



**JMM v LKM (Matrimonial Cause E001 of 2021)  
[2025] KEHC 8923 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8923 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
MATRIMONIAL CAUSE E001 OF 2021  
AK NDUNG’U, J  
JUNE 20, 2025**

**BETWEEN**

**JMM ..... APPLICANT**

**AND**

**LKM ..... RESPONDENT**

**JUDGMENT**

1. The Applicant instituted this suit by way of originating summons dated 04/10/2021 for orders that;
  - i. The honourable court be pleased to declare that land parcels numbers Ontulili/Ontulili/Katheri/XXXX, Ontulili/Ontulili block 1 (Katheri) XXXX and Ontulili/Ontulili/Katheri/XXXX forms part of the Applicant’s and Respondent’s matrimonial property and were acquired by joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and registered in the sole name of the Respondent and its possession is held in trust for the Applicant.
  - ii. This hounarable court be pleased to declare that motor vehicle registration number KCK XXXX F forms part of the Applicant’s and Respondent’s matrimonial property and were acquired by joint funds and efforts of the Applicant.
  - iii. The honourable court be pleased to order that the above mentioned properties be valued and shared equally and if incapable of being shared, be sold and the net proceeds be shared equally.
  - iv. The honourable court be pleased to order the Respondent to provide and disclose a comprehensive list of all properties, shares and bank accounts she holds, both locally and outside the jurisdiction of this court and upon such said disclosure of the properties, shares and accounts, the same to be shared equally between the Applicant and the Respondent.
  - v. That the Respondent be ordered to pay the costs of this proceedings.



2. The application is supported by a supporting affidavit of the Applicant herein. He deposed that they got married in the year 2006 under the Meru customary law and have been living as husband and wife. That the stated properties were acquired jointly under the trusteeship of the Respondent through joint and individual funds. That the Respondent evicted him from their matrimonial home despite the fact that he contributed financially in construction of their matrimonial home and the Respondent forcefully took possession of the motor vehicle which he had bought without her assistance.
3. In response, the Respondent filed a replying affidavit dated 10/11/2021 where she stated that the prayers sought in the originating summons were untenable since the properties listed there did not constitute matrimonial properties as known in law. That she acquired the said properties solely without any contribution from the Applicant through loan facilities from co-operative bank and KCB bank and only the motor vehicle was acquired with joint funds from her and the Applicant. That the Applicant failed to attach pay slips or bank statements to show source of funds towards the acquisition of the properties. That they live in parcel Ontulili/Ontulili/Katheri/XXXX which was acquired by herself prior to the marriage and the same was built without any assistance or financial contribution from the Applicant.
4. In rejoinder, the Applicant filed a supplementary affidavit dated 25/01/2022 in response to the Applicant's replying affidavit. He maintained that the properties were acquired by their joint efforts during the pendency of their marriage. In respect to parcel XXXX, he deposed that he was the one who initiated and facilitated the purchase as attested by the affidavit of the seller (JMM-1) and involved the Respondent only because she was his wife. Further, she was earning a basic salary of Kshs.8,000/- at the time hence she could not afford to pay the purchase price. That he cleared the balance of Kshs.30,000/- as evidenced by acknowledgement receipt of 30/10/2006-JMM2. That his father witnessed the agreement hence it is false that he was not involved as a purchaser.
5. In respect to parcel XXXX, the Applicant avers that he was a witness to the sale agreement and they agreed that the property be registered solely in the name of the Respondent to hold in trust for him. That the loan purported to be taken towards the purchase price by the Respondent from KCB bank was taken on 30/09/2014 after the purchase of the property on 23/09/2014. That they agreed he repay the loan taken for the purchase of the suit property hence he made direct standing order from his chartered bank account to Respondent KCB bank account termed as upkeep which amounted to Kshs.13,000/-.
6. For Parcel XXXX previously known as 1018, it is deposed that the agreement attached by the Respondent was forged as the agreement was between him, the Applicant and one Mungatia Julius M'Mugambi. They both executed the sale agreement and he did not agree to have the same registered under the Respondent's name solely hence it was registered fraudulently without his knowledge. That he paid the total purchase price from his savings and the Respondent did not substantiate that she took a loan for the said purchase as the bank statements adduced were two years and four years prior to the purchase of the subject property. That there was no evidence that the loans purported to be taken by the Respondent were for the purchase of the suit properties.
7. In respect to the motor vehicle, he averred that he bought it solely as evidenced by the hire purchase agreement-JMM5 (a), JMM-5 (b)(i) to (v), local money transfer, JMM 5(c) (i) and (c) (ii), JMM5 (d) (i) &(ii) to show that he has been maintaining the vehicle and he was the one who insured it. That he was able to raise the money through his salary as a store man at BATUK. That the Respondent was not involved in construction of their matrimonial home as evidenced by affidavit of Samuel Maina-JMM8 who sold to him building materials and JMM-9 (i)-(ii) being receipts showing various purchase of materials by him. That he was paying school fees and other related fees as evidence by JMM-10,



JMM11, and JMM-14 and utility bills as evidence by JMM-12 (a), (b), (c) and JMM-14 depicts various payments and catered for essential shopping for the house as evidenced by JMM-13. That he further sent money for the upkeep to the Respondent and to her family members as evidence by JMM14 and JMM11, the Mpesa statements. That since 2013, he has taken various loans to facilitate purchase of matrimonial properties, development of matrimonial home and payment of various utilities which he is still doing till to date as evidenced by JMM15, loan statement from standard chartered bank.

8. The matter proceeded by way of viva voce evidence. The Applicant was the sole witness in his case. He adopted his affidavit dated 04/10/2021, supplementary affidavit dated 25/01/2022 and one dated 06/12/2023 as evidence together with the attached documents.
9. He testified that he is a store man at BATUK and was married to the Respondent until when their marriage was dissolved through the divorce cause No. E015/2021. That during the pendency of their marriage, they acquired the properties known as Ontulili/Ontulili/Katheri/XXXX(hereby referred as parcel XXXX), Ontulili/Ontulili block 1 (Katheri) XXXX (parcel XXXX), Ontulili/Ontulili/Katheri/XXXX (parcel XXXX) and Motor vehicle registration number KCK XXX F. He testified that the said properties are registered under the name of the Respondent except the motor vehicle. That in respect to parcel XXXX, he paid Kshs.100,000/- in 2006 and a further Kshs.30,000/- and in respect to parcel XXXX total price was Kshs.650,000/- and he contributed Kshs.350,000/-. In respect to parcel XXXX, total price was Kshs.720,000/- and he contributed Kshs.404,000/- and he took a loan of Kshs.130,000/- while the Respondent paid the rest. That he paid Kshs.1,380,000/- for the purchase of the motor vehicle. That he was the breadwinner and his prayer is for the properties to be shared equally and that since the properties cannot be subdivided, he prayed that the same be sold and each get their contribution.
10. On cross examination by Respondent's counsel, he testified that they got married in the year 2005 and acquired parcel XXXX in the year 2006 and he paid Kshs.100,000/- in cash and paid the balance of Kshs.30,000/- and there was an agreement. That there was an acknowledgment that he paid Kshs.30,000/- to Julius Kinoti attached to supporting affidavit of 25/01/2022. The Respondent was working at Homegrown and he is not aware that she took a loan and they bought the land as husband and wife though he did not have a certificate of marriage. In respect to parcel XXXX, he gave Kshs.350,000/- to the Respondent in cash. That the sale agreement was initially in their names but the Respondent changed the agreement to reflect herself only and he did not report to the police. That there was an affidavit by the seller showing that he paid the balance. He bought the motor vehicle and paid in bits. In respect to parcel XXXX, the same was bought in 2018 and the agreement is in their names and he paid Kshs.100,000/- and he paid the balance of the purchase price and in total, he paid Kshs.420,000/-. That he was the sole breadwinner and had taken the Respondent to school for one year and he paid the school fees. That the Respondent works at Nanyuki referral and she is earning. That she lives with the children but he pays the school fees. In 2006, she was working at Homegrown company when they acquired parcel XXXX. Parcel XXXX and XXXX were acquired when she was working at Nanyuki Referral.
11. On re-examination, he testified that he realised that the Respondent forged documents to show that she bought parcel XXXX alone but he went to Kiget's Advocate for the original agreement which had both their names. That her contribution was like 30%.
12. The Respondent was also a sole witness in her case. She adopted affidavit dated 10/11/2021 as evidence. She testified that in respect to parcel XXXX, the sale agreement is dated 26/08/2006 and she took a loan of Kshs.150,000/- from Siraji Sacco. At that time, she was working at Homegrown company. That she was not even a friend to the Applicant at this time and she did not know him. That the Applicant's sister one Nancy Muringo showed her the owner of the land which was near their father's. Nancy sent the



- Applicant to show her the land and that the original number was 537. That the agreement was between her and Julius Kinoti for Kshs.130,000/- and she paid Kshs.100,000/- and later paid Kshs.30,000/- from her income. The agreement was signed by her and was witnessed by one MMR who turned out to be Applicant's father. That in the supporting affidavit there is an acknowledgment dated 30/10/2006 between the Applicant and JKR receiving money from the Applicant. That she did not sign the said acknowledgment. That by this time, the Applicant was living with his mother as they started living together in early 2007.
13. In respect to Parcel No. XXXX, she testified that it was bought by her vide an agreement dated 23/09/2014 between her and one KMM and she took a loan from KCB Bank and attached the statement which indicates that she borrowed Kshs.614,000/-. That the loan delayed and M K Kaguiria paid Kshs.650,000/- directly to the seller. That the statement shows that she withdrew Kshs.614,000/- and paid to the said K. By this time, she was married to the Applicant and that it is a lie that he paid Kshs.430,000/.
  14. In respect to Parcel XXXX, she testified that she bought the property through a loan from co-operative bank and she paid directly through co-operative bank. That the agreement is dated 06/10/2018 and the purchase price was Kshs.720,000/- and she acquired a loan of Kshs.725,000/-. That she paid the money in cash after withdrawing. She was married to the Applicant and she was working at Nanyuki referral. The Applicant contributed nothing to the purchase price. That the agreement marked as JMM 4(a) annexed to the supplementary affidavit is between Mugambi Julius, Applicant and her which was signed by them but it was not correct. That she told the advocate not to include the husband as she had taken a loan. That she never forged the document and the agreement was before an advocate. That the agreement in respect to Parcel XXXX is dated 06/10/2018 attached to her replying affidavit and which was signed by her and one JM. It was before Kiget & Co advocates. That the one produced by the Applicant included him as a purchaser.
  15. In respect to motor vehicle, she testified that she contributed Kshs.700,000/- towards the purchase price whereas the Applicant paid Kshs.680,000/-. She did a bank transfer. The motor vehicle was registered in the Applicant's name. That she is in possession of the said motor vehicle since she has custody of the children and one is taken to school every day. That the motor vehicle, parcel no. XXXX and XXXX were acquired during the marriage whereas parcel no. XXXX was acquired by her before marriage.
  16. On cross examination by Applicant's counsel, she testified that in the divorce petition, she indicated that they got married in the year 2007 whereas the Petitioner in his cross petition indicated that they got married in the year 2006 and she did not contest the date through her response to the cross petition. That they started a relationship in the year 2006 when the Applicant took her to see the land. That her son was born on 04/05/2007 hence conception would have been August 2006. That the matrimonial home is built on parcel XXXX and the agreement for the said property was done in August 2006. That she was married by August 2006. That she took a loan with Siraj Sacco though she did not have evidence. The agreement was drafted by Bwonwonga & Co Advocates. That she paid cash though there was no evidence of payment of Kshs.100,000/. The acknowledgement receipt of Kshs.30,000/- was from the Applicant. They built their matrimonial home and she still lives there with the children. That she did not bring documents to show that she contributed to the construction of the home though they built home together at 50:50 contribution.
  17. In respect to parcel XXXX, she maintained that she took a loan with KCB of Kshs.614,000/- though the loan was delayed so M KK did a bank to bank transfer to the vendor. That she did not produce acknowledgment receipt by vendor and no evidence that she paid M the money. That entry in JMM 3(a)(3) shows an entry for upkeep which was not his contribution. That JMM 4(a) was an agreement



- dated 06/10/2024 towards purchase of parcel XXXX. She confirmed her signature and the contents and testified that the agreement was not the one used to purchase the property. That she did not produce evidence to show she paid Kshs.700,000/- towards the purchase of the motor vehicle. That the Petitioner has been paying the balance of the purchase price. That parcel XXXX was bought in 2018 and she used a bank loan of Kshs.720,000/- and the statement attached was for the car. That the Applicant was paying for electricity and has been paying school fees for the children.
18. On re-examination, she testified that the motor vehicle was meant for family use and is used to take children to school and she services the vehicle. That the standing order shows Kshs.43,000/- upkeep from the Applicant. That he was giving money for upkeep and there is no mention of purchase of land or motor vehicle. That there is no evidence on his part to show that he took any loan. That she committed her payslip to about ¾. In respect to Parcel XXXX, there was no evidence that the Applicant paid any money in cash as he claimed. In the agreement of the said property, he was listed as a witness and did not contribute anything. She maintained that they contributed towards the construction on Parcel XXXX. That in the year 2006, she was earning Kshs.8000/- and she was able to take a loan and there was no evidence of the Applicant's contribution. That when she got pregnant with their first born, she was not married yet. The Applicant was living with his mother but would visit her.
  19. The matter was canvassed by way of written submissions. Learned counsel for the Applicant submitted that the properties form part and parcel of the matrimonial property that is to be distributed after the dissolution of the marriage. In respect to parcel No. Ontulili/Ontulili/Katheri/XXXX, he submitted that even though the title is registered under the Respondent's name, the property was acquired during their marriage in the year 2006. That the respondent admitted on cross examination that on or around August 2006, she was married to the Applicant. Further, their first born was born on 04/05/2007 which means she conceived in the year 2006 hence she cannot dispute that the said property was acquired during the subsistence of their marriage hence constitutes a matrimonial property. That he paid Kshs.100,000/- which was acknowledged in the sale agreement and cleared the balance as evidenced from acknowledgment dated 30/10/2006. That the Respondent acknowledged that the Applicant's father was a witness which raises question that if the Applicant was not involved, how did the Applicant's father come to be a witness?
  20. That the Respondent admitted that the sale agreement and acknowledgement were drawn by Bwonwonga & Co advocates hence there is no way that the Applicant was not a purchaser of the said property. Further, the Respondent was working at Homegrown flower farm earning a basic salary of Kshs.8000/- and therefore she could not afford the purchase price. Further, the alleged loans from KCB and Co-operative bank were taken way after the purchase of the said property. She further stated that she took loan from Swazi Sacco but no evidence was produced to that effect and this was also in contrast to her averments in the replying affidavit. That she admitted that the Applicant built the matrimonial home as well as maintaining it and paying utility bills.
  21. In respect to land parcel no. Ontulili/Ontulili Block 1 (Katheri) XXXX, he submitted that the same was acquired during the subsistence of the marriage in 2014 and therefore, falls within the threshold of matrimonial property. It was purchased jointly by the Applicant and the Respondent and they agreed to have the same registered under the Respondent's name to hold in trust for the Applicant. That the Respondent produced an account statement dating back in December 2016 for a loan of Kshs.725,000/- from co-operative bank which she stated she took to purchase this property whereas the agreement is dated 06/10/2018 which is two years after taking the loan hence the bank statement did not relate to the purchase of this property. That she acknowledged that the agreement marked as JMM4 was the correct agreement hence the agreement she produced marked as LKM-2(a) was forged to remove the Applicant from the transaction. She also acknowledged the acknowledgement of the



receipt of Kshs.100,000/- from herself and the Applicant buttressing the fact that he was involved in the purchase. That they both agreed to purchase the property through the loan the Applicant took and has been repaying the same through a standing order from the account in standard chartered bank to the Respondent's KCB bank account. He submitted that he did not agree with the Respondent to have the property solely registered under her names and was shocked to find out that she had taken the title for herself.

22. For Ontulili/Ontulili/Katheri/XXXX, he submitted that the same was acquired in the year 2014 during subsistence of marriage thus forming part of the matrimonial property. That from the agreement, the Applicant was a witness to the agreement and the Applicant testified that they agreed to have the same registered under the Respondent's name and to hold in trust for him. That the Respondent testified that she acquired the property through a loan from KCB bank and she adduced a bank statement showing that the loan was granted on 30/09/2014 which amount was given after the agreement hence, it cannot be said that the same was purchased through the loan taken. That she also failed to adduce evidence that M paid for the purchase price and she paid her the money thus she failed to substantiate her claim that she solely contributed to the acquisition of property alone.
23. That although the suit properties are solely registered under the Respondent's name, the same does not confer exclusive rights to her pursuant to Section 14 of the Matrimonial Property Act which presumes a rebuttable presumption that when the property is acquired during marriage and is registered in the name of one spouse, it is presumed that the property is held in trust of the other spouse. Reliance was placed on the case of MW v AN (2021) eKLR and F.S v E.Z (2016) eKLR where the court held that registration of the property in the name of a party did not mean that the property belonged to that particular party and if the other party could establish contribution, they can claim a share. He submitted that the Applicant solely purchased the motor vehicle as evidenced by higher purchase agreement and statement showing payments for the clearance of the purchase price. That the Respondent did not substantiate the claim that she contributed Kshs.700,000/- towards the purchase price.
24. Further that, pursuant to section 7 of Matrimonial Property Act and the case of PME vs PNE (2001) eKLR, contribution to the acquisition of matrimonial property need not be direct financial contribution but can also be in form of indirect contribution. That the Applicant proved financial contribution towards acquisition of the properties. He produced the receipts for the building materials he bought during the construction of matrimonial home and made direct contribution through the payment of children's school fees, paid utility bills and sent upkeep money to the Respondent. That he made indirect non-monetary contribution to the acquisition and maintenance of matrimonial property and home as he spent time with the children and provided emotional support to the Respondent and he was the breadwinner. Though the parties were married for 17 years and they were both gainfully employed and though he is not registered as the proprietor of the matrimonial home, he acquired beneficial interest through his direct and indirect monetary contribution hence, the properties and the motor vehicle should be shared equally at the ratio of 50:50. Reliance was placed on the case of JOO V MBO; Federation of Women Lawyers (FIDA Kenya) & another. That he has proved direct financial contribution and he is therefore legally entitled to 50% of the matrimonial property as envisioned under Article 45(3) of the Constitution.
25. In rejoinder, the Respondent's counsel submitted that land parcels Ontulili/Ontulili/Katheri/XXXX, Ontulili/Ontulili Block 1 (Katheri) XXXX and Ontulili/Ontulili/Katheri/XXXX were acquired by the Respondent without any contribution from the Applicant. That she appears as the registered owner of the said properties hence it was the onus of the Applicant to prove that he contributed to the acquisition of the said properties. He did not produce transfer documents with his names to prove that



he was part of the parties involved in the transactions. That she produced copies of bank statements marked as LMK-2(c) and pay slip marked as LMK-3 evidencing the financing of the said properties. That the Applicant has not attached his pay slips or bank statement to show any amount that was advanced towards the acquisition of the properties. For land parcel XXXX, he submitted that is where the family home is and where they live. That she bought the land and developed the same during her union with the Applicant.

26. As to the motor vehicle registration number KCK XXX F, he submitted that it was acquired with joint funds or contribution from the Applicant and the Respondent and is in custody of the Respondent which purpose is to take children to school. That the Applicant has not proved contribution to acquisition of the properties save the motor vehicle hence his case should be dismissed.
27. From the foregoing, there are two issues for determination; whether the suit properties are matrimonial properties, and if in the affirmative, what is the rightful share of each of the parties.
28. There is no doubt that there was a legal marriage between the Applicant and the Respondent. There is also no doubt that their marriage was dissolved on 03/11/2022. The Applicant attached copies of decree nisi and decree absolute in Nanyuki Divorce Cause No. E015 of 2021.
29. What constitutes matrimonial property is defined in Section 6 of the *Matrimonial Property Act* (herein referred as the Act) as:
  - (a) the matrimonial home or homes;
  - (b) household goods and effects in the matrimonial home or homes; or
  - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
30. Basically, for property to qualify as matrimonial property, it must meet the definition in Section 6 quoted above. In *T.M.W. v F.M.C* (2018) eKLR, Nyakundi J. opined that:-

“...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”
31. 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.”
32. In determining whether the properties are matrimonial properties, i propose to deal with the respective properties sequentially. The first in line is Land Parcel No. Ontulili/Ontulili/Katheri/XXXX. There is contention whether this property was purchased during the subsistence of the marriage. The Respondent’s position is that she purchased this property alone before her marriage to the Applicant.
33. The Respondents evidence is that the property was bought in August 2006 when they were already married. From the pleadings Nanyuki CM in Divorce Cause No. 15 of 2021, the Applicant (then Respondent) pleaded at paragraph 2 of his Answer to Petition and Cross Petition that the marriage was in 2006. In response to the Answer to Petition and Cross Petition, the applicant indicated that Paragraph 2 of the Answer to Petition and cross petition was not contested thus confirming the marriage was in 2006. This fact is confirmed in these proceedings by the Respondent answers in cross examination.



34. It is clear from the evidence on record that the above property is where the Applicant and the Respondent established their matrimonial home.
35. The Agreements for sale in respect thereto Ontulili/Ontulili block 1 (Katheri) XXXX, Ontulili/Ontulili/Katheri/XXXX and motor vehicle registration number KCK XXX F confirm that the properties were acquired during the subsistence of the marriage and are therefore matrimonial properties.
36. Having found the subject properties to be matrimonial property, the I now broach the question whether the said properties should be shared between the parties herein, and if in the affirmative, in what proportion(s).
37. The adjudication on division of matrimonial has not been a simple task now and even in the past legal regime that applied the Matrimonial property Act of England. While the advent of the Matrimonial property Act 2013 localised the law and brought legal clarity on the matter, the situation is still marred by the very nature of a marriage union where, unlike in business contracts and transactions, the parties involved will always lower their guard as it is never intended or even expected that the relationship could ever break down. Reality, however, is slowly dawning on the citizenry and going forward pre-nuptial agreements may become the norm to settle property issues without acrimony, drama and sometimes, unfairness. Luckily, the courts have now settled the question and the applicable principles and parameters making the work of this court a lot easier.
38. The legal position that obtains is that the distribution depends on the spouses' individual contributions in the acquisition of the properties. Such contribution may be direct monetary contribution or otherwise.
39. Section 7 of the Act has the following to say: -
  7. Ownership of matrimonial property: Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
40. Section 9 of the Act provides:
  9. Acquisition of interest in property by contribution: Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.
41. Contribution is defined in Section 2 of the Act as: -“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;



Where property registered in the names of a spouse during coverture, this does not necessarily confer exclusive rights to the party in whose names the property is registered. Section 14 of the *Matrimonial Property Act* creates a rebuttable presumption that when the property is acquired during marriage and is registered in the name of one spouse, it is presumed that the property is held in trust of the other spouse. The court in *MW v AN* (2021) eKLR and *F.S v E.Z* (2016) eKLR held that registration of the property in the name of a party did not mean that the property belonged to that particular party and if the other party could establish contribution, they can claim a share.

42. The manner of distribution was clarified by the Court of Appeal in *PNN vs. ZWN* [2017] eKLR where the court stated;

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage” and expressed itself as follows: -.... Thus, it is that *the Constitution*, thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the *Matrimonial Property Act*, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.

43. The above holding found affirmation in the Supreme Court decision in *JOO vs. MBO*;

In this regard our view is that, while article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married....<sup>104</sup>. Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of *the Constitution*. To hold that article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.

44. The court further stated;

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



for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.

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

45. So what is the obtaining position in the instant suit. Proof of contribution is a matter of fact to be discharged by way of evidence. This being a civil matter, the degree of proof is on a balance of probabilities. I have already alluded to the difficulty in the establishment of facts with precision in a matter of this nature given that the parties enjoyed a relationship based on trust and as such may not have necessary recorded or kept all evidence relating to acquisition of property. That, however, in no way lessens the burden of proof.

46. It is the Applicant's case that that the subject properties herein were acquired and developed by joint funds and efforts and are jointly owned in equal shares. First off the ramp is the property Land parcel Ontulili/Ontulili/Katheri/XXXX. The Applicant testified that he contributed Sh 100,000 towards the acquisition of this property. He exhibited a signed acknowledgement by Julius Kinoti Ringera, the seller of the property in which Julius acknowledges that he had received Sh. 30,000 being final payment towards the purchase of the land.

47. The Respondent denies any contribution by the Applicant. She states she took a loan of SH 150,000 for the purchase. She presented no evidence of this loan. It is common ground that the matrimonial home was established on this land. By her own admission, the Respondent confirms that the Applicant contributed 50% of the cost of construction of the home.

48. In light of the evidence on record, am satisfied that the Applicant has proved contribution to the purchase and development of this property to a demonstrable share of 50:50.

49. In regards to Ontulili/Ontulili block 1 (Katheri) XXXX, previously known as parcel number 1018, the Applicant's case is that the purchase price was Kshs.720,000/- and according to his evidence in court he contributed Kshs.400,000/-. while the Respondent paid the rest. This is contrary to his averment at paragraph 3(c) (xviii) in his affidavit sworn on 25<sup>th</sup> January 2022 where he states:

“The total consideration of the subject property, being Kenya Shillings Seven Hundrend and Twenty Thousand was fully funded by myself from my savings”

50. The Applicant adds that the agreement attached by the Respondent was forged as the agreement was between him, the Respondent and one Mungatia Julius M'Mugambi. They both executed the sale agreement and he did not agree to have the property registered under the Respondent's name solely hence it was registered fraudulently without his knowledge. The agreement is exhibited and it



is Witnessed by Kiprotich Kiget Advocate. Applicant maintains that the said agreement is a forgery as the purchase was by both the Respondent and himself.

51. The Respondent has exhibited an agreement dated 6<sup>th</sup> day of October 2018 witnessed by Kiprotich Kiget Advocate and an acknowledgement of payment of Ksh 100,000 by herself as deposit towards the purchase.
52. It is the Respondent's case on the other hand that she bought the property through a loan from co-operative bank and she paid directly through co-operative bank. That the agreement is dated 06/10/2018 and the purchase price was Kshs.720,000/- and she acquired a loan of Kshs.725,000/-. That she paid the money in cash after withdrawing. That the agreement marked as JMM 4(a) annexed to the supplementary affidavit is between Mugambi Julius, Applicant and her which was signed by them but it was not the correct agreement. That she told the advocate not to include the husband as she had taken a loan. That she never forged the document and the agreement was before an advocate. That the agreement in respect to Parcel XXXX is dated 06/10/2018 attached to her replying affidavit and was signed by her and one JM. And there is an acknowledgment dated the same day between her and said Julius acknowledging receipt of Kshs.100,000/- from her. Applicant's name does not appear.
53. The rule on burden of proof is that whoever alleges must prove. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya, provides that:-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. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:-

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

54. It was incumbent upon the Applicant to prove his contribution in respect of the subject property. Beyond contradicting his evidence as noted above, he has stated that the Respondent was involved in forgery in so far as the sale agreement in respect of the property herein is concerned. By raising this issue the law requires him to achieve a higher degree of proof.
55. It is trite law that fraud must be specifically pleaded and proved. In *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”

56. In *R.G Patel v Lalji Makanji* [1957] EA 314 the former Court of Appeal for East Africa stated as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”



57. In Belmont Finance Corporation Ltd v Williams Furniture Ltd Buckley L.J said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity.”

58. The burden of proof of an allegation of fraud is on the person alleging. In Ndolo v Ndolo [2008] 1KLR (G &F) 742 the court stated that:

“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

59. In Christopher Ndaru Kagina v Esther Mbandi Kagina & Another [2016] eKLR the court pronounced itself as follows:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.....”

60. In the case of Urmila w/o Mahendra Shah v Barclays Bank International Ltd & Another [1979] eKLR, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it.

61. In Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR, the Court of Appeal addressing the same issue stated:

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent.....”

62. Suffice it to note, that the burden of proof in an allegation of fraud is higher than that required in civil cases, that of proof on a balance of probabilities; and lower than that required in criminal case that is beyond reasonable doubt. In Ndolo v Ndolo [2008] 1KLR (G &F) 742 the Court stated that:

“...Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.....”



63. In *Central Bank of Kenya Limited v Trust bank Limited & 4 Others* [1996] eKLR, the court rendered itself as follows:
- “The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case.”
64. Butressing the criminal element in allegations of fraud, the Court of Appeal in *Moses Parantai & Peris Wanjiku Mukuru* expressed itself thus;
- “..... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities.....”
65. Finally on this point, the former Court of Appeal for East Africa summarized the degree of proof in the following short statement in *R.G. Patel* case;
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
66. The Applicant made a blanket allegation of fraud. No attempt whatsoever was made to substantiate the claim. The allegations were not specifically pleaded. While the Applicant had a wide latitude to challenge the sale agreement, a document made at and witnessed by an advocate practicing within the jurisdiction of the court, for inexplicable reasons no energies were directed to that end.
67. I must, based on the evidence on record touching on Land Parcel Ontulili/Ontulili block 1 (Katheri) XXXX, reach the finding that the Applicant’s claim of contribution in the purchase of this land is not proved.
68. In respect to parcel XXXX the Applicant’s case is that he was involved in the purchase of the said property. He witnessed the agreement of sale. He depones at paragraph 3 (c)(xii) of his supplementary affidavit that the same was to be purchased through a loan. He disputes that the purchase was through the loan from KCB taken by the Respondent since that loan was taken on 30<sup>th</sup> September 2014 which was after the purchase of the property.
69. He adds that they agreed he would repay the loan taken for the purchase of the suit property and he accordingly made a direct standing order from his Standard bank account No. 0100XXXXXX000 to the Respondent’s KCB account no. 11XXXXXX26 termed as upkeep. The monthly payment was Sh. 13,000. The total price was Kshs.650,000/-
70. The Respondent’s case is that she bought the property vide an agreement dated 23/09/2014 between her and one KMM and she took a loan from KCB Bank and attached the statement which indicates that she borrowed Kshs.614,000/-. That the loan delayed and M K Kaguiria paid Kshs.650,000/- directly to the seller. That the statement shows that she withdrew Kshs.614,000/- and paid to the said K. She testified on cross examination that she did not produce acknowledgment receipt by vendor and there was no evidence that she paid M the money.
71. The agreement dated 23/09/2014 was between the Respondent and one Khamis Mohammed Mutua for Ontulili/Ontulili block 1/Katheri/XXXX and the vendor acknowledged receipt of



- Kshs.650,000/-. The agreement was signed by the Respondent and the vendor and the Applicant herein was just a witness to the sale.
72. The Applicant in his submissions argued that the Respondent testified that she acquired the property through a loan from KCB bank and she adduced a bank statement showing that the loan was granted on 30/09/2014 which amount was given after the agreement and therefore it cannot be said that the same was granted through the loan taken. That she also failed to adduce evidence that M paid for the purchase price and she paid her money back, hence she failed to substantiate her claim that she solely contributed to the acquisition of this property alone.
73. I have perused the Applicant's document and specifically one marked as JMM3(b), a KCB account for the Respondent which shows a transfer of Kshs.564,000 to M Kagwiria on 02/10/2014 by the Respondent. This was barely two days after the loan was granted on 30/09/2014 according to her loan statement marked as LKM2(c). This means that her claim that she took the loan and M paid for the purchase price which amount she refunded was true.
74. The applicant states that they agreed to buy the property through a loan and it is this loan that he was repaying at a standing order of Sh. 13,000. Strangely the Sh. 13,000 is particularised as upkeep money. He does not give the particulars of the loan allegedly taken by the Respondent (a loan he was purportedly servicing through the monthly 'upkeep' money Sh 13,000) even as he maintains that it is not the loan advanced to the Respondent on 30/9/25.
75. The burden was on him to prove contribution. He has failed so to do. The claim on this property fails.
76. In regards to motor vehicle registration number KCK XXX F, the Applicant averred that he bought it solely as evidenced by the hire purchase agreement-JMM5 (a), JMM-5 (b)(i)-(v), local money transfer, JMM 5(c) (i) and (c) (ii), JMM5 (d)(i) &(ii) to show that he has been maintaining the vehicle and he was the one who insured it. He argued that the Respondent did not substantiate the claim that she contributed Kshs.700,000/- towards the purchase price.
77. The Respondent on the other hand stated that she contributed Kshs.700,000/- towards the purchase price whereas the Applicant paid Kshs.680,000/-. She did a bank transfer. The motor vehicle was registered in the Applicant's name.
78. I have perused the bank statement produced by the Respondent from co-operative bank for December 2016 whereby a loan of Kshs.725,676 was credited to her account. She clarified that this loan was for the purchase of the motor vehicle. Kshs.700,000/- was withdrawn on 28/12/2016. The transactions in the said account were done in Mombasa. According to the hire purchase agreement attached by the Applicant and marked as JMM5(a), the motor vehicle was bought on 28/12/2016 in Mombasa. This shows that indeed the Respondent contributed to the purchase of the motor vehicle and this is further evidenced by prayer No. 2 in the Applicant originating summons where he sought a declaration that motor vehicle registration number KCK XXX F forms part of the Applicant's and Respondent's matrimonial property and were acquired by joint funds and efforts of the Applicant.
79. Did the applicant contribute otherwise to the acquisition of the properties? The Applicant's pleading was pegged on monetary contribution to the acquisition of the properties. He is bound by his pleading and the court cannot stretch the pleading to raise a new cause of action.
80. In the end, I find and hold that the Applicant has proved contribution towards the purchase of the matrimonial home and the motor vehicle. The share is 50:50. The claim in respect of properties Ontulili/Ontulili block 1 (Katheri) XXXX and Ontulili/Ontulili/Katheri/XXXX fails.
81. With the result that the Applicant is partially successful and I make the following orders;



- a. That a declaration be and is hereby made that Land Parcel No. Ontulili/Ontulili/Katheri/XXXX and Motor vehicle Registration No. KCK XXX F are matrimonial property between the Applicant and the Respondent.
- b. That Land Parcel No. Ontulili/Ontulili/Katheri/XXXX and Motor Vehicle Registration No. KCK XXX F shall be valued and sold and the net proceeds shared on a 50:50 basis between the Applicant and the Respondent.
- c. Should the Respondent desire to Keep Land Parcel No. Ontulili/Ontulili/Katheri/XXXX, she shall pay to the Applicant half the net value of the property.
- d. As the Applicant was partially successful, each party is to bear its own costs.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF JUNE, 2025.**

**A.K. NDUNG’U**

**JUDGE**

