



**GM v PMM (Matrimonial Cause E001 of 2022)
[2024] KEHC 2896 (KLR) (14 March 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E001 OF 2022
SM MOHOCHI, J
MARCH 14, 2024**

BETWEEN

GM APPLICANT

AND

PMM RESPONDENT

JUDGMENT

1. The Applicant vide Originating Summons dated 15th March, 2022 brought under Sections 7,12 14 and 17 of the Matrimonial Property Act, Order 37 Rule (1) (a) and (g), of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and moved this Court seeking the following:
2. The Chamber Summons was predicated on the grounds in the Application and the Supporting Affidavit sworn by GM. She stated that she was married to the Respondent in the year 1985 under the Kisii customary laws and the same was formalized in the year 2003. Together they were blessed with three (3) issues.
3. That the whole family relocated to the United State in the year 2005 and while in the States they took turns in visiting Kenya separately to inspect projects. She stated that prior to relocating she planted their tea plantations in Kisii Gesima Settlement Scheme between the year 2002 - 2004 and further that during the subsistence of the marriage, they acquired Miti Mingi Mbaruk Block (particulars withheld), Nakuru/Municipality Matrimonial Home, Nakuru /Municipality Block (particulars withheld), Gesima Settlement Scheme, Voi Municipality Block (particulars withheld), Nairobi/Mathare Property, Two Plots at Naka Estate Nakuru and two trucks.
4. That in 1987 the Respondent was sacked and the Applicant was left to fend for the family. The Respondent left the family in Nairobi and came to Nakuru. That the Respondent caused the Applicant to leave her job for the sake of the family and join the Respondent and his brother in their business from 1999 to 2004 before relocating to the states.



5. She added that she worked there for five (5) years and was only paid for six months and the other years her salary went to family projects. That they established two matrimonial homes in Nakuru and Kisii Gesima Settlement. That she channeled all her salary and retirement benefits toward building the Milimani Matrimonial Home. That she contributed indirectly by taking care of their children, household chores taking the children to school and keeping the home running. That the assets were funded purchased and developed by joint efforts.
6. That when they left for the States they rented out the Milimani property at a monthly rent which income was used to erect several two-bedroom rental flats on the other half of the property. That 21 years back the two had a joint account where rental income was being channeled to only for the Applicant to discover that the account was closed and the Respondent opened a separate one without rendering any accounts
7. That while in the States they two contributed towards purchase of a truck whose proceeds were used to buy and develop other assets in Kenya and to also purchase a second truck. That the Respondent is not keen on sharing the assets. And that the Respondent had been cheating and supporting another family. She believes she has the right to the properties as she personally contributed.
8. The Respondent in opposing the Chamber Summons filed on 16th May, 2022, a Replying Affidavit sworn on 13th May, 2022. He stated that since 2013 March, the Applicant deserted their home in the States. That indeed they visited Kenya separately but he single-handedly inspected and supervised projects. That the tea in Gesima was planted in 1998 with the assistance of contracted workers and other relatives.
9. The Respondent stated that Title Miti Mingi Mbaruk property was purchased with his savings jointly with Sarah Maskini, Title No. Gesima Settlement Scheme is ancestral land given to him by his late father, Title No. Voi Municipality Block (particulars withheld), was purchased jointly with his brother before he got married to the Applicant and Truck FRHT Plate Number PAN XXX was purchased in 2014 when the Applicant had already deserted him. He however admitted that Nakuru/Municipality Block XXX (Matrimonial home) and Nakuru/Municipality Block (particulars withheld), were acquired during the subsistence of the marriage.
10. He stated that even when he left HZ Construction he did not abdicate his parental responsibilities nor force the Applicant to resign. He added that although the Applicant contributed to the purchase of Nakuru properties she did not contribute towards their development.
11. He added that the Applicant excluded from the list of properties purported to be matrimonial property properties which she had purchased: Sale Agreement (for plots 21, 22 and 23 Subdivision LR (particulars withheld), - Parkview, Block (particulars withheld), London Estate Nakuru, London Estate House and a five-acre land in Ngongongeri. He accused the Applicant of shifting loyalty from the family to her personal affairs.
12. He added that he had no obligation to render accounts in respect of properties that are his. That she is still his wife but deserted their home even after being well cared for. That she never contributed 50% to purchase the truck. That there has been intervention from family members.
13. The matter proceeded by viva voce evidence.

Applicant's Case

14. PW1, GM testified and adopted the her Supporting Affidavit dated 15th March, 2022. She stated that the two jointly acquired property and started with the one at Mathare North. That the Respondent has



- been controlling all the assets, collecting rent and has never accounted. That they are still married but have not been staying together since 2015. She added that she never deserted her matrimonial home but her home was sold with nowhere to live. That as at 2013 she was still together with the Respondent.
15. As regards to planting of trees in 1998 the supervising was done by herself her sister and her mother sometimes and she was still in the country at the time of planting. As for Miti Mingi Mabaruk, she stated that she was in the US when the agreement was being done in 2011 and it was Sarah who informed her and not her husband. Gesima Settlement Scheme is not ancestral land as it was purchased during the marriage and the ancestral home is elsewhere. Voi Municipality was bought in 1986 during the marriage. The truck was purchased in 2014 they separated in September, 2015.
 16. With regards to the Nakuru properties, her retirement benefits went into developments. All the Respondent's money was going to the Milimani development and she maintained the children alone. The Respondent adopted her statement dated 6th July, 2023.
 17. On cross examination, the Applicant stated that she wants 70% of the Respondent's assets. She has not filed petition for divorce nor asked elders to collect her from Mayieka family. She wanted to remain married to the Respondent while getting 70% of his wealth. She admitted to having properties in her name and her daughters. That the Respondent has not asked for anything so she has nothing to share from her wealth. The Respondent refused to joint registration of the properties except for 3. They were buying together but the Respondent would go alone to conclude the transactions and register in his name.
 18. She stated that she involved the Respondent's brother the church but has not involved other people. She had not however refused mediation at church and family level. That she is currently an assembler of pace makers in a factory. She was doing clerical work in the Ministry of Public Works and couldn't remember how much she was paid but it was more than Kshs. 625. That the Respondent was already a CPA Accountant earning Kshs. 1,500 which was more than what she was earning.
 19. She also stated that she did not have proof of financial contribution towards the acquisition of properties enumerated or receipt for school fees paid though she could get the bank records. She also stated that she also had to look for the documents of the joint account in Standard Chartered. That when she went to the United States she used to give him cash money for joint projects. That the Respondent did not disclose how much he bought the first truck for but the second truck was cost 10,000 USD.
 20. She stated that she was the eldest in her family and one of her siblings lived in with them in Nakuru for 1 year and that together with her mother they paid for his tuition in India. The Respondent knew about it and agreed. She stated that she was not sure of the value of the properties enumerated but was sure she wanted a percentage because she contributed 50%. That she was not sure of her sum of contribution but is demanding 70% since the Respondent has been collecting rent since 2005. That she has been the head of the family since they left. That they have not been able to resolve the dispute as man and wife.

Respondent's Case

21. DW1, PNM stated that he has no claim against the Applicant. He adopted his statement dated 11th May, 2023 as well as his Replying Affidavit. He stated that the Applicant moved out of their house in 2013. That they had a business which she knew where he was. That the Applicant left after the children had been educated. He states that before relocating to the US the Applicant was a cleaner with the ministry of Works earning Kshs 647.



22. That when he came to Nakuru in 1986 to start Carl Construction Engineers with his brother the families remained in Nairobi. His wife and children were living in a rental house. That he supported his family fully and that the Applicant did not contribute to the acquisition of the properties. That he included her in Mathare North property in 1996 having been bought in 1984, Kaptembwa property in 2015 after she left and Milimani in 2019 but never contributed to the acquisition or pay school fees for the children.
23. He added that he is a self-employed transporter and the Applicant has not contributed to the transport business or worked there. He paid for their daughters' school fees and they also had government grants. The Applicant only made subsistence reimbursements. He never conceded the role of the head of the family to the Applicant. That all the properties belong to their children and grandchildren. He added he had nothing to say about the Applicants demands of 70%. That she was still his wife and it was not right.
24. He stated that the Applicant called for reconciliation, they had a mediation but the Applicant disappeared at the point of signing the agreement. That the Applicant is the mother of his children and would gladly wish for reconciliation. He asked for the suit to be dismissed. That the Applicant has also not offered to share with him any of the properties registered in the name of the Applicant.
25. In cross examination he stated that it was not a perfect home and in families there were problems though their problems did not emanate from the properties. He admitted that there was emotional and psychological support from the Applicant during the projects. He stated that when he received the Applicant's demand, he wrote to the advocate asking that the Applicant stops wasting money in the corridors of court. That he did not have the draft mediation agreement. He denied that the mediation agreement was for all the properties to be in their joint names. He added that the Applicant was given the responsibility to ascertain their income but she declined. That he provided the mediation with income from the property. That some income has gone to the Applicant. Mathare property has gone to her. Gesima no money to go to her. Milimani tenant, no money has gone to her. That he had been giving the Applicant money up to December, 2022 500 USD and since January, 2023 nothing.
26. He stated further that he has documents to prove full purchase but has not availed any or for the receipts of payment of school fees. Voi Taita Taveta property was purchased before marriage as he married the Applicant in 1985 and their 1st child was born in December, 1985. (The receipts are for April, 1986). Mathare North has an allotment letter in their joint names. Ancestral home is Nyamakoroto. Gesimba Settlement was purchased by the Applicant together with his brother and father in 1991 while still together with Grace.
27. That the Applicant did not get paid for 6 months as alleged but for 5 years. The Applicant resigned from public works and was not forced. She chose to resign for the golden handshake of Kshs, 400,000. They used the money to build at prisons where the Applicant later on sold to a relative. He has no document to prove any that of that. The house in the US was sold the proceeds of the sale were in their joint names in 2015. That he had not made alternative arrangements for the Applicant since she had left by that time. He denied living in the truck or that his daughters contributed for the truck. That he messaged his daughter after the Applicant testified and added that he involved his daughters as they stand to suffer if their marriage collapses. That the it was not a big deal to have all the properties jointly and that the Applicant has all the property accounts except Nairobi. He also stated that he had no problem sharing proceeds of rental income.



Applicant's Submissions

28. The Applicant through her counsel in the written submissions dated 29th November, 2023 and filed on 30th November, 2023 submitted that, as for the properties alleged to have been bought by the Respondent, the Applicant made significant contributions to improve the property and by definition of Section 6(1), (3) and (4) of the *Matrimonial Property Act* the same forms part of matrimonial property. Reliance was placed in the cases of P.O.M v MNK (2017) eKLR , T.M.W VS F.M.C (2018) eKLR, E.W.K v J.N.K (2015) eKLR and S.W. v F.M. (2019) eKLR.
29. That the Respondent confirmed that the properties were acquired during the subsistence of the marriage from the oldest property Voi Municipality Block (particulars withheld), as well as the inheritance at Gesima Settlement Scheme. That the statement by the Applicant was never disputed by the Respondent and the court should find that the properties enumerated were all matrimonial property.
30. On the issue of distribution, the Applicant submitted that the property be distributed in the ratio of 75% to the Applicant and 25% to the Respondent . It was also submitted that, despite the fact that the Respondent stated that jurisdiction of this court had not been invoked as the marriage was still existing, the Applicant invoked Section 17 of the *Matrimonial Property Act* that the case was proper before Court and relied in the case of AKK V PKW (2020) eKLR and EWM v NMM (2022) eKLR.

Respondent's Submissions.

31. The Respondent on the other hand in his submissions dated 13th December, 2023 and filed on 15th December, 2023 submitted that the properties listed by the Applicant do not constitute matrimonial property as the Applicant has not provided evidence of her contribution. That Title No. Voi Municipality Block (particulars withheld) Title No. Miti Mingi Mbaruk Block (particulars withheld) Gesima Settlement Scheme and Truck FHRT Plate No. PAN XXX do not fit in the category of matrimonial property.
32. On contribution, the Respondent avers that he single-handedly financed, inspected and supervised all material projects without the help of the Applicant. That when the Applicant was employed by the Respondent, the Applicant used her monies solely for her own personal needs and invested the surplus in her own properties excluded from the list of purported matrimonial property. That the Applicant did not contribute to the properties in listed in the immediately preceding paragraph.
33. As to Title Nakuru/Municipality Block (particulars withheld) and Title No. Nakuru/Municipality Block (particulars withheld) the Applicant contributed to the purchase of the properties and the development was done by the Respondent. that her share should be minimal about 5%. Reliance was placed in the Court of Appeal case in PNN v ZWN (2017) eKLR.
34. The Respondent asked the court while making a finding on the truck purchased by the Respondent to also make a finding on the properties the Applicant purchased in her name: Plots Number, 21, 22 and 23 Subdivision LR XXX- Parkview, Block 2/XX, London Estate Nakuru, London Estate House and a five-acre land in Ngongongeri near Ngata purchased after she left their home.
35. It was further submitted that the Applicant is not entitled to the prayers sought especially prayers 2, 3 and 4 as the Court does not have power to grant since Section 7 of the *Matrimonial Property Act* provides for division of matrimonial property upon dissolution of marriage and the parties are still legally married. The Respondent also contended that the Applicant has not satisfied the conditions for granting of injunction.



Analysis and Determination

36. In her Originating Summons the Applicant sought inter alia a declaration that the following properties registered in the name of the Respondent, were acquired and developed through the joint efforts of the parties during their marriage and are jointly owned and registered in the names of the parties in the ratio of 75% to the Applicant and 25% to the Respondent:-
- a. Title No. Miti/Mingi/Mbaruk Block (particulars withheld);
 - b. Title No. Nakuru /Municipality Block (particulars withheld);
 - c. Title No. Nakuru /Municipality Block (particulars withheld) (Matrimonial Home);
 - d. Title No. Gesima Settlement Scheme/(particulars withheld) (Matrimonial Home);
 - e. Title No. Voi Municipality Block (particulars withheld)
 - f. Title No. Nairobi/Mathare;
 - g. Two Plots at Naka Estate Nakuru;
 - h. Two Trucks.
37. It was the Applicant's case that, these properties were acquired jointly during the coverture and that she had contributed directly and indirectly towards their acquisition and development. The Respondent refuted those claims on the basis that the Applicant only contributed toward the Purchase of two properties in Nakuru properties but he was the one who solely developed those properties without the input of the Applicant. As to the other properties, he stated that he was the registered proprietor of the properties which he solely acquired and developed. He denied that Gesima Settlement Scheme was ancestral home and it is property that was purchased by his brother, his father and it was inheritance which does not form part of matrimonial property.
38. The Applicant did not list properties she had purchased separately as matrimonial property. She testified that the properties are registered in her name and that of her daughters. The Respondent asked court to make a declaration of those properties as well.
39. The court has considered the Pleadings on record , the testimonies of the witnesses and the rival submissions of the parties. the issues for determination in this regard are:-
- i. Whether the suit properties constitute matrimonial property?
 - ii. Whether the Applicant contributed to wards acquisition and development of the properties?
 - iii. Whether the Court can entertain the issue of distribution?
 - iv. Whether the Applicant has met the threshold for grant of injunction?
 - v. Who should bear the costs
40. The Respondent has argued that at Voi Municipality Miti Mingi Mbaruk, Gesima Settlement Scheme and Truck FHRT Plate No. PAN XXX cannot be categorized as matrimonial property. As for Gesima Settlement Scheme, the Respondent has insisted that inheritance do not form part of matrimonial property and should be excluded. The Applicant submitted that it was acquired/inherited during the subsistence of the marriage.



41. The evidence on record shows that all the properties were acquired during the subsistence of the marriage. According to the reliefs sought, the Applicant is seeking both declaratory orders and distribution of matrimonial property more so the properties listed in her application. The Matrimonial Property Act (the Act) systemizes the rights of spouses in a marriage in relation to matrimonial property.

Whether the suit properties constitute matrimonial property?

42. For a property to qualify as a matrimonial property, it must meet the definition under Section 6 of the Act. For the purposes of this case, Section 6(1) of the Act provides that:-

Meaning of matrimonial property

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
43. Under Section 2 of the Act, ‘Matrimonial home’ has been defined as:-

“any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”

44. Section 14 of the 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.”

45. According to Nyakundi J. in T.M.V. vs F.M.C (2018) eKLR, the Court stated that;

“...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”

46. It is not disputed by the Respondent that some of the properties enumerated are registered in the name of the Respondent and were purchased during their marriage.

47. As regards Nakuru Municipality Block (particulars withheld), matrimonial home(Milimani) the Applicant contended that it was their matrimonial home and contributed towards the purchase and development of the home and upon relocation to the states the house was rented out with the Respondent collecting rent to the exclusion of the Applicant. It is not uncommon for parties to have different homes in both in rural and urban areas. The same goes for homes within the country and outside the country. Despite the fact that the parties relocated to the US it does not negate the fact that that is where the parties lived called home and raised their children prior to relocation. Therefore, that



property is their matrimonial home and any other attached property or development thereto is also considered to be part of the matrimonial home.

48. In any event, as regards to, Title Nakuru/Municipality 18/XX and Title No. Nakuru/Municipality Block 24/XXX the Respondent did not dispute the Applicant's contribution to the purchase but disputed her involvement in contribution towards the developments. As to whether those properties form part of matrimonial property, it goes without saying.
49. As for Title No. Voi Municipality (particulars withheld) and Title No. Miti Mingi Mbaruk Block (particulars withheld) The Respondent has produced documentation to show that the two properties were purchased jointly with other parties. The purchases nevertheless were done during the pendency of the marriage. The Court has unfortunately not been afforded an opportunity to look at the registration documents as they are not on record to ascertain whether the properties are jointly registered with the third parties or solely registered in the name of the Respondent. The Applicant in her statement stated that, Title No. Miti Mingi Mbaruk Block (particulars withheld) had been sold to develop another property. That allegation without evidence to prove stands on shaky ground. In the absence of ownership documents the Court can only make a finding based on the documentation on record produced by the Respondent. The Sale agreement for Miti Mingi and the receipts toward the Voi plot suggests the property may not be solely owned by the Respondent. However, the Respondent's share or contribution toward the purchase however small or big in the properties and if the same are developed falls within the definition of Section 6 of the Act and therefore are included as matrimonial property.
50. Mathare North property, the Respondent in his oral statement admitted that the Mathare North property has an allotment letter in their joint names and in his written statement admitted to having included the Applicant's name in 1996. Therefore, this property is property falls within the definition of Section 14 (B) of the Act and the beneficial interests in the property are equal. The same goes for the Kaptembwa and Milimani properties which as per the Respondent's own admission the properties are registered in their joint names albeit the parties not availing the copies of ownership documents.
51. As for Gesima Settlement Scheme, the property was acquired during the marriage. The Respondent has stated that the property was inherited from his father but no evidence has been advanced to the effect. The copy of title shows the same was acquired and developed during the marriage. Each party claims to have developed the property independently of the other party. The Respondent stated that the property was acquired in 1991. That was while still married to the Applicant. The Respondent however maintains that it was inheritance and does not form part of matrimonial property.
52. In ENK vs JNK [2015] eKLR Musyoka J pronounced himself thus: -

“From the language of the said Act, there is no provision which excludes inherited property form the definition of matrimonial property . Indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property (sic) where the inheritance was before the marriage. In this case, the asset in question was inherited during matrimony and therefore it forms part of matrimonial property”.
53. The property falls within the definition of matrimonial property. The Applicant has also claimed that the property is their matrimonial home but by the evidence before Court the parties lived in Nairobi thereafter moved to Nakuru. At no point was there mention of the parties living in the property. In my view since there was no evidence on record to show that the parties lived there, as such does not constitute their matrimonial home.



54. The Respondent has asked court to also make a determination of the properties left out by the Applicant in the list of matrimonial property. These are properties registered under in the name of the Applicant to the exclusion of the Respondent. The Applicant was quite reluctant to share in the properties but insisted on getting 75% of the enumerated properties. Although the Respondent has not made a claim for the properties, he has asked court to make a determination on them.
55. From the evidence on record the parties from 2013 were separated and living separately after they sold their home in the US. Parties made separate living arrangements and made separate investment options by acquiring property separately. In all fairness I do not see how either of the parties could have contributed in the acquisition of these properties and the court makes a finding that any property acquired after the parties were separated from 2013 onwards does not form part of matrimonial property. Any other property acquired withing the period of marriage be it registered in the name of the Respondent or the Applicant squarely falls under matrimonial property.
56. Besides the above, this court is unable to make a finding on whether the other truck belongs to the Respondent because no single document to establish ownership was tendered. In the same breath this court is unable to also make a finding on the existence of the 2 Naka plots and who it says they belong to. Similarly, the issue of rent cannot also be determined since there is no material placed before court to established the number of houses, when they were build how long they have been rented out.

Whether the Applicant contributed towards acquisition and development of the properties.

57. Section 7 of the same Act stipulates that ownership of Matrimonial Property depends on each spouses' contribution to wit: -

“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”

58. The principle behind this is that division of matrimonial property between spouses is based on their respective contribution to the acquisition. Contribution is defined under Section 2 of the Act to be monetary and non-monetary. Section 2 of the Act defines contribution towards the acquisition of matrimonial property as:

In this Act, unless the context otherwise requires—“contribution” means monetary and non-monetary contribution and includes—

- a. domestic work and management of the matrimonial home;
- b. child care;
- c. companionship;
- d. management of family business or property; and
- e. farm work.

59. This case must be dealt with on the basis of its peculiar facts as enumerated by Court of Appeal in TKM v SMW [2020] eKLR where it is stated as follows:

“...We bear in mind the edict in Muthembwa v. Muthembwa (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in



acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness....”

60. The Respondent admitted that the Applicant provided psychological and emotional support throughout the marriage and while he came to Nakuru to pursue a business venture, he left the children with the Applicant. The Court appreciates domestic work and management of the home as well as companionship and taking care of the children to constitute contribution. Psychological and emotional support is also considered contribution by the deviation of Section 2(c). Therefore, the court has no difficulty in finding that both the Applicant and the Respondent contributed towards the acquisition and development of the matrimonial properties.

Whether the Court can entertain the issue of distribution?

61. From the evidence placed before Court, it is not in dispute that the parties herein were married under Kisii Customary Laws and the marriage was solemnized before the Registrar on 14th February, 2003; that their marriage has broken down and their divorce has not been finalized though parties are separated and living independently of each other. That there have been attempts at mediation which have not yielded positive results.

62. Section 17 of the Act provides as follows;

- “(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
- (2) An application under subsection (1) —
- (a) shall be made in accordance with such procedure as may be prescribed;
 - (b) may be made as part of a petition in a matrimonial cause; and
 - (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes” emphasis added.

63. The Applicant in her submission relied in the case of AKK –vs- PKN [2020] eKLR, in emphasizing that the court has jurisdiction to distribute the properties according to her proposal.

64. Kemei, J in ENN vs. SNK [2021] eKLR he opined that:

- “22. On whether the petition is fatally defective and ought to be struck out, this Court finds that it is trite law that a matter regarding division of matrimonial property ought/shall have the following facets proved by either party:
- a) The fact of a valid, legal, regular marriage in law;
 - b) Dissolution of such marriage by/through an order of the Court;
 - c) That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage;
 - d) Contribution by each party to the acquisition/ development.

23. These are factual issues that cannot be litigated at this point. This court has the requisite jurisdiction to hear and determine matters regarding division of



matrimonial property and hence has power to hear and determine the instant matter and more specifically on the division of matrimonial property which shall commence upon proof of dissolution of marriage....”

65. The take away from the above decisions is that this Court has the jurisdiction only to make a declaration on matrimonial property but the court cannot determine the distribution of the properties. At this point prayer No. 2 and 3 are premature and unavailable in the absence of concrete proof of dissolution of marriage. This court holds a similar position as the decision in *T M W v F M C* [2018] eKLR to wit:

“I have not seen proof of divorce in form of a decree declaring the marriage between the parties dissolved. As to the document to proof divorce the law recognizes decree Nisi or decree absolute. So far as the language of the *matrimonial property Act* is concerned it must be obvious that the parties have terminated their cohabitation and there is no likelihood of reconciliation. The court is not a vehicle that encourages the breaking up marriages or setting them asunder. I cannot find better words rather than stating that the family is one of nature’s masterpieces. That is the spirit of *the constitution* of Kenya under Article 45 of *the constitution* which provides that:

- “45. (1) 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.

This entails that the state has an obligation to protect the sanctity of marriages. In that regard, no court in its right mind may encourage destruction of families. Thus if families are not protected or if courts are to give a blind eye on the mischief divorce, the spirit of section 45(1) of *the constitution* aforementioned will be defeated. I agree with the assertions of my brother W.M. Musyoka. J in *MNW v WNM & 3 Others* where he stated that “it is against public notice to entertain matrimonial disputes as it would accelerate the break-up of the family involved and that public policy favour family unity and should foster peace and reconciliation.” Alienation of lands between spouses during unbroken coverture does not augur well for the well-being of the family as a unit.

In the premises, I’m of the view that the Petitioner herein is entitled to a share which may not be equal to that of the Respondent if at all the matrimonial property is to be distributed. The suit property herein cannot be subject to distribution without proof of divorce.”

66. The Applicant is entitled to a share of the matrimonial property although it may not be equal and it will be based on each party’s contribution extent of distribution may await the dissolution of marriage.

Whether the Applicant has met the threshold for grant of injunction?

67. The Applicant also made an injunction application in prayer five (5). The principles under which an injunction order can be issued are settled in the case *Giella –vs- Cassman Brown & Co.*[1973] EA 358. The court laid down the test for granting the order of injunction that a party must establish a prima facie case with high chances of success; a likelihood of the Applicant suffering of irreparable damage that cannot be compensated in monetary value and balance of convenience tilting in their favour.



68. The Applicant in her Supporting Affidavit contended that there is risk of the property being alienated. That risk has not been elaborated or even submitted on. The court cannot issue orders in a vacuum. I have examined the evidence on record and there is nothing to suggest that the Respondent has instituted sale or is party to any sale process for either of the properties. In the circumstances, the balance of convenience does not tilt in favour of the Applicant. However, as to preservation of the properties in question under Section 12 (5) of the Act it states that the matrimonial home or property shall not be mortgaged or leased without written and informed consent of the spouses. That section is self-explanatory and persuasive and was enacted as a control mechanism over the Applicant's concerns seeking injunctive reliefs.

69. In the upshot, this court finds:

- a. Declares that suit properties;
 - i. Title Nakuru/Municipality Block 18/XXX (matrimonial home)
 - ii. Title No. Nakuru/Municipality Block 24/XXX,
 - iii. Title No. Voi Municipality 1/XXX
 - iv. Title No. Miti Mingi Mbaruk Block 4/XXX (Ingobor),
 - v. Title No. Gesima Settlement Scheme XXX,and
 - vi. Title No. Nairobi/Mathare XXX,Are matrimonial properties.
- b. In the absence of the dissolution of the marriage between the parties, the matrimonial properties herein cannot be distributed and as such determination of respective shares between the Applicant and Respondent assumes academic effect.
- c. There shall be no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 14TH DAY OF MARCH, 2024.

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MOHOCHI S.M.

JUDGE

