RCK v DKK (Matrimonial Cause E004 of 2022)
[2025] KEHC 12819 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12819 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MATRIMONIAL CAUSE E004 OF 2022

JRA WANANDA, J

SEPTEMBER 19, 2025

IN THE MATTER OF SECTION 2, 4, 6, 7, 12 & 17 OF THE MATRIMONIAL PROPERTY ACT, NO. 49 OF 2013, LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37 RULE 1 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF SECTION 28(A), 93(2) & 93(3) OF THE LAND REGISTRATION ACT NO. 3 OF 2012

BETWEEN

RCK ..... APPLICANT

AND

DKK ..... RESPONDENT

JUDGMENT

1. Before Court is the Applicant's Originating Summons 13/06/2022. The same is filed by the Applicant through Messrs Mukabane & Kagunza Advocates and its prayers section is premised as follows:

> " Let DK of Post office P.O Box XX Nandi Hills within Fifteen (15) days of service of this Summons enter appearance to this Summons, which is issued on the application of RCK of Post Office P.O Box XX Machakos a who claims interest in LR No. Nandi/Kipsigak/XXX, LR No. Nandi/Kipsigak LR No. Nandi Kipsigak/XXX, Kitale [Particulars Withheld] Farm, [Particulars Withheld] Farm near Griffins Academy, Motor vehicle registration No. KBV XXXW, Motor vehicle No. KCP XXXP, Motor vehicle registration No. KAX XXXU, Tractor Reg No. KCP XXXC, Motor vehicle registration No. KCU XXXX,

Pension (provident fund) with [Particulars Withheld] (EPK) Annuity and Benevolent Fund (hereinafter referred to as the "suit properties") for Orders:-

a. That a declaration be issued that the suit properties hereto were acquired by the joint funds and efforts of the parties herein during the subsistence of their marriage and registered in the name of or in the position of the Respondent and the same is jointly owned by the Applicant and the Respondent and as such the Applicant is entitled to equal share or such other share as the Court may award.

b. That an order be and is hereby issued directing that the matrimonial properties and/or suit properties be shared equally between the Applicant and Respondent and/or in any ratio as the Court may deem just.

c. That in the alternative to (b) above, an order be and is hereby issued directing that the said matrimonial property be sold and the net proceeds of the sale be shared equally between the Applicant and the Respondent.

d. That in the alternative of (b) and (c) above, an order be and is hereby issued directing that a valuation by a reputable valuer and/or valuers acceptable to both parties or to be appointed by the Court be carried out on the suit properties and upon such valuation, the Respondent do pay the Applicant and or such other share as the Court may order of the value of the property/ properties.

e. That upon grant of any of the foregoing, a permanent injunction be and is hereby issued restraining the Respondent by himself, his servants, agents and/or employees from interfering with the Applicant/Applicant lawful enjoyment and quiet possession of the share awarded to her.

f. That this Court do issue such further orders as to the redress of the rights in the interest of justice.

g. That the costs of this Application be awarded to the Applicant.

2. In her Affidavit in support of the Summons, the Applicant deponed that she got married to the Respondent on 22/12/1990 which union was blessed with 3 children but which was dissolved on 10/10/2019. She deponed that during the pendency of the marriage, they acquired the properties listed above, and that she is also a beneficiary of the Respondent's Pension. She deponed that they lived in the parcel of land L.R. No. Nandi Kipsigak/XXX comprising their matrimonial home, that the furniture, household goods, and fittings in the home were purchased by her and being a teacher by profession, her contribution towards acquisition of the properties was both monetary and non-monetary in the form of childcare, companionship and management of the home and properties. She contended that the Respondent has not allocated any share of the properties to her despite her entitlement thereto, and that her interests cannot be extinguished since she was the legitimate wife of the Respondent before the divorce. She exhibited a copy of the Decree Absolute issued in Eldoret CMDC No. 69 of 2016 dated 30/04/2019 and also copies of Official Searches for two parcels of land, log-books for 5 motor vehicles, and Amended Certificate of Confirmation of Grant issued in Kapsabet SPMC Succession Cause No. 114 of 2019-Estate of Kiboson Arap Barno dated 7/05/2021.

3. In opposition to the Summons, the Respondent, through Messrs R.M. Wafula & Co. Advocates, filed the lengthy 69-paragraph Replying Affidavit sworn by him on 12/09/2022. In the Affidavit, he denied

that the union was dissolved on 10/10/2019. He then deponed that he single-handedly acquired the parcel of land Nandi/Kipsigak/XXX, about 2003, the same with Nandi/Kipsigak/XXX, from estate of the late Kiboson Arap Barno, which he acquired on piece-meal basis between 2002-2005 from different people who had acquired portions thereof from the family of the deceased. He deponed that he single-handedly developed the property in various ways, including fencing it, planting trees and tea crops, building a dairy shed and 2 storeys building thereon, building and improving the same as his retirement home together with a kitchen and installing a water system. He stated that he is not the registered owner of the property, Nandi/Kipsigak/XXX, and also denied that Nandi/Kipsigak/XXX, belongs to him and that he therefore has no legally recognized interest in it. He also denied that the Applicant and himself have at any time single-handedly or jointly acquired the property L.R. No. Kitale [Particulars Withheld] Farm, and also denied any knowledge of the property [Particulars Withheld] Farm. He urged further that the Applicant did not contribute a single cent towards acquisition of the motor vehicles which he single-handedly acquired through a company loan scheme, that during the time that he was servicing the loans, the vehicles were jointly owned by himself and his employer and he used to pay insurance for both.

4. Regarding the motor vehicles, KAX XXXU and KBV XXXW, he urged that he sold them with the knowledge of the Applicant, to raise funds for their children's universities fees abroad. Regarding the motor vehicle KCU XXXX, he stated that he acquired it in June 2019 through a company loan which he cleared on 30/06/2022 after the couple had already divorced. He denied owning a motor vehicle KCP XXXP clarifying that the one he owns is KCD XXXP which he acquired in 2018 through a SACCL loan after the Applicant had left in 2015. He also denied owning a tractor KCP XXXC, and stated that the one he owns is KTCB XXXS, formerly KAN XXXE, which he single-handedly acquired in 2012 through another loan. Regarding the Pension (Provident Fund) with his employer, he stated that the Applicant cannot be a beneficiary. He deponed that the Applicant is teacher by profession with a Master's Degree and pensionable, and wondered what will happen to her own pension. He stated that he has already retired with no other source of income hence it would be unjust for his retirement benefit to be made part of matrimonial property which, in any case, the Applicant has not made any contribution to. He refuted the Applicant's allegation that she is the one who furnished the home and bought household goods, urging that he is the one who bought the said items, that furniture in the company house was sold to him through a check-off system, and that he purchased all furniture, fittings (his employer's house) through a company furniture loan scheme.

5. He urged further that the Applicant earns Kshs 31,000/- most of which she had committed towards her education loan/career hence she did not contribute towards acquisition of the properties. He then protested about the Applicant obtaining an ex parte order on 25/07/2022 served upon his former employer yet she had not served the subject Application or the order upon him or his Advocates. He then stated that he married the Applicant in 1990 and by 1993, she had started her education programme, that when they married, the Applicant found him with 3 employees, namely, a cook, gardener and a watchman, that they were blessed with their 1st born child in 1991 upon which he employed an additional nanny, and that the Applicant joined in college in 1993 and continuously pursued her career in Guidance and Counselling, P1 Teacher course, Higher Diploma in Counselling course, Certificate in education, and Masters in Education. He deponed that he assisted and supported the Applicant financially as she pursued and developed her career, that he is the one who facilitated her transport to and from college and university and also paid her fees, that from 2004 and for 10 years, the Applicant was the Chairperson, Kenya Primary School Music Festivals Rift Valley and as such, she was most of the time away from home, that during her education career, the Applicant spent most of her time away from home and family, and in fact, he used to live like a single parent because while the

Applicant was busy developing her career, he was the one taking care of the children, and managing the home.

6. He urged further that in 2013, he opened a shop and an M-Pesa Agent outlet and left the management thereof to the Applicant but when she was deserting the home in 2015, she left with the investment and arbitrarily closed the shop and returned the premises to the Landlord, at a time when the Respondent was away on official duties. He reiterated that he single-handedly paid the domestic workers through check-off system, managed the home, took care of the family, developed the properties, paid school, college and university fees for their children, including accommodation, both locally and internationally, which he is still paying for their last-born child. He deponed that since 2015, he has spent about Kshs 3,000,000/- for the 1st born child's education in Sweden, Kshs 6,000,000/- for the 2nd born child's education in Australia, and Kshs 3,500,000/- for the last-born child's education at Strathmore. He added that in 2019, the Applicant was ordered to make equal contribution as he towards their children's welfare but she has not complied, that in November 2016, the Applicant, their 3 children and himself were supposed to travel to the UK, courtesy of his official duties in regard to which his employer paid for the Applicant's air ticket, and the family's full accommodation while he catered for the rest of the travelling and other expenses, but on the last day, the Applicant refused to travel with them even after having gone through all the processes of obtaining visa, hence his employer lost Kshs 50,000/, and the Applicant had hoped the employer would punish the Respondent by making him reimburse the money.

7. He added that all through the marriage, the Applicant was a self-centred person and an uncaring wife or mother who gave preference to her career rather than the children, thus affecting the emotions of the children and their academic performance, that in 2018 when the Applicant was admitted in hospital for a week, the Applicant never bothered to check on him, and that since 2015 when the Applicant deserted the home, he has single-handedly supported their children in terms of university fees to a tune of Kshs 12,500,000/- from loans he borrowed from various financial institutions, some of which he is still servicing, and also sold his shares at Safaricom, and thus he has no savings. He also deponed that in 2015, the Applicant drove to the farm house, L.R. No. Nandi/Kipsigik/XXX and carted away all his households away. The other matters deponed are allegations fit for a divorce Court, not for a Matrimonial Property Cause. The Respondent however painted the Applicant as failing as a home maker, and being a fortune seeker. He pointed out that the farm house is his retirement home for which the Applicant has never contributed to its development, that the Applicant is now 52 years old, and has moved on with her life, that the children have a legitimate expectation over the properties, and that the Applicant has been given 5 acres in her parent's properties which she should be contended with. For this, he exhibited copies of pleadings filed in Eldoret High Court Probation and Administration Cause No. 217 of 1998.

8. The Applicant, in response, filed the Supplementary Affidavit sworn on 25/05/2023 in which she denied the allegations made by the Respondent and deponed that she is the one who took all the responsibilities of educating their children without the Respondent's support who had income from tea, milk and salary but chose to concentrate on educating his siblings, and that the Respondent used most of his money on concubines and alcohol. She deponed that she took loans to educate the children. She then stated that if the Respondent sold the motor vehicles KAX XXXU and KBV XXX, then she never saw the proceeds thereof, that contrary to the Applicant's allegations, the motor vehicle KCU XXXX was acquired and/or purchased prior to dissolution of their marriage. Regarding the order dated 13/06/2022, she insisted that it was served upon the Respondent and his Advocate, and that they did not attend Court for hearing of the Application that gave rise to the orders despite being served with the hearing notice.

9. The suit then proceeded for viva voce trial in which the Applicant testified before me on 20/11/2023 and on 6/03/2024, while the Respondent testified before me on 31/10/2024. Both parties did not call any other witnesses.

Applicant's Testimony

10. The Applicant, led by her Counsel, Mr. Kagunza, testified as PW1, and adopted her said Affidavits. He then reiterated matters already deponed in her Affidavits, including that she contributed to acquisition of the properties directly through her salary, and that she also took loans and gave the Respondent, but the properties were registered in the Respondent's name. She insisted that all the properties, save for motor vehicle KCU XXXX were acquired during the pendency of the marriage. Regarding the children, she testified that she is the one who used to drop them in school and return with them home in the evening. She also insisted that she contributed to construction and development of the matrimonial house erected in the property with Nandi/Kipsigak/XXX, which was first a mud house and she used to personally smear it before they converted it into a permanent cemented house. She insisted that she wants 50:50 division of all matrimonial property. Under cross-examination by Mr. Wafula, she agreed that the receipts on record show that they were for payments made through the Respondent's former employer ([Particulars Withheld] Kenya Limited). She then stated that she does not how much the Respondent used to earn but knows that he was a Manager.

11. She denied that the receipts she had produced indicating payments for chicken structure products were in respect to the company house at Nandi Hills town where they kept up to 400 chicken, insisting that the same were for a chicken structure in the matrimonial home, as they kept chicken in both homes but the one at their matrimonial home was for commercial purposes. She however conceded that she had not produced any receipts showing her contribution for the chicken rearing business operated from the company house, and agreed that it is the Respondent who was catering for it. She stated that in 2012, her salary was Kshs 31,000/- but insisted that she was servicing a loan of Kshs 500,000/-, and her net pay was Kshs 15,000/-. He however conceded that he did not produce any documents to prove that she took the alleged loans. Regarding the date of the divorce, she agreed that although in her Supporting Affidavit, she had described the date thereof as 10/10/2019, the correct date is 10/01/2019. Regarding the property Nandi/Kipsigak/XXX which comprises the matrimonial home, she agreed that the Amended Certificate of Confirmation of Grant the subject thereof was issued on 26/05/2019, and agreed that she did not produce any document to show that she contributed to purchase thereof, and agreed that her name does not appear in the Agreement for Sale. She stated that they purchased the property from a son of the deceased but she did not know that having purchased from the son, the purchase can be declared null and void, and also agreed that the portion they purchased does not have a title number. Regarding the motor vehicles, she agreed that it is the Respondent who acquired them through loans from his employer and stated that after they divorced, she purchased a separate motor vehicle for herself.

12. She agreed that the motor vehicle KCU XXXX was registered in the Respondent's name in 2019 subsequent to the divorce. Regarding the plot in Kibakerenge, she stated that she does not know the title number and she also did not have any Agreement for Sale for it. She agreed that she commenced her career in 1991-1993 when she joined college and became a teacher, she went back to college in 2004 for Diploma, and later obtained her undergraduate degree in 2009 which course she had commenced in 2006-2007. She then stated that she later obtained several other Certificates but insisted that she used to go for studies during the holidays. She also agreed that they used to have a cook, a watchman, a gardener and a house help, all provided by the Respondent's employer, although the Respondent told her that it was not for free as the employer used to deduct some amounts from his salary. She

however insisted that she is the one who used to pay their nanny. She agreed that the Respondent took huge loans to educate the children but contended that it was his duty. He agreed that the Respondent is the one who is also paying fees for the last-born child who is still in college and also conceded that the Respondent paid part of her own college and university fees, and that the Respondent sold two motor vehicles to raise school fees for the children. She agreed that the Respondent is now retired and agreed that on her part, she is yet to retire. Regarding her demand for the Respondent's pension, she stated that when her own comes, she can also share it with the Respondent. She stated that she left the matrimonial home after the Respondent chased her away therefrom.

13. Regarding the Mpesa and a clothes shop, she agreed that the Respondent opened them but she insisted that they collapsed and she agreed that she returned it to the Landlord without consulting the Respondent. She agreed that in the divorce Cause Judgment, they were directed to share at 50:50 proportion in the care of their children who were not yet independent. Regarding sending one of their children to Australia for education, she stated that they needed to raise a sum of Kshs 2,200,000/- out of which she contributed Kshs 400,000/-, her other children contributed Kshs 400,000/- and she heard that the Respondent paid the balance of Kshs 1,200,000/-. She stated that she is the one living with that child and she is the one taking care of her upkeep and that is why she did not contribute the same amount as the Respondent in raising the Kshs 2,200,000/-. In re-examination, regarding the poultry business operated in the matrimonial home, she stated it is her who initiated it, constructed the structures, and funded it on most occasions, and they used it for both domestic and commercial purposes. She stated the 1st cheque for Kshs 54,000/- which they received from Naivas supermarket for supplying them with products, they used it to pay school fees when their 1st born child joined Form 1. She stated that they commenced the business in 2012 and the said cheque came in 2015.

14. According to her, the Respondent's contribution was only when he gave them the motor vehicle. She insisted that she took a loan for Kshs 500,000/- from the bank for the poultry and for planting of tea and for other developments, and also took other loans which she used for paying her school fees, and also obtained HELB loans. She stated that her payslips contained in the Respondent's bundle of documents showed the deductions. She also insisted that apart from her role as the home-maker, she also took 3 loans to assist in construction of the matrimonial home and to also buy land, and that at the moment, she lives in a rented house.

Respondent's Testimony

15. The Respondent testified as DW1, and adopted his said Replying Affidavit. He stated that he was employed at [Particulars Withheld] Limited in 1986 and retired in 2022, that he joined as an Accountant earning Kshs 15,000/- per month, rose through the ranks, and left as the Finance and Administration Manager earning Kshs 650,000/- per month. He stated that he had already worked for 14 years by the time he married the Applicant on 22/12/1990 at which time he was earning Kshs 45,000/- per month and the Applicant was not working, having just finished Form 4. He stated that they got their 1st child in July 1991 and 3 months later, the Applicant joined [Particulars Withheld] College, then in 2001 she joined [Particulars Withheld] University for a degree course in education, and he was the one paying the Applicant's fees throughout.

16. He stated further that in 2005, the Applicant commenced her Master's degree course which she completed in 2015. He testified that by the time the Applicant left him, she was earning Kshs 31,000/-, and thus he is the one who used to take care of the family needs. He then repeated further matters already deponed in his Replying Affidavit in respect to him being the one who single-handedly financed and catered for the family needs including paying school and college fees, funding their poultry business, opening for the Applicant a shop for selling children's clothes and an Mpesa shop, and

acquisition of properties, all which he did through his salary, loans and check-off systems from his employer and SACCOs, being provided with a gardener who also used to take care of the poultry, a watchman and cook, all whose salary his employer used to deduct from his earnings. He reiterated that the Applicant never contributed anything and denied that the Applicant took any loan to finance any family project or expenses. He testified that he used to give to the Applicant the proceeds of the poultry business in full, and reiterated that when the Applicant left him in 2015, she brought a lorry and took everything from the Farm house and the shop, that for 10 years, the Applicant was the chair, Kenya Music Festival- Rift Valley and thus was too busy and always away from the home. He also opposed the Applicant's demand for a share of his Pension.

17. Under cross-examination by Mr. Kagunza, he agreed that the properties Nandi/Kipsigak/XXX, Nandi/Kipsigak/XXX, motor vehicles KAX XXXU and KPV XXXW, and tractor KTCB XXX were all acquired and developed during the pendency of the marriage, and reiterated that he has no knowledge of the alleged property described as Kapchbok Farm, near Griffins. He stated that although they were married for 29 years, the Applicant's assistance was minimal and was confined only to perhaps, upbringing of their children, though itself also minimal. When shown a copy of the Applicant's payslip for the month of December 2002, which he had included in his own bundle of documents (page 113), he agreed that the same indicates that there were monthly deduction appearing thereon in respect to a loan taken by the Applicant, but averred that the loan was taken by the Applicant for her own use and pointed out that in any event, the purpose of the loan is not shown in the pay-slip, and that he only included the pay-slip to show the monthly salary of Kshs 6,500/- earned by the Applicant as at December 2002. He also agreed that their youngest child has been living with the Applicant since the couple separated and thus, currently lives in Machakos with the Applicant.

18. He reiterated that he sold two motor vehicles, KAX XXXU double cabin which he sold in November 2019 having acquired it in 2007 during the pendency of the marriage, and motor vehicle KBU XXXW which he acquired around 2012, also during the pendency of the marriage. He insisted that he sold the two with the consent of the Applicant but conceded that he did not have any evidence of the consent. He also denied that he had been too sick that the Applicant had to nurse him. About breastfeeding the children when they were young, and dropping them to and from school, he stated that the Applicant was not doing them entirely as she was away for most of the time. About the property Nandi/Kipsigak/XXX, he agreed that although it is not in his name, there is a Sale Agreement indicating his ownership (page 53-57 of his bundle), and also clarified that he only purchased a portion thereof, not the entire parcel of land. He also agreed that some of the Receipts he produced are not in his name. About the loans taken by the Applicant, she agreed that they were for her educational and/or college fees. He also agreed that some of the Receipts on record showing expenditure for construction of the poultry businesses are in the name of the Applicant. He denied the allegation that he used his money for his personal pleasure and alcohol. In re-examination, he reiterated matters already stated, including that the two motor vehicles he referred to were sold to raise funds for their child to study in Australia. Regarding their youngest child who is living with the Applicant in Machakos where the Applicant works, he stated that she is 23 years old and is working. When asked by the Court what share he proposes to give to the Applicant, he stated that he is leaving that to the Court.

Submissions

19. After close of the trial, the parties filed written Submissions. The Applicant filed the Submissions dated 10/03/2025, while the Respondent's Submissions is dated 25/04/2025.

Applicant's Submissions

20. Counsel for the Applicant recounted the testimonies of the respective witnesses and relevant pleadings on record, and in urging that the assets in question herein constitute "matrimonial property", cited Section 6 of the *Matrimonial Property Act*, the case of T.M.V. vs E.M.C. [2018] eKLR, and also the case of S.N. vs F.N. [2019]. In urging that the Applicant's contribution is recognizable, he cited Section 2 of the *Matrimonial Property Act*, the case of Civil Appeal No. 142 of 2018-CWM vs JPM [2016] eKLR, and submitted that the Applicant is a trained teacher with Master's Degree who has been salaried for 25 years and managed the family farms, namely, L.R. No. XXX and L.R. No. XXX which has tea, and also reared poultry for commercial and subsistence purposes and the proceeds and/or capital contributed towards acquisition of the matrimonial properties which were ultimately registered in the name of the Respondent, being the husband. He pointed that at page 125 of the Respondent's Replying Affidavit, there is confirmation that the Applicant was operating and managing the business known as "Baby World Nandi Hills" and at page 113, there is confirmation that the Applicant took loans which, according to Counsel, she utilized to purchase matrimonial properties and invest in the family business.

21. He also submitted that the Applicant produced receipts and invoices for building materials from "Linro Agencies", which demonstrates that she participated in the development of the properties, and that in cross-examination, the Respondent had admitted that the Receipts are in the name of the Applicant. Regarding the sale of the motor vehicles KAX XXXU and KBV XXXW, he contended that the Respondent sold the same without the Applicant's consent, and cited Section 12 of the *Matrimonial Property Act*, on the requirement for spousal consent for such sale in a monogamous marriage. Counsel urged further that it was not disputed that the Applicant contributed in domestic chores where she made improvements to the home so that it does not lose value, she cooked for the Respondent and the children, washed the Respondent's clothes, took the children to school, and provided companionship to the Respondent. He cited the case of TKM v SMW [2020] eKLR, the case of MNH vs FHM [2018] eKLR. He also contended that although execution of parental responsibility may not by itself be a factor in division of property, the Applicant is the one who took all the responsibilities of educating the children without the support of the Respondent who, though had income from tea, milk and salary, chose to educate his own siblings.

22. Counsel therefore insisted that the Applicant is entitled to a 50 per cent share in the matrimonial property as her evidence demonstrated contribution, both monetary and non-monetary towards acquisition of thereof. He submitted that by virtue of Section 12(1) of the *Matrimonial Property Act*, the Court has powers to, and should, order that the motor vehicles KAX XXXU and KBV XXXW sold without the Applicant's consent and thus void, do revert since the Respondent did not pass a good title to the purchasers and who are therefore holding the vehicles subject to the Applicant's overriding interest. In the alternative, he urged the Court to order the Respondent to remit ½ share of the net current market proceeds of the sale of the motor vehicles, and for which the Court should order that a reputable valuer be appointed to ascertain the value. He cited the case of NKC v EWK (Matrimonial Cause No. 2 of 2023) (2024) KEHC 1044 (KLR) (20 August 2024). He then urged, in further alternative, that if the Respondent is unable to pay the ½ share, then the same be recovered from the rest of his share in other properties which are not encumbered, and an order of injunction do issue restraining him from dealing with the same.

Respondent's Submissions

23. On his part, Counsel for the Respondent, in very lengthy Submissions, after recounting the witness' testimonies, submitted that there is no law requiring equal distribution of matrimonial property

between spouses. He cited Section 7 of the *Matrimonial Property Act*, and the case of PNN v ZWN [2017] eKLR, and averred that in this case, the presumption of equal distribution, joint or trust under Section 14 has been rebutted as the contribution, if any, from the Applicant only proves to be indirect and non-monetary, and which was also diminished by the Respondent's monetary contribution in household and farm care with employees working without supervision. Regarding the Applicant's claim over the properties, he restated the law on the issue, and cited the case of Njoroge vs Ngari (1985) KLR. He submitted that the Applicant bore the legal and evidential burden of proof under Section 109 as read with Section 111 of the *Evidence Act*, and contended that she did not adduce evidence in proof of direct/financial contribution which had been pleaded, that some of the properties are registered in the names of third parties, including motor vehicles which were co-owned with the Respondent's employer. Regarding the Receipts from "Lino", he submitted that the purpose thereof was not explained, that the Applicant did not identify the property which she was developing or putting up the alleged poultry project and/or planting trees. Regarding the loan of Kshs 500,000/- which the Applicant claims to have taken, he contended that the same was not backed by any evidence and its appropriation towards acquisition or developing the property was not demonstrated. He cited the case of Burns v Burns (1989) 1 ALL ER 244, and also pointed out that the Receipts from "Lino" also form part of the Respondent's own documentary evidence and thus, the Court cannot assume a common intention.

24. He also cited the case of Gissing v Gissing (1971) AC 888 on the principle leading to a presumption of a trust and the Court's obligations over affairs of parties, and submitted that the Respondent clarified that the Receipts in the name of one Mrs Kirui were used to build the poultry structures. He also reiterated the Respondent's testimony that the Applicant was in college between 2007 and 2015 and deserted him when she finished college yet it is the Respondent who financed her college fees. Regarding the Applicant's testimony that she would get the money and give to the Applicant, he averred that the Applicant did not prove the source of this money, and thus failed to demonstrate the existence of common intention or trusteeship in acquiring the property. On the part of the Respondent, he submitted that he proved sole acquisition of properties through land sale agreements, loan schedules and applications, acknowledgment of payment of consideration, application for power line/electricity, purchase of cedar trees, agriculture loan and Receipts for purchasing hardware for projects on the land. According to Counsel therefore, the Applicant's case is incredible and unbelievable, and thus equal contribution was not proved. In respect to the claim of indirect contribution by the Applicant, Counsel averred that she admitted that the Respondent hired employees to manage the farm and did not dispute the Respondent's depositions that house-helps were hired, and that she proceeded to college and developed her career as a teacher during the pendency of the marriage.

25. He appreciated that often, women and home-keepers' contribution goes unnoticed and cited the case of **Nderitu v Kariuki (1977) LLR 2731 (CAK)**. He however submitted that each case should be determined on its merit and peculiar circumstances, and cited the case of **TKM v SMW [2020] eKLR**. He urged that the instant case is unique though not unusual in today's age as the home was literally run by employees hired by the Respondents. He reiterated that the burden of proof lay on the Applicant and yet she did not lead evidence on indirect contribution urging that her allegations of breastfeeding and dropping and picking the children from school only came up during cross-examination of the Respondent, and even then, it transpired that the Application was only doing this partly, not consistently. He cited **Section 2** of the **Matrimonial Property Act**, the case of **Kimani vs Kimani [1997] LLR 553**, the case of **Echaria v Echaria [2007] eKLR**, the Supreme Court case of **JOO v MBO (2023) KESC 4 (KLR)**, and several others. Counsel then relapsed into recounting the testimony of his client thus unnecessarily falling into repetitive Submissions, which I will not thus

reproduce. He however reiterated that there is evidence that the motor vehicle **KCU XXXX** was acquired through the Respondent's employer's scheme loans and, though delivered to him in 2019, the loan was cleared in 2022, while **KCD XXXP** was acquired in 2018 after the Applicant had already deserted the Respondent, and who cleared the loan in 2022 after the divorce. He cited **Section 14** of the **Matrimonial Property Act**.

25. Regarding the Applicant's claim to the Respondent's Pension, he cited the case of **WM v BML [2024] KEHC 9143 (KLR)** in }}which, he submitted, it was held that matrimonial property does not include Pension. Regarding salary, he cited the case of **NGV v CNV also known as CHM (Matrimonial Cause 6 of 2021) [2022] KEHC 16645 (KLR)** in which, he submitted, it was held that salary of a spouse can not constitute matrimonial property. He also cited **Section 36** of the **Retirement Benefits Act** which prohibits the attachment of such funds until released to the employee. In conclusion, in urging the Court not to be quick to allow 50:50 distribution, he cited the Supreme Court case of **Joseph Ombongi Ogentoto vs Martha Bosibori Ogentoto [2023] eKLR**.

Determination

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

> " Whether the several assets listed by the Applicant, though registered in the Respondent's (her ex-husband) name, constitute "matrimonial property", and if so, in what manner should they be shared out or divided between them, if at all?"

28. In this case, it is not in dispute that by the Judgment dated 20/11/2018, and Decree Nisi dated 10/01/2019, made in Eldoret Chief Magistrate's Court Divorce Cause No. 69 of 2016, the parties' marriage solemnized on 22/12/1990 was legally dissolved, and such dissolution formalized by way of the Decree Absolute dated 30/04/2019.

29. 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."

30. 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."

31. The phrase "equal rights" has been the subject of intense debate. 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 which it 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."

32. In Petition No. 20 of 2011, the Supreme Court, in the case of Joseph Ombongi Ogentoto Vs Martha Bosibori Ogentoto, stated, inter alia, as follows:

> "104. 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 Petition No.11 of 2020 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."

33. 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."

34. 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 that:

> " 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."

35. 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 union 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 stated that:

> " 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."

36. 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."

37. 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.

38. 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."

39. In this case, out of the 5 parcels of land alleged by the Applicant to be registered in the Respondent's name, the Respondent denied any knowledge of, or owning 3, namely, those described as Nandi/Kipsigak/XXX, Kitale [Particulars Withheld] Farm near Griffins Academy, and [Particulars Withheld] Farm Kitale as alleged by the Applicant. Indeed, the Applicant, despite listing the properties and alleging their existence, failed to present any evidence to support her allegations. The claims pertaining to these 3 alleged parcels of land therefore fails.

40. The only parcels of land proved to exist are therefore only two, namely, Nandi/Kipsigak/XXX, registered in the Respondent's name, and 3.96 acres portion of Nandi/Kipsigak/XXX, allocated to the Respondent in Kapsabet SPMC Succession Cause No. 114 of 2019.

41. In respect to the two above properties, I have no hesitation in finding that the only direct contribution made to their acquisition and development was the contribution made by the Respondent. He clearly demonstrated his source of income as being his salary and also loans from his employer and SACCO. The parties married in the year 1990 and divorced in 2019, meaning that the marriage lasted for about 29 years. It has however not been disputed that the Applicant left the matrimonial home around 2015, and thus basically separated from the Respondent even before the divorce was formalized in 2019. There is no doubt that the Respondent held a high-paying job throughout the marriage. According to the Respondent, and this was not disputed, by the time he married the Applicant (who, on her part, had just concluded her Form 4), he had already been working for 14 years. Further according to the Respondent and gain this was not challenged, he joined his employer initially as an Accountant around 1986 earning a monthly salary of about Kshs 15,000/-, and by the time he retired, in 2022, he had risen to the position of Finance and Administration Manager earning a monthly salary of around Kshs 650,000/- together with other benefits. The Title Deed on record indicates that the parcel of land Nandi/Kipsigak/XXX was registered in the Respondent's name in 2014, although he states that he acquired it much earlier in 2003, while he acquired the portion of Nandi/Kipsigak/XXX in bits around 2002-2005 The Respondent exhibited copies of documents confirming the loans he took and whose dates coincide with the period the properties were acquired and or developed. In respect to direct contribution therefore, the Respondent has, in my view, sufficiently demonstrated that he almost single-handedly incurred the cost of acquiring and developing the two properties.

42. On the part of the Applicant, she did not deny the Respondent's testimony that after completing her secondary education and getting married to the Respondent in the year 1990, she joined [Particulars Withheld] College in 1991, and thereafter got employed as a Primary School teacher, which she has been throughout her marriage, then in 2001 she joined [Particulars Withheld] University for a degree course in education, and in 2005, she commenced her Master's degree course which she completed in 2015. She also agreed that, at the time of the divorce in 2019, her monthly salary had reached the amount of around Kshs 31,000/-. She did not allege or allege that she had other sources of funds. Relatively therefore, her earnings were much lower compared to the Respondent's. It is not rocket science to determine that her salary alone could not have sustained any substantial financial contribution from her, leave alone taking of any serious loans. Although the Applicant has exhibited copies of some pay-slips demonstrating that she indeed took some loans during the marriage, looking at the low amount of the monthly deductions, it is clear that the loans taken could not have been for substantial amounts such as would support the acquisition and/or development of the two properties.

43. In any case, the pay-slips do not even show how much was taken and for what purpose. To this extent, the Respondent's contention that the loans taken by the Applicant were for her own person use

sounds plausible. I also consider that the Applicant did not seriously dispute that the Respondent heavily funded her college and university educational and career progression studies, ranging from undergraduate, to degree, to Master's level. If the Applicant had to be financed by the Respondent for her studies and also the Respondent had to open for her an M-Pesa and baby's clothes shop, obviously because she did not have the financial muscle to do these all by herself, where would she then have obtained the substantial funds required for acquisition of the two properties and their development? It is evident that the Applicant was one lucky woman insofar as she got a husband who went out of his way to heavily invest in her career progression, and in the process, nurtured the Applicant from being a Form 4 certificate holder into a Master's degree educationist. Many spouses do not get this kind privilege. It is unfortunate that after all this, the couple had to end up in divorce.

44. Having so said however, I will also say that noting that the couple was married for about 29 years, there is no doubt that the Applicant played a major and substantial role in assisting in building the Respondent to the person he is today. That cannot be wished away. Financially and career-wise speaking, the Respondent is by any means counted as a relatively successful Kenyan, having retired as a Senior Manager in a stable private company, enjoying a relatively high income, with two homes and having managed to send his children abroad for studies. Many Kenya's would be envious of the Respondent's achievements. What cannot however be ignored is the role obviously played by the Applicant in the process of the Respondent achieving these milestones, long before their relationship took a different turn leading to divorce. The Applicant carried pregnancies and after birth, must have taken care of the children as a mother, and in the process, nurturing them to adulthood. She also definitely provided the Respondent with spousal companionship and made him gain some level of respect in the society as a family man. These, by extension, contributed to the Respondent's peace of mind enabling him to concentrate on his work and career, which in turn, enabled him to rise through the ranks, and in the process gain financial freedom. It is this state of mind that enabled him to enough enough funds to then acquire and develop the properties, and to also educate the children, and give the family a relatively comfortable life. To this extent, the Applicant obviously made indirect contributions to the acquisition of the properties.

45. It is however also not disputed that during the marriage, the Respondent's employer provided the family with a company house, a gardener, watchman and even a cook, who thus played a big role in managing and handling the day-to-day family chores. I also note that according to the Respondent, his employer deducted some money from his salary to cater for these helpers.

46. It is also not contested that, as aforesaid, from the inception of the marriage, the Applicant has spent a big part of her time in pursuit of advancing her career path, starting from enrolling a primary school teachers' college, through university for an undergraduate degree course, and to a Master's Degree certificate. She, besides, also pursued and obtained several further undergraduate certificates. During all this time, she was also still maintaining her job as a school teacher. It was also not denied that for 10 years, she was the Rift Valley regional chair of the Kenya Music Festival, a duty that obviously also demanded much of her time, including a lot of travelling. It is therefore apparent that the Applicant, even if she wanted to do so, could not have had much time remaining from her very busy schedule to dedicate to her husband and children. In fact, according to the Respondent, the Applicant was more of "an absentee mother" and the Respondent was more of "a single parent".

47. Weighing all the above considerations, and applying the principles enunciated in the various authorities cited above, I am of the opinion that the fair estimate of respective contributions made by the parties in the acquisition of the two parcels of land is 70 per cent by the Respondent, and 30% by the Applicant.

48. Regarding the 5 motor vehicles alleged by the Applicant, the Respondent stated that two, namely, KAX XXXU and KBV XXXW, he sold with the knowledge and consent of the Applicant to raise

funds for one of their children's university fees abroad (Australia). This alleged consent was, of course, disputed by the Applicant. However, after listening to the parties giving their testimonies in Court, I am prepared to accept the Respondent's version. He impressed as being a truthful witness. That funds to send the child to Australia was raised is not contested by the Applicant. In fact, according to the Applicant herself, they needed about Kshs 2,200,000/-, out of which she gave Kshs 400,000/- and her other children also contributed about Kshs 400,000, and the rest was shouldered by the Respondent. The Respondent explained that he raised the funds from loans which he is still paying to date, and also from sale of the two motor vehicles. The Applicant did not also deny that it is the Respondent who basically catered for the child's upkeep in Australia and the additional fees, which he had also done for their other children also studying or who had studied abroad. In fact, the Respondent, in his testimony, stated that since 2015, he has spent about Kshs 3,000,000/- for the 1st born child's education in Sweden, Kshs 6,000,000/- for the 2nd born child's education in Australia, and Kshs 3,500,000/- for the last-born child's education at Strathmore College. He also testified that in in the divorce case Judgment made in 2019, the Applicant was ordered to make equal contribution as he towards their children's welfare but the Applicant has not complied to date. The Respondent, being retired with no known income, where did or does the Applicant expect him to have raised the funds from? In any case, there is no evidence that the Applicant has at any previous time, before this suit, demanded to know the whereabouts of the motor vehicles or, protested against the sale of the vehicles. Her raising of these issues at this belated stage smacks of an afterthought, and I reject it.

49. Regarding the motor vehicle KCU XXXX, the Respondent stated that he acquired it in June 2019 through a company loan and he cleared paying for it on 30/06/2022 after the couple had already divorced. He denied owning a motor vehicle KCP XXXP clarifying that the one he owns is KCD XXXP which he acquired in 2018 after the Applicant had left in 2015, and that he acquired it through a loan from a SACCO. Again, I am prepared to accept the Respondent's explanation since his claims are backed up with credible documentary evidence. Considering that the Applicant does not deny that she left the Respondent, and by extension, the matrimonial home in 2015 after their relationship soured, I do not see what material contribution she could have made to acquisition of the two motor vehicles which were paid for through long-term loans by the Respondent, and which payments he completed making after the divorce. This claim also fails.

50. Regarding the tractor described by the Applicant as KCP XXXC, the Respondent denied any knowledge of such a tractor but disclosed that the one he owns is KTCB XXXS (formerly KAN XXXE) which he single-handedly acquired in 2012 through a SACCO loan. There being no dispute that this tractor was acquired during the pendency of the marriage, and considering what I stated above in respect to the Applicant's indirect contribution to acquisition and development of the properties acquired during the marriage, I also subject this tractor to the same apportionment of 70 per cent in favour of the Respondent and 30 per cent for the Applicant.

51. Regarding the Pension provided to the Respondent through his former employer's Provident Fund, I agree with the Respondent's Counsel that the Applicant cannot claim to be a beneficiary thereof. Counsel urged that the Applicant is herself a teacher by profession with a Master's Degree and is equally pensionable. Counsel therefore understandably wondered what will happen to her own pension when she retires. There is merit in this submission. Counsel also raised the further credible argument that the Respondent is already retired with no other source of income hence it would be unjust for his retirement benefits to be made part of matrimonial property. I agree. In any event, what contribution, within the meaning in Section 6 of the *Matrimonial Property Act*, could the Applicant have made to the Pension? I also associate myself with the logic applied by Chemitei J in the case of WM v BML

[2024] KEHC 9143 (KLR), cited by the Respondent's Counsel, in which, faced with circumstances similar as herein, the Judge held as follows:

> " 50. Turning now to the issue of the pension, it is evident that the same came from the [particulars withheld] Foundation and T-C which the plaintiff worked for. There is respectfully no evidence of how she contributed to it or at all.
>
> 51. Section 6 of the Matrimonial Property defines what is matrimonial property it states thus:-"....."
>
> 52. The same does not include pension as one of the properties. One's pension is jealously guarded in law and it is so personal that in the usual scheme of things for example it is not possible to attach. Needless to state that it does not form part of the matrimonial assets as defined above and therefore that prayer by the defendant is not meritorious."

52. For the above reasons, the Applicant's claim of entitlement to the Respondent's Pension fails.

Final Orders

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

    i. A declaration is hereby made that for purposes of the now dissolved marriage between the Applicant and the Respondent, considering the direct and indirect contributions made by the parties in acquisition and development thereof, the following 3 assets constitute matrimonial property acquired and/or developed during the pendency of the marriage, in which both the Applicant and the Respondent have beneficial interest, and in which the Respondent, DKK, is entitled to a share of 70 per cent of the aggregate value thereof, while the Applicant, RCK, is entitled to 30 per cent:

        a. parcel of land known as Nandi/Kipsigak/XXX measuring 1.37 Hectares, currently registered in the sole name of the Respondent.

        b. 3.96 acres portion of the parcel of land known as Nandi/Kipsigak/XXX, allocated to the Respondent in Kapsabet SPMC Succession Cause No. 114 of 2019-Estate of Kiboson Arap Barno, as indicated in the Amended Certificate of Confirmation of Grant dated 7/05/2021.

        c. Tractor described as registration number KTCB XXXS, (formerly KAN XXXE).

    ii. I now give the parties a period of thirty (30) days to discuss and attempt an amicable settlement on the manner in which they wish to divide and/or share the 3 properties listed above, in accordance with (i) and (ii) above. Should the parties fail to reach a settlement within the set timelines, unless the same is extended, the Court shall be at liberty to proceed to divide the property accordingly between them.

    iii. For avoidance of doubt, the Applicant's following claims are dismissed:

        a. Claims over the 3 alleged parcels of land described as Nandi/Kipsigak/XXX, Kitale [Particulars Withheld] Farm near Griffins Academy, and [Particulars Withheld] Farm Kitale, the Applicant having failed to adduce evidence of the existence of the said parcels of land and/or to prove that they are registered in the name of the Respondent.

b. Claims over the motor vehicles registration numbers, namely, KAX XXXU and KBV XXXW, the Respondent having demonstrated that that the two were sold during the pendency of the marriage for purposes of raising funds for one of the Applicant's and Respondent's children's university fees abroad (Australia).

c. Claim over the motor vehicle registration number KCU XXXX, the Respondent having demonstrated that he acquired the same in June 2019 through a company loan which he cleared servicing in June 2022, after the couple had already divorced.

d. Claim over the motor vehicle registration number KCD XXXP (wrongly described by the Applicant as KCP XXXP), the Respondent having demonstrated that he acquired the same through a loan in 2018, the same year that the couple divorced, after the Applicant had long left him in 2015.

e. Claim over the Respondent's Pension (Provident Fund) with [Particulars Withheld] (EPK) Annuity and Benevolent Fund.

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

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF SEPTEMBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Mr. Lubanga h/b for Kagunza for the Applicant

Mr. R.M. Wafula for the Respondent

Court Assistant: Brian Kimathi