



REPUBLIC OF KENYA



KENYA LAW
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MJR v DKR (Application E016 of 2021) [2025] KEHC 6324 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
APPLICATION E016 OF 2021
RN NYAKUNDI, J
MAY 16, 2025**

BETWEEN

MJR PLAINTIFF

AND

DKR DEFENDANT

JUDGMENT

1. By Originating Summons dated 4/05/2024, the Plaintiff/Applicant seeking determination of the following issues:-
 1. Whether the land parcels known as Eldoret Municipality Block 9/1652, Pioneer/Ngeria Block 1 (EATEC)/xxxx , Pioneer/Ngeria Block 1 (EATEC)/10xxxx , Block 15 Plot No. 896 UPN: xxxx in the name of Catherine M. Masika and 11 cares with tea Plot No. 1xxxx in Nandi Chepkumia in the names of Benjamin Sigira Magicho constitute matrimonial property having been acquired during the subsistence of the marriage between the Applicant and the Respondent.
 2. Whether the Applicant contributed towards the acquisition of the said property by way of contribution in terms o sections 2 and 9 of the Matrimonial Property Act, 2014 and what is the extent of the said contribution.
 3. Whether the property should be apportioned between the parties as follows:-
 - a. Eldoret Municipality Block 9/1652 measuring 0.0294 Ha be transferred in full to the Applicant.



- b. Pioneer/Ngeria Block 1 (EATEC)/xxxx be shared equally amongst the Applicant and the Respondent by a conveyance of the full share to the Applicant.
- c. Pioneer/Ngeria Block 1 (EATEC)/1xxxx be apportioned as between the Applicant and the Respondent in equal shares.
- d. Land parcel known as Block 15 Plot No.896 UPN: xxxx be fully apportioned to the Applicant in full.
- e. 11 acres and tea plantation on PLOT No. 1xxxx in Nandi Chepkumia in the names of Benjamin Sigira Magicho be apportioned fully to the Respondent.
4. Whether the Respondent does handover vacant possession of the entire parcel of land known as Eldoret Municipality/Block 9/1652 to the Petitioner and in default he be evicted by the Officer Commanding, Kapsoya Police Station.
5. Whether the Deputy Registrar and/ or such other officer as the Honourable Court may designate to execute the requisite conveyancing instruments in default of the Respondent failing to comply in tandem with Section 98 of the [Civil Procedure Act](#), Cap 21.
6. Who should meet the costs of this suit.

The Applicant's Case

2. In her supporting Affidavit, the Applicant deposed that she as a spinster and the Respondent as a Bachelor solemnized a Christian Marriage at Kabaskei SDA Church in then Nandi District within the then Rift Valley Province on the 7/04/1987, that the Respondent and her then established their matrimonial home in Kabarnet within Baringo County, Uasin Gishu County and Nandi County, that out of their marriage, the Respondent and her have 3 issues; NJ, OK and CK.
3. The Applicant further deposed that prior to the marriage and during the subsistence of the marriage, she was employed as a nurse commencing as a Kenya Enrolled Midwife III on 19/06/1984 in the Ministry of Health, progressing to the Moi Teaching and Referral Hospital with effect from 1st July, 2000 in the position of Kenya Enrolled Midwife I and to Senior Enrolled Nurse at the time of presenting this petition which employment persists.
4. The Applicant further deposed that she has been paying school fees and other educational needs for the children singlehandedly including paying and that she even took loans from banks to facilitate the meeting of the said expenses which included educating their daughter abroad and that the payslip shows the deductions and letter from KCB Bank Ltd.
5. According to the Applicant, based on her salary, her industry support, financial and domestic contribution in caring for the Respondent and her children, the following properties have been acquired which constitute matrimonial property:- Eldoret Municipality/Block 9/1652 measuring 0.0294 Ha registered in the name of the Respondent on 19/10/2000 as trustee for the Applicant, Pioneer/Ngeria Block 1(EATEC)xxxx measuring 2.023 Ha registered on 28/10/2003 in the Respondent's name as a trustee for the Applicant, Pioneer/Ngeria Block 1 (EATEC) 10xxxx measuring 0.10 Ha still registered in the name of the Registered Trustees of Moi University Pension Scheme but acquired in the name of the Respondent and held in trust for the Applicant, land parcel known as Block 15 Plot No. 896 UPN: xxxx still in the name of Catherine M. Masika but held in trust for the



- Applicant, 11 acres of land and tea plantation on Plot No. 1xxxx in Nandi Chepkumia in the names of Benjamin Sigira Magicho but held in trust for the Applicant.
6. The Applicant maintained that the aforesaid property constitutes matrimonial in accordance with Section 6 of the *Matrimonial Property Act*, No.49 of 2013, that she is a co-owner of the aforesaid property by virtue of contribution in terms of Section 7 of the *Matrimonial Property Act* No. 49 of 2014, that the particulars of contribution to acquisition of the property are by way of domestic work and management of the matrimonial homes for over 30 years of marriage, caring for the Respondent as a wife and offering companionship, siring and taking care of 3 children successfully leading them to higher levels of education, taking loans to pay school fees and meeting domestic needs, financial contribution to acquisition of the property and financial contribution by taking a loan and improving on the property by planting tea.
 7. The Applicant seeks a declaration of settlement of the matrimonial property and that the property be divided as follows:- Eldoret Municipality Block 9/1652 measuring 0.0294 Ha be transferred in full to the Applicant, Pioneer/Ngeria Block 1(EATEC)xxxx be apportioned to the Applicant in full, Pioneer/Ngeria Block 1(EATEC)/ 10xxxx be shared between the Applicant and the Respondent in equal shares, land parcel known as Block 15 Plot No. 896 UPN: xxxx be fully apportioned to the Applicant in full, 11 acres of land with tea plantation on Plot No. 1xxxx in Nandi Chepkumia in the names of Benjamin Sigira Magicho be apportioned fully to Respondent.
 8. The Applicant urged that the Respondent does handover vacant possession of the entire land known as Eldoret Municipality/Block 9/1652 to her and in default he be evicted by the Officer Commanding Kapsoya Police Station.
 9. In conclusion, the Deputy Registrar and/or such other officer as the Honourable Court may designate do execute the requisite conveyancing instruments in default of the Respondent falling to comply in tandem with Section 98 of the *Civil Procedure Act*, Cap 21 and that she has already instituted a divorce petition before the Chief Magistrate Court in Eldoret.

The Respondent's Case

10. On the part of the Respondent, he swore a Replying Affidavit on 30/10/2024, in which he deposed that him and the Applicant solemnized a Christian marriage at Kabaskei S.D.A church on 7/04/1987 and that they were blessed with 3 issues namely: NJ, OK and CK. He further deposed that he was first employed by the Ministry of Health Kabarnet in the year 1989 as Radiographic Fil Processor Technician II and that later he got an appointment letter from Moi Teaching and Referral Hospital as a Radiographer grade M on 1/07/2000 and later in 2018 his salary was increased for having attained a Masters in Radiology.
11. The Respondent maintained that the properties listed by the Applicant are neither matrimonial properties within the *Matrimonial Property Act* nor trust properties as alleged. He deposed that he purchased Eldoret Municipality Block 9/1652 with his own money from one Wallace Mbutivu and that the Applicant has no idea how that purchase came to play, that he purchased Pioneer/Ngeria Block 1 (EATEC)/xxxx solely and has receipts that all are in his name and also clearance letters indicating that he had made full payments and that the said plot was purchased from LONRHO East Africa Ltd, that Pioneer/Ngeria Block 1 (EATEC)/10xxxx was bought by Moi University Pension Scheme and sold to members and it was subdivided, that the scheme made a notice to staff members of the sale and he made an application for the said purchase of land and paid a deposit for the plot for Kshs.20,500/=, that the university pension scheme used to deduct the consideration amount of the purchase of plot Pioneer/Ngeria Block 1 (EATEC)/10xxxx from his payslip as evidence and that he



was to make payments within 4 years, that he later sold Pioneer/Ngeria Block 1 (EATEC)/10xxxx vide a sale agreement dated 16/03/2020 to enable him make some renovations and also build, that he purchased Eldoret Municipality Block 15/896 from one Catherine M. Masika who later requested that the same be transferred to him vide a letter dated 29/08/2018, he added that the Applicant is not aware of the terms of the agreement with Catherine M. Masika, that one of his colleagues at Moi University sold the said land to him and at the time of the transaction the Applicant herein was not aware and that the Applicant has never directly interacted with Catherine Masika on the same issue, that he later sold Eldoret Municipality Block 15/896 vide a sale agreement dated 8/08/2018 for a consideration of Kshs.1,200,000/= and the consideration he received from the said sale of land was to finance his studies at the Durban University Technology for his doctorate vide an offer letter dated 5/06/2018, that the 11 acres and tea plantation on Plot No.1xxxx in Nandi Chepkumia is an ancestral land and that the same was passed down from his father.

12. He denied the Applicant's allegation that she solely paid school fees and deposed that he has been paying fees for all their children from when they were little until they completed their studies, that being a staff of Moi University, he was a beneficiary of the 50% fee waiver for all his children and that besides that he covered all the payments towards their fees and catered for all other needs for his children and he even used to apply for tuition bursary for his children in regard to their school fees.
13. The Respondent contended that the Applicant herein was not a stay at home wife as she was an employee of Moi Teaching and Referral Hospital, working as a nurse. He added that the Applicant has 2 plots that she not mentioned in this Court and the said properties were acquired during the subsistence of the marriage.

Rejoinder

14. The Applicant also filed a Supplementary Affidavit dated 20/11/2024, wherein save from reiterating the contents of her Supporting Affidavit, she deposed that the Respondent confirms that the property which is subject of the Originating Summons was acquired during the subsistence of the marriage, that the Respondent confirms that the marriage had 3 children, that the Respondent does not deny her contributions as deposed in her Supporting Affidavit, that contrary to the allegation raised by the Respondent in paragraph 14 and 15 of his replying Affidavit, she supported her family including even giving financial assistance to the Respondent during his studies in South Africa by taking a loan from AFYA SACCO of Kshs.150,000/= to sponsor his Bachelors degree by depositing the same in his Barclays Bank Account, she contended that the fact that she was not a stay at home wife does not disentitle her from being considered as having made contributions within the meaning of Section 2 of the *Matrimonial Property Act*, Cap 152 and that contribution is both monetary and non-monetary and which she has well outlined.
15. The Applicant maintained that she holds a beneficial interest in the property based on her contribution towards improving the same like taking of the loan to plant tea. According to the Applicant, the Respondent herein holds the property in trust for her.

The Submissions

16. The application was canvassed both orally and vide written submissions. Both the Applicant and the Respondent filed their respective submissions. (Kindly note that I didn't extract the parties oral submissions made in Court)



The Applicant's Submissions

17. In his submissions, Counsel for the Applicant gave a background of the Applicant's case already captured in her Supporting Affidavit. He contended that despite the denials by the Respondent that the said property did not constitute matrimonial property, the same well falls within the scope of Section 6 of the *Matrimonial Property Act* No. 49 of 2013. Counsel submitted that even for 11 acres of land and tea plantation in plot No.1xxxx in Nandi Chepkumia which the Respondent claimed that it was inherited from his father. Counsel maintained that the Respondent inherited the same while the marriage subsisted. He relied on the case of RCL *V MKK (Matrimonial Cause No.6 of 2022)* [2022] KEHC 10719 (KLR).
18. Counsel further submitted that the Applicant is a co-owner of the property by virtue of contribution in terms of Section 7 of the *Matrimonial Property Act*. Counsel maintained that the fact that the Applicant did give records of contributions in the purchase is not a hurdle that should come into the path of defeating her entitlement. Counsel urged that it is acknowledged that in a marriage setting couples rarely come into the marriage with the intention that they will divorce and recorded keeping is not accorded priority. Counsel contended that the allegation that the Respondent employed a house help whom he paid to care for the children ought not to be accorded any seriousness consideration as the reality is that the Applicant gave birth to 3 children in the marriage. Counsel further urged the Court to be guided by the decision in *MGNK V AMG* [2016] eKLR.
19. Counsel maintained that the Applicant has established both monetary and non-monetary contribution towards acquisition of the property. He relied on the holding in *HMN V FTS* [2021] eKLR in that regard.
20. With regard to settlement, Counsel submitted that the Applicant has tendered her proposal, she seeks a declaration of settlement of the property and that the property be divided.
21. Counsel also cited Article 45 (3) of *the Constitution* with regard to the rights of parties to a marriage and he also urged the court to be guided by the holding in *PNN V ZWN* [2017] eKLR.
22. In the end, Counsel urged that the Respondent does handover vacant possession of the entire land parcel known as Eldoret Municipality/Block 9/1652 to the Applicant and in default, he be evicted by the Officer Commanding Kapsoya Police Station and that the Deputy Registrar and or such other officer as the Court may designate do execute the requisite conveyancing instruments in default of the Respondent failing to comply in tandem with Section 98 of the CPC.

The Respondent's Submissions

23. Counsel for the Respondent equally gave a background of the case and submitted that the issues for determination are;
 - a. Whether Eldoret Municipality Block 9/1652, Pioneer/Ngeria Block 1(EATEC)xxxx and 11 acres and tea plantation on Plot no 1xxxx Chepkumia in the names of Benjamin Sigira macho are matrimonial properties.
 - b. Whether the said properties should be shared and in what manner
24. Counsel cited Article 45 (3) of *the Constitution* of Kenya and he submitted that the phrase 'equal rights' has been a subject of debate on what it exactly means. Counsel added that it is now however generally agreed that equality of parties alluded to Article 45(3) does not mean equal proprietary entitlement. Counsel submitted that a conclusive interpretation of the said provisions has now been made by the



Supreme Court in the case of JOO V MBO, federation of women lawyers (Fida Kenya & Another (Petition 11 Of 2020) [2023] KESC 4 KLR. Counsel also cited the case PNN V ZWN and the case of EGM Vs BMN [2020] eKLR.

25. With regard to whether Eldoret Municipality Block 9/1652, Pioneer/Ngeria Block 1(EATAC 1)/xxxx and 11 acres of land and tea plantation on Plot No. 1xxxx in Nandi Chepkumia in name of Benjamin Sigira Magicho are matrimonial properties, Counsel submitted that the Applicant has not disputed that parcels of land Eldoret Municipality Block 9/1652 and Pioneer/Ngeria Block 1(EATAC 1)/10xxxx are registered in the name of the Respondent and were acquired by the Respondent, what the Applicant insists upon is that she directly contributed to their acquisition. With regard to indirect contribution the Respondent stated that she did domestic work and caring for the Respondent as a wife and offering companionship and siring 3 children and paying their school fees.
26. Counsel submitted that on his part, the Respondent stated that he solely purchased the two properties using his own resources without any contribution whatsoever from the Applicant, he also testified that to develop Eldoret Municipality Block 9/1652 he took a loan from Standard Chartered Bank which loan he resericed alone and that in support of the said averments the Respondent indicated to the court a charge on the property for a sum of Kshs 250,000/= by Standard Chartered Bank. Counsel added that with Pioneer /Ngeria Block 1(EATEC)/xxxx , the Respondent equally stated that he purchased the land out of his own resources and savings, that the Respondent produced receipts to support the allegations and that the said documents of were not challenged thus conclusive evidence.
27. Counsel urged that the law states that ownership of matrimonial property will depend of the contribution of the spouse, it requires a spouse to show through evidence that he/she made direct or indirect contribution in the acquisition and or development of the property. Counsel contended that the two properties herein being exclusively registered in the name of the Respondent and the Applicant being the one who come to court to seek for remedy, it is her who bears the burden of proof. Counsel cited Section 107 of the Evidence Act and contended that the Applicant herein failed to discharge this burden. Counsel submitted that the Applicant claimed that she contributed towards the purchase and development of parcel of Eldoret Municipality BloCk 9/1652 but she did not produce any convincing documentary to support the allegation thus the two properties do not form part of the matrimonial property. In addition, Counsel submitted that it emerged during the hearing that the Applicant acquired some properties during the subsistence of the marriage which she did not disclose to the court. Counsel maintained that this is a clear manifestation that the parties herein acquired their respective properties, separately as per Section 13 of the matrimonial property act which allows the parties to own property separately during the subsistence of the marriage.
28. Regarding the 11 acres and tea plantation on PLOT NO 1xxxx in Nandi in the name of Benjamin Sigira Magicho, counsel submitted that the Applicant herein deponed under paragraph 11 (e) of her affidavit of support of the application that the same be apportioned fully to the Respondent, however during the Applicant changed that position. Counsel maintained that it is trite law that courts are moved by pleadings and any judgment or relief granted will be based on the prayers sought and the Applicant therefore cannot be allowed to seek for what she has not prayed in the pleadings. In addition, Counsel submitted that the said property is ancestral owned by the Respondents deceased father and does not fall under the ambit of matrimonial property as per the provisions of the Act, that the said property has not be subdivided among the beneficiaries of the late Benjamin Sigira Magicho which process will require take up Letters of Administration and that the ancestral land belongs to the Respondent's larger family and the same cannot be distributed without affecting the rights of other beneficiaries to the estate.



29. On whether the said properties should be distributed, Counsel submitted that the guiding principle in the distribution of matrimonial property is by a party providing what he or she is entitled by way of contribution. Counsel contended that whereas the Applicant did not provide any evidence to prove contribution, the Respondent provided evidence to prove direct financial contribution during the subsistence of the marriage and that aligned with the principle that a party has to prove contribution to enable a court determine the percentage available to it at distribution and safeguard against a blanket expectation that the principle of equality would be applied generally in the division of matrimonial property irrespective of contribution. He cited the case of PNN Vs. ZWN (supra).
30. In the conclusion, Counsel urged that from the evidence adduced before the court and tested in cross examination it is clear that it was the Respondent who solely acquired the properties in question. Further the Applicant confirmed that she had purchased some properties during the subsistence of the marriage which properties she did not disclose to the court. Counsel contended that it is clear that the parties herein acquired properties separately during the subsistence of their marriage and as such each party should be left with his or her acquired property. Counsel further urged that the Applicant herein does not expect the court to take away that which belongs to the Respondent and award it to her merely because they were married. Counsel maintained court is to ensure that no party will be denied what he or she deserves and no party is unfairly given more than what they contributed. Counsel submitted that the Applicant herein did not prove her case as per law required and the same must be dismissed with no orders as to costs the same being a family matter.

Analysis and determination

31. This Court, having examined the pleadings, scrutinized the evidence adduced, appraised the exhibits tendered, and considered the submissions filed by both parties, now confronts the task of disentangling the complex proprietary interests woven into the fabric of this matrimonial dispute. At the heart of this controversy lies a matrimonial union solemnized in the precincts of Kabaskei SDA Church on 7th April, 1987; a union that subsequently established its domestic footprint across multiple counties. The predominant issue here is what percentage of contribution under the Matrimonial Property Act did the applicant make towards acquisition, infrastructural development, management and value addition to the question of properties, subject matter of this cause.
32. This Court is called upon to undertake the delicate exercise of determining whether five distinct parcels of land; Eldoret Municipality Block 9/1652, Pioneer/Ngeria Block 1 (EATEC)/xxxx, Pioneer/Ngeria Block 1 (EATEC)/10xxxx, Block 15 Plot No. 896 UPN: xxxx, and 11 acres with tea plantation on Plot No. 1xxxx in Nandi Chepkumia constitute matrimonial property within the statutory framework. Beyond this threshold question lies the more nuanced inquiry into whether the Applicant's contributions both tangible and intangible warrant proprietary recognition, and if so, in what proportion?
33. The evidentiary burden in establishing that the disputed properties constitute matrimonial property and the quantum of contribution toward their acquisition rests squarely upon the Applicant's shoulders. This cardinal principle of our law of evidence, enshrined in Sections 107 and 1xxxx of the *Evidence Act*, mandates that the party asserting a fact must prove it. In the matrimonial property context, this translates to the Applicant demonstrating, on a balance of probabilities, both the matrimonial character of the properties and her contribution toward their acquisition or enhancement.



34. Sections 107(1), (2) and 1xxxx of the Evidence Act are on the burden of proof. They state as follows: -
- “ 107(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. and
- 1xxxx . Proof of particular fact.
- The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
35. The degree of proof in civil cases was well enunciated in the case of Miller vs Minister of Pensions [1947] which was cited with approval in D.T. Dobie Company (K) Limited Vs Wanyonyi Wafula Chabukati [2014] eKLR where the court held:-
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, thus proof on a balance of probabilities means a win however narrow.”
36. In the case of Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR it was held that:
- “As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 1xxxx and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as section 108 of the Evidence Act provides the burden lies on that person who would fail if no evidence at all were given as either side.”
37. It is appreciated from these authorities that the case at bar falls within the branch of Matrimonial Property Act a dispute by this nature is on sharing of the marital estate between the Applicant and Respondent, precisely a civil claim. It is trite that the standard of proof is on a balance of probabilities which simply means that the applicant would sustain her case with such evidence which is more credible than that of the Respondent. It also follows that the Respondent in his defence can lay before court a yardstick of proof which controverts existence or non-existence of facts which the applicant had placed more weight in order to secure judgment in her favour under the Matrimonial Property Act. Therefore, the applicant is a party with the legal burden and also bears the evidential burden for that standard of proof on a balance of probabilities. This is the threshold in which her evidence will be tested as against the defence by the Respondent.
38. The burden of proof therefore squarely lies on the applicant. The Applicant shoulders the primary responsibility to prove her claims regarding the matrimonial nature of the properties and her contributions thereto. This fundamental legal burden remains fixed with the Applicant throughout these proceedings. However, the evidential burden may temporarily shift to the Respondent when the Applicant establishes sufficient preliminary evidence supporting her assertions. When this occurs, the



Respondent must introduce countervailing evidence to challenge the Applicant's contentions, though the ultimate burden of persuasion never departs from the Applicant.

The Law

39. It is under the guidance of Art. 45(3) of *the Constitution* which provides the constitutional imperatives and the anchor of the *Matrimonial Property Act*. It states:

“Parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage.”

40. For purposes of this equality clause, *the Constitution* in Art. 27(1) & (4) also states as follows:

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

41. One of the dominant features of our legal system is the entrenchment of international law in Art. 2(5) & (6) of *the Constitution*. This means that both international and regional conventions or protocols apply in equal measure in the decision making process by courts as they exercise jurisdiction in adjudicating disputes as provided for in Art. (50(1) of *the Constitution*. In this respect the Protocol to the African Charter on Human and People's Rights on the rights of women in Africa. In Art. 6(j), provides that a woman during her marriage shall have the right to acquire her own property and to administer and manage it freely. Whereas in Art. 7(d) which states that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. This means that in the case separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

42. It goes without saying that by dint of Art. 2(5) & (6) of *the Constitution* International law plays a complementary role in entrenching our human rights discourse in developing our domestic jurisprudence. This court takes judicial notice that even before the advent of *the constitution* 2010, Kenya had ratified various international instruments like CEDAW which mandated it to ensure that any forms of discrimination against women were eliminated. This includes identical rights of both spouses before, during and after the marriage concerning property ownership, acquisition, management, administration, enjoyment and disposal whether acquired freely or for valuable consideration. This was also echoed in the Universal Declaration of Human Rights which states inter alia that women are entitled to equal rights in marriage, during this marriage and its dissolution. This same constitution when reading it as a whole brings in the provisions of Art. 40 in so far as the matrimonial property is concerned with the express language that:

“(1) subject to Art. 65, every person has the right, either individually or in association with others, to acquire and own property: -

- a. Of any description; and
- b. In any part of Kenya”



43. With all these legal provisions, one has to horizon as to the legislative scheme of the applicable Act in so far as it applies to the circumstances and facts of this case.
44. Section 17 of the *Matrimonial Property Act*, provides for the jurisdiction of courts on matters touching on matrimonial property as follows;

- “(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
- (2) An application under subsection (1)-
- (a) shall be made in accordance with such procedure as may be prescribed.
 - (b) may be made as part of a petition in a matrimonial cause; and
 - (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

45. The Court of Appeal discussed the jurisdiction of the High Court with regards to declaration of rights of spouses’ in matrimonial property in *AKK v PKW* [2020] eKLR as follows:

“Whilst the Respondent argued that the suit offended Section 7 of the *Matrimonial Property Act*, 2013 on the basis that the remedy sought for division of property was not available until divorce or dissolution of marriage, the appellant, relying on Section 17 of the same Act argued that the court is not limited in respect to the declaration of rights of a spouse’s interest in matrimonial property. Section 7 states:

“... 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.”

Section 17 states that:

- “(1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.
- (2) An application under subsection (1) –
- (a) shall be made in accordance with such procedure as may be prescribed;
 - (b) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

Section 7 refers to division of matrimonial property whilst Section 17 refers to a declaration of rights in any property contested between a person and a spouse. It can be discerned from the appellant’s pleadings in the High Court that she sought not only division but also orders from the court that the listed property was matrimonial property and a further finding that she had proprietary and pecuniary interests in the same. The trial court found that it had no jurisdiction under Section 7 to make orders as to the division of property. It is also correct that the orders concerning division of



matrimonial property pursuant to Section 7 of the *Matrimonial Property Act* was unavailable to the appellant until the determination of Divorce case 867 of 2017 between the parties hereto. However, in view of the order sought by the appellant extensively detailed above, it cannot categorically be said that the appellant's prayers fell solely within the ambit of Section 7 of the Act. It is our opinion that the learned Judge erred in limiting the court's jurisdiction to the provisions in Section 7 of the Act. In failing to address itself to the nature of reliefs sought by the appellant and the enabling provisions under Section 17 of the Act, the trial court did not proceed to determine whether the appellant satisfied the provisions under Section 17 of the Act in order for the court to make the declaratory orders sought.....

We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant's prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.

In our opinion, the trial court had jurisdiction to make declarations in so far as the interest in the property during the pendency of a marriage is concerned. The issues of distribution of the property would then only be determined upon dissolution of a marriage.....”

46. The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is my considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However for this case, as at the time of determining this question, it emerged that the applicant and the Respondent's marriage was underway being litigated in another forum which finally handed down the divorce.
47. In the present case, from the Applicant's prayers in the Originating Summons, it is clear that, the Applicant not only seeks that the listed properties be declared as matrimonial property but also seeks division.
48. Section 6(1) of the *Matrimonial Property Act* defines matrimonial property as- the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. In a nutshell, for property to qualify as matrimonial property it has to be obtained during the subsistence of the marriage unless otherwise agreed by the parties that a particular property does not form part of the matrimonial property. It is not contested herein that the Applicant and Respondent conducted a Christian Marriage on 7/04/1987.
49. Under Section 2 of the Act, 'Matrimonial home' has been defined as:-

any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.
50. The other dimensional definition of property is what is found in the Black's Law dictionary 9th ed. 1335-36, the term property is defined as follows:

“(i) the Right to possess, use and enjoy a determinate thing either land or a chattel.



- (ii) Any external thing over which the rights of possession, use or enjoyment are exercised or
- (iii) In a narrower sense, it means a person's proprietary (exclusive) and not his personal (individual rights) or
- (iv) it is the right of ownership in a material object itself.”

51. In the sense of Black's Law dictionary, marital property is defined as one acquire during marriage and that is subject to distribution or definition at the time of marital dissolution.

52. From the various exhibits presented before this Court, it is apparent that the suit properties were obtained during the subsistence of the marriage.

53. Further, section 14 of the Act provides that:

“Where matrimonial property is acquired during marriage-

- (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- (b) In the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

54. Section 14 of the Act introduces a significant legal presumption: where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. This presumption, while not irrefutable, places the evidentiary onus on the Respondent to displace it through compelling evidence of sole acquisition, untainted by any form of spousal contribution. The presumption of equal beneficial interest arises where the property stands in the joint names of the spouses.

55. It is however clear that contribution need not necessarily be in financial terms since according to section 2 of *Matrimonial Property Act, 2013*

“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.

56. The Applicant asserts a multifaceted contribution to the acquisition of the contested properties, encompassing both direct financial input and non-monetary contributions throughout their marriage. Her narrative presents a comprehensive view of spousal contribution as contemplated in the expansive definition under the *Matrimonial Property Act*. In stark contrast, the Respondent maintains that he was the sole financial architect behind these acquisitions, having exclusively funded their purchase without any material assistance from the Applicant. This fundamental divergence in the parties' accounts regarding contribution forms the crucible in which this Court must forge its determination.



In the persuasive case of *Kayambo v Kayambo* (1987-89) 12 MLR 408 the court made the following observations:

“Where there is evidence that one spouse contributed to the acquisition of the other party’s property or to its development and the parties intended that the other should acquire a beneficial interest and the extent of contribution can be ascertained, the contributing party will acquire a corresponding beneficial interest. However, where the extent of the contribution cannot be precisely ascertained, the maxim equality is equity duly applies. The court went on to state that the intention of financially independent and equal partners that the Respondent and the Appellant were during subsistence of their marriage in respect of acquisition of property be dislodged. The fact of existence of marriage by itself does not create community rights in property.”

57. The record establishes unequivocally that the Applicant maintained gainful employment as a nurse throughout the relevant period, a fact acknowledged by the Respondent. She progressed professionally from a Kenya Enrolled Midwife III in 1984 to a Senior Enrolled Nurse at the time of filing this petition. Conversely, the Respondent has tendered sale agreements, receipts, and payslip documents that create a documentary trail connecting his financial resources to the property acquisitions. This evidentiary asymmetry regarding direct monetary contribution tilts in favor of the Respondent’s account of financial investment in the properties.
58. Turning to the dimension of non-monetary contributions, the Court finds compelling evidence that the Applicant made substantial contributions within the contemplation of Section 2 of the *Matrimonial Property Act*. The Respondent’s contention that the presence of domestic workers diminished or negated the Applicant’s household contributions reflects an unduly narrow interpretation of spousal contribution that is inconsistent with both the letter and spirit of the Act. The orchestration of family life ensuring the harmonious functioning of the household, the nurturing of three children, and the creation of a supportive environment represents invaluable contributions that transcend simple domestic chores. These contributions persist regardless of employment status or the presence of hired help. The Court observes that the supervisory and managerial role in household affairs, the emotional labor of maintaining family relationships, and the companionship provided over decades of marriage constitute significant non-monetary contributions to the matrimonial enterprise. The Respondent’s dismissal of companionship as a recognized form of contribution directly contradicts Section 2 of the Act, which explicitly includes companionship within its statutory definition.
59. The Applicant’s non-monetary contributions are complemented by evidence of discrete financial inputs toward family expenses, as documented in the bank statements and M-Pesa transaction records tendered before this Court. These financial records substantiate her assertion of having contributed to household expenses, including the significant costs of children’s education and residential accommodations. While these expenditures may not directly trace to the property acquisition transactions, they nonetheless demonstrate the Applicant’s financial investment in the family’s welfare, potentially freeing up the Respondent’s resources for property investments. This indirect financial contribution, coupled with substantial non-monetary contributions, presents a more nuanced picture of spousal contribution than the Respondent’s narrative suggests.
60. The modern law of *Matrimonial Property Act* as negotiated in 2014 and articulated in many decisions arising out of the superior courts has had little impact upon the parties in sustaining a functional marriage. Marriage generally is regarded as a partnership in which the woman leaves her heritage to join the husband’s family so that they can work together as equals and more significantly unless limited



biologically to bring forth a new generation in form of children. As declared in the mythology of creation, in the garden of Eden, Eve was created after Adam as a companion and part of her obligation, she gave birth to Abel and Cain. This contribution by its very nature casts a heavy burden on a woman or the female gender. She bears the burden of carrying pregnancy and thereafter, breastfeeds and sustained the infant until a particular age when it is presumed that they can undertake fundamental activities within the social spectrum of rights. A wife in a marriage union undertakes to run the home in all its facets and looking after the children. This is what is commonly referred to as a wife being a home maker. It is also just valuable to state that for the matrimonial home to survive the vicissitudes of life for better or for worse. The husband in equal measure is required to provide leadership in ensuring the welfare and best interest of the children without ignoring his spouse. It is a holistic task of equals in that partnership which is curatively distinct from legal partners in a commercial venture or company. Obviously the 2014 legislation improved the lot of married women considerably but unreservedly, the main benefits of the separate property rights for spouses under Art. 40 of *the Constitution* is relatively muted. If indeed the acceptance and application of the rights and fundamental freedoms is stipulated in our Constitution. In the changing character of our society. Spouses have a right and should be permitted within a marriage union to acquire and retain property for their own benefit. In a practical sense in the already surviving, sustainable marriages applying the separate property principle husbands who have acquired various assets in their own name are known to have exercised their rights to property by disposing of any real or personal property in the same manner it was acquired without reference to the equal partner to the marriage. In a legal system much like ours where *the Constitution* is the supreme law of the land interpretation of rights and its protection and guarantees should be followed adroitly and Punctiliously that to ascertain the *matrimonial property Act*. Construing those rights, the law must start from *the Constitution* and the rights and freedoms under it down to the applicable legislation.

61. It is essentially my view that women contemplated in Art. 45(3) of *the Constitution* by dint of their marriage should have equal protection of the law and not be discriminated against on the basis of gender or marital status in the event their contribution majorly on acquisition of the marital property falls within the category of domestic work and management of the matrimonial home;
 - (b) child care;
 - (c) companionship;
 - (d) management of family business or property; and
 - (e) farm work.
62. The upshot of these elements when weighted with monetary contribution, there are high chances of them carrying higher percentage values which should form the basis of the metrics in the distribution matrix of the matrimonial property on dissolution of the marriage. In the second limb of interpreting Art 27(1) & (4) of *the Constitution*, married women contemplated in Art. 45(3) should not be discriminated against on the basis of their marital status which includes the right to be accorded the same right as their spouses with equal capacity to enter into contracts, commercial or joint ventures with third parties or spouses for that matter, acquire and maintain rights to property independently regardless of their marital status or union. For our purposes, at the moment this is one of the key legal battle ground under the *Matrimonial Property Act*, 2014. This is not to invalidate the fact that marriage invariably results into acquisition or owning assets and liabilities jointly as between spouses at the time of marriage, during and after dissolution by way of a decree absolute. There is therefore no doubt in law as the acquisition of property by marriage.
63. Generally speaking, the root of the problem, is that attitudes, values, societal expectations, culture, customs etc. have undergone intergenerational metamorphosis on the view of marriage. For those



accustomed to the African culture and customs some decades back divorce was rare and any spouse contemplating divorce implied a social stigma within the clan or community. That is not the case now in the 21st century that for better or worse vows in our churches, dedicated garden grounds to solemnize the wedding or the civil unions oversights by the Attorney General's office soon thereafter. Divorce is more common and more socially acceptable. The marriage union can no longer be conceptualized as a sacrament of holy matrimony but with such avalanche of litigation under the *Matrimonial Property Act* in which declaration of property rights by one spouse against another is analogous to a company limited by guarantee or shares or a business partnership which is capable of being liquidated at will. This is the tension in which this originating summons between the applicant and the Respondent for them to have a break away from the past and open up a new chapter maybe with new relationships or marriage solemnization. What is more important from the evidence is that the applicant was not a remote controller during the subsistence of the marriage as the respondents tried to convince this court to accept that narratology. When this is so, fairness requires that these features of other elements of contribution should be taken into account by the court when exercising its statutory powers under the *Matrimonial Property Act*. This equality sharing principle is derived from basic concept of equality which permeates any marriage union at its formation, subsistence until death or divorce.

64. From my perspective, I rule against the Respondent's typology to this court which can be summarized briefly with this maxim, "once you get out you lose everything". Based on the evidence, this marriage solemnized at Kabaskei SDA Church in then Nandi District within the then Rift Valley Province on 7/04/1987 and blessed with three issues does merit an entitlement to the applicant of a matrimonial home which is to be the continuing home for her and the children. In the comparative jurisprudence in *Millennium Educational Trust v. State of Karnataka (2013) ILR Karnataka 1452*, the court held:

"Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore includes: adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other amenities etc, so as to have easy access to his daily avocation. The right to shelter, therefore does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being."

65. In addition, the Supreme Court of India in *Tukaram Kana Joshi v. Maharashtra Industrial Development Corporation (2013) 1 SCC 353* had this to say:

"The right to property is now considered to be, not only a constitutional or statutory right, but also a human right. Though, it is not a basic feature of *the Constitution* or a fundamental right, human rights are considered to be a realm of individual rights such as the right to health, the right to livelihood, the right to shelter and employment etc. Now however Human rights are gaining an even greater multi-faceted dimension. The right to property is considered very much to be a part of that new dimension"

66. What often is overlooked in matrimonial property litigation is the question of continuity of either of the spouses whose marriage has been extinguished or terminated for reason of death or divorce that none should be rendered Stateless, a refugee or an asylum seeker in his/her own country of birth. In these matters related to matrimonial property there is a legitimate expectation and a duty of care owed by one party to the other notwithstanding the irretrievable breakdown of once lovely happy marital union. That is the duty of care the Respondent can not run away from by urging this court to release the applicant from the marriage without any compensation.



67. Given the letter and the spirit of the law together with the parameters which guide the court to exercise discretion on distribution of the marital estate, I am of the strong view having listened to the viva voce evidence from both parties, despite the differences in the amount of their contribution this is one case they should be regarded as having equal beneficial interest to the residual net estate. What is being ignored substantially is the unique contribution being made by wives in the form of services as a home maker and child rearers or caregivers from conception to ad-infinitem. However this court does not lose sight on the monetary contribution which is a major capital investment when it comes to the purchase of real property and the reason why that factor seems to carry more weight in comparison with the other aspects of a home maker, companionship, or in contributing child bearing and incidental services which go with it
68. As a cautionary statement to the Kenyan women, the Matrimonial Property Act has formulated guidelines for the protection of their rights referred to as prenuptial agreements. This is the covenant for now and not the future in guaranteeing the provisions of the Constitution and statute law on matrimonial property rights.
69. Having meticulously analysed the evidence and legal principles applicable to this case, this Court now proceeds to make the following observations regarding the properties in contention:
70. With respect to Pioneer/Ngeria Block 1 (EATEC)/10xxxx , the Court notes from the evidence adduced that this property was subsequently sold by the Respondent vide a sale agreement dated 16th March, 2020. The law is clear that only existing matrimonial property at the time of determination can be subject to division. Where property has been lawfully alienated prior to the resolution of matrimonial property disputes, such property no longer forms part of the distributable matrimonial estate. Consequently, this Court declares that Pioneer/Ngeria Block 1 (EATEC)/10xxxx no longer constitutes part of the matrimonial property available for distribution between the parties.
71. Similarly, regarding Block 15 Plot No. 896 UPN: xxxx , the evidence demonstrates that this property was also sold by the Respondent vide a sale agreement dated 8th August, 2018 for a consideration of Kshs. 1,200,000/=. Following the same principle articulated above, this Court declares that Block 15 Plot No. 896 UPN: xxxx has been validly alienated and does not form part of the matrimonial property subject to division in these proceedings.
72. Concerning the 11 acres with tea plantation on Plot No. 1xxxx in Nandi Chepkumia registered in the name of Benjamin Sigira Magicho, the Court finds that this constitutes ancestral land inherited by the Respondent from his father. Section 6(2) of the Matrimonial Property Act explicitly exempts trust property, including property held in trust under customary law, from the definition of matrimonial property. Ancestral land passed down through patrilineal inheritance falls within this exemption. This position is reinforced by the Applicant's initial prayer in her Originating Summons seeking that this particular property be fully apportioned to the Respondent. This Court therefore declares that the 11 acres with tea plantation on Plot No. 1xxxx in Nandi Chepkumia do not constitute matrimonial property within the meaning of the Matrimonial Property Act.
73. Having excluded the aforementioned properties from the distributable matrimonial estate, this Court finds that the remaining properties namely Eldoret Municipality Block 9/1652 and Pioneer/Ngeria Block 1 (EATEC)/xxxx constitute matrimonial property acquired during the subsistence of the marriage and are therefore subject to equitable division between the parties.
74. Based on the totality of evidence adduced regarding both monetary and non-monetary contributions by both parties, this Court determines that the Applicant and Respondent are each entitled to a 50% share in Eldoret Municipality Block 9/1652 and Pioneer/Ngeria Block 1 (EATEC)/xxxx .



75. In conclusion and on the strength of this cause of action evidence together with the discharge of the burden of proof on a balance of probabilities, the following orders shall abide:

- a. As for Eldoret Municipality Block 9/1652 and Pioneer/Ngeria Block 1 (EATEC)/xxxx, be and are hereby declared as the net marital estate capable of being distributed between the applicant and the respondent, with the condition precedents to crystallize the rights:
 - i. That within 60 days from the date of this judgment, the parties shall agree on and appoint a registered valuer to conduct a professional valuation of Eldoret Municipality Block 9/1652 and Pioneer/Ngeria Block 1 (EATEC)/xxxx. In the event the parties cannot agree on a valuer within this period, the Court directs that the County Valuer, Uasin Gishu County, shall undertake the valuation exercise. The cost of valuation shall be borne equally by both parties.
 - ii. Upon completion of the valuation, either party shall have the option to buy out the other's 50% share in either or both properties at the professionally determined market value. This option shall be exercised in writing within 45 days of receiving the valuation report.
 - iii. That in the alternative, both parties be at liberty to express interest in buying out the other's share in the same property. Preference shall be given to the party offering the highest purchase price above the professionally valued amount. The party with the highest offer shall be given the right to purchase the property. In case of identical offers, preference shall be given to the party currently in occupation of the property.
 - iv. That during the implementation period, neither party shall encumber, lease, or alienate their interest in the properties without the written consent of the other party or the leave of this Court.
- b. That the property for this matrimonial cause classified as family estate of the Respondent, yet to be distributed under the Law of Succession shall not form part of the free marital estate for division between the parties.
- c. That the properties identified as having been sold to third parties who have acquired beneficial or registrable interest for purposes of this cause does not form part of the marital estate for lack of notice to the third parties and not being part of these proceedings.
- d. That the Respondent having failed to adduce credible material evidence as to the assets acquired by the applicant before or during the subsistence of the marriage shall not form part of the matrimonial property for purposes of this dispute.

76. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF MAY 2025.

In the Presence of

Mr. Ndege Advocate for the Respondent

Mr. Mengich Advocate for Kagunza for the applicant

Mr. Nyachiro Advocate for the Respondent

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R. NYAKUNDI



JUDGE

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