter on Human and People's Rights on the rights of women in Africa. It provides:-

“In cases of separation, divorce or annulment of marriage women and men shall have the right to an equitable right to an equitable sharing of the property deriving from the marriage”

There is also Article 6(1) (h) of the International Convention on the Elimination of All Forms of Discrimination against Women which enjoins state parties:-

“To ensure on the basis of equality the same rights for both spouses in respect of the ownership, acquisition, management, administration enjoyment and disposing of property whether free of charge or for valuable consideration”

Currently these prescriptions are applicable by the courts in this jurisdiction through Article 2(5) of the same Kenyan constitution 2010. It provides:-

“The general rules of international law shall be part of the law of Kenya”

Bearing in mind the caveat in section 23(3) (c) of the Interpretation and General Provisions Act (Supra) this court can only go round that caveat if it can be demonstrated that there was obligation on the part of the court of appeal or any other court in this Jurisdiction to apply principles of equality in matrimonial property disputes based on this principle of equality as a basic human right both before the making, during the making and after the making of the decision in the Echaria versus Echaria (Supra) decision if this issue of equal entitlement as between spouses based on human rights had arisen and interrogated by the court at the invitation of the parties or on the basis of the court's own motion.

In the case of RONO VERSUS RONO AND ANOTHER (2008) 1KLR(G&F) 803 at page 812 pr.30- page 813 Pr. 20, the court of appeal made the following observation:-

“Is international law relevant for consideration in this matter? As a member of the international community Kenya subscribes to international customary law and has ratified various International covenants and treaties. In particular it subscribes to the International Bill of Rights, which is the universal declaration of Human Rights (1948) and two International Human Rights covenants. The covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in 1966) in 1984. It also ratified without reservation the convention on the Elimination of all forms of Discrimination Against women in short (CEDAW)...In the African context Kenya subscribes to the African Charter on Human and Peoples Rights otherwise known as the Banjul Charter (1981) which it ratified in 1992 without reservation. In article 18 the charter enjoins member state inter alia to:-

---Ensure the elimination of every discrimination against the protection of rights of the women and the child as stipulated in international declarations and conventions. On the basis of that reasoning the CA in the Rono & Another versus Rono (Supra) case the court embraced the principle of equality in the distribution of a deceased person's estate between two households signified by the two widows of the deceased with one household having only daughters while the other had daughters and sons.

In this court's opinion the decision in Rono & Another versus Rono (Supra) is authority that even before the advent of the provisions in article 2(5) and 45 (3) of the current Kenyan constitution 2010 Kenyan courts were already alive and sensitive to there being a need to accord equal treatment to women and children in all spheres of life. This court appreciates that the decision in Rono and another versus Rono (Supra) dealt with inheritance rights and issues, but the court is of the view that application of law knows no boundaries and for this reason application of the principle of equality in matrimonial property disputes is not remote. This court notes and appreciates that the principle of law set by the court in ECHARIA VERSUS ECHARIA (SUPRA) stems from provisions of a legislation subordinate to constitutional provisions, meaning that the constitutional provisions enshrining the principle of equality when it comes to distribution of matrimonial property has primacy over the principle of law enunciated by the decision in ECHARIA VERSUS ECHARIA (SUPRA). Which stems from an ordinary legislation.

In the premises this court proceeds to apply the afore set out identified principle of equality on distribution of matrimonial property to the determination of this matter as hereunder:-

- (1) With regard to the issue as to whether the parties were married to each other as at the time of the initiation of these proceedings, the courts' response to this question is in the affirmative as evidence adduced by both sides is in agreement that indeed parties were so married.
- (2) As to whether the properties in dispute were acquired during the marriage, the courts' response is also in the affirmative as even the Respondent himself does not dispute this. What he disputes is the plaintiff's entitlement to the said property. The respondent's stand is fortified by the fact that all the initial registration documents portray the respondent as the sole registered owner with no indication of other persons' interests in regard thereto either by way of trust or otherwise. The only evidence of a move

having been made to have such other interests registered was the period when the plaintiff initiated these proceedings and then placed caveats against those titles. It is her assertion that she was persuaded to remove the caveats with a view of reconciliation a matter not denied by the respondent as he has not explained why these were caveats removed during the pendency of these proceedings. Had the removal been taken as a signification of the plaintiff's admission of having no interest in the said properties, then this action should have been preceded by the termination of the proceedings first. The court therefore makes a finding that the removal of the caveats by the plaintiff did not prejudice her claim to entitlement to the said properties. The court believes her explanation that these were removed to facilitate reconciliation.

(3) With regard to the applicant's contribution towards the purchase of the said properties, the court wishes to adopt its earlier findings on the factual aspects of the case and in a summary that:-

- (i) It is not in dispute that both parties were civil servants earning various amounts in terms of monthly pay and they retired from the civil service as such with retirement benefits.
 - (ii) That the plaintiff has stressed that her major contribution towards the acquisition of the subject properties came from contribution from her earnings and majority from the proceeds of farming activities on the Nyandarua farm which activities she supervised.
 - (iii) That there are no detailed accounts on how each spent each and even single cent earned by them from the civil service jobs. Likewise there is no detailed accounts of how much was earned from the farm produce from the Nyandarua farm and how the same was applied.
 - (iv) That details of employees supervised by the respondent on weekends have not been given. Neither has any of those employees' deposed affidavits to show that indeed it is the respondent who was doing the supervisory work and not the plaintiff.
 - (v) That the plaintiff has furnished supportive evidence through affidavit that she was involved in the supervision of the farming activities on the Nyandarua farm which depositions have not been countered by the respondent. Nor has it been claimed that the deponents of the said affidavits were fictitious persons.
 - (vi) At no time did the respondent ever complain to the plaintiff that she had abdicated her role as a wife and mother to her children. In the absence of such a complaint the court makes a finding that the sole reason for the respondent not raising complaints about the plaintiff's alleged failure to participate in income generating activities undertaken for the common good of the family and her failure to contribute towards the same common good of the family from her civil service earnings is because there was no reason for the respondent making such a complaint because the plaintiff was meeting both her financial contribution and supervision role as a family member. For the reasons given under this item 3, and in the absence of properly audited accounts on the financial contribution of each disputant towards the acquisition of the said properties. It is fair and just to apply the principle of equal contribution.
- (4) In addition to the findings in number 3 above the principle of equality currently enshrined in Article 45 (3) of the current Kenyan constitution and as derived from the afore assessed human rights instruments that Kenya was party to as a member of the international community and which principle this court is enjoined to apply enjoins this court to rule and order that the plaintiff is entitled to a half share of all matrimonial properties adjudged to be matrimonial properties herein.
- (5) Another issue for consideration and determination is the availability of two properties namely Bahati/Kabati Block 1/2338 and 2339 which undisputedly were acquired during the subsistence of the marriage and which were solely registered in the names of the respondent as at the time of the initiation of the proceedings subject of this Judgment, they were even subjects of caveats to protect the interests of the plaintiff, which caveats' were removed on an undisputed persuasion of the plaintiff by the respondent and soon thereafter a 3rd party was made a joint owner which 3rd party is not on board herein. It is the finding of this court that as found earlier on proof of the contribution of the 3rd party towards the acquisition of

Bahati/Kabatini Block 1 /2339 was not made out. This falls into the same footing as its sister property Bahati/Kabatini Block 1/2338. It is however noted that no adverse orders have been sought against the 3rd party by the plaintiff herein. Neither did the respondent cross-apply to have these two properties excluded from being contested over as matrimonial properties herein. The court is also of the opinion that the non-availability of the said properties for distribution on the ground does not rule out the possibility of an order for compensation either in kind or in monetary terms being made in favour of the party who cannot access that property by way of distribution on the ground.

(6) With regard to the Donholm property the reasoning given for the Nyandarua property applies to this plot. Save that no order for income distribution can be given in the absence of audited accounts to show how much has been earned in order to be apportioned. The best the court can do is to give liberty to the plaintiff to pursue the issue of apportionment of income accrued upon the actual figure being established either herein or in another form if she so deems to do so.

(7) The property found not to have been proved to be a matrimonial property will not attract any order of distribution.

(8) Costs usually follow the events but have to bear in mind the dictates of the identified principle of equality as a basic human rights.

For the reasons given in the assessment, the court proceeds to make the following final orders:-

1. An order be and is hereby issued and declared that the property listed as Bahati/Kabatini LR. NO. T.B.A. and with shop developments therein known as Njugumo is not matrimonial property as no evidence was adduced by the plaintiff/applicant to prove its acquisition as well as its existence.

2. An order be and is hereby made and declared that property number Nyandarua/Gilgil West/31 approximate 20 ha is matrimonial property.

(ii) That for the reasons given in the assessment, an order be and is hereby made issued and ordered that it be shared equally between Z. W. N. and the Respondent P. N. N..

(iii) That an order be and is hereby made and ordered that the plaintiff who has been residing on this property will retain the portion where the matrimonial house is where as the respondent is to retain all other developments on the portion adjudged to be his half share.

3. An order be and is hereby made and ordered and declared that property known as Donholm LR. No. Nairobi/Block 82/181 is matrimonial property.

(ii) For the reasons given in the assessment, this property is to be valued with the participation of both the plaintiff and the Respondent, its value established and then the same be sold and the resulting proceeds to be shared out equally between the plaintiff and the Respondent.

(iii) In the alternative to number (ii) above either the plaintiff or the Respondent is at liberty to buy out the share entitlement of the other should they deem it fit to do so.

(iv) As for the income which has been accruing from this property, the court declines to make orders with regard to distribution of the said resulting income as no audited accounts were ever produced to court to that effect to prove the same.

(iv) In the alternative to number (iii) above, the plaintiff is at liberty to establish the resulting income by way of rental proceeds from the said property by way of Audited accounts and then seek appropriate orders for half of the said resulting income either in these proceedings or in other proceedings if she deems fit to do so.

4. That for the reasons given in the assessment land parcels number Bahati/Kabatini Block 1/2338 and

Bahati/Kabatini Block 1/2339 which are currently registered in the joint names of the Respondent and one Margaret Gathiru qualify to be adjudged matrimonial properties and they are so adjudged for the following reasons:-

- (i) They were acquired and developed during the subsistence of the marriage of the plaintiff and the Respondent.
- (ii) The plaintiff duly registered caveats against them in order to protect her share entitlement of the same but was persuaded by the respondent to remove the caveats as consideration for reconciliation which the plaintiff did in good faith.
- (iii) The registration in the joint names of the respondent and one Margaret Gathiru was effected during the pendency of these proceedings and was aimed at defeating the plaintiff's claim of the plaintiff's share entitlement in the same and for this reason they cannot be protected.
- (iv) The Respondent has not put in a cross petition/application to have these two properties struck out from the list of properties asserted to be matrimonial properties as pleaded by the plaintiff. Neither has he sought declaration orders that they were not to be considered as such matrimonial properties as at the time of the presentation of these proceedings.
- (v) The named M.G. though not party to these proceedings has not deposed an affidavit confirming the respondent's allegations with regard to the acquisition of the said properties.

5. By reason of what has been stated in number 4 above, an order be and is hereby made and declared that the plaintiff is entitled to half share beneficial interest in the property known as Bahati/Kabatini Block 1/2338 and Bahati/Kabatini Block 1/2339.

- (ii) That the said properties be valued with the participation of both parties and be sold and the resulting proceeds be shared equally between the plaintiff and the respondents.
- (iii) In the alternative to number (ii) above the Respondent to be at liberty to buy out the beneficial interest of the plaintiff in the said property in monetary terms.
- (iv) In the alternative to number (iii) above the plaintiff's beneficial interest in the named two properties be off set against the respondent's interest in the half share of property adjudged in his favour with regard to land parcel number Nyandarua/Gilgil West/31.

6. In line with the principle of equality of the spouses each party will bear own costs.

7. There will be liberty to apply granted to either party if need be.

8. The delay in the drafting and delivery of this Judgment which is highly was occasioned firstly by systematic work constraints and secondly by inadvertence whereby the file was filed away instead of it being handed to the judge for drafting of the judgment and ruling after conclusion of proceedings.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE - JA

DATED, READ AND DELIVERED AT NAIROBI BY HON. MR. JUSTICE MAJANJA ON THIS 28TH DAY OF SEPTEMBER, 2012.

JUDGE