



**NWK v BKG (Civil Suit 55 of 2017) [2024] KEHC 163 (KLR)
(Family) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT 55 OF 2017
PM NYAUNDI, J
JANUARY 19, 2024
IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013
AND IN THE MATTER OF THE LAND REGISTRATION ACT**

BETWEEN

NWK APPLICANT

AND

BKG RESPONDENT

JUDGMENT

1. Vide Amended Originating Summons dated 19th May 2021, presented under Section 2,6,7,9 and 17 of the Matrimonial Property Act, 2013 and Section 93(3) of the Land Registration Act, the Applicant herein seeks the following orders
 1. That a declaration do issue that all the under listed properties which are registered in the name of the Respondent and / or otherwise held on his behalf, his control are owned jointly by the Applicant and the Respondent and/ or are held beneficially and in trust for the Applicant
 - a. Sosian/sosian Block 1/6812 (Mifugo)
 - b. Kabaruu/ BlockII/ Mathina 735
 - c. Sosian/ Sosian Block 1/11393 (Mifugo)
 - d. Kabaruu/ Block 2/ Mathina/ 729
 - e. Kabaruu/ Ngonde/ Block 3/ Thego/109
 - f. Kabaruu/ Ngonde Bloc III/ Thego/ 110



- g. Kabaru/ Ngonde Bloc 3/ Thego/ 111
 - h. Kabaru/ Ngonde Bloc III/ Thego/ 112
 - i. L.R. No. 6845/170 (plot no 26 & 27) UTAWALA
 - j. Plot Certificate NO. 0478/UTAWALA
 - k. Kiganjo Estate P/NO/9395/197
 - l. Kiganjo Estate P/NO/9395/212/77
 - m. Ruaraka Housing Estate Ltd Certificate No.3929
 - n. Ngara House No. 12, 1st Floor, Block B Phase II Estate
 - o. Toyota Hilux Registration NO. KBN 999J
 - p. Toyota Crown Registration No. KBZ 932Y
 - q. Toyota Prado Registration No. KBW 484 G
 - r. Isuzu (Bus) registration No. KCC 021 A
 - s. Isuzu (Bus) Registration No. KCK 249 F
 - t. Isuzu (Bus) Registration No. KCD 179 Q
 - u. Subaru Impreza KBZ 882 R
 - v. 330 Shares in Utumishi Investment Ltd
 - w. Kabaru/ Block 11/ Mathina/ 304
 - x. Donyo Sabuk/ Komarock Block 1/ 27522
2. That an order do issue declaring that 50 % of the properties aforesaid or such other or higher proportion of the properties aforesaid are held by the Respondent in trust and for the beneficial interest of the Applicant.
3. That the joint ownership in respect of matrimonial properties listed hereunder be severed and that the same beheld by the parties herein as tenants in common;
- a. Kabaru/ Ngonde Block III/ Thego/ 107 measuring 0.3412 Ha
 - b. Kabaru/ Block 2/ Mathina/ 318 measuring 0.7284 Ha
 - c. Plot No. 9395/ 212/ 77 (Kiganjo) measuring 50 by 1000
 - d. Plot No. 9395/ 197 (Kiganjo) measuring 50 by 100
 - e. Plot No. 140/ Chaka
 - f. Plot No. 63/ Chaka
 - g. Plot No. 62/ Chaka
 - h. Kabaru/ Block 2/ Mathina/ 736
 - i. Kabaru/ Ngonde Block 111/ 108



- j. Plot No. 9395/216
- 4. That an order do issue declaring that the Respondent is accountable to the Applicant in respect of the sale of the following properties;
 - a. Plot Number 477 of L.R. No. 6845/ 165, Embakasi
 - b. Plot Number 478 of L.R. No. 6845/ 165, Embakasi
 - c. Motor Vehicle Toyota Crown Reg. No. KBZ 932 Y
 - d. Plots: Kabarú/ Ngonde/ Block 7 Muruthi/ 119
 - e. Kabarú/ Ngonde/ Block 7/ muruthi/ 120
- 5. That the Deputy Registrar be empowered to sign any documents that the Respondent may refuse to sign.
- 6. That this Honourable Court be pleased to grant such further or other reliefs may be just in the circumstances
- 7. That the costs of the Summons be provided for
- 2. The Respondent opposes the Summons and has filed Affidavits in Opposition.
- 3. The matter proceeded to hearing by way of viva voce evidence and both the Applicant and Respondent testified in Court

Summary Of The Applicant's Testimony And Submissions

- 4. The Applicant testified that she and the Respondent were married for 35 years, prior to their divorce. The union has 2 children whom they adopted. Her Affidavits in support of the Original Originating Summons, the Amended originating Summons, her further affidavit and witness statement were admitted as her evidence in Chief.
- 5. The Respondent supported the Children until 2017. It was her evidence that during their marriage she was in salaried employment, and she took loans that she utilised to contribute towards acquisition and development of the joint matrimonial property. This includes Mathina/ 735 and Mathina 736.
- 6. She made both financial and non- financial contribution. By the nature of his work, the Respondent travelled extensively. She managed the house, took care of the children and his ailing parents. She also sponsored his sister through a tailoring course in college.
- 7. She testified that she contributed towards the acquisition and development of the property at Kiganjo, where they have 16 residential units. She supervised the construction and on occasion she contributed financially. She cited an occasion when she contributed Kshs 40,000.
- 8. He completed the Construction in 2017 the rent is channelled to his current wife.
- 9. She seeks 50% of the property that is jointly registered in their names as it was acquired during the pendency of the marriage
- 10. On cross examination, she confirmed that the children of the marriage are adopted. She asserted that the properties were registered in their joint names as they were acquired jointly.
- 11. She retired in 2018. At the time of her retirement her salary was Kshs 50000. She made financial contribution towards the purchase of the matrimonial property. She did not keep receipts of her



- financial contribution as the relationship was based on trust. She does not have evidence of her financial contribution towards the purchase of the Utawala property. The Ngara property was acquired through the Civil Servants Mortgage Scheme.
12. It was her evidence that all the properties were acquired during the pendency of the marriage. She contributed by offering guidance and support. The Respondent bought her the Subaru Impreza KBZ 882R as a gift.
 13. In re-examination, she stated that she was informed by her children that the Respondent had carried his clothes out of the house. It is not true that she had stolen his title deeds. The respondent had left the title deeds in the house when he moved out. She contributed towards the purchase of Sosian and other properties. At the time they got married she was earning more than the Respondent. It was the Respondent who left the matrimonial home.
 14. In her Submissions the Applicant identifies the following as the issues for determination
 1. Whether the properties were acquired during the marriage
 2. Whether the parties contributed towards the acquisition, development, and maintenance of the suit properties
 3. How jointly held properties should be dealt with
 4. Whether the Applicant is entitled to a 50% share or such higher proportion of the properties
 15. On the first issue it is submitted that since all the properties were acquired during the subsistence of the marriage, they are matrimonial property.
 16. On the Second issue, it is submitted that both the parties were engaged in employment during the marriage. The Applicant it is submitted took out a loan to contribute towards the purchase- of Kabaru/ Block II/ Mathina 735. It is further submitted that the Applicants contribution should be recognised notwithstanding she does not have documentation to support the same, as at the time she was making the contributions, she did not foresee that in the future she may be required to prove her contribution.
 17. It is submitted that the Utawala property was the matrimonial home and that the parties lived there before moving to Ngara and that she made both direct and indirect contributions towards its acquisition and development.
 18. It is submitted that the home at Ngara is the current matrimonial home, and the Applicant has singlehandedly contributed to its running and management. The family has lived there together from 2014 to 2017 when the Respondent left. The Applicant submits that she contributed Kshs 150000 towards the payment of the deposit for its purchase.
 19. With regards to the following commercial plots; Plots No. 477 and 478 on LR No. 6845/165; Kabaru/ Ngonde/ Block 7 Muruthi/ 119 & Kabaru/ Ngonde/ Block 7/ Muruthi/ 120; plot certificate no. 0478/ Utawala, it is submitted that these are matrimonial properties that the Respondent and should therefore account for the proceeds from their sale.
 20. With regards to Sosian/ Sosian Block 1/ 6812 and Sosian/ Sosian Block 1/1 1393 (Mifugo) , Donyo Sabuk/ Komarock Block 1/ 27522; Ruaraka Housing Estate Certificate No. 3929; Kabaru Ngonde and Kabaru Mathina in Nyeri. It is submitted that the Applicant contributed towards their acquisition. That the same are vacant and the Applicant undertook some farming on the plots and also invested in farm implements. It is contended that she is entitled to a share having made both direct and indirect contributions.



21. The Applicant relies on the following precedents for the assertion on whether the suit properties constitute matrimonial properties and how the Court should determine the respective shares; DNK VKM [2021] eKLR , MW vs AN [2021] eKLR and Supreme Court Petition No. 9 of 2021
22. On the 3rd Issue in relation to the properties registered in the joint names, it is submitted that the Applicant is entitled to an equal share and reference is made to the decision in H K W v N I I [2017] eKLR
23. On the submission that the Applicant is entitled to 50% share of the matrimonial properties, the Applicants makes reference to a number of decisions of the High Court namely E N K v J N K [2015] eKLR; EMN V N M [2018] eKLR ; F S V E Z [2016] eKLR and MNH v FHM [2018] eKLR

Summary Of Respondent's Case And Submissions

24. It was the Respondent's evidence that the only assets the Applicant contributed towards acquisition were Sosian/ Block 1/ 6812 and Sosian/ Sosian Block 1/ 11393, which are in Laikipia. That it was while he was on special assignment between 2003-2010 that he was able to acquire income to invest in the properties to prepare for his retirement.
25. That the House at Ngara was paid for by him through the Civil Servants Mortgage Scheme and while married with the Applicant they lived there. He considers Ngara to be the matrimonial home.
26. He contended that he solely contributed to the purchase of the property at Utawala and that is where he resides. It was his evidence that he had never lived with the Applicant at Utawala.
27. He registered the properties in their joint names to cushion the Applicant from his family as she was unable to conceive children.
28. He stated that the property in Kiganjo is developed on his father's land and is therefore not available for distribution. He asserts that he disposed of properties to finalise the construction at Kiganjo and Utawala. The motor vehicle KBZ 932 Z was registered in his name and he disposed of it when it developed mechanical problems.
29. It was his response that some of the vehicles claimed by the Applicant were registered in the name of a 3rd party. It is his assertion that he contributed 99% towards the acquisition of the assets. It is his evidence that the marriage collapsed on account of the infidelity of the Applicant.
30. On cross examination, he asserted that the Children were adopted and that the birth certificates presented in Court were fake. He stated that he does not support the children. He opted not to register all the properties jointly. He purchased the properties when he was on special assignment and his earnings increased.
31. It was his evidence that with the loans she took, the Applicant constructed a house for her sister and her father. He denied that the Applicant supervised the construction of the Utawala house. He confirmed that before Ngara they lived at Highridge. He stated that the Applicant had refused to move into the Utawala house.
32. He denied that the properties were registered in their joint names because they had made equal contribution.
33. In Submissions, the Respondent identifies the following as the issues for determination
 1. Whether the suit properties constitute matrimonial properties



2. Whether in the circumstances the Applicant is entitled to the orders prayed for in the amended Originating Summons
34. The Respondent submits that the only properties that constitute Matrimonial property and to which the Applicant contributed are
1. Sosian/ Sosian Block 1 6812 (Mifugo
 2. Sosian/ Sosian Block 1/ 11393 (Mifugo)
35. He concedes that the following are registered in their joint names, but no contribution made by the Applicant.
1. Kabarú/Block II/ Mathina/318
 2. Plot No 62/ Chaka
 3. Plot Number 63/ Chaka
 4. Plot Number 140/ Chaka
36. The Respondent avers that the following properties are registered in his name solely as they were acquired without the contribution of the Applicant and do not comprise matrimonial property.
1. Kabarú/ Block II/Mathina 729
 2. Kabarú/ Block II/Mathina 735
 3. Kabarú/ `Ngone/Block III/ Thego/107
 4. Kabarú/ `Ngone/Block III/ Thego/109
 5. Kabarú/ `Ngone/Block III/ Thego/110
 6. Kabarú/ `Ngone/Block III/ Thego/111
 7. Kabarú/ `Ngone/Block III/ Thego/112
 8. Kiganjo Estate Plot No. 9395/197
 9. Kiganjo Estate Plot No. 9397/212
 10. L.R. No. 6845/170 (Plot No.26 and 27) Utawala
 11. Plot certificate No. 0478/ Utawala
 12. Ngara House p/no 1978041151
 13. Toyota Hilux Registration Number KBN 999J
 14. 330 shares in Utumishi Investment Limited
37. It is submitted further that since the following motor vehicles are not registered in the name of the Respondent, they cannot constitute matrimonial property
1. Isuzu (Bus) registration Number KCC 021A
 2. Isuzu (Bus) registration Number KCK 249F
 3. Isuzu (Bus) registration Number KCD 0179Q



38. The Respondent relies on the decision in F.S v E.Z [2016] eKLR for the assertion that the Applicant is not entitled to share in property in which she did not make any monetary contribution.
39. On the 2nd Issue the Respondent relies on the decision in the case of Peter Mburu Echaria vs Priscilla Njeri Echaria [2007] eKLR for the assertion that the Applicant has not discharged the burden of proof to entitle her to a share of the properties registered in the sole name of the Respondent as she has not proved her financial contribution either direct or indirect.
40. The Respondent is vehemently opposed to the assets being distributed equally as it is his submission that her contribution was minimal and argues that this would be tantamount to allowing the Applicant to reap where she did not sow.

Analysis And Determination.

41. Having reviewed the pleadings, submissions filed herein and the relevant law , I identify the following as the issues for determination-
 1. Which of the suit properties are matrimonial property?
 2. Did the Applicant Contribute towards the acquisition of the matrimonial property
 3. What share, if at all, of the matrimonial property is the Applicant entitled to?
 4. Who should bear the costs of the Suit?

Issue 1: Which of the Suit properties are matrimonial property?

42. Section 6 of the [Matrimonial Property Act](#), 2013 provides the definition of Matrimonial property to include
 - (1) For the purpose 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 owed and acquired during the subsistence of the marriage.
43. The parties solemnised their marriage in accordance with Kikuyu Customary law and later under the [Marriage Act](#) (now repealed) on 5th November 1982. The couple adopted 2 children during the pendency of their marriage.
44. The properties as enumerated under paragraphs 1 of the Amended Originating Summons were acquired during the subsistence of the marriage. For purposes of determining the Applicant's interest they can be categorised as follows-
45. From the evidence on record, it is clear that during the pendency of the marriage the Couple established 2 matrimonial homes. One at Utawala LR No. 6845/170 (Plot 26 & 27) in Utawala and the subsequent one at Ngara House No. 12 1st Floor, Block B Phase II Estate (P/No.1978041/151)
46. The other home they had established was in Nyeri, the Applicant did not lead evidence that would enable the Court identify which of the properties enumerated consists the home in Nyeri.



47. There is uncontroverted evidence that the Applicant currently resides with the Children at the house in Ngara and has lived there since 2014. It is also not controverted that when the marriage hit the rocks the Respondent removed the belongings of the Applicant from the houses in Nyeri and Utawala. It is on this basis I find that the houses in Ngara and Utawala constitute matrimonial property as defined under Section 6 (1) of the *Matrimonial Property Act*. As stated from the evidence placed before me I am unable to identify the property in Nyeri that was the matrimonial home of the parties.
48. It is also not disputed that during the pendency of the marriage the Couple acquired some properties that were jointly registered, these are indisputably matrimonial properties. These include
1. Kabaru/ Ngonde Block 111/ Thego 107
 2. Kabaru/ Block II/ Mathina/ 318
 3. Plot Number 62/ Chaka
 4. Plot Number 63/ Chaka
 5. Plot Number 140/ Chaka
49. The Respondent concedes that the following 2 properties are registered in his sole name but that the Applicant made a contribution to their acquisition
1. Sosian/ Sosian Block 1/6812 (Mifugo)
 2. Sosian/ Sosian Block 1/ 11393 (Mifugo)
50. Lastly there are the properties that were acquired during the pendency of the marriage that are registered in the sole name of the Respondent in which the Applicant claims a beneficial interest by virtue of Section 14 (a) of the Matrimonial Properties Act 2013, these include
1. Kabaru/ Block II/Mathina 729
 2. Kabaru/ Block II/Mathina 735
 3. Kabaru/ Ngone/Block III/ Thego/109
 4. Kabaru/ Ngone/Block III/ Thego/110
 5. Kabaru/ Ngone/Block III/ Thego/111
 6. Kabaru/ Ngone/Block III/ Thego/112
 7. Kiganjo Estate Plot No. 9395/197
 8. Kiganjo Estate Plot No. 9397/212
 9. Plot certificate No. 0478/ Utawala
51. I have excluded some assets that have not been demonstrated to be matrimonial property. These include
- a. Isuzu (bus) registration Number KCC 021 A
 - b. Isuzu (bus) registration Number KCK 249F
 - c. Isuzu (bus) registration Number KCD 0179Q



These properties are not registered in the name of the Respondent. The Respondent has produced log books that show they are registered in the name of a 3rd party, this fact unchallenged by the Applicant

- d. It is also conceded that the Respondent purchased motor vehicle KBZ 882R Subaru Impreza and the same is registered in the name of the Respondent. This is a gift and therefore not included in the matrimonial assets
 - e. 330 shares in Utumishi Investment Limited. It is well established that this Court does not have jurisdiction to determine a dispute over shares that are held in a company. I rely on the decision in *N N N v S N M* [2017] eKLR in which the Court stated
 - [46]. Shares owned by the Respondent in the company cannot be construed as matrimonial property and be distributed under the principles set out in the Matrimonial Properties Act. The Applicant has not proved that she contributed in monetary or non-monetary ways towards acquisition or development of the property, or that she bought any shares in the company. This court therefore has no jurisdiction to grant the reliefs sought by the Applicant with respect to Plot No. [Particulars Withheld] and the shares in [Particulars Withheld] Limited which manages the hostels in the said Plot.
 - [47.] It is trite law that a company is a separate legal person/entity from its shareholders and directors as was espoused in the English case of *Salomon v Salomon* (1887) AC 22. From the foregoing I find that the said Property in L.R. No. [Particulars Withheld] managed by [Particulars Withheld] Limited belongs to the company and therefore the Applicant can only make a claim to the company shares under the provisions of the Company Act.
 - f. I have also excluded the following assets as the Respondent was categorical that he disposed of them so as to complete the development of the family home at Utawala and asking him to be accountable to the Appellant for the proceeds of the sale would amount to a double benefit to the Applicant.
 - i. Plot Number 477 of LR No 6845/165 Embakasi
 - ii. Plot Number 478 of LR No. 6845/165 Embakasi
 - iii. Motor Vehicle Toyota Crown Reg No. KBZ 932Y
 - iv. Plots: Kabaru/ Ngonde/ Block 7 Muruthi/119
 - v. Kabaru/ Ngonde/ Block 7/ Muruthi /120
 - g. Motor vehicles-
 - i. Toyota Hilux Registration No. KBN 999J and
 - ii. Toyota Prado Registration No. KBW 484G
52. Apart from producing the log books as proof of ownership, the Applicant did not in evidence establish that she contributed towards the acquisition towards the same. It is not sufficient to demonstrate that the asset is within the family, she had to demonstrate that there was a common intention that the same be regarded as matrimonial property.



2nd Issue: Did the Applicant Contribute towards the acquisition of the matrimonial property

53. It is now well established by judicial precedent that a marriage on its own does not have the effect of altering proprietary rights of a spouse. It is incumbent on the Spouse seeking a declaration of their share to matrimonial property to demonstrate contribution.
54. In the instant case this is particularly pertinent in relation to the properties enumerated under paragraph 53 above. It is not disputed that the Applicant was married to the Respondent for 35 years. She led evidence to show that at the time of their marriage they were both working. She was earning a salary of Kshs 1440/- while the Respondent was earning Kshs 900/-.
55. She has also submitted statements that show she took loans it is her evidence that she applied these loans to acquire matrimonial property. In addition to the direct and non- direct financial contribution she states she made some non financial contribution towards the acquisition of the property by managing the home, running the home, providing support and counsel to her husband.
56. It is not disputed that during their marriage, the Respondent's career was on a continuous upward trajectory including the 7 years he worked at State House and during which period he was able to acquire a number of the suit properties. It is conceded that the job entailed much travel and the Applicant was left to tend the home and in her evidence supervise the family assets.
57. Section 2 of the *Matrimonial Property Act* defines 'Contribution' to include Monetary and non-monetary contribution and includes—
- (a) domestic work and management of the matrimonial home;
 - (b) Child care;
- 59.
- (c) companionship
 - (d) management of family business or property; and
- 60.
- (e) farm work;
58. The *Matrimonial Property Act*, 2013 therefore responds to the proposal made by the Court of Appeal in the Echaria vs Echaria decision (Supra) when the Court deplored the state of the law then in Kenya that failed to recognise non- financial contribution by a spouse to acquisition of matrimonial property and stated as follows

This Court had occasion in Kamore vs. Kamore (supra) to clarify the law applicable in disputes of this kind. What this Court said at page 89 paragraph b is worth repeating:

“ We would like to add our observations, that is to say, that until such time as some law is enacted, as indeed it was enacted in England as a result of the decision in Pettitt vs. Pettitt and Gissing vs. Gissing to give proprietary rights to spouses as distinct from registered title rights section 17 of the Act must be given the same interpretation as the Law Lords did in the said two cases. Such laws should be enacted to cater for the conditions and circumstances in Kenya. In England the Matrimonial Homes Act of 1967 was enacted which was later replaced by the



Matrimonial Proceedings and Property Act of 1970. The Matrimonial Causes Act of 1973 also made a difference”

It is now about seven years since this Court expressed itself in *Kamore v Kamore*, but there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our Law Reform agenda to keep the country shackled to a 125 year-old foreign legislation which the mother country found wanting more than 30 years ago! In enacting the 1967, 1970 and 1973 Acts, Britain brought justice to the shattered matrimonial home. Surely our Kenyan spouses are not the product of a lesser god and so should have their fate decided on precedents set by the House of Lords which are at best of persuasive value!

59. The law now recognises monetary and non- monetary contributions when it comes to acquisition of matrimonial property. In the instant case I find that the Applicant made both direct and indirect financial contribution towards the acquisition of matrimonial property. She was in salaried employment. She contributed substantially to the running of the homestead and caring for her in laws (tuition for sister-in-law to undertake a tailoring course, nursing a sick father-in-law). She also took over running of the house thereby freeing the hands of the Respondent to allow him to scale to high heights in his career. I can think of no higher contribution a spouse can make to the development of a home than providing a conducive and enabling environment for the spouse to thrive career wise.
60. Having determined that the Applicant contributed to the acquisition of the matrimonial property, the next issue for determination is her share. Section 14 (b) of the *Matrimonial Property Act* provides, that where matrimonial property is acquired during the marriage

in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal
61. Section 14 (a) also provides that where the property is acquired during the marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.
62. As is evident the onus is on the party who challenges the presumption to disprove it. In the instant case, I find that the RESPONDENT did not discharge this burden. In the circumstances I find that the properties that are jointly registered are held in joint equal shares between the Applicant and the Respondent and find that she is entitled to 50 % share of those properties.
63. As relates to the properties registered in the sole name of the Respondent, I note that all these properties were acquired within the same time frame (over a period of within 10 years) and within the same locality. It is safe to infer a continuing intention to expand the family investment portfolio.
64. I am guided by the observation of the Supreme Court in the recent decision of *Petition No 11 of 2020 Ogentoto vs Ogentoto* where it stated thus In agreeing with the above decisions, we must note that, in a marriage, the general assumption is that both spouses share everything, and on the face of it, both parties contribute towards the home or family, in one way or another, to whichever extent, however big or small. Again, and further to this, both spouses may also work and earn income, which inevitably, at most instances, always ends up being spent on the family unit. It may be the whole income, or a substantial part of it, but ultimately, a percentage of it goes into the family. This is the essence of Section 14 of the *Matrimonial Property Act*, 2013.



65. In the Echaria case, the Court of Appeal was emphatic that in determining the beneficial interest of the spouse the Court had to have regard to the circumstances of each case

In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see *Essa vs. Essa* (supra); *Nderitu vs. Nderitu*, Civil Appeal No. 203 of 1997 (unreported), *Kamore vs. Kamore* (supra); *Muthembwa vs. Muthembwa*, Civil Appeal No. 74 of 2001 and *Mereka vs. Mereka*, Civil Appeal No. 236 of 2001 (unreported)). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband.

66. This approach was cited with approval by the Supreme Court in the Ogentoto case cited above. The Court stated-

(83) The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfil their obligation of proving what they are entitled to be way of contribution.

67. It was the Applicants case that she had made direct financial contribution towards the acquisition of some of the matrimonial properties in Ngara, Utawala and Nyeri but did not have evidence of the same as at that time she did not anticipate that a time would come when she would need to prove her contribution, the relationship being one that is founded on trust. Having had opportunity to observe both the Applicant and Respondent in Court I am inclined to believe the Applicant. She was able to demonstrate that she did take loans. There is a sale agreement in respect of property in Kiganjo where she co signed as a purchaser, notwithstanding that the Respondent states he solely purchased the property. The Supreme Court concurred with the Court of Appeal decision in the Ogentoto case where the Court stated-

[18.] 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 a beneficial interest therein....

68. Apart from the direct and indirect financial contribution, the Applicant also made non monetary contribution to the accumulation of the matrimonial properties. As observed earlier by taking on the home front she literally freed the Respondent and gave him the space, opportunity and ability to cast his net as wide as he wanted to. In his evidence and submissions, the Respondent sought to trivialise the contribution of the Applicant.



69. In the Ogentoto case, the Supreme Court cited with approval the dicta of the House of Lords in the decision in *White v White* [2001] 1 AC 596 on the weighting between financial and non financial contribution-

“Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. As Butler-Sloss LJ said in *Dart v Dart* [1996] 2 FLR 286, 303, the statutory jurisdiction provides for all applications for ancillary financial relief, from the poverty stricken to the multi-millionaire. But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions. This is implicit in the very language of paragraph (f): '... the contribution which each has made or is likely ... to make to the welfare of the family, including any contribution by looking after the home or caring for the family.' If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.

70. An interpretation of the law that recognises and gives due weight to both financial and non financial contribution is in consonance with Article 45 (1) of the Constituion of Kenya which provides-

The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.

71. The institution of marriage will be at risk if at its termination parties are required to present a record similar to audited accounts of their direct and indirect financial contribution towards the acquisition of matrimonial properties. This would mean that during the pendency of the marriage time and effort that should be spent on building the home may be spent keeping a brick by brick record of the contribution. This would not make for healthy marriages.
72. It is best that from the get go that parties appreciate that the law places commensurate value on non financial contribution and a party who gives their heart and soul to the building of the family will not be subjected to the indignity of 'being set back' by virtue of having been married.
73. In this case the marriage lasted 34 years. That must count for something. The Applicant was clearly responsible for running the home. Having determined that I consider the non-financial contribution of the Applicant to be weighty, I hold that the beneficial share of the Applicant in the properties registered solely in the Respondents name shall be 50%.
74. On the final issue as to costs, having regard to the nature of the matter and the relationship between the parties as co parents, each party shall bear their own costs.



75. Consequently, having regard to Rule 30 of the Matrimonial property Rules these are the final orders of the Court

1. The following properties are matrimonial property
 - i. Kabaru/ Ngonde Block 111/ Thego 107
 - ii. Kabaru/ Block II/ Mathina/ 318
 - iii. Plot Number 62/ Chaka
 - iv. Plot Number 63/ Chaka
 - v. Plot Number 140/ Chaka
 - vi. Sosian/ Sosian Block 1/6812 (Mifugo)
 - vii. Sosian/ Sosian Block 1/ 11393 (Mifugo)
 - viii. Kabaru/ Block II/Mathina 729
 - ix. Kabaru/ Block II/Mathina 735
 - x. Kabaru/ `Ngone/Block III/ Thego/109
 - xi. Kabaru/ `Ngone/Block III/ Thego/110
 - xii. Kabaru/ `Ngone/Block III/ Thego/111
 - xiii. Kabaru/ `Ngone/Block III/ Thego/112
 - xiv. Kiganjo Estate Plot No. 9395/197
 - xv. Kiganjo Estate Plot No. 9397/212
 - xvi. Plot certificate No. 0478/ Utawala
 - xvii. Utawala LR No. 6845/170 (Plot 26 & 27)
 - xviii. Ngara House No. 12 1st Floor, Block B Phase II Estate
2. The Applicant having contributed both in monetary and non monetary terms is entitled to 50 per cent share of the matrimonial assets as set out in para (1) above.
3. That in the interest of justice the Applicant and Respondent shall retain the homes in Ngara and Utawala respectively as their separate matrimonial home. The Respondent to execute documents to facilitate transfer of the home in Ngara to the Applicant within 30 days.
4. Having determined the shares of the matrimonial properties, to facilitate division, it is necessary that the properties be valued (except for the 2 matrimonial homes) so as to determine their worth. Counsel of both the Applicant and Respondent to jointly identify a valuer to determine the value of the aforesaid assets within 30 days.
5. In the event that they are unable to agree on a valuer within 30 days, Counsel for the Applicant will identify a valuer within 14 days.
6. The Valuer will prepare and submit the valuation report within 30 days of receipt of instructions. The Valuation fees to be shared equally between the Applicant and the Respondent.



7. The first right to purchase will be given to the Respondent herein. The Respondent will buy out the Applicant (50 per cent of the value) within 90 days of the submission of the evaluation report.
8. In the event the Respondent elects not to buy out the Applicant or is unable to do so, the Respondent shall effect documents that will facilitate the transfer to the Applicant of her share within 30 days from the last day on which he had the option to exercise his right of purchase.
9. In the event that the Respondent declines to sign any documents that will facilitate the transfer of the assets within 21 days of delivery to him, the Deputy Registrar, Family Division will execute the same in his place.
10. The matter will be mentioned on 30th July 2024 to confirm compliance.

It is so ordered

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JANUARY, 2024.

NYAUNDI

JUDGE

In the presence of:-

Ms Ndirangu for the Applicant

Mr. Mugo was for the Respondent

Sylvia Court Assistant

