WKM v EJ (Matrimonial Cause E008 of 2022)
[2025] KEHC 6466 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6466 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MATRIMONIAL CAUSE E008 OF 2022

JRA WANANDA, J

MAY 23, 2025

BETWEEN

WKM ..... PETITIONER

AND

EJ ..... RESPONDENT

JUDGMENT

1. Before the Court is the Petition dated 7/11/2022 and filed in Court on 9/11/2022. The same is filed by the Petitioner in person and seeks orders are as follows:

    i. That since the marriage between me and the Respondent has been dissolved, the matrimonial property be equally divided between us.

    ii. That the Respondent be compelled to desist from registering any caveats or cautions on the said land until a subdivision is carried out.

    iii. That the Respondent be compelled to pay costs of these proceedings.

    iv. Any other relief this Honourable Court may deem fit and just to grant.

2. At the start of the trial of this matter, I allowed the Petitioner to amend prayer (i) above by inserting therein the parcel of land known as "Uasin Gishu/Kimumu/XXX" and the "motor vehicle Registration number KAL XXH" as constituting the matrimonial property referred to therein, there being no objection to the request. The prayer (i) therefore now reads as follows:

    "i) That since the marriage between me and the Respondent has been dissolved, the matrimonial property, Uasin Gishu/Kimumu/XXX and the motor vehicle Registration number KAL XXH be equally divided between us."

3. In the body of the Petition, the Petitioner stated that he successfully filed for divorce on 24/02/2020 in Divorce Cause No. XX of 2020, upon which a Decree Nisi was given on 6/12/2021 by the Magistrate's Court, and on 20/06/2022, a Decree Absolute was issued thus bringing the marriage to an official end. He stated further that even before filing for Divorce, the couple, due to their unofficial separation, had already started dividing some of their property such as furniture and books, that on 29/06/2022, they held a meeting at Wagon Hotel, Eldoret and discussed the fate of their other properties such as a Saloon Car Registration No. KAL XXH purchased in 2002 and the parcel of land known as Uasin Gishu/Kimumu/XXX measuring 0.15 Hectares (hereinafter referred as the "suit land") and purchased in 2001.

4. He stated further that in 2018 they contracted Premium Valuers Ltd to value the suit land for purposes of a Court bond and the same was valued at Kshs 3,000,000. He stated further after some deliberations, they involved their children in the discussions concerning the suit land upon which the Respondent proposed 3 options, namely, (i) she pays the Petitioner ½ value of the suit land and she retains it, (ii) they divide the land into two equal portions such that they each take ½ share, or (iii) they sell the land and divide the proceeds equally. According to the Petitioner however, the Respondent reneged on the above proposals and instead, asked the Petitioner to go to Court as she was unwilling to surrender the suit land, and that the Respondent, despite interventions by her relatives advising on amicable division of the suit land, has remained adamant. Further, according to him, their children are also not averse to the division of the suit land as their interests are catered for in their ancestral land. He made further comments about his relationship with the Respondent and described their disagreements concerning their property but which are not directly relevant to the matters at hand. He then pointed out that the Respondent had lodged a caution over the suit land.

5. The Petitioner also filed his Statement dated 7/11/2022 in which he reiterated the matters above. He also added that he was employed by the Government in 1984 and was retrenched in 1996, that he got married to the Respondent on 6/12/1992 during which marriage they got 3 children who are now adults, and also acquired several properties which they both contributed to. He stated that during the marriage, the Respondent who was working with Telkom Kenya used her employer's loan facility to purchase the said car registration number KAL XXXH after an agreement between them on how they were going to meet other bills incurred by the family during the her loan repayment period and which was that the Petitioner was to meet house rent, school fees with other domestic requirements which he did satisfactorily, that they later bought the suit land which they paid for over a period of time between 2001 and 2003, that the total purchase price was Kshs 161,000/- and that the value thereof included trees and semi-permanent buildings. He stated that due to financial constraints, they moved into the suit land in early 2002 from Mwanzo area of Eldoret town notwithstanding that at that time, the suit land did not have electricity or piped water, that they have amicably dispensed with the sharing of household properties such as furniture and books and as regards a sideboard/cupboard given to them during their wedding, the same will go to the Respondent and he will deliver the same to her. He went on to state that the Respondent deserted the matrimonial home with the children in tow in 2009 thus he lived alone at the suit land for about 3 years, he later learnt that the Respondent was renting a house in Kesses near Moi University where she had secured a job, he looked for her and convinced her to move back to the suit land home because of the children, which she did, and the Petitioner then moved out leaving mature cypress trees and the dwellings on the property intact.

6. He stated that the Respondent has been living on the suit land to date and that he, Petitioner, has not been able to enjoy it. In conclusion, he stated that as they are now that officially divorced, there is no point in continued joint possession of the property between them.

7. The Respondent, through Messrs B.I. Otieno & Co. Advocates, filed the Response to Petition dated 23/11/2022. Regarding their divorce, she stated that although the Petitioner obtained a Decree Absolute, she was never involved in the Divorce Cause as she was not aware of it. She denied having any discussions with the Petitioner regarding division of their properties and stated that all she could recall was that the Petitioner demolished her matrimonial home in Moiben thus denying the Respondent the chance of salvaging any property therefrom and which that the Petitioner confiscated, including wedding gifts. She stated that she contributed in making the Moiben home habitable, planted trees and bananas, built toilets and dug a borehole thereon. Regarding the motor vehicle Registration number KAL XXXH, she stated that she is the one who purchased it on mortgage, thus it is co-owned with Telkom (K) Ltd and herself, and that it became handy for her especially since she got an accident and needs it for her movement to and from her workplace at Moi University. Regarding the suit land, she stated that the alleged valuation was for purposes of a Court bond and not sale, that it is the only plot her children who live with her know as their home and moreso after the Petitioner demolished their house in Moiben.

8. She contended that she has been very categorical that she is not agreeable to the suit land being subdivided or sold because it is the only home where she resides with her children who are still under her care even though some are adults, that it is the only property her children know as their home and if anything, it should be registered in their names to safeguard their interest, and that in fact the same is not "matrimonial home", the "matrimonial home" being the one that was demolished by the Petitioner. She contended further that the Petitioner already has two homes built for him by his 3rd wife who later left him leaving him the house and the 2nd house was also built by the 4th wife whom the Petitioner lives with to date, and that all that the Petitioner wants to do is to sell the house and leave their children homeless. He then stated that is her who has single-handedly taken care of the children, paying their school fees and providing them with all basic needs while all the Petitioner has majored in is to get married left and right and taking care of children who are not his biologically. She then stated that the suit land was in fact a gift from her parents who paid Kshs 80,000/- to enable her secure the same, that since the whole purchase price was Kshs 140,000/-, the balance of Kshs 60,000/- was paid from the couple's hotel business which it is the Respondent who took a loan of Kshs 60,000/- to put up and which was then managed by the Petitioner and that this is how they managed to pay the Kshs 60,000/- balance.

9. According to the Respondent, the Petitioner is hell bent to render the Respondent and their children homeless and that is from the suit land that the Respondent has a small farm where she gets maize and rears a cow a and sheep for the benefit of the children since she earns only a basic salary of Kshs 15,000/- from her employment. In conclusion, she stated that the Petitioner moved out of the suit land, he never contributed anything in the building and/or structure thereon, and that she single-handedly made the house habitable since the Petitioner opted to be retrenched in 1996.

10. The Respondent also filed the Statement dated 23/11/2022 in which she, too, reiterated the matters already captured above. She however added that she was employed by Telkom Kenya in 1993 and was retrenched in 2007 before she was later employed at Moi University in 2011 where she works to date. She also confirmed that she got married to the Petitioner on 6/12/1992, and they got 3 children who are under the Respondent's custody, the last born being in Form 4 and the other two are still unemployed.

11. The Petitioner then filed the "Response to Reply to the Petition", dated 29/11/2022. In the Statement, the matters not already pleaded above was that the Respondent has already bought building materials which she intends to use to build herself a home on a 10-acre parcel of land given to her by her father. He also denied that the Respondent's parents partly paid for purchase of the suit land.

12. Subsequently, the Respondent also filed the Witness Statement dated 11/10/2023 made by one Peris Jerotich Chepsoi, who described herself as the Respondent's mother. She stated that the Petitioner and the Respondent, after their marriage initially lived in Mwanzo estate in Eldoret Town and both were employed, that the Respondent, due to the Petitioner's irresponsibility, struggled to pay rent and in 2001, she informed her parents that the couple had secured a parcel of land in Kimumu (the suit land) which also had a temporary structure on it but they had no money to pay for it, that the parents stepped in, met the vendor and paid him a total of Kshs 80,000/- on different dates while the couple later settled the balance of Kshs 60,000/- and moved into the suit land. She stated further that she is aware that the Respondent secured a loan from Barclays Bank to put up a hotel which the Petitioner could operate and enable them to raise the said balance of Kshs 60,000/- which was then paid in instalments and thus, this is how the balance was settled. She added that they (Respondent's parents) supplied milk and vegetables to the hotel without payment. She stated further that the Petitioner, in 1996, opted for retrenchment and since then, has not been in any gainful employment and they (parents) even helped in paying school fees for the couple's children.

13. The Petitioner then appointed Messrs Kamau Mbugua & Co. to come on record as his Advocates which they did vide the Notice dated 26/10/2023. The Petitioner, through the said law firm, the filed the Further Statement of the same date in which he stated that during the 19 years of their marriage, the Respondent's mother was a frequent visitor to the couple's house in light of her strong attachment to the Respondent who is her last born child and that the frequency of her visits contributed to the downfall of the marriage as she attempted to micro-manage the couple. Regarding the suit property, he narrated how he identified the same for purchase, discussed it with the Respondent and they agreed to purchase it. He stated that the Respondent's parents appear as witnesses in the Agreement solely because the Respondent convinced him to allow her the parents to accompany them so as to assist in the negotiations for the purchase, and nothing more. He narrated how the payments for the suit land were made and insisted that the purchase money was entirely raised jointly by himself and the Respondent and he is not aware of any separate arrangements that the Respondent may have had with her own parents about raising of the purchase price.

14. Regarding the hotel business, he stated that it was his brainchild and as such, he injected capital in excess of Kshs 150,000/-, operated it as a family business, never drew any salary out of it bit ploughed every profit into family bills such as rent for the hotel, school fees and food. He also added that he had taken tenders to repair books for various educational institutions besides renting farms to engage in farming for food and commercial purposes. He described the Respondent as a spendthrift and always attempted to live beyond her means which is what made her dependent on her mother. He denied that he was an irresponsible father or husband and reiterated that he carried out all his family responsibilities. He then went into matters touching on the Respondent's character and morality and their personal family issues which matters are not relevant to the issues at hand herein and which I will not therefore recount. He then stated that he is the one who settled a boundary dispute relating to the suit land, that he is the one who has been paying rates for the suit land and that in 2001, he purchased from the vendor of the suit land the semi-permanent buildings thereon at a cost of Kshs 21,000/- which transaction was not part of the earlier Sale Agreement and/or purchase price of Kshs 140,000/- which was only for the land and trees planted thereon and that it is he who also processed the issuance of the title deed which process the Respondent was not even involved nor participated in offsetting the cost. According to him, subdividing the suit land will not be viable economically and the open options are to either sell it and share the proceeds equally or either of them raises ½ the value and pay off the co-owner after the land has been valued.

15. The parties had also filed their respective bundles documents.

16. The suit then proceeded for viva voce hearing which commenced on 4/10/2023.

Petitioner's Testimony

17. The Petitioner testified before me on 4/10/2023 as PW1. As aforesaid, with leave of the Court, he, at this juncture, orally amended prayer (i) of the Petition to include the description of the suit land and the said motor vehicle. He then adopted his Statements and produced a total of 6 documents attached to his Petition and 1 exhibited to his Affidavit sworn on 2/06/2023. He then basically reiterated matters already captured in his pleadings earlier referred to and added that the suit land, in the Sale Agreement, measures 552 square metres but in the title deed is about 0.8 acre (approximately 0.15 Hectares). He reiterated that the suit land is too small to be subdivided and the option is to sell it and they share the proceeds equally. He stated that as per the Valuation Report he supplied, the value of the suit land is Kshs 3,000,000/-. As for the children, he testified that, if at all they are there, he can arrange to get them alternative accommodation. In cross-examination, regarding the questions touching on the matters already captured in his pleadings, he basically answered in the same manner and I will not therefore recite the same. He stated that they started cohabiting around 1990, got married in 1991 and lived together until 2009, and they acquired the suit land around 2001. He conceded that he had not produced evidence to demonstrate that he used to run the various businesses he alleged. Regarding the children, he stated that they are now grown up but agreed that their home is the suit land and that he himself lives in Moiben in his ancestral land where he has been living since he moved out of the suit land about 12 years ago in 2009.

18. Regarding school fees for the children, he reiterated that it is he who used to pay. He then testified that in the suit land, he made a lot of improvements, including, erecting a gate, fencing it, building a toilet, installing electricity and water and also constructing a car park. He also stated that when he visited the home recently, he noticed that it had been painted and also it had some "mabati" (iron sheets). He stated further that they both contributed for the property and as for the children, they are adults who can fend for themselves, that the eldest is about 32 years, 2nd is about 28 years and the last born is about 20 years. According to him, the 1st born uses drugs and sometimes goes back to the mother's house and that the suit land's existence gives the children a false sense of comfort and this is a further reason why it should be sold.

19. At this juncture, I adjourned the matter due to time constraints, and upon the Respondent applying to file the Further Witness Statement that was eventually made by one Peris Chepsoi, the Respondent's mother, I allowed the Application and also gave corresponding leave to the Petitioner to also file his own Further Statement that he eventually filed in response, as also already referred to above. In the circumstances, I directed that the Petitioner would be permitted to give further-in-chief should he find it necessary to do so.

20. When the matter resumed on 25/07/2024, the Petitioner (PW1) indeed asked to give further evidence-in-chief, and which I allowed. He adopted the said Further Statement dated 26/10/2019 and produced the 11 additional annexures thereto. Regarding the purchase of the suit land, he insisted that the Sale Agreement only included the land itself and the trees but did not include the semi-permanent structures thereon. He denied that the purchase price money came from the hotel business which he stated, only catered for school fees and other expenses. He also denied that the Respondent's mother supplied any items/foodstuffs for the hotel. He testified that the mother lives in Kaptagat, far away, and that he used to get supplies from town where the hotel is located. Regarding the family's upkeep, he insisted that both he and the Respondent contributed. He stated further that he is now approaching 60 years and his father left him some parcels of land in which he intends to settle his said 3 sons. According to him, he only came to Court as a last resort after the Respondent declined out of Court settlement.

21. In cross-examination, he stated that among their 3 children, the 2nd born is employed in Nairobi and lives in his own house, he does not know where the 1st born aged 32 years lives and the 3rd born still lives with the Respondent in the suit land. He testified that the house in the suit land has 1 bedroom but there is also a mud-house which is where the children sleep whenever they visit. Regarding the hotel business, he reiterated that it is him who injected the investment thereon and which he raised from his farming and book-binding businesses although he conceded that he had not produced any evidence of the binding business. About allocating land to his 3 children, he stated that he will do so as soon as his family concludes the Succession proceedings for his late father who died in 2022. Regarding the 1st born son, he added that he was married but separated with his wife then returned home to live with the Respondent (the mother) at the suit land. In re-examination, he reiterated that the 1st born son is on drugs and that he also does not want the children to fight over the suit land and thus the best option is to sell it and he then settles the sons elsewhere. About the Respondent, he stated that she is paid house allowance under her employment and can therefore cater for herself.

Respondent's Testimony

22. The Respondent also testified on the same 4/10/2023, as DW1. She too reiterated matters already captured in her earlier pleadings referred to hereinabove and which I will not therefore again recount. She stated that she started living with the Petitioner in 1991, she got a job at KenKnit in 1993 and later at Telkom Kenya in the same 1993. Regarding the suit land, she testified that they purchased it around 2000-2001, that it used to belong to a workmate of hers but because they did not have money, the Petitioner asked her to request for the money from her parents, which she did and her parents agreed to assist.

23. She stated that on the date that her parents paid the purchase price, those present were the vendor and his wife, the Petitioner, the Respondent and the Respondent's parents, that the payment was made in Eldoret town and the amount the parents paid on that day was Kshs 40,000/- out of the purchase price of Kshs 160,000/-. She stated that on a later date, the same group went to the vendor's rural home in Turbo-Kipkaren and on which date the parents paid another Kshs 40,000/-. She then reiterated that the balance of Kshs 80,000/- was paid by the Petitioner out of the proceeds of their hotel business which was set up after the Respondent took a loan of Kshs 100,000/- and injected it therein and which hotel the Petitioner used to run. She stated that she still lives with their 1st and 3rd born sons in the suit land. She also stated that they made improvements in the suit land including upgrading the house which was initially mud-walled and also fencing the land and that for these improvements, they both contributed. She conceded that in the Sale Agreement dated 3/02/2001, her parents are indicated only as "witnesses". She opposed the Petitioner's proposal that the suit land be sold as she insisted that for her, it is the only home she knows, but for the Petitioner, he has 2 other homes in Moiben, including their former matrimonial home.

24. At this juncture, it was agreed that because of the advanced age of the Respondent's next witness, her mother, the Respondent would be stood down to allow her mother to testify.

25. When she testified, the Respondent's mother, Peris Jerotich Chepsoi (DW2) reiterated matters already stated in her Statement and added that she and her late husband assisted the couple herein to purchase the suit land as the Petitioner, at that time, did not have a job. She stated that they came to Eldoret town to meet the vendor and although there is nothing in writing, she and her husband paid the vendor a sum of Kshs 80,000/- but the vendor retained the title deed until full payment. She stated that when they later went to collect the title deed, the vendor, although he released the title deed to them, told them that a balance of Kshs 10,000/- was still pending and which, according to her, the Petitioner and the Respondent were to settle. She however conceded that she did not know the purchase price. She

stated that at some point, the Petitioner and the Respondent used to run a hotel business in Eldoret town and that she (DW2) and her husband used to supply the hotel with items such as maize, meat, and charcoal. She then adopted her Statement. In cross-examination, she stated that she is 90 years old. Regarding the financial assistance to purchase the suit land, she stated that the Respondent went alone to seek the assistance from her and her late husband. She reiterated that the amount she and her husband paid to the vendor was Kshs 80,000/-. In re-examination, she stated that when she and her husband paid the money, they did not ask for any Receipts or written Acknowledgements. She also agreed that when they went to collect the title deed from the vendor, they (herself and her husband) were with the Petitioner and the Respondent.

26. The Respondent (DW2) then returned for cross-examination on 31/10/2024. In her testimony, she conceded that under her employment terms, she is paid a monthly house allowance of Kshs 10,784/-. She also agreed that she was not yet employed when she got married to the Petitioner who, on his part, was already employed by then and also had some household properties of his own. She conceded that the purchase of the suit land was the Petitioner's idea but insisted that they consulted each other. She stated that in the Sale Agreement, the purchase price is indicated as Kshs 140,000/- but which figure captured only the land and trees, and was silent on the structures, although in her view, the figure included the structures as well. She denied any knowledge of the subsequent Agreement dated 27/08/2002 between the Petitioner and the vendor. Regarding her parents' payment of the said Kshs 80,000/-, she described it as a gift to herself, and as her contribution to purchase of the suit land. She conceded that the Petitioner was running a book-binding business and also that it is the Petitioner who processed the title deed for the suit land. According to her, the suit land is ¼ acre although the tile deed indicates 0.15 Hectares and there is a dispute with their neighbours in light of this discrepancy.

27. She conceded that she left the matrimonial home in 2009 and went to live with her parents before later moving to Nairobi where the children later joined her, but she later returned home as she wanted the Petitioner to pay school fees for the children. She stated that she later got a job at Moi University and went to live nearby, in Kesses, where she rented a house, that when the Petitioner visited and noted how they were struggling with life, he asked them to return to the matrimonial home, which they did. She conceded that her father, by her Will, left her some property. About the motor vehicle, she conceded that it was purchased in 2001 during the marriage but insisted that she is the one who purchased it and that is why it was registered in the joint name of herself and Telkom Kenya, her employer. In re-examination, she stated that she purchased the motor vehicle because she had a problem with her leg and needed it to go to work. Regarding the Petitioner's book-binding business, she stated that the whole family used to assist in binding, especially during weekends.

Submissions

28. After close of the trial, the parties filed written Submissions. The Petitioner filed the Submissions dated 25/11/2024 while the Respondent's Submissions is dated 16/01/2025.

Petitioner's Submissions

29. In his lengthy Submissions, Counsel for the Petitioner submitted that "this case is not only about property, it is also about fairness, dignity and the right to move forward independently after the end of shared life". He pointed out that although the Respondent initially in her "Response to the Petition" contested that the suit land was "matrimonial property", later during cross-examination, she acknowledged that the both the suit land and the subject motor vehicle are indeed "matrimonial assets". He submitted that a fair division of the properties, based on a 50:50 split, is equitable, given a fair consideration to both party's contributions. He pointed out that the suit land measuring approximately 1/8 acre (0.15 Hectares) is jointly registered in the names of both their names, that

the purchase price, including trees and buildings, totalled Kshs 160,000/- which was paid over a 2-years period, but that the structures were later acquired for practical and economic reasons. Regarding the motor vehicle which, he agreed, is registered solely in the name of the Respondent, he reiterated that it was acquired during the marriage and that although it was acquired through a loan from the Respondent's employer, it was intended for family use and both parties made both financial and non-financial contributions towards its acquisition. He submitted that in a gesture of fairness, and to expedite a peaceful resolution and not to belabour the Court, the Petitioner proposes a token amount of Kshs 40,000/- as his fair share of the motor vehicle which was bought at Kshs 300,000/- and which share reflects a meagre 13.3%. He proposed that if the Petitioner cannot raise the said sum, then the same be deducted from her 50% share of the suit land and that the proposal is made because the Respondent has enjoyed the car alone since 2009, thus denying the Petitioner the same enjoyment.

30. Regarding the children, Counsel submitted that they are grown up men who have not come to Court to state their case and the Respondent cannot purport to speak for them as they are adults. He also submitted that since the Petitioner has a home in Moiben and the Respondent is paid house allowance, both can set up homes where the children can be visiting. She proposed a 60 days period to allow the Respondent get alternative accommodation as she has stated that she cannot pay for the interests of the Petitioner for the suit land. He submitted further that under Section 14 of the *Matrimonial Property Act*, 2013, joint registration of the suit land presumes equal ownership and no compelling evidence has been presented to rebut this presumption. He averred that during the marriage, financial and non-financial contributions were made by both parties contributing to the acquisition, maintenance, development of the "matrimonial property" and such contribution by the Petitioner enabled the Respondent to pursue her career, secure loans which then enabled her to otherwise contribute to family assets. He cited Sections 6, 7, 14 of the *Matrimonial Property Act*, 2013, Article 45(3) of *the Constitution* and several authorities, both local and international. He also pointed out that besides the Petitioner's activities as a farmer, and operator of a hotel and other businesses contributing to the family's finances, his non-financial contributions such as managing the household, overseeing family businesses and caring for the children were also crucial in maintaining the family's stability.

Respondent's Submissions

31. On his part, Counsel for the Respondent, in his brief Submissions, urged, without giving any particulars, that the issue of sale and distribution of the motor vehicle was abandoned by the Petitioner. He then pointed out that even the acreage of the suit land has not been determined since there is an unresolved issue of public road affecting the neighbours. He contended that the suit land is where the couple's children call home, that the Petitioner has not given them any land elsewhere, and that the Respondent submitted that the suit land can be registered in the name of the children since they have no other home and yet the Petitioner has a large track of land in Moiben. He also averred that from the evidence on record, it is the Respondent who made substantial contribution in acquisition and development of the semi-permanent house on the suit land. In conclusion, he submitted that once the boundary of the suit land is determined, then the same should be registered in the name of the couple's children as their inheritance from their parents.

Determination

32. The broad issue that arises for determination in this matter is evidently as follows:

> "Whether the suit land and the subject motor vehicle herein constitute the parties' herein "matrimonial property", and if so, in what manner should they be shared out or distributed between them, if at all?"

33. In this case, it is not in dispute that by the Judgment and Decree Nisi dated 26/11/2021 and made in Eldoret Chief Magistrate's Court Divorce Cause No. 16 of 2020, the parties' marriage solemnized on 6/12/1992 was legally dissolved, and such dissolution formalized by way of the Decree Absolute given on 9/09/2021.

34. Regarding the definition of "matrimonial property", Section 6(1) of the *Matrimonial Property Act* gives the following explanation:

> "(1) For the purposes of this Act, matrimonial property means—
>
> (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."

35. The starting point on the law governing division of "matrimonial property" in this country is *the Constitution* of Kenya, 2010 and the *Matrimonial Property Act*. Article 45(3) of *the Constitution* provides as follows:

> "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."

36. The phrase "equal rights" has been the subject of intense debate on what it exactly means. It is now however generally agreed that "equality of parties" alluded to in Article 45(3) does not necessarily mean equal proprietary entitlement. 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 (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment). In that case, the Supreme Court guided as follows:

> "In the event that a marriage broke down, the function of any court was 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) had the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages. Noting the changing times and the norms in the society, 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 matrimonial property. That could not have been the intention of Kenya's law on the subject."

37. Similarly, Kiage JA in the Court of Appeal case of PNN v ZWN [2017] eKLR, expressed himself as follows:

> "First, while I take cognizance of the marital equality ethos captured in Article 45 (3) of *the Constitution*, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough;"
>
> .....

Does this marital equality recognized in *the Constitution* mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra."

38. Indeed, Section 7 of the *Matrimonial Property Act*, which Act was enacted to give effect to the principle in Article 45(3) of *the Constitution* provides as follows:

> " 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."

39. There is therefore no longer any room in our laws for the conduct commonly referred to as "gold-digging" where spouses carefully head-hunt wealthy suitors and lead them into sham marriages without the slightest intention of building the marriage into a permanent institution but with the sole aim of subsequently "rocking" it from within, causing it to collapse and in the end hoping to walk away with a fortune. This scenario was again well captured by, Kiage JA, in the same PNN vs ZWN case (supra), in which, in his usual trade-mark poetical style, he expressed himself, rather strongly though, in the following terms:

> " I think 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. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say *the Constitution* gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."

40. Further, in the case of EGM v BMM [2020] eKLR, the Court of Appeal remarked as follows:

> " We think it was erroneous for the learned judge to assume and hold that *the Constitution* gives spouses an automatic 50% share of the matrimonial property simply by being married.
>
> .....
>
> The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed."

41. From the foregoing, it is evident that the "equality of spouses" principle in respect to division of property means that a spouse's entitlement must be commensurate to his/her contribution. The logic is that dividing property between spouses on a 50-50 basis as a matter of right will result into the absurd and unfair situation where one spouse may be unfairly denied his/her rightful share and the other may be enriched in excess of his/her contribution. This principle was acknowledged even in the earlier, pre-2010 Constitution, Court of Appeal case of Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR.

42. On its part, Section 14 of the *Matrimonial Property 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."

43. The Court of Appeal, in the case of PJS v MHAD; AMH (Interested Party) (Civil Appeal 350 of 2017) [2022] KECA 641 (KLR) (24 June 2022) (Judgment), while analyzing the mechanism of sharing out of "matrimonial property" where such property is registered in the joint names of the couple, also guided as follows:

> " 57. The next question which we are concerned with is the consequence of registration of a title in the joint names of a married couple without a declaration of the individual beneficial interest.
>
> 58. It is not in dispute that both parties originally decided to purchase the Kilimani property as their matrimonial home and that the property was purchased and conveyed into their joint names as joint tenants. The question is, does a joint tenancy in such circumstance automatically give rise to equal ownership or does a beneficial trust arise under which the degree of ownership is determined by the direct financial contributions of the parties?
>
> 59. The legal starting point is clear, where the legal estate in land is in the joint names of parties, those named are presumed to hold the beneficial interest equally. This presumption is however rebuttable and can be displaced by evidence to the contrary. (See Pecore v. Pecore, [2007] 1 S.C.R. 795, 2007 SCC 17, Kamore v Kamore [2000] 1 EA 81 and Kivuitu v Kivuitu [1991] LLR 1411 CAK). How then, is such presumption to be rebutted? The appellant appears to propose that the answer lies solely in the examination of the financial contribution of the parties to the purchase of the house as determined in Echaria v Echaria (supra) and that the intention of the parties is irrelevant. However, the devil is in the details.
>
> 60. The distinction between the Echaria case and this one is quite evident, and of course well known to Dr. Kuria, who represented the respondent in that matter. In that case, the property in dispute was bought and registered in the name of only one spouse, being the husband. .....
>
> .....

61. The significance of the above passage is that where spouses hold property jointly, the beneficial share of each does not solely depend on their proven respective proportions of financial contribution towards the acquisition of the property. In Kivuitu v. Kivuitu, where the husband and wife held property jointly but the original deposit and the subsequent mortgage instalments were paid by the husband, the court found that the wife clearly made a financial contribution through employment and the businesses she ran. The court stated that even though her contribution was intermittent and not as much as the husband's, she and the husband bought the property as a family venture, had it registered in their joint names and that they clearly intended to hold it in equal shares as a family asset. Agreeing with this decision, the learned Judges in Echaria stated the following:

> " On analysis, we have come to the conclusion that Kivuitu's case was correctly decided both on law and on facts as it is a case where the husband and wife had a joint legal interest and a resultant equal beneficial interest in the property. The court in Kivuitu's case did not lay any general principle of equal division as suggested."

62. According to the decision rendered in Stack v. Dowden (supra), in a case of joint legal ownership the onus is on the party who wishes to show that the beneficial interests are not equal.

63. The starting point is not a resulting trust but to look at the intention of the parties with respect to the property and their conduct in relation to it. In the views of Baroness Hale in Stack v. Downden, whether the couple is married or cohabiting, the principles of law are the same in ascertaining the intentions of the parties with respect to their beneficial ownership. The only difference may be the inferences drawn from their conduct. The question therefore is not simply "...did the parties intend their beneficial interests to be different from their legal interests?"

64. Undeniably, when a couple agrees to share their lives in a joint home, they do so on the basis of mutual trust, love and affection and in the expectation that their love will endure all trials and tribulations. "Till death do us part" is not an aspirational ideology to most couples at the moment of making important legal and family decisions but a genuine expression of an expectation made in good faith. Most couples consequently do not make any agreement, or have any express common intention as to what should happen in the event of the dissolution of the marriage. Unfortunately, that is what the parties herein did not envisage when the original decision of marriage and subsequent acquisition of the properties in dispute. It is natural and common ground that an unexpected end or dissolution of the marriage was not in their plan and mind.

67. Where there is no express agreement as to the respective beneficial interest of each spouse, it may be possible to infer their common intention as to their respective beneficial interest save from their conduct. In this regard, the contribution to the purchase price, payment of the loans taken and the manner in which parties conducted themselves will be telling. .....

.....

70. In short, what we are saying is that the direct contribution of spouses is an important factor for consideration where parties intend their beneficial interest to be different from legal interests. But the starting point rests with the maxim; 'equality is equity' and follows the law in ascertaining the beneficial interest of parties, the same is only rebuttable after having due regard to the whole course of dealings between the parties with regard to the property.

71. This then, is the duty that this Court is tasked with. We must make enquiries and determine upon re-examination of the evidence on record, whether the appellant provided clear and cogent proof that the presumption of equality should be displaced. This evidence must be convincing, in that it instantly tilts the scales in the affirmative when weighed against the evidence in opposition, leaving us with abiding conviction that it is true."

44. In this case, the properties in issue are two, namely, the suit land described as Uasin Gishu/Kimumu/XXX and the motor vehicle registration number KAL XXXH. The issue whether the properties constitute "matrimonial property" is not seriously in dispute considering that the suit land was acquired between 2001 and 2003 and the motor vehicle also around that time, and the parties got married in 1992 and divorced in 2022. Both properties were therefore clearly acquired during the subsistence of the marriage. It is evident from their testimonies that neither of the parties seriously disagrees that the properties were both acquired during the pendency of the marriage and are indeed "matrimonial property" there being no other evidence to the contrary. In any case, the Respondent who initially had tried, feebly in my view, to argue that the properties are not "matrimonial" did not pursue that line of argument subsequently any further.

45. The other matter that is interesting in this Cause is that while the Petitioner wants division of the property to be made at 50:50 thus signifying his acknowledgment that both parties contributed to their acquisition, development and/or maintenance, the Respondent, on her part, although she acknowledges the Petitioner's contribution, wants to retain both and rejects the proposal that the properties be divided or sold and the proceeds shared out. In respect to the suit land, she argues that it is the only place herself and her children know as home and regarding the motor vehicle, she argues that she needs it for her travel to and from work as she had at some point suffered an injury to her leg.

46. From the evidence on record, regarding the motor vehicle, the parties agree that it is the Respondent who purchased it out of a loan that she took from her then employer, Telkom Kenya, and that she is the registered owner thereof. The Petitioner has however argued that, although it is the Respondent who purchased the motor vehicle out of the said loan, he cushioned the Respondent from the effects of the financial burden of repaying the loan because he agreed to take over other substantial family expenses and that this is what then allowed the Respondent to smoothly repay the loan. He also referred to the usual non-monetary support and companionship that a spouse would be presumed to give to the other thus enabling that other to make gains in life such as career advancement and acquisition of assets. According to the Petitioner therefore, he, too, contributed to acquisition of the property, even if not directly monetary. I did not hear the Respondent disputing these claims by the Petitioner and neither did I hear the Respondent disputing that the motor vehicle was acquired to serve and/or cater for the family's needs. Everything remaining constant therefore, I find that the Petitioner has established that he indirectly contributed to the purchase of the motor vehicle and that is he therefore entitled to a beneficial interest thereto.

47. Fortunately, the Petitioner's Counsel has, in his written Submission, offered a proposed way out. He has pointed out that the motor vehicle having been purchased at the sum of Kshs 300,000/- (as alluded by the Respondent in her Statement), the Petitioner is willing to only ask for a sum of Kshs 40,000/- (13.3%) from the Respondent as "compensation" for his contribution and/or interest thereon, upon which he will fully and finally cede his claims over the motor vehicle. I do not find this proposal to be unfounded or unjust and I will consider it.

48. Regarding the suit land, while, according to the title deed presented to this Court, it measures approximately 0.15 Hectares (0.37 acres), in the Sale Agreement, the acreage is captured as 552 square metres (approximately 0.13 acres), no doubt a lesser acreage. Both parties agree that there is a boundary dispute as there is a discrepancy between the acreage indicated in the title deed and the actual size on the ground. As regards this dispute, the resolution thereof is not within this Court's mandate and I will therefore say no more about it.

49. Be the above as it may, an assessment of the evidence on record, again, reveals that the parties are not in disagreement that both of them contributed in the acquisition, development and maintenance of the suit land, in one way or another. While the purchase price was Kshs 140,000/-, there is evidence that Kshs 80,000/- may have come from the side of the Respondent and this claim the Petitioner does not seriously dispute. According to the Respondent, it is her parents who paid this amount to the vendor. On his part, the Petitioner argues that he was not party to the arrangement between the Respondent and her parents in respect to the raising of the Kshs 80,000/- and that even if it is the Respondent's parents who paid it, the same would only constitute the Respondent's contribution regardless of its source. It is also not disputed that the balance of Kshs 60,000/- was paid by the Petitioner. However, according to the Respondent, that balance of Kshs 60,000/- that the Petitioner paid was proceeds of the family hotel business which, although it was being run by the Petitioner, was set up through a capital of Kshs 100,000/- that the Respondent invested out of a loan that she obtained from Barclays Bank. She also claimed, which claims the Petitioner disputes, that her parents used to supply important items to the hotel to keep it afloat, such as vegetables, maize, milk, charcoal and meat, at no cost. On his part, the Petitioner argues that apart from running the hotel business in which he put in a lot of energy, he also injected capital of about Kshs 150,000/- thereon. He also stated that he never drew any salary out of the hotel business and ploughed back every profit into family bills such as rent for the hotel, school fees and food. He also contended that he also carried out farming and also operated a book-binding business and that therefore the balance of Kshs 60,000/- paid by him came from his various sources.

50. The Appellant also testified that he paid a further sum of Kshs 21,000/- to the vendor of the suit land to acquire the semi-permanent structures that the vendor had erected thereon and which were not part of the initial Sale Agreement which, according to him, only related to acquisition of the land itself and the trees grown thereon. There is also acknowledgement by both parties that the suit land has since undergone improvements and developments, including processing of the title deed, installation of electricity and water, payment of land rates, digging of a borehole, fencing, erecting of a toilet, painting, and others. The parties having lived in the suit land at different times after separating, after the other had moved out, these improvements were made at times when either was in occupation, and there is really no dispute that both contributed. It is also agreed that at the moment, it is the Respondent who occupies the suit land, the Petitioner having moved out and relocated to his ancestral home.

51. In respect to apportioning divorced parties' beneficial interests in matrimonial property and determining the parties' respective beneficial interest in cases where the property is registered in their joint names, as guided in the authorities above, the first principal is that the parties are presumed to hold the interest equally. The second is that although this presumption is rebuttable and can be displaced

by evidence to the contrary, in such case of joint legal ownership, the onus is on the party who wishes to show that the beneficial interests are not equal.

52. Looking at the claims and counter-claims made by the parties in this case, what is apparent is that neither of them seriously disputes the contribution made by the other to acquisition and development of the suit land. The point of disagreement seems to be only the manner that the contributions were made. None has also attempted to quantify his/her in terms of percentage or proportions and none has produced any serious documentary evidence to prove their contributions. In the circumstances, the suit land herein having been, and being registered, in the joint names of the two parties, I find that there has been no rebuttal of the presumption that they hold the interest equally. Each party is therefore entitled to 50% thereof. Since no challenge has been offered against the Petitioner's argument that it is impractical to sub-divide the suit land into two portions for each party to take ½ considering its small size, the options available seem to be two, namely, either for one party to buy out the other's 50% share, or alternatively, the suit land be sold and the proceeds thereof be shared between the two of them in equal proportions.

53. The Respondent has vehemently opposed both options. On the option of "buying out" the Petitioner, she has alluded that she no money to do so. On the option of the Petitioner buying her out, she also alluded that she does want to let go of the suit land. On the option of selling the suit land and sharing the proceeds equally, she argues that this will leave her children homeless. In short, the Respondent seems to want "to eat her cake and also keep it at the same time". This is not possible in life. She must acknowledge and recognize that the Petitioner holds a 50% stake in the suit land and which stake this Court cannot ignore or overlook in light of the already cited clear provisions of the law and *the Constitution*.

54. In any case, the 3 "children" that the Respondent keeps referring to are not even "children', they are all grown up adult men. From my estimate based on the testimonies presented before me, the 1st born is currently about 34 years old. According to the Petitioner, the 1st born was even married at some point before separating with his alleged wife and the Petitioner does not even know where he now lives. On her part, the Respondent stated that the 1st born returned home to live with her. The 2nd born is now about 30 years old and is said to be employed and lives in his own house. The last born should currently be about 24 years and is said to be still living at home. While it is said that everyone remains a baby "in the eyers of his/her parents", under our laws, a person who has attained the age of 18 years is an adult and except in exceptional circumstances, parental responsibility over him/her ceases. Even if I were to treat the 22 years old last born as still in need of parental care, I do not think the parties would be unable to take care of him if either of the options on the table herein is implemented. The Respondent cannot therefore unleash the children "card" to hold the Petitioner at ransom. In any case, the Petitioner has promised to allocate the children their inheritance from his ancestral land in Moiben and also arrange for their alternative accommodation. The Respondent is also employed and has also admitted that she is paid house allowance under her employment terms. She can therefore adequately cater for herself without holding on to the Petitioner's legally recognized 50% share of the suit property. On her proposal that the suit land be registered in the names of the children, this Court has no jurisdiction to make such an order in a matrimonial Cause and in any case, it cannot compel the Petitioner to accept the proposal when he is still alive. Only in the case of death can the Court, when dealing with Succession of an estate, make such an order.

Final Orders

55. In the premises, I rule and order as follows:

i. A declaration is hereby issued that for purposes of the now dissolved marriage between the Petitioner and the Respondent, the land parcel No. Uasin Gishu/Kimumu/XXX (suit land) registered in the joint names of the Petitioner and the Respondent and the motor vehicle registration number KAL XXXH are both matrimonial property in which both the two parties have equal beneficial interest. Each party is therefore entitled to an equal 50% share thereof.

ii. I grant the Respondent the first priority to "buy out" the Petitioner's 50% share of the said land parcel No. Uasin Gishu/Kimumu/XXX upon which the Respondent shall have and assume full ownership of the suit land and the Petitioner shall have no further claims thereon.

iii. In respect to the motor vehicle registration number KAL XXXH, the Petitioner having offered to receive a sum of Kshs 40,000/- in full and final settlement of all his claims over the motor vehicle, I also grant the Respondent the first priority to "buy out" the Petitioner at the said sum of Kshs 40,000/-.

iv. I give the Respondent a period of thirty (30) days to present to the Court a clear road-map of how she proposes to achieve or comply with the orders (ii) and (iii) above upon which, if satisfied with the same, the Court shall give timelines for the valuation of the land parcel No. Uasin Gishu/Kimumu/XXX and conclusion of the buy-out of the Petitioner.

v. Should the Respondent fail to comply with (iv) above within the timeline given, both the properties shall be valued, the same sold, and the proceeds shared out between the Petitioner and the Respondent, and the Court shall, at that point, give directions on the timelines and other logistics concerning the valuation and sale of the properties. In the event that this option of sale is resorted to, the Petitioner shall be at liberty, and have the first priority, to purchase the Respondent's 50% share in the properties, and thus fully and individually assume and/or retain ownership thereof as a whole.

vi. This being a family matter, each party shall bear his/her own costs of the suit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF MAY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

N/A for Petitioner's Advocate (but Petitioner present)

Mr. B. I. Otieno for the Respondent

Court Assistant: Edwin Lotieng