



**MN v CMM (Matrimonial Cause E002 of 2024)
[2025] KEHC 4696 (KLR) (11 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MATRIMONIAL CAUSE E002 OF 2024
RN NYAKUNDI, J
APRIL 11, 2025**

BETWEEN

MN APPLICANT

AND

CMM RESPONDENT

JUDGMENT

1. The brief facts underlying this cause are that the Applicant was married to the Respondent up until 22nd July 2019 when she filed a Divorce Petition seeking to have their union dissolved. The divorce cause was set down for hearing on and vide the judgement delivered on 16th February 2024 the marriage was dissolved. The applicant then applicant approached this court vide the Originating Summons dated 2nd April 2024 seeking the following orders;
 - a. A declaration be and is hereby issued declaring that the Applicant is entitled to half share (or such other share as the court may award) of the properties (movable and immovable) acquired by the Applicant and the Respondent during the subsistence of their marriage and that the Respondent hold title, interest, ownership and possession of the said properties intrust for himself and that of the Applicant in their respective shares as the legal owner and cestui que trust respectively namely: -
 - (I) Eldoret Municipality Block 9/xxxx.
 - (ii) Eldoret Municipality Block 5/xxx .
 - (iii) Eldoret Municipality Block 21 (particulars withheld)/19xx.
 - (iv) Eldoret Municipality Block 21(particulars withheld)/40xx.
 - (v) Eldoret Municipality Block 11/xxx.



- (vi) Eldoret Municipality Block 11/xxx.
- (vii) Trans Nzoia/Kipsoen/1xxxx.
- (viii) Trans Nzoia/Kipsoen/xxxx.
- (ix) Sinyerere/Sitatunga Block I/Mukuyu/xxx.
- (x) Provisional Number xxxx8 Allotted By Kamulu Housing Co-op Society Limited.
- (xi) Provisional Number xxxx9 Allotted By Kamulu Housing Co-op Society Limited.
- (xii) The Motor Vehicle Registration Numbers- KCL xxxN- KCL xxxV- KCF xxxF.
- (xiii) deposits in the bank Account Numbers: -
 - Equity Bank
 - Mxxxxxxx Collection - 030016090xxxx.- jxxxxxx Enterprises - 030019009xxxx.-
 - Mxxxxxxx Collection - 030016551xxxx.
 - Co-operative Bank
 - Mxxxxxxx Enterprises - 0110945751xxxx.- (particulars withheld) and Apparel Centre
 - 0114868615xxxx.- Mxxxxxxx Enterprises - 0302000xxx.- Mxxxxxxx Enterprise
 - 8588435810130865.- Margaret Ndung'u - 8587906010012xxxx.- Jill Gathoni -
 - 8585739510xxxx.- Charles Muniu & Margaret Ndung'u - 08200000xxxx.
 - Consolidated Bank
 - (particulars withheld) and Apparel Centre - 1015120600xxxx.Transnational Bank-
 - Charles Muniu & Margaret Ndung'u -506046xxxx.
 - ABC Bank –
 - Mxxxxxxx Enterprises 5Bxxx.Savings with Safaricom SACCO to a tune of- Kshs.
 - 4,000,000/= .Savings with Riri Investment Co. Ltd of - Kshs. 10,000,000/=Old
 - mutual Insurance Savings - Kshs. 2,200,000/=.

- b. A declaration be and is hereby issued declaring that the Applicant is entitled to half share (or such other share as the Court may award) of the net current market proceeds of the sale of that parcel of land known as Eldoret Municipality block 9/xxxx and Eldoret Municipality Block 5/xxx and pursuant to the said share of the net proceeds forthwith.
- c. That in the alternative to the prayer 2 hereinabove should the Respondent fail or unable to pay the share entitled to the Applicant the same to be recovered from the other properties where the Respondent is entitled for a share.
- d. An order do issue all immovable properties be subdivided into two equal portions, or be subdivided into two portions, or be subdivided in any other ratio as the court may deem just and two separate title deeds be issued for each of the new two portions, one in the name of the Applicant and the other in the name of the Respondent as the respective Registered proprietors.
- e. An order be and is hereby issued directing that the above-mentioned properties both movable and immovable be shared between the Applicant and the Respondent equally or in any other ration as the Court may deem just.
- f. In the alternative an order be and is hereby issued directing that a valuation by a reputable valuer and or valuers acceptable to both parties or appointed by the court be carried out



both movable and immovable properties and upon such valuation the Respondent do pay the Applicant half (or such other share as the Court may order) of the value of the said properties.

- g. Upon granting of any of the foregoing prayers a permanent orders of injunction be and is hereby issued restraining the Respondent whether by himself, his servants, agents and/or employees from interfering with the Applicant's lawful enjoyment and quiet possession of the properties awarded to her.
 - h. That the Respondent to refund the Applicant a sum of Kshs. 3,500,000/= amount which the Applicant paid on the repayment of the loan.
 - i. Such other orders be granted as the court may deem fair, just in the circumstances.
 - j. Costs be awarded to the Applicant.
2. The application is premised on the grounds set out on the face of it and the averments in the supporting affidavit.

Applicants' Supporting Affidavit

3. The applicant deponed that she moved in with the respondent in 1994 and in 1996, the respondent and his family visited her home where they paid dowry according to Kikuyu customary law. They lived together as husband and wife until 30th October 2024 when they conducted a church wedding at PCEA (particulars withheld) church in Eldoret. She started working at a tailor shop in January 1995 where she was an attachee and in 1996 they opened their first shop operating under Margaret Ndung'u. In 1999 she registered their first business under the name Mxxxxxxx enterprises and while she was running the business, the respondent was working as an office clerk at Raymond Woollen mills. In 2016, they entered into a partnership agreement and they were issued with certificates of registration.
4. The Applicant opened other businesses being Mxxxxxxx Designers and jxxxxxx enterprises which were sole proprietorships. She was in charge of tailoring and production whereas the Respondent was at the shop running sales. She started traveling to Uganda and Dubai to purchase fabric and tailoring accessories and in 2007 she extended her travel to China. As the tailoring service peaked in 2012, she travelled a lot and as a result she closed the tailoring business. She assisted the respondent in the business of buying and selling tailoring accessories at the Mxxxxxxx collection shop.
5. They had many accounts in the business operation and either of them could sign and withdraw money but she trusted the Respondent and was the one running the account. She stated the accounts they held together as follows; Equity Bank Mxxxxxxx Collection - 030016090xxxx.jxxxxxx Enterprises - 030019009xxxx.Mxxxxxxx Collection - 030016551xxxx.Co-operative Bank Mxxxxxxx Enterprises - 0110945751xxxx.(particulars withheld) and Apparel Centre - 0114868615xxxx.Mxxxxxxx Enterprises- 0302000xxx.Margaret Ndung'u – 8587906010012xxxxJill Gathoni - 8585739510xxxx.Charles Muniu & Margaret Ndung'u - 08200000xxxx.Consolidated Bank –(particulars withheld) and Apparel Centre 1015120600xxxx.Transnational Bank –Charles Muniu & Margaret Ndung'u -506046xxxx.ABC Bank Mxxxxxxx Enterprises 5Bxxx.Savings with Safaricom SACCO to a tune of- Kshs. 4,000,000/=.Savings with Riri Investment Co. Ltd of - Kshs. 10,000,000/=.Old mutual Insurance Savings - Kshs. 2,200,000/=.
6. The deponent averred that their total savings in the bank were Kshs. 8,000,000/- and during the operation of the accounts anyone could deposit. Further, that on various occasions she made deposits into the accounts. The respondent joined a social group of men know a Riri investment group where he invested money from their business shop Mxxxxxxx collection. He had invested Kshs. 10,000,000/- in



the investment company and further, he had also invested Kshs. 4,000,000/- from Mxxxxxxx collection into Safaricom Sacco.

7. She deponed that they jointly registered another business name to assist in production of uniform being (particulars withheld) and Apparel center. They took out a Kshs. 6,000,000/- loan with Equity Bank and the respondent repaid Kshs. 1,500,000/-. He defaulted and requested the bank to proceed and sell the security. She then repaid the loan using Mxxxxxxx designers under her name making a total payment of Kshs. 3,500,000/-. When he learnt that she had started repaying he repaid Kshs. 1,000,000 balance and took the security with him.
8. The deponent averred that they had also invested a Life Insurance cover at Old Mutual for their daughter Jill Gathoni where they had invested a sum of Kshs. 2,000,000/- during the pendency of the divorce. The Respondent proceeded to withdraw a sum of Kshs. 1,800,000/- which sums were deposited in the account No. 1015121400xxxxx at Consolidated Bank under (particulars withheld) and Apparel centre.
9. The applicant filed the divorce cause on 22nd July 2019 and was issued with a Decree Nisi on 16th February 2024. Further, that during the pendency of their marriage they had acquired the following properties;

Motor vehicle registration nos ;

KCL xxxN.

KCL xxxV.

KCF xxxF

Immovable properties;

Eldoret Municipality Block 9/xxxx.

Eldoret Municipality Block 5/xxx .

Eldoret Municipality Block 21 (particulars withheld)/19xx.

Eldoret Municipality Block 21(particulars withheld)/40xx.

Eldoret Municipality Block 11/xxx.

Eldoret Municipality Block 11/xxx.

Trans Nzoia/Kipsoen/xxxx.

Trans Nzoia/Kipsoen/xxxx.

Sinyerere/Sitatunga Block I/Mukuyu/xxx.

Provisional Number xxxx8 Allotted By Kamulu Housing Co-op Society Limited.

Provisional Number xxxx9 Allotted By Kamulu Housing Co-op Society Limited

10. She urged that she is the one who purchased the properties known as Eldoret Municipality Block 9/xxxx and Eldoret Municipality Block 5/xxx . Further, that they had established their matrimonial home on Eldoret Municipality Block 5/xxx . She stated that the respondent has since proceeded and sold both these parcels of land which were sold during the pendency of the divorce, which sale was meant to defeat her matrimonial interest. She prayed the court grant the prayers sought in the Originating Summons.



Replying Affidavit

11. The respondent opposed the application vide a replying affidavit dated 17th July 2024. The deponent averred that the originating summons is devoid of merit, is frivolous, incompetent, fatally defective .vexatious .baseless and dead on arrival. He denied the allegations contained in paragraph *para_ 2 2, para_ 3 3, para_ 4 4. 5 & 6* of the affidavit in support of the Originating Summons.
12. The Respondent asserted that he and the applicant got married on 30th October 2014 and there was no Kikuyu customary marriage as alleged by the applicant. Further, that the two children namely Jill Gathoni and Ivy Wamboi Mwangi now deceased were born through casual sexual encounters out of wedlock.
13. The respondent urged that he was a stranger to the contents of paragraph 7,8,9,10,11,14,16,17,18 and 33 of the supporting affidavit and specifically, that the allegations in paragraph 10 and 11 of the affidavit in support of the instant application are a concoction of lies peddled by the applicant. In response to paragraph 15 of the affidavit he stated that the annexure relied upon by the applicant is a lease agreement between himself and David Wanjohi Kamau which lease agreement was executed in 2007 before they got married which document was witnessed by the advocate Moses J. Esikuri alone. Further, that annexure MN8 that has the name of the applicant is a forgery. He urged that he had annexed a copy of the genuine lease agreement marked and rent payment schedule duly executed by the landlord one David Wanjohi Kamau as CMM-I(a-b).
14. The deponent averred that the contents at paragraph 19 of the affidavit in support amounts to falsehoods. He stated that he is the one who took huge loans to enhance the business and annexed a bundle of statements of accounts from equity bank loan facilities from Equity bank and demand for loan repayment from equity bank. He pointed out that the contents of paragraph 20, 21,22 and 31 of the affidavit in support are falsehoods as they are not backed by any documentary evidence. Additionally, in response to the contents at paragraph 24 and 25 of the affidavit he asserted that he joined Social group of men known as Riri Investment company where he invested his own money and did not use any proceeds from Mxxxxxxx collection as alleged by the applicant
15. In response to the contents at paragraph 26 of the affidavit the deponent averred that he invested his own money in Safaricom Sacco and there was no time he invested any money in the Safaricom Sacco being proceeds from family business as alleged by the applicant. Further, that he sold all his shares at Safaricom to enable me pay off the loans for his business investments which information is well within the knowledge of the applicant.
16. The respondent stated that he registered Mxxxxxxx Enterprise in 1999 and subsequently in the year 2016, with the sole intention of enhancing his income, he registered (particulars withheld) & Apparel Centre and included the applicant notwithstanding the fact that all the business belonged to him. Further, he urged that he single handedly purchased motor vehicles Registration No KCE xxxF.KCL xxxN and KCL xxxV as evidenced by annexure MN21 to the affidavit in support of the applicant's supporting affidavit. He used to pay insurance covers for the said vehicles and later sold motor vehicle registration No. KCL xxxN with the knowledge of the applicant for purposes of paying and debts he had accumulated.
17. He stated that the applicant, has not produced any documentary' evidence to prove that land reference No. Provisional Number xxxx8allotted by Kamulu Housing Co-operative society & provisional Number xxxx9 allotted by Kamulu Housing Cooperative Society Limited was acquired by herself or the respondent to form part of the matrimonial properties. He stated that the property known as Land Reference No. Trans Nzoia/Kipsoen /xxxx is not a matrimonial property in which the



applicant should have an interest. As it was registered in the respondents' name on 18th July 2014 even before they got married. Land reference No. Eldoret Municipality Block 21 (King'ong'o)/19xx & Eldoret Municipality Block 21(King'ong'o 1/40xx were acquired on 5th April 2018 and 29th June 2018 respectively and leased on 16th March 2023 and 12th March 2024 respectively. He annexed the respective lease agreements as proof of the same. He urged that Land reference Sinyerere/Sitatunga Block 1/Mukuyu/xxx was acquired on 21st June 2001 prior to the marriage and the same does not form part of matrimonial properties. Land reference No. Eldoret Municipality Block 9/xxxx was single handedly acquired by the Respondent on 7th October 2009 prior to the marriage having purchased the same from Rehema Koriomat Investment Limited and the same does not form part of matrimonial properties. In any event the same was sold to one Simon Kamau on 4th March 2019. He pointed out that Land reference No. Eldoret Municipality Block 5/xxx, was single handedly acquired by himself on 29th January 2009 prior to the marriage having lawfully purchased the same from Priscilla Gathitu, further, that the same was sold to one Anna Njeri Kamau on 15th March 2022 which fact was admitted by the applicant in Eldoret Divorce Cause No. 8 of 2019 - Margaret Ndungu vs Charles Mwangi Munui.

18. The deponent averred that the applicant has for ulterior motives failed to disclose to the court that land reference Nos. Eldoret Municipality Block 11/xxx6 and Eldoret Municipality Block 9/3375 were registered in the name of the Applicant on 11th December 2014 and 30th September 2021 from the monies that he had given to the applicant. The applicant has also failed to disclose that for Land reference No. Eldoret Municipality Block 23(KINGONGO) 1948, a land sale agreement was entered in the applicants' name vide an agreement dated 26th February 2020 from the monies he had given her in cash.
19. The deponent stated that he purchased all furniture, fittings, household goods and other utilities during the pendency of their marriage. Further, that when he married the applicant, she found him four employees namely a cook, a gardener and a watchman and a nanny. He single handedly paid the domestic workers, managed the home, took care of the children and even the applicant, developed and maintained his properties, paid all the school fees and accommodation and other expenses for the children. That as a father he has spent huge sums of monies towards the education of his child namely:
 - i. Jill Gathoni approximately Kshs 3,000,000/ =
20. During the pendency of the marriage, the applicant was always away from home and family. In fact, he used to live like a single parent because while she was away on leisure travels, he was the one taking care of the children and managing the home and working hard for the benefit of the family.
21. He stated that in the year January 2015 and with the sole intention of enhancing the income of his family he opened up a shop christened baby world and M-pesa agent shop and left the management of the same to the applicant. Unfortunately, when she was deserting home in 2017, she left with investment to a tune of Kshs. 8,000,000/= and arbitrarily closed the shop which happened when he was away on official trip. Besides closing the aforesaid business (shop), the applicant carted all his households' goods away from the matrimonial house and took them to unknown place for good.
22. The respondent stated that it is within his knowledge that the applicant has been given 10 acres in her parents' properties hence she should be contended with that. Further, that since the applicant did not make any financial or non-financial contribution towards the acquisition of the properties, her case is nothing but a frivolous one, vexatious and one and amounts to an abuse of the court process and deserve to be dismissed with costs.



Hearing of the Application

23. The applicant swore a witness statement and gave testimony in court. her witness statement was a reproduction of the averments in the supporting affidavit and therefore, there is no need to regurgitate the same.
24. The respondent called one witness in support of his case being David Muchiri Nganga. He stated that the applicant and the respondent got married on 30th October 2014 and that there was no customary marriage. Further, that he is aware that the parties were blessed with two issues, Jill Gathoni and Ivy Wamboi, born through casual encounters out of wedlock, and who are now deceased.
25. The parties were directed to file submissions on the application. The applicant filed written submissions through the firm of Messrs Mathai & Company Advocates, whereas the Respondent filed his submissions through the firm of Messrs Mukabane Kagunza & Co. Advocates.

Applicants' Submissions

26. Learned counsel for the applicant submitted that in or about the year 1994, the Petitioner and the Respondent started cohabiting as husband and wife until 30th October, 2014 when they formalized their marriage by conducting a church wedding/Christian marriage in accordance with the marriage Act at PCEA (particulars withheld) Church in Eldoret West, that the said marriage was blessed with 3 issues born in 1997, 2002 and 2016. She urged that the same can be seen at paragraph 1 of the Judgment that was produced as Applicant's exhibit 1. She pointed out that the Respondent, during the Divorce proceedings acknowledged that he was cohabiting with the Applicant but in his Replying Affidavit dated 17th July, 2024 he denied ever cohabiting with the Applicant and stated that they got married on the 30th October, 2014 and that there was no Kikuyu customary marriage as alleged by the Applicant and the two children he was acknowledging as his Jill Gathoni and Ivy Wamboi Mwangi were born through a casual sexual encounters out of wedlock. She urged that the Respondent sated in his response and cross petition to the divorce petition stated that as a result of their cohabitation with the Applicant herein they were blessed with two issues.
27. Learned counsel submitted that the marriage between the Respondent and the Applicant was cohabiting coupled with Christian marriage. He cited Halsbury's Law of England, 5th Edition 2015, Matrimonial and Civil partnership Law Volume 72 which provides that:-

“Where a man and a woman have cohabited for such a length of time, in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place, particularly where the relevant facts have occurred outside the jurisdiction and this presumption can be rebutted only by strong and weighty evidence to the contrary.”
28. He cited Section 119 of the Evidence Act on presumption of fact and urged that the courts are permitted to make a prima facie legal inference that certain facts exist without proof, regard being taken to the common course of natural events and human conduct, in relation to the facts of a particular case. Further, that presumption of marriage was first applied in Kenya in Hortensia Wanjiku Yawe vs the Public Trustee Nairobi 19761 eKLR. The principles distilled from the former court of Appeal (Wambuzi P. Mustafa up and Musoke JA) for East Africa decision were outlined in Mary Njoki vs John Kinyanjui Mutheru & 3 Others (Mary Njoki) (1985) eKLR by Kneller JA as follows: -
 - a. The onus of providing customary Law marriage is generally on the party who claims it.



- b. The standard of proof is the usual one for a civil action namely, on the balance of probabilities.
 - c. Evidence as to the formalities required for a customary Law marriage must be proved to that standard.
 - d. Long cohabitation as a man and a wife gives rise to presumption of marriage in favour of the party asserting it;
 - e. Only cogent evidence to the contrary can rebut the presumption.
 - f. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.
29. It is the Applicants' case that this doctrine has also been applied in the case of Phyllis Njoki Karanja & 2 Others vs Rosemary Mueni Karanja & Another (2009) eKLR. Counsel urged that in the Divorce judgment, the respondent confirmed that they were cohabitating with the Applicant and further, that the Applicant called one George Njuguna Waweru as PW2 who stated that he knew the Respondent and the Applicant herein in the year 2008 since his wife used to visit their shop where they were doing tailoring business as a couple and subsequently he became their best man when they solemnized their marriage in the year 2014. Counsel urged that it is clear from the Divorce proceedings that the parties cohabitated before formalizing their union through a church wedding. It has also been established that the that they had children together, conducted business together and they acquired properties together. They conducted themselves as husband and wife in the public and they were known so before formalizing their marriage in 2014.
30. Counsel submitted that Section 6 of the *Matrimonial Property Act* 2013. defines matrimonial property to include the matrimonial home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Additionally, he cited section 14 of the *Matrimonial Property Act* on matrimonial property. He cited the findings of Musvoka J in P.O.M vs M.N.K (2017) and the case of T.M.W vs F.M.C (2018) eKLR. He urged that when interpreting Section 5 of the Matrimonial Property in ENK VS JNK (2015) Musvoka J pronounced himself as follows;
- “From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property.
- To indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property where the inheritance was before the marriage.”
- Additionally, counsel cited the findings of Mabeya J. in S.N Vs F.N (2019) eKLR in support of this submission.
31. The Applicant listed the following as the properties they had acquired during the pendency and subsistence of the marriage;
- i. Eldoret Municipality Block 9/xxxx which was acquired on the 3rd August, 2006 by the Applicant being a subdivision of Eldoret Municipality Block 9/2810 and the Respondent became Registered on 7th October, 2009.
 - ii. Eldoret Municipality Block 5/xxx which was acquired on the 13th September, 2004 by the Applicant who purchased it and the Respondent was a witness. The sale agreement was produced as exhibit 24 and the Respondent became Registered on the 29th January, 2009.



- iii. Eldoret Municipality Block 21 (King'ong'o) 19xx registered on the 5th April, 2018.
 - iv. Eldoret Municipality Block 21 (King'ong'o)/40xx this property the same was registered on the 29th June, 2018.
 - v. Eldoret Municipality Block 11/xxx the same was Registered in the name of the Applicant on the 9th November, 2005.
 - vi. Eldoret Municipality Block 11/xxx the same was registered on 11th December, 2014.
 - vii. Trans Nzoia/Kipsoem/xxxx registered in the name of the Respondent and the Applicant respectively on 8th January, 2023.
 - viii. Trans Nzoia/Kipsoem/xxxx the same became Registered in the name of the Respondent on the 8th January, 2013.
 - ix. Sinyerere/sitatunga Block L/mukuyu/xxx the same was acquired on 21st June 2001.
 - x. Provisional Number Xxxx8 allotted By Kamulu Housing Co-op Society Limited.
 - xi. Provisional Number Xxxx9 Allotted By Kamulu Housing Co-op Society Limited.
 - xii. Motor Vehicle Registration Number KCL xxxN, KCL xxxV, KCF xxxF.
32. Counsel urged that as the applicant has established that the parties began to cohabit as husband and wife in the year 1994, before the same was formalized on 30th October, 2014 and further, that they have demonstrated that the parties in the Divorce cause proceeded on cohabitation therefore the above properties form the matrimonial properties of the parties herein.
33. Counsel posted that it is important to address the Ruling of Justice S.M Githinji delivered on 30th April, 2020 where he had indicated that those parcels of land known as Eldoret Municipality Block 5/xxx and Eldoret Municipality Block 9/xxxx did not form part of the Matrimonial Properties since the Applicant did not establish cohabitation and the only property that formed the matrimonial properties were those that were acquired after 30th October, 2014. The parties appealed against this Ruling through Civil Appeal No. E192 of 2021 Charles Mwangi Muniu -Vs- Margaret Ndungu and Court of Appeal made the following orders:
- “The Learned Counsel appearing before us Mr. Kagunza for the Respondent, agree that this interlocutory appeal and the cross appeal, do not serve much purpose. They further agree that both the Appeal and the Cross Appeal be marked as settled on terms that the status quo currently obtaining with regard to all of the properties in contention shall be maintained pending the hearing and determination of the petition before the High Court at Eldoret.
- We therefore order that the status quo be so maintained and order further that the said petition be processed and expedited for quick determination. There shall be no order as to costs”.
34. The essence of the orders were that the all properties were to be preserved until the petition for Divorce was heard and determined. Further, that the court can only deal with matrimonial property after the dissolution of marriage is finalized.
35. Counsel reiterated that the properties fall squarely under matrimonial property as defined under the act. He cited the of TMV-VS- FMC (2008) eKLR and ENN -Vs- SNK (2021) eKLR in support of this submission.



36. Counsel submitted that contribution towards the acquisition of matrimonial property is defined under section 2 of the *Matrimonial Property Act*. Citing the case of AW-Vs- MVCAM AWM (2018) eKLR and Civil Appeal No. 142 of 2018 CWM -Vs- JPM (2017) eKLR counsel urged that the applicant demonstrated that she substantially contributed to the acquisition of the matrimonial properties by her evidence. She produced a Business Licence as exhibit 2 which confirmed that she opened her first shop in January 1996. In the year 1999 they registered their first business enterprises and she produced a certificate of Registration as exhibit 3. She produced single business permit as exhibit 4 which confirmed that the Mxxxxxxx enterprises was in operation. Further, she stated that in 2016 they proceeded to have a partnership business between the Respondent and herself and they registered Dauniform and Apparel Centre for which she produced the partnership deed as exhibit 5. Besides that, they opened and registered another business in their joint names trading under the name Mxxxxxxx collection. She produced a certificate of Registration as exhibit 6. The Applicant opened a sole proprietor Business under the name Mxxxxxxx Designers and she was issued with a Certificate of Registration which was produced as Exhibit 7. In her evidence, she stated that they opened a shop under Mxxxxxxx collection in October 2007 opposite Huduma Centre where the Respondent took the running of the shop and she annexed a lease agreement that was produced as exhibit 8. She was in charge of the Tailoring and production while the Respondent was mainly at the shop running the sales. She produced customer measurement books as exhibit 9.
37. The Applicant stated that she started travelling to Uganda to buy Vintage fabric in 2004 and later she started travelling to Dubai to buy Tailoring Accessories and she extended her travel to China in the year 2007. She produced her passport as exhibit. She also produced evidence on the loans obtained for the businesses and that she paid the loans the respondent had taken out. She is the one who purchased parcel of land known as Eldoret Municipality Block 9/xxxx and Eldoret Municipality Block 5/xxx and produced the sale agreements as exhibit 23 and 24 respectively.
38. Counsel pointed out that during the hearing it came out that the Applicant was taking care of the children but the applicant has since proved that she was very active in acquisition of the matrimonial property through her contribution from the monies that were obtained from the family business and taking care of the children and hence, entitled to a share of the matrimonial property.
39. Counsel submitted that the principle of sharing matrimonial property was espoused in the Echaria case where the 5-judge bench of the court of appeal held that where the property in dispute is registered in the name of one spouse the beneficial interest of each spouse would depend on the financial contribution by each spouse. The Court was of the view that the disputed property is not registered in the joint name of the parties to the marriage but is registered in one spouse, the beneficial share of each spouse would ultimately depend on their proven respective financial contribution, either directly or indirectly in the acquisition of the property. The Court then went on to find that for a wife to be entitled to a share of the property that is registered in the husband's name, she had to prove contribution towards acquisition of that property. Additionally, it noted that for one to be entitled to a share the property, the court should consider the circumstances of each arising case independently in assessing contribution further noting that what amounts to contribution may either be direct and monetary and indirect and none monetary.
40. Counsel submitted that the Court of Appeal in EGM -Vs- BMM (2020) eKLR also discussed whether article 45 (3) grants property rights upon dissolution of a marriage. Counsel additionally referred the court to the Court of Appeal decision in MEK V GLM (2018) eKLR which further espoused the meaning of equality. He cited Article 45(3) of *the Constitution*, submitting that it underscores the concept of equality as one that ensures that there is equality and fairness to both spouses. That equality and fairness are concept that all parties should have the same rights at the dissolution of a marriage



based on their contribution. He stated that equity advocates for a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property.

41. Counsel referred to the decision in the English case of *Gissing - Vs- Gissinf* (1971) AC 88b and urged that equity is an important principle when it comes to matrimonial property since what is fair as related to equity is not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to acquisition of matrimonial property, even though such contribution is indirect, but nevertheless has in one way or another enabled the acquisition of such direct or indirect acts as was discussed by Lord Justice Fox Burns -VS- Bums (1984)1 ALLER 244. He also referred to the opinion of Kiage JA in *PNN V ZWN*, Civil Appeal No. 128 of 2014 (eKLR) where he discussed the concept of marital equality and whether it is translated to mean that matrimonial property should be divided equally at dissolution of marriage. s translates to equal proprietary entitlement".
42. Counsel urged that it would be surreal to suppose that *the Constitution* somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage.
43. Counsel cited the cases of *LMM v IMM* (2014) eKLR and the case of *JOO V MBO; Federation of Women lawyers "FIDA Kenya & Another (Amicus curiae) (Petition) 11 of 2020* (2023) urging that the applicant demonstrated that she provided monetary support in the acquisition of the matrimonial property. She has produced documents to confirm that she was doing business as sole proprietor and in other business as a partner. The Respondent confirms that having sold that parcel of land known as Eldoret Municipality Block 9/xxxx on 4th March, 2019 while the marriage between him and the Applicant was still subsisting. He further confirms that he sold land parcel No. Eldoret Municipality Block 5/xxx on 15th March, 2022 all these were done without the consent of the Applicant.
44. Counsel cited Section 12 of the *Matrimonial property act* and the case of *Kadzo Mkutano Vs Mkutano Mwambose Kadosho & 2 Others* (2016) eKLR and ELC 334 of 2016 EKN-Vs- AS & 2 Others in support of this submission. The union between the Respondent and the Applicant was monogamous and therefore section 12 of the *Matrimonial Property Act* applied where it was necessary for consent to be given by the Applicant and since such consent was never sought and obtained the sale of the above stated parcels was null and void and the purchasers neither obtained legal title of the land as notionally it was overriding interest nor were the purchasers entitled to possession since their transfers were subject to applicants unregistered overriding encumbrance.
45. Counsel urged that the Applicant is entitled to 50% of all the properties they held during the pendency of their marriage and outlined as follows with respect to Eldoret Municipality Block 9/xxxx and Eldoret Municipality Block 5/xxx ; the same were sold by Respondent but they have since established that the sales were void for lack of consent and the purchasers are holding the said parcels subject to the Applicant's overriding interest and what is void is always void. That this court has powers pursuant to section 12(1) of the Matrimonial act to revert the sale since the Respondent could not pass good title to the Purchasers in the absence of the Consent by the Applicant which consent was never given. He posited that this is not a dispute in ownership to be determined in the Environment and Land Court under Section 13 of the said act since there is no dispute of ownership between the Applicant and the purchasers. Further, that the purchasers never obtained good title to obtain proprietary rights.
46. Counsel urged that in the alternative, the court orders the respondent to remit half the share of the net current market proceeds of the sale of those parcels of land that were sold by him during the pendency



- of their marriage. Further, that the Court also make an order that a reputable valuer to be appointed by the Court to value the property for purposes of ascertaining the current value.
47. Counsel cited the case of NKC *V EWK (Matrimonial Cause No, 2 of 2023)* 12024) KEHC10440 CKLR) (20 August 2024) and urged that should the Respondent fail to pay the half share the same value can be recovered from the rest of his share in the other properties which are not encumbered . He urge that an order of injunction do issue restraining the Respondent from dealing with the said properties.
48. Counsel submitted that the Applicant is to be given half share in the rest of the other properties herein under.
- (i) Eldoret Municipality Block 9/xxxx.
 - (ii) Eldoret Municipality Block 5/xxx .
 - (iii) Eldoret Municipality Block 21 (particulars withheld)/19xx.
 - (iv) Eldoret Municipality Block 21(particulars withheld)/40xx.
 - (v) Eldoret Municipality Block 11/xxx.
 - (vi) Eldoret Municipality Block 11/xxx.
 - (vii) Trans Nzoia/Kipsoen/xxxx.
 - (viii) Trans Nzoia/Kipsoen/xxxx.
 - (ix) Sinyerere/sitatunga Block L/mukuyu/xxx.
 - (x) Provisional Number Xxxx8allotted By Kamulu Housing Co-op Society Limited.
 - (xi) Provisional Number Xxxx9 Allotted By Kamulu Housing Co-op Society Limited.
49. With respect to parcel Number Eldoret Municipality Block 9/3375 the Applicant acquired it on 30th September, 2021 after the parties had separated living their separate lives, the Respondent did not contribute to its acquisition. Eldoret Municipality Block 23 (King'ong'o) 1948 was purchased by MAjida Uniforms 24/7 Limited which company is not associated with the Applicant and the same was acquired on the 26th February, 2020 after the parties had separated each living separate lives.
50. Counsel cited the Ugandan case of Bwabinumi -VS- Bahimbisomwe (Civil Appeal No. 10 of 2009 (2013) eKLR UGSC and Supreme Court Petition 11 of 2020 JOO VS MBO; Federation of Women lawyers "FIDA Kenya) & Another (Amicus curiae) (Petition) 11 of 2020 (2023) KESC 4 (KLR) (Family) (27 January 2023) in support of his submissions on division of the property.
51. Counsel reiterated that the Respondent did not contribute anything in acquisition of Eldoret Municipality Block 9/3375 or demonstrate that he contributed to its acquisition and therefore the above parcel is a private property owned by the Applicant and the same does not form part of the matrimonial property. With respect to movable assets which are Motor Vehicle Registration Numbers KCE Z75F, KCL xxxN and KCL xxxV, counsel urged that the Respondent confirmed that he sold Motor KCL xxxN the proceeds of the sale should be shared equally between the parties. While the other two each party should retain the Vehicle in their possession.
52. Counsel concluded by submitting that the Applicant has proved her case on a balance of probabilities and the Originating summons dated 2nd April, 2024 should be allowed in its entirety.



Respondents' Submissions

53. Learned counsel for the respondent filed submissions on 13th February 2025. He urged that from the material and evidence placed before the honourable court, it is clear that the parties herein were married having solemnized their marriage before the Registrar on 30th October 2014 and not in 1996 as claimed by the applicant given that there was no evidence of dowry having been paid for the applicant by the respondent.
54. Counsel urged that David Muchiri Ng'anga testified that he is the secretary general of the Kikuyu council of elders well versed with kikuyu customary marriage and that he knew for a fact that the applicant and the respondent who are individuals well known to him never conducted any Kikuyu customary marriage. Further, that all essentials of a valid Kikuyu customary marriage were never carried out and in particular the respondent never visited the applicant's parents with the intention of paying dowry. On cross-examination, the applicant admitted that there was no evidence that dowry was ever paid and/or that the respondent ever visited her parents.
55. Counsel submitted that in the ruling dated 30th April 2020 by Justice S.M Githinji in Eldoret HC Divorce Cause No.8 of 2019 on respondents' application dated 22nd July, he held that the applicant had failed to prove cohabitation and that the only date when marriage existed between the applicant and the respondent was 30th October 2014 which finding the applicant never preferred any appeal against. Further, that it is instructive to note that Civil appeal No. E192 of 2021 .Charles Mwangi Muniu vs Margaret Ndungu ,the Court of Appeal, never pronounced itself on the issue of cohabitation. Counsel additionally stated that the applicant did not meet the threshold for presumption of marriage prior to 30th October 2014 which principles were well enumerated in the case of Hortensia Wanjiku Yawe vs the Public Trustee Nairobi (1976) eKLR.
56. Counsel cited the case of Hellen Tum vs. Jepkoech Tapkili Metto & another (2018) eKLR where the Court of Appeal expressed itself on the crucial evidence in proof of a customary marriage and urged that the applicant never produced any exhibit to prove, on a balance of probabilities, that there was a customary marriage in existence between her and the respondent. Additionally, he cited the case of Eva Naima Kaaka & Anor v Tabitha Waithera Mararo [2018] eKLR which referenced the essentials of a marriage under Kikuyu Customary law as set out in Cotran's 'Casebook on Kenya Customary Law.
57. Counsel urged that the instant cause was instituted in the year 2024 after the enactment of the *Matrimonial Property Act* (2013) and the *Marriage Act* 2014 which reformed matrimonial property and marriage law in Kenya in which statutes on the doctrine of presumption of marriage ceased to apply. He cited the case of Supreme Court of Kenya Petition No. 9 of 2021 - Mary Nyambura Kangara alias Mary Nyambura Paul vs Paul Ogari Mayaka & Anor in support of this submission.
58. Counsel submitted that for properties to qualify to be matrimonial properties, they ought to have been acquired during the subsistence of the marriage between the applicant and the respondent as defined by Section 6 of the *Matrimonial Property Act* laws of Kenya. In view of the definition of matrimonial properties under section 6 of the *Matrimonial Property Act* laws of Kenya, the respondent urged that the following properties are not matrimonial properties whatsoever: Land reference No. Trans Nzoia/Kipsoen /xxxx is not a matrimonial property in which the applicant should have an interest. The said property was registered in the respondent's name on 18th July 2014 even before the applicant and respondent got married on 30th October 2014 and the same was charged on 9th November 2021. Land reference Nos Eldoret Municipality Block 21(King'ong'o)/19xx & Eldoret Municipality Block 21(King'ong'o)/40xx were acquired on 5th April 2018 and 29th June 2018 respectively and leased on 16th March 2023 and 12th March 2024 respectively. Land reference Sinyerere/Sitatunga Block



l/Mukuyu/xxx was acquired on 21st June 2001 prior to the marriage between the applicant and respondent and the same does not form part of matrimonial properties. Land Reference No. Eldoret Municipality Block 9/xxxx was single handedly acquired by the respondent on 7th October 2009 prior to the marriage between the respondent and the applicant having purchased the same from Rehema Koriomat Investment Limited and the same does not form part of matrimonial properties. The applicant's purported Land reference No. Eldoret Municipality Block 9/xxxx is a forged one and inconsistent thus should not be relied upon by the court. In any event the same was sold to one Simon Kamau on 4th March 2019. Land Reference No. Eldoret Municipality Block 5/xxx, was single handedly acquired by respondent on 29th January 2009 prior to the marriage between respondent and the applicant having lawfully purchased the same from Priscilla Gathitu and the same does not form matrimonial property. The applicant has an agreement which indicates that she bought the land from an individual namely Njeri who appears nowhere in the title for land reference No. Eldoret Municipality Block 5/xxx that was sold thus had no capacity to sale what did not belong. The respondent on the other had has an agreement that shows he bought the land from one Priscilla Gathitu who later transferred the same to the him which follows that the agreement for land reference no. Eldoret Municipality Block 5/xxx between the applicant and is fake o. Further, that the same was sold by the respondent to one Anna Njeri Kamau on 15th March 2022 which fact was admitted by the applicant in Eldoret Divorce No.6 of 2019 Margaret Ndungu vs Charles Mwanai Muniu. The respondent single handedly purchased motor vehicle registration Nos. KCE xxxF KCL 402 N and KCL 047 V prior to the marriage. The applicant did not lead any evidence to prove that land provisional Number xxxx8and 1419 both allotted by Kamulu Housing co-operative Limited do exist and in absence of proof of the existence of the said parcels cannot be termed as matrimonial properties

59. He submitted that no evidence was led by the applicant to demonstrate that there is any deposits in the bank account numbers: Equity Bank - Mxxxxxxx Collection -030016090xxxxjxxxxxx Enterprises -030019009xxxxMxxxxxxx collection - 030016551216Cooperative Bank - Mxxxxxxx Enterprises - 0110945751xxxx(particulars withheld) and Apparel centre-0114868615xxxxMxxxxxxx Enterprises - 0302000xxxMxxxxxxx Enterprise - 8588435810130865Margaret Ndungu - 858 79060100126050Jill Gathoni - 8585739510xxxx.Charles Muniu & Margaret Ndung'u -08200000xxxxConsolidated Bank - (particulars withheld) and Apparel Centre 1015120600xxxxTransnational Bank - Charles Muniu & Margaret Ndung'u - 506046xxxxABC Bank - Mxxxxxxx Enterprises 5BxxxSavings with Safaricom Sacco to a tune of - Kshs. 4,000,000/ =Savings with Riri Investment Co. Ltd of - Kshs. 10,000,000/ =Old mutual Insurance Savings - Kshs. 2,200,000/ =
60. Counsel urged that it is worth noting that the properties that were sold to pay off debts by the respondent were sold before the status quo order was made in Civil appeal No.E192 of 2021 Charles Mwangi Muniu vs Margaret Ndungu. Further, that the sale did not require spousal consent given that the law on spousal consent was repealed. The repeal occurred when Section 28 was replaced with Section 11 of the *Land Registration Act* Amendment Act 2016. The only matrimonial properties available for distribution thus include; Land reference No. Eldoret Municipality Block 11/xxx Land reference No. Trans Nzoia/Kipsoen/xxxx Land reference No Eldoret/Municipality Block 11/xxx Land Reference No. Eldoret Municipality Block 9/3375 (Maisonette). This was acquired during the pendency of the marriage noting that divorce proceedings between the applicant and respondent were concluded on 16th February 2024 Land reference No. Eldoret Municipality Block 23(KING'ONG'O) 1948 Land reference No. Eldoret Municipality Block 13(KINGONGO) 19xx Land reference No. Eldoret Municipality Block 21(KINGONGO) 40xx
61. Counsel submitted that the applicant does not deserve a 50% share in the matrimonial properties given that she never demonstrated that she contributed to the acquisition of the properties in issue. That by



- the time he married the applicant, he was already an established businessman who used the proceeds of his income from his businesses to purchase properties whereby some of the properties were jointly registered in the name of the applicant and respondent, some in his name and some in the name of the respondent for which properties he is the one who contributed capital for purchase and for starting and running of family businesses. Additionally, that the evidence is clear that the respondent was an established business man by the time the applicant was still in school. The applicant did not dispute that by the time she met the respondent, the respondent was already working.
62. It was the evidence of the respondent that Mxxxxxxx collection, Mxxxxxxx Enterprises, (particulars withheld) & Apparel Centre are businesses that -were established by himself and the applicant whereby he contributed capital for those businesses' establishments. On monetary contributions, evidence on record show that the respondent joined social group of men known as Riri Investment company where he invested his own money, the respondent invested in Safaricom Sacco which shares he later sold to improve his businesses and repay loans. He obtained loans that were utilized to purchase properties and invest in the family business which evidence is clear enough that the respondent made more if not all financial contributions and arrangement towards the properties in issue.
 63. The Respondent produced bundle of statements of accounts from Equity Bank, loan facilities from Equity bank and demand for repayment of loan from Equity Bank. He highlighted that the annexures marked as CMM1 and CMM2 demonstrate that the respondent leased premises where the businesses were being conducted to generate monies for purchase of the properties. Further, that the applicant claims refund of Kshs 3,500,000/= being amount she paid on repayment of loan which claim is not buttressed.
 64. Counsel urged that the applicant did not contribute in domestic chores as she was engaged in leisure travels and that when the applicant met the respondent, the respondent already had a cook, gardener a watchman, and a nanny. The respondent also educated the children of the marriage and for instance the applicant spent on Jill Gathoni education one of the issues of the marriage approximately Kshs 3,000,000/ =. The applicant was not a home maker who always away on leisure travels and at one time he was admitted in hospital for a month but the applicant never bothered to visit him. He pointed out that the applicant insinuates that they had many bank accounts while it is clear that the accounts being referred to are personal accounts of the respondent.
 65. Additionally, counsel submitted that the applicant claims that she participated in paying of loans which allegations is not buttressed with any documentary evidence to that effect. Counsel submitted that the view that the provisions of Article 45(3) of *the Constitution* does not entitle parties to equal distribution of matrimonial property, was taken by the Court of Appeal (Kiage, JA) in PNN v ZWN [2017] eKLR. Further, that the share of each party to a marriage is pegged on the contribution made by each party as per section 7 of the Matrimonial Properties Act.
 66. Counsel cited the case of MNH vs. FHM [2018] eKLR on contribution and urged that in division of matrimonial property, there is no set rule or mathematical formula. He submitted that the applicant's contribution in this case is about 20% and it is in the best interest of justice that the beneficial interest in the available matrimonial properties be divided between the applicant and the respondent on the ratio of 20%: 80% respectively taking into account parties' contribution, notwithstanding the fact that the applicant carted all the respondent's households goods away from the matrimonial house and took them to an unknown place for good which were worth a fortune when she deserted the respondent in the year 2017.
 67. Counsel urged the court to consider that respondent had also opened an M-pesa agent shop and another shop christened "Baby World" for the applicant who later deserted with the applicant's



properties worth Kshs 8,000,000/=. He additionally cited the case of Francis Njoroge vs Virginia Wanjiku Njoroge Civil Appeal No. 179 of 2009 where it was held that a division of the property must be decided after weighing the peculiar circumstances of each case as well.

68. On 3rd of April, 2025 parties were directed to file supplementary submissions shading more light on the various properties acquired by the parties and their approximate value.

Applicant's supplementary submissions

69. Learned Counsel Mr. Mathai started by outlining the legal framework governing matrimonial property in Kenya. He referred to Section 6 of the *Matrimonial Property Act* 2013, which defines matrimonial property to include "the matrimonial home or homes or any other property jointly owned and acquired during the subsistence of the marriage."
70. Counsel submitted that the Applicant had listed various properties acquired during the marriage, including:
- Eldoret Municipality Block 9/xxxx (acquired on 3rd August, 2006)
 - Eldoret Municipality Block 5/xxx (acquired on 13th September, 2004)
 - Eldoret Municipality Block 21(particulars withheld)19xx (registered on 5th April, 2018)
 - Eldoret Municipality Block 21(particulars withheld)40xx (registered on 29th June, 2018)
 - Eldoret Municipality Block 11/xxx (registered on 9th November, 2005)
 - Eldoret Municipality Block 11/xxx (registered on 11th December, 2014)
 - Trans Nzoia/Kipsoen/xxxx (registered on 8th January, 2023)
 - Trans Nzoia/Kipsoen/xxxx (registered on 8th January, 2013)
 - SINYERERE/SITATUNGA BLOCK 1/MUKUYU/xxx (acquired on 21st June, 2001)
 - Two provisional numbers allotted by KAMULU HOUSING CO-OP SOCIETY LIMITED
 - Three motor vehicles with registration numbers KCL xxxN, KCL xxxV, and KCF xxxF
71. Counsel noted that the parties began cohabiting as husband and wife in 1994, before formalizing their marriage on 30th October, 2014, and that the above properties form the matrimonial properties of the parties.
72. Counsel referred to a ruling by Justice S.M Githinji delivered on 30th April, 2020, which had indicated that parcels known as Eldoret Municipality Block 5/xxx and Eldoret Municipality Block 9/xxxx did not form part of matrimonial properties since cohabitation was not established. The parties had appealed through Civil Appeal No. E192 of 2021. The Court of Appeal ordered that the status quo be maintained with regard to all properties pending determination of the divorce petition.
73. Counsel contended that the Respondent had admitted to selling Eldoret Municipality Block 9/3151 on 4th March, 2019, and Eldoret Municipality Block 5/xxx on 15th March, 2022, without the Applicant's consent. Relying on the case of Kadzo Mkutano –Vs- Mukutano Mwambose Kadosho & 2 Others [2016] eKLR, Counsel submitted that spousal consent is required before matrimonial property can be sold, and without such consent, the sale becomes null and void.
74. Counsel argued that the principle of sharing matrimonial property was espoused in the Echaria case, where a 5-Judge bench of the Court of Appeal held that the beneficial interest of each spouse in property registered in one spouse's name would depend on their financial contribution.



75. Mr. Mathai gave the estimate value of the properties as follows:
- Eldoret Municipality Block 9/xxxx - Kshs. 18,000,000/=
 - Eldoret Municipality Block 5/xxx - Kshs. 30,000,000/=
 - Eldoret Municipality Block 21 (particulars withheld)/19xx - Kshs. 8,000,000/=
 - Eldoret Municipality Block 21(particulars withheld)/40xx - Kshs. 8,000,000/=
 - Eldoret Municipality Block 11/xxx - Kshs. 8,000,000/=
 - Eldoret Municipality Block 11/xxx - Kshs. 8,000,000/=
 - Trans Nzoia/Kipsoen/xxxx - Kshs. 11,000,000/=
 - Trans Nzoia/Kipsoen/xxxx - Kshs. 11,000,000/=
 - SINYERERE/SITATUNGA BLOCK 1/MUKUYU/xxx - Kshs. 5,000,000/=
 - PROVISIONAL Number xxxx8ALLOTTED BY KAMULU HOUSING CO-OP SOCIETY LIMITED - Kshs. 3,000,000/=
 - PROVISIONAL Number xxxx9 ALLOTTED BY KAMULU HOUSING CO-OP SOCIETY LIMITED - Kshs. 3,000,000/=
 - KCL xxxN - Kshs. 1,650,000/=
 - KCL xxxV - Kshs. 3,500,000/=
 - KCF xxxF - Kshs. 1,650,000/=

Respondent's supplementary submissions

76. With respect to property identification, learned counsel submitted that certain properties were not matrimonial properties, specifically:
- Land reference Nos. Eldoret Municipality Block 9/xxxx
 - Eldoret Municipality Block 5/xxx
 - Trans Nzoia/Kipsoen/xxxx
 - SINYERERE SITATUNGA/BLOCK 1/MUKUYU/xxx
77. Counsel submitted that these properties were acquired by the respondent before marriage, with particular emphasis on SINYERERE SITATUNGA/BLOCK 1/MUKUYU/xxx being the respondent's ancestral land.
78. Counsel further submitted that land reference No. Eldoret Municipality Block 11/xxx, located at Mwanzo with rental houses, belongs to the applicant as it was acquired when she was not married to the respondent.
79. With regard to joint property, counsel submitted that land reference No. Trans Nzoia/Kipsoen/xxxx was registered in joint names of the applicant and respondent, having been acquired as business partners.
80. Regarding matrimonial properties and their approximate values, counsel submitted the following: Land reference No. Eldoret Municipality Block 9/3375, valued at Ksh 15,000,000/=, is a matrimonial property located at Kapsoya where the applicant currently resides. Counsel submitted that the respondent financed the applicant toward its acquisition. Land reference No. Eldoret



Municipality Block 23(KING'ONGO) 1948, valued at Kshs. 20,000,000/=, is a matrimonial property purchased in the name of Majida Uniforms 24/7 Limited, where the applicant and one of the couple's daughters, Jill Gathoni Mwangi, are signatories. Counsel submitted that this property is currently occupied by the applicant who has converted it into her place of work. Land reference No. Eldoret Municipality Block 21(KING'ONGO)19xx, valued at Kshs. 18,000,000/=, is a matrimonial property solely acquired by the respondent, where he currently resides. Land reference No. Eldoret Municipality Block 21(KING'ONGO) 40xx, valued at Kshs. 5,000,000/=, is a vacant matrimonial property without any structure. Land reference No. Eldoret Municipality Block 11/xxx, valued at Ksh 5,000,000/=, is a matrimonial property located in Mwanzo with rental houses. Motor vehicle KCL xxxV Land Rover Discovery, valued at Kshs. 5,000,000/=, is matrimonial property in the applicant's possession. Motor vehicle registration KCE xxxF Toyota Noah, valued at Kshs. 1,000,000/=, is matrimonial property in the respondent's possession.

81. Counsel submitted that Motor vehicle registration No. KCL xxxN Toyota Shuttle, valued at Kshs. 2,000,000/=, is not matrimonial property as it was sold by the respondent to pay loans.
82. Regarding the business aspect, counsel submitted that by the time the respondent married the applicant, he was already an established businessman who used the proceeds of his income to purchase properties. Counsel emphasized that evidence clearly showed the respondent was an established businessman while the applicant was still in school. Counsel noted that the applicant did not dispute that the respondent was already working when they met.
83. Counsel submitted that businesses including Marggietex Collection, Magytex Enterprises, (particulars withheld), Apparel Centre, and Majida Uniforms 24/7 Limited were established by both parties, with the respondent contributing capital for these businesses' establishments. Counsel argued that since Majida Uniforms 24/7 Limited is associated with the respondent, the jurisdiction of the court lies with liquidation of its assets for distribution purposes.
84. In conclusion, learned counsel submitted that the contribution in this case is approximately 20% for the respondent and 80% for the applicant toward the acquired matrimonial properties.

Analysis & Determination

85. The dissolution of matrimonial bonds invariably necessitates the careful adjudication of accumulated assets, a task that demands judicial precision and nuanced understanding of both statutory mandates and lived realities. This Court, confronted with competing narratives regarding the trajectory of the parties' relationship and their respective contributions to wealth creation, must chart a path governed by principle rather than presumption. The division of matrimonial property is not merely an accounting exercise but a profound recognition of the multifaceted ways in which spouses invest in their shared future investments that may manifest through direct financial contributions, entrepreneurial partnership, domestic stewardship, or child-rearing responsibilities. In rendering judgment on this matter, the Court is guided by the foundational tenets of the *Matrimonial Property Act*, illuminated by constitutional imperatives of equity and fairness, and informed by judicial precedent that has consistently emphasized substance over form in evaluating spousal contributions. The Court's analysis will therefore focus on the following three determinative questions:
 - a. What period amounts to the pendency of the marriage?
 - b. What properties form the matrimonial properties?
 - c. How should the matrimonial properties be divided?

What period amounts to the pendency of the marriage



86. The question of when a marriage legally commences and concludes constitutes a threshold determination in matrimonial property disputes, as it establishes the temporal framework within which property rights accrue. While this inquiry may appear straightforward in cases involving formal ceremonies and precise documentation, it becomes significantly more nuanced when allegations of customary unions or cohabitation precede officially registered marriages. Determining the pendency of marriage requires this Court to navigate carefully between statutory provisions, customary practices, and judicial precedent, all while remaining cognizant that such determinations directly impact the scope of assets subject to division. I must observe evolution of Kenya's matrimonial jurisprudence reflects a progressive recognition of various forms of marital unions, yet it equally demands rigorous evidentiary standards to prevent uncertainty in property rights.
87. It is noteworthy that this precise question regarding the commencement of the parties' marriage was previously adjudicated by Justice S.M. Githinji in a ruling delivered on 30th April 2020, wherein the learned Judge found that the Applicant had failed to establish cohabitation as a legally recognized marriage. The Court determined that the only legally recognized marriage between the parties commenced on 30th October 2014 when they solemnized their union through a church ceremony. This finding constitutes a judicial determination that is binding on the parties absent a successful appeal against it. The Court observes that while the parties did appeal against this ruling in Civil Appeal No. E192 of 2021, that appeal was marked as settled on the limited terms that the status quo regarding the properties in contention would be maintained pending the divorce proceedings, without disturbing the substantive finding on the commencement date of the marriage. The principle of *res judicata* precludes the relitigation of this issue, as it would undermine judicial certainty and finality to permit the Applicant to reintroduce, in the guise of a matrimonial property claim, a factual contention that has been conclusively determined in prior proceedings between the same parties. This Court is therefore bound by the earlier judicial determination that the marriage commenced on 30th October 2014.
88. Consequently, for the purposes of determining which properties qualify as matrimonial property subject to division under the *Matrimonial Property Act*, this Court shall recognize the marriage between the Applicant and Respondent as having commenced on 30th October, 2014. This temporal boundary establishes a clear demarcation for assessing which assets fall within the definition of matrimonial property under Section 6 of the Act. While the Court acknowledges the evidence presented regarding the parties' prior interactions, business relationships, and acquisition of various properties before this date, the legal consequences of those activities must be evaluated through the prism of ordinary civil and commercial law principles rather than matrimonial property law. The Court's jurisdiction in this matter extends only to those properties acquired during the subsistence of the legally recognized marriage, and it is upon this foundation that the subsequent analysis of the disputed assets shall proceed.

What constitutes Matrimonial Property?

89. The determination of what constitutes matrimonial property stands as a cornerstone inquiry in family law jurisprudence, one that demands meticulous statutory interpretation, principled reasoning, and careful consideration of the unique circumstances presented in each case. The legislature's framework, as embodied in Section 6 of the *Matrimonial Property Act*, provides essential parameters for this assessment, yet the application of these statutory provisions to the varied tapestry of marital acquisitions requires judicial discernment that transcends mere textual analysis. In delineating the boundaries of matrimonial property, this Court recognizes the need to balance the protection of individual proprietary interests with the acknowledgment of marriage as an economic partnership, a partnership that creates both rights and obligations with respect to assets acquired during its subsistence. As Kenya's constitutional and statutory framework has evolved to reflect changing



societal norms regarding marital relations, so too has judicial interpretation expanded to recognize the multifaceted nature of spousal contributions, whether monetary or non-monetary, direct or indirect. With these considerations in mind, the Court now turns to the pivotal task of determining which properties, among those claimed by the Applicant, properly fall within the legal definition of matrimonial property subject to division.

90. On what constitutes matrimonial property, I am guided by Section 6 of the *Matrimonial Property Act* that defines matrimonial property as:
- (a) the matrimonial home or homes;
 - (b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
91. Having established the temporal parameters of the parties' legally recognized marriage, the Court must now undertake the critical task of identifying which properties qualify as matrimonial assets subject to division. This determination hinges on the acquisition date of each disputed asset, as Section 6 of the *Matrimonial Property Act* clearly delineates matrimonial property as comprising the matrimonial home, household effects, and other property "jointly owned and acquired during the subsistence of the marriage." The Court's analysis must therefore proceed with precision, examining each claimed property against this temporal threshold of 30th October 2014. Properties acquired prior to this date regardless of the parties' relationship status at that time fall outside the statutory definition of matrimonial property, while those acquired subsequent to this date and before the dissolution of marriage on 16th February 2024 properly constitute the pool of matrimonial assets for equitable distribution. This bright-line approach provides necessary clarity in what might otherwise become an unduly complex determination, allowing the Court to focus its assessment on the respective contributions of the parties toward the acquisition of qualifying properties.
92. The applicant stated that she purchased Eldoret Municipality Block 9/xxxx and annexed a sale agreement as evidence of the same. Annexure MN23 that was annexed as evidence of the same is a sale agreement dated 3rd April 2006 is for the sale of the property known as Eldoret Municipality/Block 9/2810 between Rehema Koriamat Ltd and the Applicant for the purchase of two residential houses. However, there is a letter dated 6th November 2009 from the Rehema Koriamat Limited, notifying the Town Clerk that the property known as Eldoret Municipality Block 9/xxxx had been sold to the Respondent. Annexure MN22, is a Certificate of Lease that indicates that the respondent was registered as the proprietor of the said property on 7th October 2009 which was before the union was formalized. Therefore, it cannot constitute Matrimonial Property.
93. With respect to Eldoret Municipality Block 5/xxx, the Court is presented with conflicting narratives regarding its acquisition. The Applicant contends that she purchased this property from Bernadette Njeri Kariuki and subsequently instructed that it be registered in the Respondent's name, producing both a sale agreement and correspondence with the town clerk to substantiate this claim. The Respondent, conversely, maintains that he single-handedly acquired the property, having purchased it from Priscilla Gathitu on 29th January 2009. The Certificate of Lease confirms registration in the Respondent's name on 30th January 2009, well before the commencement of the legally recognized marriage between the parties.
94. While the Court acknowledges the Applicant's assertion of her financial contribution toward this property, the timing of its acquisition presents an insurmountable barrier to its classification as



- matrimonial property under Section 6 of the *Matrimonial Property Act*. The property was acquired and registered more than five years before the marriage was formalized on 30th October 2014. Even if the Court were to accept the Applicant's version of events regarding the purchase, her contribution would at most create a beneficial interest under general property law principles rather than establishing the property as matrimonial in nature. The Court therefore concludes that Eldoret Municipality Block 5/xxx falls outside the statutory definition of matrimonial property for purposes of division under the *Matrimonial Property Act*.
95. Trans Nzoia/Kipsoen/xxxx was registered jointly in the names of both parties on 6th January 2013 and Trans Nzoia/Kipsoen/xxxx was registered in the name of the Respondent on 18th July 2014. As these were registered before the formalisation of the marriage, they cannot form part of the matrimonial property. Sinyerere/Sitatunga Block 1/Mukuyu/xxx was registered in the name of the Respondent on 21st June 2001 and does not form part of the Matrimonial property.
 96. Eldoret Municipality Block 11/xxx was registered on 11th December 2014 and was registered in the name of the applicant. Therefore, it forms part of the Matrimonial Property.
 97. The property known as Eldoret Municipality Block 21 (King'ong'o)/40xx was registered in the name of the Respondent on 29th June 2015. As this was registered after the formalisation of the union, the same forms part of the matrimonial property. There is no dispute as to whether Eldoret Municipality Block 21 (King'ong'o)/19xx, Eldoret Municipality Block 21 (King'ong'o)/1948 and Eldoret Municipality Block 21 (King'ong'o)/40xx form part of the Matrimonial Properties. I also note that the respondent concedes that Land Reference no. Eldoret Municipality Block 9/3375 was acquired during the pendency of the marriage and therefore forms part of the matrimonial property.
 98. Motor vehicle registration no. KCL xxxN was registered in the name of the Respondent then in the name of Samwel Ndungu Mungai on 27/04/2017.
 99. From my analysis, the following properties constitute the Matrimonial Property; Eldoret Municipality Block 11/xxx Eldoret Municipality Block 21 (King'ong'o)/19xx Eldoret Municipality Block 21 (King'ong'o)/1948 Eldoret Municipality Block 21 (King'ong'o)/40xx Eldoret Municipality Block 9/3375
 100. As for the bank accounts that the applicant laid claim to, it is my considered view that the applicant did not produce sufficient evidence as to the current balances in the said accounts. Additionally, the evidence was not sufficient enough to establish the exact timelines of deposits with regards to the exact period during which the marriage subsisted. Matters concerning bank accounts require the evidence to be presented with meticulous attention paid to the deposits and withdrawals, which presentation is better placed in form of audit reports or account statements. The applicant relied on her own assertions as to the transactions which were couched in generalities and fell below the threshold of a balance of probabilities.
 101. There is also no sufficient evidence with regards to the movable properties to wit; the motor vehicles reg no. KCL xxxN, KCL xxxV and KCF xxxF. In her pleadings she annexed a search for KCL xxxN which revealed that the vehicle was registered in the name of the respondent on 27/04/2017. Additionally, it was registered in the name of Samwel Ndungu Mungai as at 16/07/2020. No other evidence was presented as to the acquisition and registration of the said motor vehicle or any other of the vehicles mentioned in the application. The annexure MN21 that she sought to rely upon only contained vehicle records pertaining to KCL xxxN.
 102. Regarding the properties identified as PROVISIONAL Number xxxx8 and PROVISIONAL Number xxxx9 ALLOTTED BY KAMULU HOUSING CO-OP SOCIETY LIMITED, the Court finds



that the Applicant has failed to produce sufficient documentary evidence to establish the existence of these properties or their acquisition by either party. No title deeds, allotment letters, or other registration documents were presented to substantiate the claim that these properties exist and form part of the matrimonial estate. In the absence of such fundamental evidence, the Court cannot make a determination on properties whose existence has not been conclusively established. Consequently, these alleged properties are excluded from the matrimonial property distribution matrix.

103. The court can only distribute that which is proved to be matrimonial property. It follows that the property available for distribution as matrimonial property is restricted to the following properties; Eldoret Municipality Block 11/xxx Eldoret Municipality Block 21 (King'ong'o)/19xx Eldoret Municipality Block 21 (King'ong'o)/1948 Eldoret Municipality Block 21 (King'ong'o)/40xx Eldoret Municipality Block 9/3375

104. One of the longstanding issues on how matrimonial property is to be shared in the event of a divorce and cannot agree on the distribution, has now been settled by the law and the superior Courts. The current position is that the distribution depends on the spouses' individual contributions in the acquisition of the properties. Contribution may be direct monetary contribution or otherwise. Section 7 of the Act has the following to say: -

Ownership of matrimonial property:

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

105. Section 9 of the Act also provides as under: -

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.

106. Section 2 of the Act defines 'contribution' as follows: -

“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;

107. Notably, the non-monetary contribution in law is not limited or exclusive to the five categories listed above, but is rather inclusive. Therefore, it means that a Court may consider other inputs by that party in determining a party's non-monetary contribution. This issue was addressed by the Court of Appeal in PNN vs. ZWN [2017] eKLR where it looked into Article 45(3) of *the Constitution* which provides that “Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage” and urged doth: -



.... Thus, it is that *the Constitution*, thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the *Matrimonial Property Act*, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.

Kiagi JA in regard to the same case stated further as follows:

“I think it would be surreal to suppose that *the constitution* somehow converts the state of coverture into some sort of laissez-passer, a passport to 50% wealth regardless of what one does in that marriage. Our new constitutional dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who will rather reap from rich women or women who see in moneyed men an adieu to poverty.”

108. This position was affirmed by the Supreme Court in *JOO vs. MBO (Petition No. 11 of 2020)* which remains the locus classicus in family law for it addressed three pertinent issues of great public interest. The issues are as follows: -

- i. What is the applicable law in the division of matrimonial property where causes were filed prior to the current matrimonial property regime being *the Constitution* and the *Matrimonial Property Act*, 2013?
- ii. Should a matrimonial property cause filed prior to the promulgation of the Kenyan Constitution, 2010 be determined under section 17 of the Married Women’s Property Act, 1882 and in accordance with the principles espoused in *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR or should courts follow the new regime as at the time of determination by applying the provisions of article 45(3) of *the Constitution* and the *Matrimonial Property Act* 2013 which underpin the principles of equality?
- iii. Whether article 45(3) provides for proprietary rights and whether the said article can be a basis for apportionment and division of matrimonial property on a 50/50 basis without parties fulfilling their obligation of proving what they are entitled to by way of contribution.

109. On the interpretation of Article 45(3) of *the Constitution*, the Supreme Court stated thus: -

“In this regard our view is that, while article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married....

Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of *the Constitution*. To hold that article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non- monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.”



The Apex Court also stated as under: -

81. the equality provision in article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that article 40(1) and (2) of *the Constitution* which protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC's language.
82. While therefore reiterating the finding in Echaria, we also find that article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in *the Constitution* do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.

On the aspect of non-monetary contribution, the Supreme Court held as follows: -

It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. The learned Judge having appreciated the appellant and the respondent were married for 18 years, and 15 of those years the appellant was in gainful employment; she constantly took loans, having found the only property that was acquired with joint efforts was the matrimonial home where the appellant was residing; the fact that upon separation the respondent was able to purchase another home where he settled. For those reasons, we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired beneficial interests therein; we also find for the same reasons the learned Judge erred by awarding the appellant a share of 30% of the house she has been in occupation and a mere 20% of the rental units which are in the same premises.

Further, the Supreme Court rendered itself on the constitutional principle of equity as follows: -

93. Article 45(3) of *the Constitution* underscores the concept of equality as one that ensures that there is equality and fairness to both spouses. Equality and fairness are therefore one and intertwined. Equality also underscores the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, a finding we have already made and in stating so we recognize that each party's contribution to the acquisition of matrimonial property may not have been done in an equal basis as a party may have significantly contributed more in acquiring property financially as opposed to the other party.
94. Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property.

In applying the maxim of equity, equality is equity, in which equity is now a constitutional principle in Article 10(2)(b) of *the Constitution* the Apex Court stated as follows: -



95. As was pointed out by the Court in the English case of *Gissing v Gissing* [1971] AC 886, the maxim 'equality is equity' has never been truer. To our minds, equity is an important principle when it comes to matrimonial property since what is fair as it relates to equity is not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to acquisition of matrimonial property, even though such contribution is indirect, but nevertheless has in one way or another, enabled the acquisition of such property amounts to significant contribution. Such direct or indirect acts as was discussed by Lord Justice Fox in *Burns v Burns* [1984] 1 All ER 244 may include: -
- i. Paying part of the purchase price of the matrimonial property.
 - ii. Contributing regularly to the monthly payments in the acquisition of such property.
 - iii. Making a substantial financial contribution to the family expenses so as to enable the mortgage instalments to be paid.
 - iv. Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.
 - v. Caring for children and the family at large as the other spouse works to earn money to pay for the property.

The Court further stated as follows: -

96. These considerations are in line with the finding of the court in the English case of *White v White* [2001] 1 AC 596 where Lord Nicholls of Birkenhead held that the court should always ensure a fair outcome in considering the contribution of spouses by stating:

Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely ... But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contribution."

This is implicit in the very language of paragraph (f):

“the contributions which each ... has made or is likely ... to make to the welfare of the family, including any contribution by looking after the home or caring for the family.”

If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.



110. At a glance, the court in exercising discretion under the Matrimonial Properties Act, has to be guided by the general principles in section 2, it cannot be gainsaid that fairness is an elusive concept and has to be construed and interpreted with instinctive response to a given set of facts. In my view ultimately, it is grounded in social and moral values and sometimes may not be justified or refuted by any objective process of logical reasoning. Moreover, there is also the constitutional imperative of Art.45(3) of *the Constitution*. This provision imports the strand of sharing. This equal sharing principle is derived from the basic concept of equality permeating a marriage as understood during the promulgation of the common law which also remains as a legitimate expectation of any marriage union as of today hence the maxim marriage is often said to be a partnership of equals. *The Constitution* 2010 in domesticating the common law did import the value of equality within the family union as prescribed in the referenced article 45(3) (supra).
111. For all intents and practical purposes, it is universally accepted that during the solemnization of the marriage be either Civil, Christian or customary, both spouses commit themselves to sharing their lives for worse or for better until death sets them asunder. During the happy times, they live and work together as equal partners and within the principles in the JOO vs. MBO (supra) case when the dissolution of marriage takes place, each is entitled to an equal share unless there are compelling reasons to the contrary. For instance, in the acquisition of the marital estate, huge financial resources are involved both at the primary level of purchase of the assets and thereafter the investment which may accrue only evidence to show that the other party to the marriage though earning substantial income failed to contribute towards acquisition of the questionable assets during the subsistence of the marriage. In *Njoroge v. Ngari* (1985) KLR the court made the following observations: “If a matrimonial property is being held in the name of one spouse even if that property is registered in the name of that one spouse but the other spouse made contribution towards its acquisition, then each spouse has proprietary interest.” Contribution therefore on matters to do with assets with an element of huge capital development by either spouse to the marital union has been viewed in the trending jurisprudence as the core principle in the division or distribution of the marital estate. A petitioner or an applicant to a marriage who seeks to benefit from the marital estate acquired during the subsistence of the marriage must under the *Matrimonial Property Act* apply to court seized of jurisdiction for an order of distribution of the estate. In the ensuing proceedings, he/she must show that he/she has contributed directly or indirectly to the acquisition, maintenance or development of the estate in question during the subsistence of the marriage. This is mainly through evidential material, the fact of marriage or cohabitation however long it takes is presumably a lesser ground on which a court may deem it necessary to exercise discretion that such distribution of the assets be justly and equitably shared equally.
112. I therefore emphasize the qualifying phrase that equal sharing principle of the assets is applicable unless there are good compelling reasons to the contrary. The yardstick of equality contemplated in Art. 45(3) of *the Constitution* is to be applied as aid, not a rule in the interpretation of the question of equity. The approach of the court on this legal proposition must also take cognizance of the fact to depart from the equality doctrine where the circumstances at the dissolution of the marriage, the respective contributions made and the period of time such contributions have accrued. I consider it to be fundamentally unfair that a party who has made contribution as the parameter during a marriage of 5, 7, 10 or 20 years should be awarded the same assets in a marital estate as a party who has made domestic contribution. Notwithstanding this view, the provisions of the law did not contemplate or do not contemplate that a short marriage is no less a partnership of equals than long marriage. The only difference discernible between the elements of a short marriage with that of a long marriage is that the former has been less enduring in the marital union. It is this element or characteristic which then



- demonstrates that in the nature of things a shorter marriage would affect the quantum of the financial fruits which accrue out of the marital union or partnership.
113. The *Matrimonial Property Act* gives only a limited guidance on how the courts should exercise their statutory powers under section 2 of the Act and seems to lay much more emphasis on the canon of contribution which sometimes there is difficulty for the courts to give a specific value or percentage which can generate a fair, equity and equal contribution for the best interest of each party to the marriage upon dissolution.
 114. The court is asked to consider the feasibility of a clean break now that the marriage is no longer subsisting and having broken down irretrievably with a declaration of a decree absolute. Implicitly, even from the dicta of JOO vs. MBO (supra) and PNN v. ZNN (supra) a trial court is expected to exercise its powers so as to achieve an outcome which is fair between the parties. However, an important question in this kind of proceedings is an aspect of fairness which essentially requires that like cases should be treated alike if there has to be acceptable degree of consistency of jurisprudential decisions from one case to another. Sometimes there is this presumption that in the distribution of the marital estate, the courts should have regard to the reasonable requirements of the petitioner or applicant to the originating summons usually the wife and treat this as a determinative question giving rise to the proportionate award of the marital estate.
 115. Therefore, looked from the lens of that perspective, fairness lay in enabling the wife to continue to live in the fashion to which she had become accustomed to during the subsistence of the marriage. This is the controversy more often than not nuanced in the search for a fair outcome pertinent to any claim under the *Matrimonial Property Act*. My understanding and appreciation of the law is that any set of facts under this legislative scheme, the court is to have in mind the conceptual framework that fairness in its true sense has to generate obligations as well as rights between the parties to the litigation. That the financial provision made on divorce by either the wife or the husband for the other is still in a typical sense without sounding gender discriminative under Art. 27(4) of *the Constitution* not in the nature of largess.
 116. On this guideline, the court in construing and interpreting the concept of equality, it is not a case of taking away assets from one party to the marriage and giving to the other property which belongs to the former. In the letter and spirit of *the Constitution* and the statute each party to a marriage is entitled to a fair share of the available net marital estate, I find that to be the soul for what are the requirements of fairness and equity dependent on the specific facts and circumstances of each case. I see the relationship of a marriage giving rise to some form of interdependence and none joins the union with superior rights.
 117. The parties to a marriage prima facie unless otherwise controverted share the roles of wealth creation, home maker and child support on all the rights envisaged in section 8, 9 & 10 of the Children's Act 2022. In the present context, the financial needs, obligations and responsibilities which each of the parties to the *Marriage Act* or is likely to have in the foreseeable future must not ignore the welfare and best interest of the children particularly those in the class of 18 years and below. I hold the view that when the marriage ends by way of a divorce which is the textual legal frame of the *Matrimonial Property Act*, fairness requires that a court does exercise discretion that the assets of the marital estate should be divided primarily so as to make provision for the socio-economic rights for the parties. That is to cater for housing and financial needs taking into account a wide range of facts and personal circumstances such as their ages, their future earning capacity, the family's standard of living, the needs of the children who might be under 18 years during the dissolution of the marriage and any disability.



118. It is also further my appreciation of the law that cognizance must be given to the aspect of redressing any economic disparity which may exist between the parties laying their claim under the provisions of this act arising from the manner and the way they conducted their marriage. What is significant about this? For instance, either the wife or the husband may have organized their affairs in their so called purpose driven life in a way which greatly advantaged the husband or the wife dependent on their earning capacity but leaving one of them handicapped so far as any one of them earning capacity is concerned.
119. Without sounding feminist, sometime this is often the case that women sometimes suffer a disproportionate financial loss following the dissolution of a marriage because of their traditional role as home makers and child caregivers. Marriage and its legal consequences is considered to be or to sit at the heart of creation and for those who belief in God, the Bible declares in Genesis 1:26-27 in the following ordained words:
27. “Then God said, “Let us make man in our own image, according to our likeness; let them have dominion over the fish of the sea, over the birds of the air, and over the cattle, over all the earth and over every creeping thing that creeps on the earth”
27. So God created man in His own image; in the image of God He created him; male and female He created them.”
- Similarly, in Chapter 2:18 it reads: “And the Lord God said, It is not good that man should be alone; I will make him a helper comparable to him.”
120. In a deeper sense, at the solemnization of a marital union as prescribed under the [marriage Act](#), profoundly obligates the couples to be committed to the promotion and guarantees provided in our Bill of Rights chapter 4 of our Constitution. The right to associate with another for purposes of the marriage whether under customary, civil or Christian system as recognized in the Act also offers each individual honourable and profound state that is adorned with legal, social and economic recognition with many privileges and obligations which go with such a union. It is considered a commitment of equals shared together fashioned in love and friendship in exclusion of all other human beings on earth until death sets them asunder.
121. Having carefully analysed the evidence presented by both parties, this Court finds that a property-specific approach to distribution is more equitable than applying a uniform ratio across all assets. The evidence demonstrates that both parties made contributions to the matrimonial properties, albeit in different ways and proportions for different assets. The registration patterns of these properties, with some registered in the Respondent's name, others in the Applicant's name, and one jointly, reflect the complex interplay of their respective contributions throughout the marriage. While the Respondent has demonstrated significant financial contributions toward certain properties, the Applicant has similarly established meaningful contributions to others, both directly and indirectly. Therefore, instead of adopting a blanket distribution ratio, this Court shall determine the appropriate allocation of each property based on the specific evidence of contribution related to that property, the timing of its acquisition, its current registration status, and considerations of equity in the overall distribution scheme.
122. The Court has carefully considered the evidence presented by both parties regarding their contributions toward the acquisition of these properties, including both monetary and non-monetary contributions as defined in Section 2 of the Act.
123. With respect to Eldoret Municipality Block 11/xxx, the Court notes that this property was registered in the Applicant's name on 11th December 2014, shortly after the parties' marriage. The Respondent, in



his supplementary submissions, characterized this property as a matrimonial asset located in Mwanzo with rental houses, valued at approximately Kshs. 5,000,000/=, while the Applicant's valuation placed it at Kshs. 8,000,000/=. The Court observes that throughout these proceedings, a consistent pattern emerges of the Respondent playing a significant role in property acquisitions during the marriage, often providing substantial financial input toward various assets, including business capital that generated further wealth. While specific documentation for this particular property is limited, the totality of evidence suggests the Respondent's financial contributions were instrumental across their property portfolio. The registration timing, occurring only six weeks after the marriage was formalized, strongly suggests this property was acquired with matrimonial resources at the commencement of their legal union. Considering the overall distribution pattern of matrimonial assets across multiple properties and recognizing the Respondent's demonstrated pattern of financial support toward property acquisitions, the Court finds it appropriate to award this property to the Respondent as his sole property. The Applicant is directed to execute the necessary transfer documents to effect this change in ownership within 90 days of this judgment.

124. Regarding Eldoret Municipality Block 21 (particulars withheld)/19xx, registered on 5th April 2018 in the Respondent's name, the Court notes that this property was acquired during the subsistence of the marriage. The Respondent maintained throughout proceedings that he was responsible for acquiring and managing this property. The Applicant has not presented sufficient evidence to establish a substantial contribution toward its acquisition. Based on the available evidence and the property's current registration status, the Court finds it appropriate to award this property to the Respondent as his sole property.
125. Concerning Eldoret Municipality Block 21 (particulars withheld)/1948, the Court has carefully weighed the competing claims. The Respondent, in his supplementary submissions, valued this property at approximately Kshs. 20,000,000/=, noting it was purchased in the name of Majida Uniforms 24/7 Limited, where both the Applicant and their daughter, Jill Gathoni Mwangi, are signatories. Significantly, the Respondent acknowledged this property is currently occupied by the applicant who has converted it into her place of work. This admission is particularly illuminating, as it establishes that beyond being merely a matrimonial asset, this property has become integral to the Applicant's economic sustenance and livelihood following the dissolution of marriage. While the Respondent maintains he financed the purchase, the documentary evidence reveals the land sale agreement dated 26th February 2020 was executed in the Applicant's name. The business relationship between the parties throughout their marriage demonstrates a complex intertwining of personal and commercial interests, where contributions often flowed in multiple directions. The Court recognizes that matrimonial property division must consider not only historical contributions but also future economic viability for both parties. Given that this property now functions as the Applicant's primary source of income and economic stability, and considering the registration documentation favours her proprietary claim, the Court finds it appropriate and equitable to award this property to the Applicant as her sole property, thereby preserving her established means of self-support following the marriage dissolution.
126. Regarding Eldoret Municipality Block 21 (particulars withheld)/40xx, the Court notes this property was registered in the Respondent's name, with the registration occurring after the formalization of the marriage. It is not disputed that the property was acquired during the subsistence of the marriage and is registered in the Respondent's name. The Applicant has not presented specific evidence demonstrating a substantial contribution toward its acquisition that would override the registration status. The Court further notes that the Respondent has been managing this property, as evidenced by the lease agreement executed on 12th March 2024. Considering these factors and the overall distribution of



- matrimonial assets, the Court finds it appropriate to award this property to the Respondent as his sole property.
127. Concerning Eldoret Municipality Block 9/3375, registered on 30th September 2021, both parties acknowledge this property was acquired during the pendency of the marriage. The property is registered in the Applicant's name, which establishes a presumption of ownership. While the Respondent claims he provided funds for its acquisition, this assertion follows the same pattern of claims made regarding other properties registered in the Applicant's name, without supporting documentation. The Court observes that during this period, the Applicant operated several businesses, including Mxxxxxxx Designers, which she registered as a sole proprietorship. The timing of this property's acquisition, occurring after the parties had separated but before the formal dissolution of marriage, further supports the Applicant's proprietary claim. Balancing these considerations with the approach taken for properties registered in the Respondent's name, the Court awards this property to the Applicant as her sole property.
 128. With regard to Trans Nzoia/Kipsoen/xxxx, the evidence shows this property was registered jointly in the names of both parties on 8th January 2023. This joint registration reflects the parties' intention for shared ownership, and neither party has presented compelling evidence to disturb this arrangement. To avoid potential conflicts arising from continued joint ownership following the dissolution of marriage, the Court orders that: The parties shall, within 45 days of this judgment, jointly appoint an independent property valuer to determine the current market value of the property; The parties shall explore whether the property can be physically subdivided into two equal portions without diminishing its overall value, and if feasible, such subdivision shall be undertaken with each party receiving title to one portion; If physical division is not feasible or economically prudent, either party shall have the option to buy out the other's 50% share at the established market value; Should both parties express interest in purchasing the other's share, preference shall be given to the party who demonstrates greater financial capability to complete the transaction within 60 days of valuation; If neither party wishes to buy out the other's share, the property shall be sold on the open market at a price not less than 90% of the valuation, with the net proceeds divided equally between the parties; and Until such transfer, subdivision or sale is completed, any income derived from the property shall be divided equally between the parties, with shared responsibility for taxes, maintenance costs, and other associated expenses.
 129. Regarding the motor vehicles KCL xxxN, KCL xxxV, and KCF xxxF, the Court has carefully considered the evidence presented by both parties concerning their acquisition and current status. While the documentation regarding these vehicles was limited, the Court acknowledges their acquisition during the marriage constitutes them as movable property that requires equitable distribution.
 130. With respect to vehicle KCL xxxV, the Court finds it appropriate to award this vehicle to the Applicant as her sole property. This allocation recognizes her contributions to the marriage and provides practical transportation means to support her continued business endeavours following the dissolution of the marriage.
 131. Concerning vehicles KCL xxxN and KCF xxxF, the Court notes the Respondent's evidence of having secured insurance coverage for these vehicles and his management of these assets throughout the marriage. Furthermore, the Court acknowledges the Respondent's testimony that vehicle KCL xxxN was sold with the Applicant's knowledge to address pressing financial obligations. Therefore, the Court determines that vehicle KCF xxxF shall be awarded to the Respondent as his sole property, and any proceeds from the prior sale of vehicle KCL xxxN shall be considered solely the Respondent's, with no further claims permitted against these funds.



132. From the foregoing, the following orders do issue:

Immoveable properties

- a. Eldoret Municipality Block 11/xxx is awarded to the Respondent as his sole property. The Applicant is directed to execute the necessary transfer documents to effect this change in ownership within 90 days of this judgment.
- b. Eldoret Municipality Block 21 (particulars withheld)/19xx is awarded to the Respondent as his sole property.
- c. Eldoret Municipality Block 21 (particulars withheld)/1948 is awarded to the Applicant as her sole property.
- d. Eldoret Municipality Block 21 (particulars withheld)/40xx is awarded to the Respondent as his sole property.
- e. Eldoret Municipality Block 9/3375 is awarded to the Applicant as her sole property.
- f. Trans Nzoia/Kipsoen/xxxx shall remain jointly owned by both parties on a 50/50 basis. To avoid potential conflicts arising from continued joint ownership following the dissolution of marriage, the Court orders that: The parties shall, within 45 days of this judgment, jointly appoint an independent property valuer to determine the current market value of the property; The parties shall explore whether the property can be physically subdivided into two equal portions without diminishing its overall value, and if feasible, such subdivision shall be undertaken with each party receiving title to one portion; If physical division is not feasible or economically prudent, either party shall have the option to buy out the other's 50% share at the established market value; Should both parties express interest in purchasing the other's share, preference shall be given to the party who demonstrates greater financial capability to complete the transaction within 60 days of valuation; If neither party wishes to buy out the other's share, the property shall be sold on the open market at a price not less than 90% of the valuation, with the net proceeds divided equally between the parties; and Until such transfer, subdivision or sale is completed, any income derived from the property shall be divided equally between the parties, with shared responsibility for taxes, maintenance costs, and other associated expenses.

Movable properties

- g. Motor vehicle KCL xxxV is awarded to the Applicant as her sole property.
- h. Motor vehicle KCF xxxF is awarded to the Respondent as his sole property.

Dismissed claims

- i. The Applicant's claims regarding Provisional Number xxxx8 and Provisional Number xxxx9 Allotted By Kamulu Housing Co-op Society Limited are dismissed due to insufficient evidence establishing the existence of these properties.
- j. The Applicant's claims regarding bank accounts and savings are dismissed for lack of sufficient evidence.
- k. The Applicant's claim for refund of Kshs. 3,500,000/= is dismissed for lack of sufficient supporting evidence.
- l. Each party shall bear responsibility for the transfer costs and applicable taxes for properties awarded to them.



- m. That the parties shall execute all necessary documents to effect these transfers within 90 days of this judgment.
- n. That a permanent order of injunction is hereby issued restraining each party from interfering with the other's lawful enjoyment and quiet possession of the properties awarded to them.
- 1. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2025

.....

R. NYAKUNDI

JUDGE

Email: mathaimainaadv@gmail.com

skagunza@gmail.com

