IC v SS (Matrimonial Cause 01 of 2021) [2024] KEHC 3316 (KLR) (9 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

MATRIMONIAL CAUSE 01 OF 2021

AC MRIMA, J

APRIL 9, 2024

BETWEEN

IC ..... PLAINTIFF

AND

SS ..... DEFENDANT

JUDGMENT

Introduction:

1. This judgment relates to determination and distribution of properties allegedly acquired during the currency of a marriage between the parties herein. The parties were later legally divorced.

2. The Plaintiff herein, IC, who was the then wife, through an Originating Summons dated 23rd September, 2021 laid claim on two properties as matrimonial properties and rooted for an equal share of contribution.

3. On his part, the Defendant, SS, the then husband, denied the allegations and held that the Plaintiff never made any contribution of any nature whatsoever to any of the properties in issue. He urged this Court to dismiss Cause.

4. This judgment, therefore, settles the parties' rights and ascertains their respective entitlements; if any.

The Plaintiff's case:

5. The Plaintiff pleaded that she was legally married to the Defendant and their nuptials celebrated on 25th November, 2007. That, they met in Europe in 2005 while taking part in an athletics competition. In 2006, they began living together and in 2007 they formalized their marriage through a Christian wedding.

6. The Plaintiff was and still works with the Kenya Defence Forces as an Officer in the Airforce Regiment whereas the Defendant is still a Kenya Police Service Officer attached to the Sports section at the Kitale Police Station.

7. On their marriage, they continued living in the Plaintiff's previously acquired house in Ngong in Nairobi. They were blessed with a girl.

8. She further pleaded that they remained as a husband and a wife until 19th October, 2021 when their union was dissolved through divorce proceedings in Kitale Chief Magistrates Court Divorce Cause No. 16 of 2021.

9. The Plaintiff averred that during the subsistence of their marriage, they jointly acquired and developed the following two properties namely: -

    a. L.R. No. Waitaluk/Kakoi/Block 1/Kibormos/29 measuring around 10 acres;

    b. Kitale Municipality Block 15/Koitogos/2282 measuring one-half of an acre.

10. The Plaintiff's present action, therefore, arose from the fact that since the parties are now divorced, the listed properties should be declared matrimonial properties and be subdivided and distributed to the parties equally.

11. It is these facts that formed the substratum of the following questions as pleaded in the Originating Summons being: -

    a. Whether the Respondent and the Applicant were at one point husband and wife?

    b. Whether the Applicant and the Respondent acquired some properties during the existence of their marriage.

    c. Whether the following properties are Matrimonial properties?

        1. Ten (10) acres of L.R No.Waitaluk/Kakoi/Block1/Kibormos/29.

        2. Kitale Municipality Block 15/Koitogos/2282 measuring half an acre with a five (5) roomed permanent house build on it.

    d. Whether the Respondent and the Applicant are no longer husband and wife?

    e. Whether the Applicant is also entitled to a share of the above mentioned property upon divorcing the Respondent?

    f. Who should bear the costs of this suit?

12. Resulting therefrom, the Plaintiff prayed for the following reliefs: -

    a. A declaration that the Applicant and the Respondent were at one time married but they are now divorced.

    b. A declaration that the Applicant and the Respondent acquired some property together wit:- Ten (1) acres out of L.R.NO.Waitaluk/Kakoi/Block1/Kibormos/29 & KTIALE Municipality Block 15/Koitogos/2282 measuring half an acre, otherwise known as matrimonial property.

    c. An Order that the Applicant is entitled to half the share of the Ten (10) acres comprised in Land L.R NO. Waitaluk/Kakoi/Block1/Kibormos/29.

    d. Any other relief that this Honourable court may deem fit and just to award.

e. Costs of this suit be borne by the Respondent.

13. The case was eventually heard by way of viva voce evidence where the Plaintiff solely testified without calling any witness. The Defendant also testified and called a witness one Lydia Temoi Yego.

14. In her testimony, the Plaintiff stated that their wedding took place at the Anglican Church of Kenya at Ngong within Kajiado County and produced the Certificate of Marriage as an exhibit. She also affirmed that the marriage was later dissolved.

15. She further testified that during their marriage, the Plaintiff and the Defendant jointly acquired and developed the two properties. She averred that by then both were employed, but it was her who provided the entire consideration for the purchase of the parcel of land known as L.R. No. Waitaluk/Kakoi/Block 1/Kibormos/29 measuring around 10 acres (hereinafter referred to as 'the Farm' since the Defendant by then did not have such means.

16. The Plaintiff also stated that the farm was acquired vide three agreements. That, since the registered owner was deceased and was survived by two widows, then each widow signed an agreement. The third agreement was signed by a son to the registered owner. The Agreements were dated 27th September, 2006, 30th November, 2006 and 04th April, 2009 respectively. The Agreements were produced as exhibits.

17. On why the Plaintiff was not the Purchaser or a Co-Purchaser of the farm in the Agreements, she posited that by then she was so heavily engaged in many foreign assignments and trusted his husband whom she would withdraw money from her Bank accounts and give him to render the payments. That, at one point in time, it happened that she was within the country and she managed to sign one of the Agreements, but as a witness.

18. The Plaintiff further testified that when the purchase of the farm was completed, she used to farm maize thereon where the returns were substantial. That, they then agreed to develop Kitale Municipality Block 15/Koitogos/2282 (hereinafter referred to as 'the Plot') by putting up their matrimonial home thereon. That, the Defendant had acquired the Plot before their union and there stood a small house which they agreed and demolished it thereby paving way to the instant five-bedroomed house which stands thereon to date.

19. It was the Plaintiff's evidence that she bought all the building materials towards the construction on the Plot and hoped to move therein once the house was completed.

20. Sometimes in 2012, the Plaintiff testified that the Defendant asked her to take a loan of Kshs. 950,000/= from her workplace so as to develop the farm by buying some dairy cows. That, the Plaintiff obliged and eventually gave the Defendant the said amount as she left the country for a foreign mission. However, on her return, the Plaintiff was shocked to find that the Defendant did not purchase the cows as agreed and had instead moved from where they used to live in Nairobi to Kitale and had occupied their matrimonial house on the Plot with another woman to her total exclusion.

21. As efforts to settle the matter proved elusive, the Plaintiff then instituted the divorce proceedings in 2021 where their marriage was eventually dissolved. The Plaintiff also filed Nairobi Children's Court Case No. 915 of 2014 against the Defendant towards their daughter's maintenance. She lamented that despite orders in favour of the child, the Defendant had adamant ignored to comply.

22. In response to the allegation that the Defendant was married to one Lydia Temoi Yego (hereinafter referred to as 'Lydia') before their union, the Plaintiff stated that she was never put into know although the Defendant later informed her that she had two children with a woman whom he did not marry.

The Defendant also told her that he had been asked to take up and live with his two children. That, the Plaintiff gladly agreed and lived with the Defendant's said two children in her house in Nairobi alongside other relatives of the Defendant including the one who was later allegedly to have 'bought' their farm.

23. On the alleged sale of the farm, the Plaintiff vehemently denied and contended that it was a fraud as its best. She pointed out that the alleged purchaser was the Defendant's nephew whom she accommodated in her house in Nairobi during his days in the University of Nairobi. She lamented that the collusion was so glaring. The Plaintiff, nevertheless, averred that the alleged consent by Lydia was immaterial since the 'sale' allegedly took place during the currency of her marriage with the Defendant.

24. The Plaintiff could also not agree with the contention that the farm was sold to a third party in 2014 since she visited it in 2021 and the Defendant threatened her with dire consequences once she set her foot on the farm again. That, she reported the matter at the Kitale Police Station vide OB No. 49 of 40/06/2021. The Plaintiff wondered what interest the Defendant still had if it was true he had sold the farm in 2014.

25. Having divorced, the Plaintiff stated that she still reached out to the Defendant for the amicable distribution of the properties, but in vain. She, hence, filed the present suit.

26. The Plaintiff buttressed her case through written submissions dated 29th August, 2023. She submitted that she had discharged her burden of proof to the required standard and accused the Defendant of dishonesty. She relied on the evidence and several decisions in her quest for equal apportionment of the properties.

27. Based on the foregoing, the Plaintiff urged this Court to allow the Summons and find that she was entitled to one-half of the properties in issue.

The Defendant's case:

28. The Defendant entered Appearance and filed his Replying Affidavit he swore on 5th July, 2021. He also testified before Court.

29. He denied the Plaintiff's averments to the effect that she had any entitlement in the impugned properties.

30. According to the Defendant, he solely acquired the properties out of his earnings from employment and athletics. That, by the time he met the Plaintiff he had already bought the Plot and out of his income and savings he then bought the farm.

31. While admitting that he had a child with the Plaintiff, the Defendant was categorical that the Plaintiff had nothing towards the acquisition of the Plot and the farm.

32. Buttressing his position, the Defendant called a witness, one Lydia.

33. Lydia testified to be married to the Defendant for about 20 years and that she knew nothing about the Plaintiff and the alleged marriage to the Defendant. According to Lydia, the farm and the plot were bought by herself and the Defendant to the total exclusion of the Plaintiff whom she had never set her eyes on in her life.

34. She posited that it was the reason she gave her spousal consent in the sale of the farm as the wife of the Defendant.

35. In his submissions dated 15th September, 2023, the Defendant defined matrimonial property within the meaning set out in Section 6 of the *Matrimonial Property Act*. In light of this, he submitted that the Plot and farm were not matrimonial properties.

36. While relying on several decisions, the Defendant urged this Court to find in his favour and to dismiss the Cause.

Analysis:

37. The Court has considered the pleadings, the evidence adduced, the exhibits and submissions filed by both parties.

38. From the evidence, it is not in dispute that the parties herein were married and which marriage was dissolved by a Court.

39. The point of departure is on the two properties listed in the pleadings. As such, this Court will ascertain whether the properties are, in the first instance, matrimonial properties.

40. In the event this Court finds in the affirmative, then it will venture into whether the properties ought to be shared and if so, in what proportion.

Whether the Plot and the farm are matrimonial properties:

41. As a precursor, the meaning of matrimonial property ought to be visited. From the reading of various decisions and legal writings, it appears that the term 'matrimonial property' derives meaning depending on the applicable legal regime at hand.

42. On the choice of the applicable legal regime, the Supreme Court of Kenya in JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & Another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment) held that the applicable law is determined from when the suit was filed.

43. In this case, the Originating Summons was filed in December, 2021. The applicable law is, therefore, the *Matrimonial Property Act*, No. 49 of 2013 (hereinafter referred to as 'the Act') which became operational as from 16th January, 2014.

44. Section 6 of the Act defines 'matrimonial property' as follows: -

    6. 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.

        (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

        (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust. (Emphasis added).

45. From the above provision, sub-section 2 is the applicable provision in the circumstances of this case. That is because the parties did not allude to any customs or pre-nuptial agreements in their respective cases.

46. Therefore, this Court adopts the definition of 'matrimonial property' for the purposes of this case to mean the matrimonial home or homes, household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

47. Turning to the main consideration as to whether the Plot and the Farm are the parties' matrimonial properties, Section 2 of the Act defines a 'matrimonial home' to mean: -

> 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.

48. The above provision is relevant in this case in a bid to settle whether the alleged house or premises on the Plot may be regarded as the parties' matrimonial home.

49. It is on record that after their marriage, the parties herein lived in the Plaintiff's house in Nairobi. They never moved to Kitale or at all. It is also on record that the Plaintiff has never spent in the house on the Plot.

50. The Plaintiff did not deny that the Defendant acquired the Plot before their marriage. What is in contention is whether the Plaintiff took part in constructing the alleged house thereon.

51. According to the Defendant, he acquired the Plot and put up the house thereon long before he met the Plaintiff.

52. However, on her part, the Plaintiff, apart from the alleging as much, did not adduce any evidence to demonstrate that she was the one who purchased the building materials [whether all or part] used in the construction of the house on the Plot. The Plaintiff, therefore, only averred, but never proved the allegations.

53. In such circumstances, this Court finds no difficulty in disregarding the Plaintiff's version as unproved. Consequently, this Court finds and hold that the Plot and the house thereon were acquired by the Defendant before his marriage with the Plaintiff.

54. As a result, it is this Court's further finding and holding that the Plot and the house thereon do not constitute the parties' matrimonial home or property.

55. I will now turn to the farm.

56. It is on record that the farm was acquired between 2006 and 2009. The parties herein were married on 25th November, 2007 and were formally divorced on 19th October, 2021.

57. According to the Plaintiff, the parties met in May 2005 and began living together in 2006 before formalizing their marriage in Church in 2007. The Defendant only testified to meeting the Plaintiff in 2006 and marrying her in 2007.

58. Be that as it may, the parties were in a relationship in 2006. By the time the settlement of the consideration was made in 2009, the parties were long married. Legally speaking, therefore, the farm was acquired during the subsistence of the marriage.

59. As such, the farm, as opposed to the Plot, qualifies as a matrimonial property pursuant to Section 6(1)(c) of the Act.

60. In sum, the Plot (Kitale Municipality Block 15/Koitogos/2282) is not a matrimonial property, but the Farm (L.R. No. Waitaluk/Kakoi/Block 1/Kibormos/29) is a matrimonial property.

Should the farm be shared?

61. The longstanding quagmire on how matrimonial property is to be shared in the event spouses can no longer sustain their marriages and are unable to mutually agree on the distribution, has now been settled by the law and the superior Courts.

62. The position is that the distribution depends on the spouses' individual contributions in the acquisition of the properties. Contribution may be direct monetary contribution or otherwise.

63. Section 7 of the Act has the following to say: -

    7. Ownership of matrimonial property:

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

64. Section 9 of the Act also provides as under: -

    9. Acquisition of interest in property by contribution:

    Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.

65. Section 2 of the Act defines 'contribution' as follows: -

    " 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;

66. It is imperative to note that the non-monetary contribution in law is not limited or exclusive to the five categories listed above, but it is rather inclusive. It, therefore, means that a Court in determining a party's non-monetary contribution may consider other inputs by that party.

67. Addressing itself to the above issue, the Court of Appeal in PNN vs. ZWN [2017] eKLR looked into Article 45(3) of *the Constitution* which provides that "Parties to a marriage are entitled to equal rights

at the time of marriage, during the marriage and at the dissolution of marriage" and expressed itself as follows: -

> .... Thus, it is that *the Constitution*, thankfully, does not say equal rights 'including half of the property.' And it is no accident that when Parliament enacted the *Matrimonial Property Act*, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.

68. The foregoing was affirmed by the Supreme Court in JOO vs. MBO case (supra). The said case remains the locus classicus in family law for it addressed three pertinent issues of great public interest. The issues are as follows: -

    i. What is the applicable law in the division of matrimonial property where causes were filed prior to the current matrimonial property regime being *the Constitution* and the *Matrimonial Property Act*, 2013?

    ii. Should a matrimonial property cause filed prior to the promulgation of the Kenyan Constitution, 2010 be determined under section 17 of the Married Women's Property Act,1882 and in accordance with the principles espoused in Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR or should courts follow the new regime as at the time of determination by applying the provisions of article 45(3) of *the Constitution* and the *Matrimonial Property Act* 2013 which underpin the principles of equality?

    iii. Whether article 45(3) provides for proprietary rights and whether the said article can be a basis for apportionment and division of matrimonial property on a 50/50 basis without parties fulfilling their obligation of proving what they are entitled to by way of contribution.

69. On the interpretation of Article 45(3) of *the Constitution*, the Supreme Court variously stated thus: -

    97. In this regard our view is that, while article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married....

    104. Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of *the Constitution*. To hold that article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.

70. The Apex Court also stated as under: -

    81. ..... the equality provision in article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that article 40(1) and (2) of *the Constitution* which protect

the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC's language.

82. While therefore reiterating the finding in Echaria, we also find that article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in *the Constitution* do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.

71. On the aspect of non-monetary contribution, the Supreme Court held as follows: -

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

72. Further, the Supreme Court rendered itself on the constitutional principle of equity as follows: -

93. Article 45(3) of *the Constitution* underscores the concept of equality as one that ensures that there is equality and fairness to both spouses. Equality and fairness are therefore one and intertwined. Equality also underscores the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, a finding we have already made and in stating so we recognize that each party's contribution to the acquisition of matrimonial property may not have been done in an equal basis as a party may have significantly contributed more in acquiring property financially as opposed to the other party.

94. Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property.

73. In applying the maxim of equity, equality is equity, in which equity is now a constitutional principle in Article 10(2)(b) of *the Constitution* the Apex Court stated as follows: -

95. As was pointed out by the Court in the English case of Gissing v Gissing [1971] AC 886, the maxim 'equality is equity' has never been truer. To our minds, equity is an important principle when it comes to matrimonial property since what is fair as it relates to equity is not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage

that led to acquisition of matrimonial property, even though such contribution is indirect, but nevertheless has in one way or another, enabled the acquisition of such property amounts to significant contribution. Such direct or indirect acts as was discussed by Lord Justice Fox in Burns v Burns [1984] 1 All ER 244 may include: -

i. Paying part of the purchase price of the matrimonial property.

ii. Contributing regularly to the monthly payments in the acquisition of such property.

iii. Making a substantial financial contribution to the family expenses so as to enable the mortgage instalments to be paid.

iv. Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.

v. Caring for children and the family at large as the other spouse works to earn money to pay for the property.

74. The Court further stated as follows: -

> 96. These considerations are in line with the finding of the court in the English case of White v White [2001] 1 AC 596 where Lord Nicholls of Birkenhead held that the court should always ensure a fair outcome in considering the contribution of spouses by stating:
>
> 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 ... 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' contribution.''

This is implicit in the very language of paragraph (f):

> " the contributions 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.

75. Based on the foregoing guidance and parameters on the monetary and non-monetary contributions, this Court will now apply such to the case at hand.

76. Since contribution is an issue of fact, it calls for evidence. The conduct of this civil matter is guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to civil matters and affidavits in Section 2 thereof. The provision provides as follows: -

1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.

2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

77. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state as follows: -

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(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

78. Therefore, the burden of proof squarely lies on the Plaintiff. Depending on the nature of the evidence adduced, the evidential burden of proof may shift to the Defendant and vice versa whereas the legal burden of proof remains static upon the Plaintiff.

79. The standard of proof in this matter is on a balance of probabilities.

80. The parties' marriage spanned for around 15 years; that is from 2006 to 2021. However, the Plaintiff stated in her examination-in-chief that on the Defendant's advice, she took a loan of Kshs. 950,000/= and gave the money to the Defendant to buy cows as she left for an international assignment out of the country and that on return, the Defendant had moved from Nairobi to Kitale and severed links with her.

81. The record is not clear when the Plaintiff returned back to Kenya and was faced with the shock of her life. There is, however, evidence that the Plaintiff filed Nairobi Children's Court Case No. 915 of 2014 against the Defendant in respect of their child. Orders of custody and maintenance were made on 10th October, 2014.

82. It can, hence, be deduced that by then [2014] the parties' relationship must have been at its lowest and that is why the Plaintiff opted to and filed the said case.

83. For purposes of this case, this Court can now safely deduce that the parties enjoyed around 8 years of peaceful cohabitation during their marriage.

84. It is the position that when the parties herein settled down in 2006, they were both employed and had earnings.

85. None of the parties in this case adduced evidence of their earnings. The Defendant relied on the Sale Agreements as proof of his sole contribution to the purchase of the farm. The total cost of the farm according to the Agreements was Kshs. 2,790,000/=.

86. On her part, the Defendant only alleged that she was the one who fully paid the purchase price in acquiring the farm, but did not tender any evidence or at all to that end.

87. The Defendant, therefore, failed in proving any direct monetary contribution towards the purchase of the farm.

88. Having found as such, this Court is under a legal duty to satisfy itself as to whether the Plaintiff made any indirect contribution towards the acquisition and sustenance of the farm, and if so, to quantify the same.

89. As stated elsewhere above, Section 2 of the Act describes 'non-monetary contribution' to include any domestic work and management of the matrimonial home, child care, companionship, management of family business or property, farm work among others.

90. There is evidence that the parties herein lived together during the period that the farm was acquired. It was the Plaintiff who provided accommodation in her house in Nairobi. The Defendant left the Plaintiff's premises 8 years later. The purchase of the farm took around 4 years from 2006.

91. The parties were also blessed with their child in June 2007. That was evidenced by the Certificate of Birth No. B053621 which was produced in evidence.

92. There was also evidence that the Plaintiff visited the farm sometimes in 2021 and was threatened by the Defendant. She made a report at Kitale Police Station vide OB No. 49 of 04/06/2021. The Plaintiff's visit, therefore, settled the position that indeed the Plaintiff used to take care and manage the family farm.

93. It can, hence, be deduced that whereas the Plaintiff did not adduce evidence of direct monetary contribution towards the acquisition of the farm, there is credible evidence of her indirect contribution. Such includes accommodating the family in her own premises in Nairobi for 8 years, child bearing and caring, companionship and the care and management of the family farm.

94. As a result of the above indirect contribution by the Plaintiff, a constructive trust can be imported into the land sale agreements to defeat the alleged Defendant's sole ownership of the farm. [See the Supreme Court of Kenya on whether a constructive trust can be imported into a land sale agreement to defeat a registered title as discussed in Shah & 7 Others vs. Mombasa Bricks & Tiles Limited & 5 Others (Petition 18 [E020] of 2022 [28 December 2023] [Judgment].

95. Deriving from the foregoing, and in balancing the scales of fairness, this Court finds that the Plaintiff's contribution to the farm, in the unique circumstances of this case, can be fairly quantified at 50%; more so given that the Defendant was accommodated by the Plaintiff in her house in Nairobi for a period of 8 years and that the cost of the farm was only Kshs. 2,790,000/=.

96. In the end, this Court finds and hold that the parcel of land known as L.R. No. Waitaluk/Kakoi/Block 1/Kibormos/29 shall be equally shared by the parties herein.

97. However, in the event the Defendant legally parted with the possession of the farm, he shall then pay the Defendant one-half of the purchase price or one-half of the value of the farm which shall be rendered upon undertaking a valuation; whichever is high.

98. With the above finding, suffice to bring this matter to an end.

Disposition:

99. As I come to the end of this judgment, this Court hereby profusely apologizes to the parties for the late delivery of this judgment which was occasioned by pressure of work on its part. Galore apologies.

100. Deriving from the foregoing, this Court hereby makes the following final orders: -

    a. The Plaintiff's case partly succeeds.

    b. A Declaration hereby issue that the parcel of land known as Kitale Municipality Block 15/Koitogos/2282 is not the parties' matrimonial property and as such the Plaintiff has no share thereof.

    c. A Declaration hereby issue that the parcel of land known as L.R. No. Waitaluk/Kakoi/Block 1/Kibormos/29 is the parties' matrimonial property and it shall be equally shared.

    d. The property known as L.R. No. Waitaluk/Kakoi/Block 1/Kibormos/29 shall be forthwith equally sub-divided and one-half thereof registered in the Plaintiff's name.

    e. In the event the Defendant legally parted with the possession of the parcel of land known as L.R. No. Waitaluk/Kakoi/Block 1/Kibormos/29, he shall then pay the Defendant one-half of the purchase price or one-half of the value of the property which shall be rendered upon undertaking a valuation; whichever is high.

    f. In case of need, the OCS Kitale Police Station or any other OCS and/or police officers, as the case may be, who shall be so directed by the Trans Nzoia Kenya Police Service County Commander, shall provide security during the time of the valuation of the land in issue.

    g. Further, the valuation exercise shall not take into account any physical developments on the land since none were thereon at the time the parties' marriage was dissolved.

    h. The valuation shall be undertaken by a Valuer agreed upon by the parties and in the event the parties are unable to agree on any, the County Valuer, Trans Nzoia County Government shall undertake the exercise.

    i. The cost of the valuation and/or sub-division and registration shall be equally shared by the parties and in case of unwillingness by any party to pay, the other party shall so pay and the other party's share shall be summarily recovered by the party that made the payment by way of execution in this matter.

    j. Given the nature of this matter, each party shall bear its own costs.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 9TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Gemenet, Counsel for the Plaintiff.

Miss. Lelei, Counsel for the Defendant.

Chemosop/Duke – Court Assistants.