



**VJC v BSW (Matrimonial Cause E002 of 2022)
[2024] KEHC 688 (KLR) (2 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MATRIMONIAL CAUSE E002 OF 2022
JRA WANANDA, J
FEBRUARY 2, 2024**

BETWEEN

VJC PLAINTIFF

AND

BSW DEFENDANT

JUDGMENT

1. Before the Court is the Plaintiff's Originating Summons dated 25/03/2022 and filed in Court on 5/04/2022. The same is filed through Messrs Martim & Co. Advocates and is brought under the provisions of Section 2, 6, 7, 9 and 14 of the *Matrimonial Property Act*, Section 93(3) of the *Land Registration Act* and "all the other enabling provisions of the law". The questions placed before the Court for determination are as follows:
 - i. Whether the Plaintiff and the Defendant being husband and wife acquired the following property in the course of marriage:
 - a. Uasin Gishu/Kimumu Scheme [.....]
 - b. Matrimonial home.
 - ii. Whether the Plaintiff made material or non-material contributions towards the acquisition of the properties whose particulars are set out hereinabove.
 - iii. Whether the Plaintiff has a right to retain the matrimonial home either under common law principles of equity or customary law.
 - iv. Whether the relationship between the Plaintiff and the Defendant was one based on trust so that at equity the Court can enter constructive trust in respect of the properties acquired in the course of matrimonial relationship.



- v. Who shall bear the costs of this Summons.
2. The Summons is supported by the Affidavit sworn by the Plaintiff in which she deponed that she got married to the Defendant in the year 2007 under the Luhya customary law, they were blessed with 2 children, that in the year 2009 they purchased the plot measuring $\frac{1}{4}$ acre known as Uasin Gishu/ Kimumu Scheme [.....] (suit property) where they built their matrimonial home in the year 2013 and where the Plaintiff has lived to date, that they lived and cohabited peacefully until 2014 when the Plaintiff got employed and relocated to Kapsowar, since then the Defendant's attitude towards the Plaintiff changed and at times the Defendant became violent and the marriage irretrievably broke down, that she filed for divorce, namely, Eldoret CMCC Divorce Cause No. 31 of 2018, which has since been concluded, that under the common law a married woman has the right to retain the matrimonial home and the same is never available for distribution as matrimonial property, that their relationship was at all times based on trust, she worked and contributed materially to the acquisition of the property acquired with the Defendant, she had hopes that the marriage would be solid and based on integrity and fidelity and for this reason all the property was registered in the name of the Defendant, that from the nature of their relationship a trust ensued to the extent of her material and non-material contributions, that under the law she is entitled to a share of the properties due to her contributions towards acquisition.
 3. The Originating Summons was opposed by the Defendant who swore the Replying Affidavit filed on 10/06/2022 through Messrs Onyinkwa & Co. Advocates. In the Affidavit, he deponed that he is the registered and legal owner of the suit property having acquired it in the year 2009, that the Plaintiff is dishonest in alleging that they purchased the property together, that the Plaintiff was only a witness to the Sale Agreement, the Defendant single-handedly purchased the property, that contrary to the Plaintiff's statement that they built the matrimonial home in the year 2013 where the Plaintiff has allegedly been living to date, the correct position is that the Defendant moved into the suit property in the year 2014 at which time the Plaintiff was working and residing in Kapsowar and only came to the property later, that the Plaintiff never contributed to the acquisition of the property, that the property is not available for distribution since it is where their children reside and distributing the property will go against the best interest of the children as they will be rendered homeless, that the property is also not available for distribution since both parties were granted the joint custody of the children with the Plaintiff retaining physical custody of the minors as long as the Plaintiff remains at the matrimonial home, this was as per the order made in Eldoret CMCC No. 35 of 2017.
 4. The Defendant deponed further that there is nothing to be shared since he is the only one who acquired the property, that he paid the entire purchase price, the Plaintiff contributed nothing to the acquisition and it will therefore be unfair to distribute the property, that the Plaintiff took a loan with Mwalimu Sacco for purchasing and developing the property, the loan was for Kshs 787,000/-, although the Plaintiff was employed she never bothered to contribute even a single coin, that the loan is still outstanding and is still being serviced by the Defendant to date, that upon expiry of her employment contract the Plaintiff forced her way into the house that had already been completed, it is the Defendant who also furnished the house including purchasing electrical equipment and also purchased roofing materials, that he is the one who applied for electricity connection, the Plaintiff's intention all along has been to frustrate the Defendant, that the Plaintiff has not come to Court with clean hands since she has failed to mention that the Defendant supported her financially by opening an Mpesa agency business for her and that the Plaintiff makes periodic deposits into the business to keep running.
 5. The suit then proceeded for viva voce hearing which was conducted on 4/10/2023.



Plaintiff's evidence

6. The Plaintiff stated that the Defendant was her husband but are now divorced, the divorce was pursuant to Eldoret CMDC No. 31 of 2018, the Judgment was delivered on 27/09/2018, that the suit property was purchased in 2009, her contribution to the suit property is that she is the one who searched for it and was a witness when it was purchased, they purchased the property while they were still married and it is now developed, she purchased building materials and commenced construction of the foundation up to the lentil and the Defendant only joined in to assist at that stage, she had begun purchasing materials in 2010 and commenced the construction in 2013, when it reached the roofing stage she brought timber from her ancestral home, that the Defendant only began participating around May-June 2013, they concluded the construction in 2014 and moved in the same year, that in her Affidavit she had erroneously deponed that they moved-in in the year 2013, that the correct date is 2014, that she was then living at [Particulars Withheld] where she used to have an employment contract with Kenya Commercial Bank (KCB) but she used to come over during weekends, and that in 2014 the Defendant used to work at [particulars Withheld] High School and used to live in the school.
7. The Plaintiff stated that she now lives in the suit property, that she deserves a share thereof since she contributed to its acquisition and construction, that they have 2 children who also live in the property, the Defendant currently works at [particulars Withheld] Secondary School in Elgeyo Marakwet, he lives in the school and comes over during weekends, that the Defendant and herself therefore live in the same house but in separate rooms. She then referred to her Affidavit and the Receipts that she attached thereto to support her contributions and reiterated that she has invested heavily in the property. Regarding the children, she stated that they are a girl aged 15 years and a boy aged 13 years.
8. In cross-examination, the Plaintiff stated that they got married in 2007 under customary law, that they first lived in a rented house within the said Kimumu area and resided there until they moved into the suit property, they started experiencing problems in 2014 by which time they had not yet moved out of the rented house, they divorced in 2019, the Defendant purchased the suit property at a purchase price of Kshs 425,000/-, she did not contribute to the purchase price, the Defendant is the one named in the Agreement for Sale as the purchaser and it is also the Defendant who is the registered owner. The Plaintiff reiterated that she is the one who began the construction but admitted that she had not produced the building plan. She stated that she purchased the building materials in 2010 and commenced the construction in 2013, and that the materials were stored in the suit property. She was then referred to the copies of Receipts that she exhibited to her Affidavit and she admitted that although the Receipts were dated 9/05/2010, 10/8/2010 and 24/11/2010, thus months apart, they somehow bore successive serial numbers 2023, 2024 and 2026 in sequence, respectively. She also admitted that although the Receipts that she had exhibited in support of purchasing timber bore the dates 12/10/2011 and 21/02/2013, the serial numbers somehow bore close proximity in sequence being number xxxx and xxxx. She admitted that the sequence appeared suspicious but stated that the explanation thereon could only be given by the seller and denied that the Receipts were "doctored". She also conceded that the Receipts do not bear her name. She also agreed that she had not produced any photographs of the stages of construction. She reiterated that the timber for roofing came from her ancestral home and that they were brought by a lorry although she did not produce any Receipts to support the lorry transportation. She admitted that at the time that they moved into the house she was still residing at [particulars Withheld] pursuant to the KCB employment contract and that it is therefore true that the Defendant moved in alone. She agreed that she had not produced a copy of the KCB contract.



9. In Re-Examination, regarding the Receipts that she had produced, the Plaintiff stated that she is not the one who wrote them as they were issued by the seller. She therefore stated that she would not be able to give any explanations thereon. She added that the other Receipts that she had produced do not raise similar doubts. Regarding the timber materials for roofing, she stated that the same were given to her by her parents and as such there could not be any Receipts in support thereof.

Defendant's evidence

10. On his part, the Plaintiff testified that he is a teacher, that he got married to the Plaintiff in the year 2007 but are now divorced, that he is the one who constructed the house in the suit property, he took a loan from [Particulars Withheld] Sacco which is what he used to build, the loan was for Kshs 787,000/-, that he has produced electricity supply forms and Receipts which are all in his name, he opened an Mpesa business for the Plaintiff in 2010-2011, that he has produced Receipts showing that he is the one who has been making top-up payments for the Mpesa business, that they both still live in the same house in the suit property into which they moved in 2014, that it was him, the children and the maid who moved in, the Plaintiff was not there and they did not therefore move in with her, she was still at the rental house and moved in only about 1 month later, she has been on-and-off since then. The Defendant stated that he works at [particulars Withheld] High School in Keiyo South but insisted that he always comes back to the house when free. He also reiterated that the property belongs exclusively to him as he is the one who solely constructed it.
11. In cross-examination, the Defendant insisted that the Plaintiff only moved into the home later, that at that time the Plaintiff was working at [particulars Withheld] and rarely used to come over, that she moved in upon the end of the KCB contract. He agreed that before he moved, he was working in a school as a teacher in [particulars Withheld] where he used to live, that he used to live outside the school in a rented house but used to regularly come back home to see the children, that he used to employ maids for the children. He reiterated that the Plaintiff moved-in by breaking into the house and started living there, and that he is the one who constructed the house. He conceded that he has not produced any evidence to support his purchase of building materials and stated that he began purchasing the materials in pieces around 2012-2013 and not at once. He denied that the Plaintiff was the one who began the construction and conceded that some of the Receipts that he produced did not bear his name. He stated that currently he lives in the suit property together with the children who are currently in boarding school, that he is the one who purchased the furniture in the house and it is only one sofa set that was purchased by the Plaintiff and which, in any case, is kept in the Plaintiff's room.
12. In Re-Examination, he reiterated that he is the one who purchased all household goods, when they moved in, he is the one who used to live with the children, that he is the one who exclusively purchased the land, that by the time that they moved in they already had their daughter. He reiterated that the Plaintiff broke into the house after her contract with KCB ended and that he was away at that time.

Plaintiff's Submissions

13. In his Submissions, Counsel for the Plaintiff submitted that the couple jointly acquired the suit property in the year 2009 and the marriage ended in 2019. He cited Section 6 and 7 of the *Matrimonial Property Act* and submitted that the property was acquired during the subsistence of the marriage, was developed and the couple moved thereunto and therefore the property is within the threshold of what constitutes "matrimonial property". Counsel added that under Section 14 of the Act, there is a rebuttable presumption that the property is held in trust for the spouse and therefore the fact that the property was registered in the Respondent's name does not make it his personal property, he was holding it in trust for the Plaintiff in her capacity as a "spouse" and that the fact that she



contributed towards the construction of the property establishes her contribution and she is therefore entitled to claim a share. He submitted further that the Plaintiff made direct monetary contribution as well as indirect contribution by buying materials, supervising the construction when the Defendant was away in school, managing the home and catering for the children, that the Plaintiff also provided companionship to the Defendant during pendency of the marriage, that the contribution of the Plaintiff was not disputed by the Defendant and it is also admitted that the Plaintiff witnessed the purchase of the property was a show of support towards the Defendant.

14. Counsel further submitted that the Plaintiff should retain the matrimonial home, that she has been residing in the home from the year 2013 to date, it is where the children also reside having been granted custody of the minors, that the Defendant has not disputed that position, and that the fittings and furniture in the home were purchased by the Plaintiff. He cited the case of *PWK v SKG* [2015] eKLR and *F.S vs E.Z.*
15. Counsel further cited Article 45(3) of *the Constitution* and submitted that the Article is a basis for apportionment and division of matrimonial property. He further relied on the Supreme Court case of *JOO v MBO* [2003] KESC4 [KLR] and also *NMW v KNM* [2014] and submitted that the Plaintiff herein contributed a sum of Kshs 250,750/-. Lastly, Counsel cited the Court of Appeal case of *TKM v SMW* [2020] eKLR

Defendant's Submissions

16. On his part, Counsel for the Defendant submitted the couple got married in the year 2007 under Luhya customary law, that the suit property is where the parties together with their children reside, that the property was acquired in the year 2009, that at the time that the family moved into the home the Plaintiff was not there as she had moved out of the rental house they used to live in due to marital differences, that the property was solely purchased by the Defendant through a loan from [particulars Withheld] Sacco which he single-handedly serviced, the Plaintiff only came back and forced herself in after realizing that the Defendant had put up the home, this proves the Plaintiff's zero contribution. Counsel cited Section 6(1) of the *Matrimonial Property Act* and submitted that the mere status of the marriage did not entitle the Plaintiff to a beneficial interest in the property, it is not correct that the Defendant held the property in trust for the Plaintiff, that the Plaintiff had deserted the family and only forcefully returned much later, that the Plaintiff is only trying to enrich herself by reaping where she did not sow, she never contributed in acquisition or development of the property despite herself earning. Regarding the Receipts produced by the Plaintiff to support her claims of contribution, Counsel submitted that same "fabricated/cooked", she never contributed at all hence the desperate attempt to "cook" evidence, since the Plaintiff deserted the family and the children she cannot be said to have made indirect contributions or provided companionship, that the spirit of the *Matrimonial Property Act* was not to unjustly enrich spouses who do nothing but only to ride on the status of marriage, that the share of each spouse should be pegged on the contribution made by each, merely getting married does not give a spouse free cash cheque.
17. Regarding the proposal that the Plaintiff retains the matrimonial home, Counsel termed it a very selfish and unreasonable prayer, that this is because the Defendant has owned the property since he acquired it, the couple both still live in the property together with their children, all the sweat and hard work that the Defendant put in the acquisition of the building and establishing his family cannot be ignored or put to waste, that matrimonial property should be shared or distributed on the basis of fairness. Counsel, too, cited Article 45(3) of *the Constitution* and submitted that the Article espouses the equality of spouses during and after marriage, and that equality of spouses does not involve the re-distribution of property rights. He, too, cited the Supreme Court case of *JOO vs MBO* [2023] KESC



- (4) KLR and submitted that the said decision held that all parties to a marriage have the same rights at the dissolution of marriage but based on their contribution, and that the issue is what did the party contribute?
18. Counsel submitted further that the Plaintiff does not expect the Court to take away that which belongs to the Defendant and award it to her merely because they were married, that it is a question of no party being unfairly denied what he/she deserves and no party is unfairly given more than what they contributed. In support, Counsel quoted the holding of Kiage JA made in the Court of Appeal case of PNN vs WN [2017] eKLR.

Issues for Determination

19. Upon examination of the Pleadings, Affidavits, Submissions and the entire Record, I find the one broad issue that arises for determination in this matter to be as follows:

“Whether the suit property is “matrimonial property”, whether it should be shared out or distributed between the parties and if so, in what manner”

20. Although the prayer section of the Originating Summons refers to two separate properties as being in contention, namely, (a) Uasin Gishu/Kimumu Scheme [...] and (b) matrimonial home, it is clear from the pleadings, evidence and Submissions that only the property, Uasin Gishu/Kimumu Scheme [...] has been litigated upon in this case. The particulars, reference number or details of the other alleged property referred to as “matrimonial home” has not been disclosed nor did any of the parties refer to it during the trial. I therefore presume that the same was only erroneously or inadvertently included in the prayers section of the Originating Summons. Accordingly, I will confine this Judgment to only the property, Uasin Gishu/Kimumu Scheme [...].

21. 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.”

22. The phrase “equal rights” has been the subject of intense debate on what it exactly means. It is now however generally agreed that “equality of parties” alluded to in Article 45(3) does not necessarily mean equal proprietary entitlement. A conclusive interpretation of the said provisions has now been made by the Supreme Court in the case of JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment). In that case, the Supreme Court guided as follows:

“In the event that a marriage broke down, the function of any court was to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of *the Constitution*. To hold that article 45(3) had the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages. Noting the changing times and the norms in the society, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the matrimonial property. That could not have been the intention of Kenya’s law on the subject.”



23. Similarly, Kiage JA in the case of PNN v ZWN [2017] eKLR, in his usual trade-mark poetical style, expressed himself, rather strongly, in the following terms:

“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.”

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

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

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

“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.”

26. 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.

27. From the foregoing, it is evident that “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 was also the principle established in the earlier pre-2010 Constitution Court of Appeal case of Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR
28. 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.”
29. The above provisions therefore demand that the Court gives due consideration to both the monetary and non-monetary contribution of spouses in a marriage. Where therefore, as herein, the disputed property is not registered in the joint names of both spouses but in the name of only one, beneficial share of each spouse would depend on his/her proven proportions of financial contribution, either direct or indirect, towards acquisition and/or development thereof. To succeed in this case therefore, the Plaintiff has to demonstrate through evidence that she contributed, directly or indirectly, towards the acquisition and/or development of the property in dispute.
30. 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.”
31. Before I proceed further, I observe that the Plaintiff advanced the rather strange position that under the common law, a married woman has the right to retain the matrimonial home and that the same is never available for distribution as matrimonial property. With due respect, this position is wholly misconceived and is completely alien to the Kenyan law. I swiftly reject it.
32. I now turn to consider whether the Plaintiff made contribution in the development of the property. As set out in the authorities cited above, to discharge this burden, the Plaintiff has to establish that she made direct and/or indirect contribution towards acquisition and/or development of the property.
33. Although the parties disagree on various factual matters, at least they are in agreement that they got married in the year 2007 under the Luhya customary law, that until 2014, they lived in a rented house, that they got 2 children during the marriage and that they divorced in 2019, 12 years after the marriage.



The parties also agree that the suit property was acquired in 2009 (2 years after the marriage) at the purchase price of Kshs 425,000/- and was registered in the sole name of the Defendant (husband). It is therefore agreed that the property was acquired during the subsistence of the marriage. It is also agreed that the only person named in the Agreement for Sale as the sole purchaser was the Defendant and the Plaintiff only was named as a witness to the Agreement. Another point of unanimity is that the purchase price of Kshs 425,000/- came exclusively from the Defendant without any portion thereof being raised by the Plaintiff. They also agree that the construction of the house on the property commenced sometime in 2013, was completed in the year 2014 and was moved into in the same 2014.

34. The Plaintiff has not disputed that the Defendant is the one who solely purchased the property. What she insists upon is that she indirectly contributed to acquisition thereof as she is the one who searched for it. On direct contributions, she insists that she is the one who commenced constructing the house. Specifically, she states that it is her who constructed the foundation and built the walls up to the lentil level and that when the house reached the roofing stage, it is her who brought timber for that purpose and which she brought from her ancestral home, being a donation to her by her father.
35. On his part, the Defendant argues that he is the one who solely purchased and developed the property using his own resources and without any contribution whatsoever from the Plaintiff. As aforesaid, this was not challenged. He also testified that to develop the property, he took a loan from Mwalimu Savings and Credit Co-operative Society (Sacco) for a sum of Kshs 770,000/- and which loan he is still servicing to date. He stated that he began purchasing materials in pieces around 2012-2013 and not at once. Indeed, he has produced some documents to support of the allegation of taking the loan and also of purchase of the materials. Although the documents produced are, in my view, not conclusive, they have not been challenged by the Plaintiff and neither did the Plaintiff deny the taking of the loan by the Defendant to construct the house nor to purchase building materials by the Defendant. I therefore do not have any reason to doubt the same. I also note that the Defendant produced Receipts and documents proving that he is the one who even sourced for and paid for electricity connection. I also believe the same.
36. On the part of the Plaintiff, the Receipts that she produced are so minimal in value that they do not prove any significant purchase of materials or any other item. Even the few Receipts that she produced were suspicious and appear to have been specifically procured or “manufactured” for the purposes of this case. Despite being issued months apart, somehow the serial numbers of the Receipts bear successive numbers in sequence. How is that even possible? I do not at all believe this suspicious numbering sequence was a coincidence. Even in her testimony, the Plaintiff did not strike me as being a very reliable witness. I also observed that she did not at all disclose the source of the finances which she claims to have used to fund the construction. Considering that from the Judgment exhibited and delivered in the Divorce Case between the parties, it is stated that the Plaintiff used to earn a monthly salary of only Kshs 15,000/-, it was important for her to disclose the source of the funds. She also did not challenge the Defendant’s contention that the Defendant opened an Mpesa business for her and that it is the Defendant who has been making top-up payments for the Mpesa business. If indeed the Plaintiff possessed sufficient funds to the extent of managing to construct an entire house, why did she still need the Defendant to still come to her aid and finance her Mpesa business? In any case, she admitted that she was away when the family moved into the house in 2014 and that she only re-appeared after her employment contract came to an end. According to the Defendant, the Plaintiff forced herself into the house when she returned. If she is the one who was constructing, how is it that she was not around at the time of moving in and never participated in the same? Her demenour and her continuous fumbling with her answers led me to form the opinion that she was being economical with the truth.



37. When the law states that ownership of matrimonial property will depend on the contribution of either spouse, it requires a spouse to show through evidence that he/she made direct or indirect contribution in the acquisition and or development of the property. The property being exclusively registered in the name of the Defendant, and the Plaintiff being the one who has come to Court to seek a remedy, it is her who bears the greater burden of proof. Regrettably, she failed to discharge this burden. She claims that she is the one who constructed the foundation and also built the walls up to the lintel. In the absence of any convincing documentary evidence produced by her as I have already observed, the Plaintiff should have considered calling witnesses, such as the contractor, to prove her allegations. Regarding the claim that it is her father who donated timber for the roofing, could the Plaintiff not get at least one of her relatives who was there, to come and testify on that point?
38. I am therefore not persuaded that the Plaintiff made significant direct contribution to the development of the property. If she did, then it was minimal. That notwithstanding, it cannot be denied that the house was constructed during the subsistence of their marriage. The Plaintiff was a “spouse” when the property was developed and in the absence of conclusive evidence to the contrary, I agree that she may as well have contributed in a lesser way.
39. In the circumstances, doing the best I can, I make the conclusion that while it is clear that it is only the Defendant who bore the direct cost of acquiring and also developing the property, both parties directly contributed to the development thereof but the lion’s share was obviously contributed by the Defendant.
40. Regarding indirect contributions, the parties were married for about 12 years from 2007 to 2019. From the evidence on record, the last 4-5 years were rocky as the parties had already begun experiencing serious marital differences. Since they acquired the property in 2009 and from the look of things, they did so when they were still cordial, they must have still been in a happy union by then and for some further period thereafter. They also got their 2 children around this time. During this period, the Plaintiff, no doubt gave the Defendant love, support and companionship as his wife. She gave birth to their 3 daughters and there is no evidence that she did not offer them love as a mother should. Although the Defendant contends that she used to employ maids to cater for the children, there is no evidence that love and companionship from the Plaintiff was not forthcoming. Further, although the Plaintiff has conceded that at some point she used to live and work in Kapsowar, away from home, it has not been denied that she used to make visits to the home. I do not therefore agree that by merely living out of town, the Plaintiff should be accused of deserting the home or family. Just like the Defendant who was also working and living away in Kipsoen, the Plaintiff had a right to also seek a living. If the Plaintiff is guilty on that ground, then equally the Defendant would be similarly guilty of the same charge. In any case, the Plaintiff was only away in Kapsowar for a brief period under a temporary employment contract and swiftly returned home upon expiry of the contract. In short, the Defendant did not argue that the Plaintiff did nothing for the family during the entire 12 years period that they were married to persuade this Court that she did not play any role in the growth and development of the family.
41. I am therefore satisfied that the Defendant made indirect non-monetary contribution towards the family’s well-being in the form of upkeep and welfare. This undoubtedly gave the Defendant peace of mind and helped him to perform and make other achievements in life including acquiring the suit property. While it is difficult to quantify this non-monetary contribution, the same must be taken into account in determining the Plaintiff’s entitlement to the property herein. To disregard this non-monetary contribution would fall afoul of the equality principle in Article 45(3) of *the Constitution* and result in an injustice.



42. Accordingly, I make the finding that in view of the direct, though much lesser contribution made by the Plaintiff in development of the suit property, the Plaintiff also made indirect non-monetary contribution. She is therefore entitled to a beneficial interest in the property. I place her contribution at 30%.

Final Orders

43. In the premises, I order as follows:

- i. A declaration is hereby issued that Land parcel No. Uasin Gishu/Kimumu Scheme [...] is matrimonial property.
- ii. A declaration is hereby issued that the Plaintiff is entitled to 30% of the said land parcel No. Uasin Gishu/Kimumu Scheme [...] while the Defendant is entitled to 70% thereof.
- iii. Within a period of thirty (30) days from the date hereof, the parties shall agree on and appoint a joint professional valuer to determine the value of the said Uasin Gishu/Kimumu Scheme [...] (including all developments thereon) and thereafter the Defendant shall pay to the Plaintiff an equivalent of the said 30% value of the property.
- iv. In the event of failure to agree on a joint valuer, either party shall be at liberty to move the Court to appoint such valuer.
- v. Within a period of sixty (60) days from the date of receipt of the said 30% value amount in full, the Plaintiff shall move out of the said Uasin Gishu/Kimumu Scheme [...] and thereby surrender, forfeit and/or cease all her claims over the property.
- vi. This being a family matter, each party shall bear his/her own costs of the suit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 2ND DAY OF FEBRUARY 2024

.....

WANANDA J.R. ANURO

JUDGE

