



**VJC v BSW (Civil Suit 44 of 2019) [2024] KEHC 10905 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10905 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL SUIT 44 OF 2019**

**JRA WANANDA, J**

**SEPTEMBER 20, 2024**

**(FORMERLY ELDORET ELC NO. 126 OF 2019)**

**IN THE MATTER OF THE MARRIED WOMEN’S PROPERTY ACT, SECTION 17**

**AND**

**IN THE MATTER OF ARTICLE 45(3) OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF SECTION 93(1) OF THE LAND REGISTRATION ACT, 2012**

**BETWEEN**

**VJC ..... PLAINTIFF**

**AND**

**BSW ..... DEFENDANT**

**JUDGMENT**

1. In as much as the title of this Cause refers to the Married Women’s Property Act, that Act’s application to Kenya having long ceased, and this Cause having been instituted in the year 2019, the correct statute that ought to have been cited is the *Matrimonial Property Act (Act No. 49 of 2014)* which came into effect on January 16, 2014 and which is the statute that now provides for and governs “the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes”.
2. Be that as it may, before the Court is the Plaintiff’s Originating Summons dated 4/11/2019. The same is filed through Messrs Limo R. K. & Co. Advocates and the property in contention is Uasin Gishu/Kimumu Scheme/1XX2 (“the suit property”). The questions placed before the Court for determination are as follows:
  - i. Whether there was a marriage between the parties herein.



- ii. Whether the suit property was acquired during the subsistence of the marriage between the parties herein.
  - iii. Whether the Defendant by virtue of being registered as the owner of that property known as Uasin Gishu/Kimumu Scheme/1XX2 does hold the property in trust for the Plaintiff.
  - iv. Whether the suit property should be subdivided among the parties herein.
  - v. Whether the Plaintiff is entitled to costs.
3. 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 2002 and are blessed with 2 children, that they resided as a family at their matrimonial home at the suit property, and that she contributed both directly and indirectly towards acquisition of the suit property. She deponed further that the title to the property is solely registered in the name of the Defendant in the Plaintiff's trust, that the marriage has since been dissolved vide Eldoret Chief Magistrate Divorce Cause No. 32 of 2018, that prior to the marriage, the parties worked together for the same employer, and that the Plaintiff did domestic chores while the Defendant went to work not to mention the Plaintiff investing all her savings from her employment on the suit property. The Plaintiff contended further that the Defendant, upon leaving employment, has since been busy disposing off one asset after another without involving the Plaintiff, and that the Defendant has now disposed of all assets save for the suit property which is also now facing imminent danger of being sold as well, that the Defendant. She deponed further that in the year 2018, the Defendant evicted the Plaintiff from the suit property claiming that the Plaintiff, being a woman, had no say, that the Defendant still lives in the past when women were disregarded in matters to do with matrimonial property and that the Plaintiff has an interest in the suit property as she has contributed towards the purchase, development and maintenance.

### **Defendant's Response**

4. The Originating Summons was opposed by the Defendant who swore the Replying Affidavit filed on 24/05/2020 through Messrs Isiaho Sawe & Co. Advocates. In the Affidavit, the Defendant deponed that the suit property was a gift which was neither acquired or developed with the input of the Plaintiff. He claimed that he came from a polygamous family whereby his father had married 2 wives, namely, CK (the Defendant's mother and 1<sup>st</sup> wife) and EL (2<sup>nd</sup> wife), that his father and mother however parted ways in the year 1975 leaving the Plaintiff and his siblings under the care of their father and his said 2<sup>nd</sup> wife. He deponed further that their father later left and moved into the home of his brother, AKL (Defendant's paternal uncle) and his wife, one MSL ("aunt") in the mid-1980s where he lived until his death in April 2001. He added that after he completed his 4<sup>th</sup> Form in the year 1989, he and his siblings all moved in with the family of his said uncle AKL and his wife MSL, who met all their needs, including education costs, while in their custody, as his own children, and that it is under those circumstances that his said uncle and his wife gifted the Plaintiff and his brothers parcels of land as follows:



a)	BKL	L.R. No. Uasin Gishu/ Kimumu/1XX9
b)	MKL	L.R. No. Uasin Gishu/ Kimumu/1XX6
c)	Plaintiff	L.R. No. Uasin Gishu/ Kimumu/1XX2 (suit property)

5. The Defendant deponed further that upon securing employment in the year 1996, he constructed his 2-bedroomed house on the suit property in the year 1998, and that having married his 1<sup>st</sup> wife, one AM, in the year 1997, the house constituted their matrimonial home albeit the Plaintiff having solely developed it. He deponed further that the Defendant and the said AM parted ways in the year 2001 and that she never claimed any share of the suit property for the reason that she was aware that the Defendant solely developed it. He contended further that the Plaintiff then married the Plaintiff in the year 2002 who found the Plaintiff already living in the said house in the suit property and which was fully developed and furnished. According to him therefore, the Plaintiff did not contribute anything towards acquisition and/or development of the suit property hence her claim thereto is malicious and without any legal basis, that contribution made by a spouse must be proved before the same can be distributed according to such contribution and that the suit property is not matrimonial property as alleged.

### Hearing of the Cause

6. By consent, the parties agreed that the matter be heard by way of viva voce evidence and the same therefore proceeded as such on 18/10/2023, 23/05/2023, and 6/07/2023. The Plaintiff testified for himself while the Defendant testified for himself and also called 2 other witnesses.

### Plaintiff's evidence

7. The Plaintiff testified as PW1. She testified that currently she works at a company by the name, [Particulars Withheld], as a contractual casual, that before she got married to the Defendant, she used to work at [Particulars Withheld] Investments between 2000 and 2003 where the Defendant was her supervisor, but that the employment ended in 2003. She deponed further that when they married, they established their matrimonial home at the suit property in 2003, that the property was registered in the Defendant's name and that before then, they used to live in Nairobi. She testified further that during the marriage, they also acquired Uasin Gishu/Kimumu/5XX7 which was registered in her (Plaintiff's) name which, when they started having disagreements, the Court gave a Ruling on 31/10/2019 in Eldoret Magistrates Court Case No. 32 of 2018 that they share it 50:50. She then stated that they purchased the suit property from the Defendant's "aunt" (wife to Defendant's uncle), one MS, although she does not have a copy of the Agreement. She also stated that when their employment ended in Nairobi, they returned to Eldoret and constructed the house even before their 1<sup>st</sup> child was born, and that she contributed financially through her employment benefits. It was also her testimony that later the Defendant got another job in Nairobi at [Particulars Withheld] before the birth of their 2<sup>nd</sup> child and the Plaintiff remained on the suit property, that they also built rentals in 2006 and that it is her (Plaintiff) who used to supervise the construction thereof since the Defendant was away working in Nairobi until 2017-2018.



8. She denied that the suit property was given as a gift to the Defendant by the said MS, and alleged that even the Defendant's other siblings also purchased plots from the same aunt. She claimed that the title of the suit property was to come out in her name (Plaintiff's) from the "aunt's" name but that the "aunt" passed away before issuance of the title deed. She added that even after the death of the "aunt", the "aunt's" husband was still to do so, that the intended issuance of the title deed in the name of the Plaintiff was the Defendant's proposal, and that the registration in the Plaintiff's name was not effected because the Defendant remarried. She testified further that the Defendant now lives elsewhere. She also testified that she (Plaintiff) moved out of the suit property on 25/10/2018 because on that date, the Defendant, who had himself already moved out of the suit property in 2012, collected her property from the suit property and transported it to the Plaintiff's ancestral home by a lorry where he dumped them on a road near the Plaintiff's ancestral home. She claimed that the Defendant gained access to the property after demolishing a portion thereof, and breaking the doors and windows, and that she reported the matter to Kapsoya Police Station. She testified further that her children now live with her in her ancestral home.
9. The Plaintiff also denied that it is the Defendant and one A who built the house. She however conceded that the Defendant had a wife before. She insisted that by the time that the Defendant married her (Plaintiff), the suit property had not been acquired. She then pleaded with the Court to allow her to return and live with the children in the suit property and stated that the Defendant converted the same to a rented house after he partitioned it into two.
10. Under cross-examination by Ms. Isiaho, Counsel for the Defendant, the Plaintiff stated that she never met the Defendant's 1<sup>st</sup> wife and only heard that her name was A. She conceded that she had not produced any evidence to prove that she used to work at [Particulars Withheld] Investments. She stated that her monthly salary was Kshs 10,000/- but again conceded that she did not produce a copy of her payslip or proof that she had been paid benefits when she left the employment. She further conceded that her name does not feature in any Sale Agreement as a joint purchaser. She also conceded that when she met the Defendant, he indeed informed her that he had been brought up by his uncle and his wife (AL and MS) after his mother was divorced and that it is the said MS who was the Defendant's guardian and who also took in the Defendant's 2 siblings – ML and BL. The Plaintiff also admitted that, regarding the Divorce, she did not produce the Decree Absolute and only produced the Decree Nisi. Regarding her employment, she stated that it ended when the company closed in the year 2003 but conceded that she had not produced any evidence to prove that the company wound-up.
11. The Plaintiff then reiterated that the Defendant and the said A never resided in the suit property. Regarding her claim that she contributed to the construction of the house, she admitted that she did not produce any evidence to support the claim nor called the contractor to testify nor produced the approved building plans. She also conceded that she did not produce any evidence to prove that the Defendant was working with her at Posta Investments or any Sale Agreement for the alleged purchase of the suit property. She also conceded that the Certificate of Search produced in evidence indicates that the Defendant was registered as owner of the property on 28/07/2015 and also that she has not at any time sued to have the name of the Defendant removed and be replaced with hers. She then claimed that her documents in proof of her contribution to the construction of the house were lost. She then prayed that the suit property be shared out at 50:50 between them.
12. The Plaintiff acknowledged that the Defendant has other children by another woman or other women but insisted that the suit property should only be shared between herself and the Defendant since it is only the two of them who contributed to its construction. She stated she got her current job at [Particulars Withheld] in the year 2018 and that since her earlier employment at [Particulars Withheld] Investments ended in 2003, she had not worked again. She also stated that they however had a hardware



business but admitted that she had not produced any evidence to prove the existence of the business. Regarding the alleged dumping of her property at her ancestral home by the Defendant, she conceded that she did not produce an extract from the Police Occurrence Book or called any witness to prove the claim. She also alleged that the Defendant has since remarried but admitted that she did not have any evidence to that effect. She denied that she is using this case to blackmail the Defendant. Regarding the alleged demolition of the suit property by the Defendant, she stated that the Defendant was not charged in Court for the same because her mother told her not to pursue the matter.

13. In re-examination, the Plaintiff stated that they operated the hardware business between 2005-2006.

### **Defendant's Evidence**

14. On his part, the Defendant testified that the Plaintiff was his 2<sup>nd</sup> wife and that his 1<sup>st</sup> wife was the said AM whom he married in 1996. Regarding his divorce with the Plaintiff, he stated that the Decree Absolute is yet to come out and that only the Decree Nisi has been issued. Regarding the suit property, he reiterated that the Plaintiff never contributed to its acquisition as the same was given to him by his said "aunt" as a gift. He then reiterated the role played by his uncle, and the "aunt" (uncle's said wife) in upbringing of the Defendant and his siblings whom they took in since 1976. He also reiterated his denial that the suit property was sold to him by the "aunt" and also denied that the Plaintiff made any contribution to construction of the house thereon. He insisted that he constructed the house between 1997-1999 and that he lived there with his 1<sup>st</sup> wife, AM, and even got 2 children there, one in 1997 and the other in 2000. He also denied that the Plaintiff used to work in the Plaintiff's hardware business as he had never owned such business.
15. The Defendant further denied that the Plaintiff had taken any loan to assist in funding construction of the house and reiterated that he completed construction of the house long before he married the Plaintiff. He was therefore emphatic that the Plaintiff could not have therefore supervised the construction. He testified further that transfer of the suit property to him was done after the death of the "aunt" but occupation by him was earlier, in 1997, and that the suit property was transmitted to him vide Eldoret High Court Succession Cause No. 92 of 2013 in which the Certificate of Confirmation of Grant was issued on 22/06/2023. He further denied that there were any instructions from his said uncle, AL, that the suit property was to be transferred into the name of the Plaintiff, and added that in any event, the said uncle was not even the registered owner. The Defendant also denied that he had demolished the house in the suit property and left the Plaintiff in the streets. According to him, the Plaintiff simply chose to leave the house when the Defendant filed for divorce, and that as he was in Nairobi at that time, he just heard that the Plaintiff had moved out.
16. Under cross-examination by Mr. Kibii, Counsel for the Plaintiff, the Defendant stated that he was employed at [Particulars Withheld] Sacco in 1996 and denied that he had at any time worked with the Plaintiff at the said [Particulars Withheld] Sacco. According to him, the Plaintiff worked at [Particulars Withheld] Investments although he (Defendant), too, also later joined [Particulars Withheld] Investments. He stated that he worked with [Particulars Withheld] Sacco between 1996 and 2001 and with [Particulars Withheld] Investments between 2001 and 2003 which is therefore the period that he worked together with the Plaintiff and that is how they met, and that he was a Manager, not the Plaintiff's Supervisor. He stated further that they married in 2002 after the Plaintiff was retrenched, that he was himself also later retrenched in 2003, that they got 2 children, and that they lived in the suit property and conducted their wedding in 2002 after the Plaintiff's retrenchment but before his own retrenchment.
17. According to the Defendant, their 1<sup>st</sup> child was born in 2004 in Nairobi and that it is after his retrenchment that he returned to Eldoret, and that the 2<sup>nd</sup> child was born in 2007. He testified further



that he joined [Particulars Withheld] in 2005 in Nairobi and worked there until January 2017 but the family remained in Eldoret where they continued schooling. He also confirmed that there are rental houses in the suit property and which were built around 2011 and 2019, and confirmed that he was working in Nairobi when they were constructed and that the construction was supervised by the foreman although he did not have any documentary evidence to prove such supervision. He stated that he lived with the Plaintiff until 2018 and that he is the one who filed for the divorce, that it is when the Plaintiff moved out that he put up the suit property for rental, that currently he lives in Kwinet, that he does not have another family there but he has a girlfriend. He conceded that the Plaintiff was taking care of the children and the day to day family chores. He also stated that he married his 1<sup>st</sup> wife, AM, in a traditional manner and has children with her although he did not produce the birth certificates. He also conceded that he too did not produce the building plans or Bills of Quantities or Receipts to prove purchase by him of the construction materials.

18. He conceded that in his Witness Statement, he stated that it is in 1989 that he went to live with the family of his uncle, AL, and the wife, MS, and that he (Defendant) was born in 1971 although his Baptism Certificate refers to his year of birth as 1969. He also conceded that in 1989 he was already an adult. He stated that he does not know where the Plaintiff lives although he is aware that he lives with the children. He also denied the Plaintiff's claims that he collected the Plaintiff's property, put them in a hired lorry and dumped it at the Plaintiff's parent's/ancestral home or that he evicted the Plaintiff and the children from the suit property. He claimed that the children were in boarding school.
19. DW2 was LKL. He stated that the Defendant is his cousin as he (DW2) is the son of the said AL who is a brother to the Defendant's father, SL. He supported the Defendant's claim that the suit property was a gift from DW2's late mother, MS, to the Defendant, and stated that apart from the Defendant, the Defendant's brothers, ML and BL were also so gifted. He joined the Defendant in denying that the plots were purchased and also supported the Defendant's claim that her mother, MS was the guardian of the Defendant and his 2 said brothers. He also denied that his father, the said AL, had instructed that the suit property be given to the Plaintiff. He stated further that the Defendant and his 2 siblings all took possession of their respective plots in the 1990s, that he (DW2) (together with his now deceased father), is one of the Administrators in his mother's Succession case, namely, Eldoret High Court Succession Cause No. 92 of 2013, and that even in the Certificate of Confirmation, the Defendant and his siblings are listed as "heirs". He also supported the Defendant's claim that the Defendant, at the time that he took possession of the suit property, was residing with his 1<sup>st</sup> wife, AM, and contended that it cannot therefore be true that the Plaintiff contributed to construction thereof.
20. In cross-examination, he stated that the Defendant worked for [Particulars Withheld] and also [Particulars Withheld] Sacco but that he is not aware that the Defendant also worked with [Particulars Withheld] Investments or that the Plaintiff and the Defendant worked together at the same company. He testified further that he participated in the construction of the house on the suit property as he is the one who brought timber for roofing around 1998 and at which time he was about 21 years. He stated that his father, AL, died in 2007, that he did not transfer the property to the Defendant during his lifetime, and that it is her mother who herself told him that she had gifted the suit property to the Defendant. He testified further that the suit property was never owned by his father and he is not aware that his father wanted to transfer the property to the Plaintiff, and not the Defendant. He conceded that while the Defendant was away in Nairobi, the Plaintiff and the children remained in Eldoret and he denied any knowledge of any hardware business that was operated by the Plaintiff and the Defendant.
21. DW3 was MKL. He stated that the Defendant is his brother and that therefore the Plaintiff is his sister-in-law. He, too, stated that the Plaintiff is not the Defendant's 1<sup>st</sup> wife as the Defendant was first married to AM with whom they got 2 children and with whom the Defendant used to live in the suit property.



He, too, therefore denied that the Plaintiff participated in acquisition of the suit property or in its development. He stated that among the properties that their “aunt”, MS, gave them (the 3 siblings) as gifts, he was given plot No. 1896 but that the same does not appear in the Certificate of Confirmation because he had processed his transfer and title before the “aunt” died. He, too, stated that he was not aware of any hardware business that the Plaintiff and the Defendant allegedly operated and he, too, testified that the Defendant took possession of the suit property long before he married the Plaintiff and that the 1<sup>st</sup> wife, AM, had even attempted to stop the Plaintiff’s wedding to the Defendant.

22. In cross-examination, he stated that he is the 1<sup>st</sup> born in their family, born in 1968 and older than the Defendant. He conceded that in his Witness Statement, he had stated that they moved into the uncle’s home around 1990 but insisted that the “aunt” and uncle began to take care of them since 1976 when their parents had marital problems. He also admitted that they had a step-mother but insisted that they never lived with her. He conceded that he had nothing in Court to prove that the plot number 1886 that he had referred to used to belong to the “aunt”, MS. He confirmed that there are rental houses in the suit property but he could not tell when or how they were constructed as he was not involved. He also acknowledged that at some point the Plaintiff and the Defendant used to work for the same company.

### **Submissions**

23. The parties then filed written Submissions. The Plaintiff filed her Submissions on 24/10/2023 while the Defendant filed on 3/04/2024.

### **Plaintiff’s Submissions**

24. In his Submissions, Counsel for the Plaintiff submitted that the Plaintiff contributed directly and indirectly towards the acquisition, development and maintenance of the suit property, that the parties were married for over 16 years and in that period the Defendant was away in Nairobi working for [Particulars Withheld] for almost 12 years between 2005 and 2017, that during this period the Plaintiff was taking care of their children while maintaining the suit property and supervising the construction of the rental houses that were being put up around 2019. According to Counsel, these matters were not disputed by the Defendant, that under Section 93 of the [Land Registration Act](#), No. 3 of 2012 where property is obtained during the subsistence of a marriage, it is to be dealt with under the [Matrimonial Property Act](#) which also under Section 6 thereof defines “matrimonial property” as including among others, “any other immovable or movable property jointly owned and acquired during the subsistence of the marriage”. He submitted that the suit property was acquired during the subsistence of the marriage as demonstrated by the Certificate of Official Search hence it qualifies to be “matrimonial property”. He contended further that the Plaintiff made a contribution to the acquisition of the suit property by applying her accrued income from [Particulars Withheld] Sacco to develop the suit property and thereafter taking care of the children while maintaining the property as the Defendant worked in Nairobi. He cited the case of Nakuru High Court Matrimonial Cause No. 20 of 2016, MW vs AN [2021] eKLR and also the case of Machakos High Court Matrimonial Cause No. E001 of 001, EKTU v ECC [2021] eKLR.
25. Counsel submitted further that although the suit property was transferred to the name of the Defendant by way of transmission through Eldoret Succession Cause No. 92 of 2015, the same was registered in the name of the Defendant on 28/07/2015, 15 years after the parties got married, that upon getting married, the suit property remained vacant and that they had to construct a temporary structure first before they later constructed rental houses. He added that the allegation by the Defendant that he had settled with his 1<sup>st</sup> wife was not supported by any evidence, that the



Defendant did not produce any evidence of marriage to the alleged 1<sup>st</sup> wife or tender any evidence in form of certificates of births of the issues of the alleged wife, and that the Plaintiff was emphatic in her evidence that the alleged wife was based in Nairobi and never set foot in Eldoret. He contended that the suit property constituted the parties' matrimonial home where they lived and where all their children were born, and that the parties cohabited for over 26 years prior to separation in 2018 and subsequent divorce. He cited the case of Marsabit Matrimonial Cause No. 1 of 2017, M A A v A R [2018] eKLR.

### **Defendant's Submissions**

26. On his part, Counsel for the Defendant submitted that the Plaintiff's allegations that she contributed to the acquisition or development of the suit property or that the property was purchased from the Defendant's "aunt" was not supported or corroborated by any evidence contrary to the provisions of Section 107 of the *Evidence Act* which provides that "he who alleges a fact must prove". She further submitted that although a Decree Nisi has been issued, the marriage remains undissolved in lieu of the Decree Absolute which is yet to be issued and that in these circumstances, this Court has no jurisdiction to entertain this matter since the marriage is still subsisting.
27. Counsel contended further that the suit property was a gift from his "aunt" and was never purchased as alleged by the Plaintiff, and that this fact was supported by the other 2 witnesses that the Defendant called. She contended that the gift was given by the aunt" as she and her husband (Defendant's uncle) took in the Defendant and his siblings as their own children and became their guardians after the Defendant's parents separated, that they also educated the Defendant and his siblings and that later in 1989, the Defendant and his siblings moved into the "aunt" and uncle's home, that the Defendant completed university in 1995 and was employed in 1996, and that it is on this basis that the aunt" allocated them a plot each.
28. She added that the Defendant, having secured employment in 1996, constructed a 2-bedroomed house on the suit property in 1998, that he married the said AM in 1997 and they lived in the said house as a married couple. She submitted further that the allegation that the Plaintiff was in the picture when the house was built are not only untrue but also uncorroborated, that the evidence that the Defendant solely met the development costs of the house remains unchallenged, and that this is why the said AM, when she separated from the Defendant left without making any claim on the suit property as she was aware that the Defendant solely met its development costs. Counsel submitted further that all these facts were corroborated by the other witnesses particularly DW2 who is a son to the said "aunt" and uncle and who confirmed that the Defendant and his siblings moved into their house where they were then brought up and also allocated the respective plots of land as gifts.
29. She then cited Section 7 of the *Matrimonial Property Act* which provides that "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". According to Counsel therefore, since the Decree Absolute is yet to issue, the prayers sought herein cannot be granted.
30. Regarding the Plaintiff's quest for 50:50 division of the suit property, Counsel cited Section 6, 9 and 14 of the *Matrimonial Property Act*, 2013 and also the Court of Appeal case of PNN v ZWN [2017] eKLR and submitted that even if the property was acquired during the subsistence of the marriage, that does not guarantee or entitle the Plaintiff to a share thereof and that she must prove contribution either towards its acquisition or improvement. She also cited the case of Peter Mburu Echaria vs Priscilla Njeri Echaria [2007] eKLR. In conclusion, she submitted that the suit should be dismissed with costs as costs follow the event.



## Issues for Determination

31. I find the issues that arise for determination in this matter to be the following:
- i. Whether this suit can be entertained when the Decree Absolute emanating as a consequence of the order of divorce is yet to issue.
  - ii. Whether the suit property is “matrimonial property”, whether it should be shared out or distributed between the parties and if so, in what manner”
32. I now proceed to determine the said issues.

### **i. Whether this suit can be entertained when the Decree Absolute emanating as a consequence of the order of divorce is yet to issue.**

33. As correctly observed by Counsel for the Defendant, Section 7 of the [Matrimonial Property Act](#), 2013 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.”

34. It is therefore evident that the point in time when the Court can assume jurisdiction to divide matrimonial property is only after the parties to a marriage have divorced or their marriage has been judicially dissolved in any other manner. In this case, what has been produced before the Court is only the Decree Nisi dated 7/05/2021 issued in Eldoret Chief Magistrates Court Divorce Cause No. 32 of 2018. It seems to be agreed between the parties that a Decree Absolute has not yet been issued.
35. It is in light of this scenario that the Defendant contends that the parties have not yet formally divorced as yet nor has the marriage been fully dissolved since no Decree Absolute has been issued as yet by the Divorce Court, notwithstanding that a Decree Nisi was issued,. According to the Defendant therefore, this Court lacks the jurisdiction to entertain this suit.
36. In answering this question, I may restate that where a Petition for divorce is allowed, and the marriage dissolved, the Court will then issue a Decree Nisi, which is a temporary order that confirms that the grounds for divorce have been established and allows time for anyone to give reasons why the marriage should not be dissolved with finality. Once the duration for the Decree Nisi lapses, a Decree Absolute is then issued. The Decree Absolute is therefore the final stage of the divorce proceedings and its effect is that the laws applying to a married couple no longer bind the parties and they are henceforth free to remarry.
37. In my view therefore, the real purpose of a Decree Absolute is to give the divorced parties the right to “move on” by remarrying. In short, a divorced couple cannot enter into another marriage without obtaining a Decree Absolute. However, ss regards proof of dissolution of the marriage, in my, view, that is sufficiently done once the Divorce Court pronounces its Judgment declaring the marriage as dissolved and issues a Decree Nisi. In this case, although it seems that neither of the parties has bothered to pursue extraction of the Decree Absolute, it is not denied that the marriage was dissolved by the Court vide its Judgment delivered way back on 20/09/2019, 5 years ago and further, neither of the parties denies that they have both accepted that fate.
38. Although each case must be decided on the basis of its own peculiar facts, and although it is advisable and good practice to always extract a Decree Absolute after a marriage has been dissolved, in this



case, my view is that, even without the Decree Absolute, the Decree Nisi confirms that the marriage was dissolved and is therefore sufficient to sustain an action commenced under Section 7 of the Matrimonial Property. I therefore find that this Cause is properly before the Court for determination.

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

39. 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.”

40. 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.”

41. 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.”

42. Indeed, as already stated, 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.

43. There is therefore no longer any room in our laws for the conduct commonly referred to as marriage “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.”

44. 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.”

45. 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

46. 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.”

47. The law therefore demands that the Court gives consideration to both the monetary and non-monetary contribution of spouses in a marriage. Where therefore, as herein, the suit 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 suit property.

48. 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.”

49. Regarding land, there is also Section 93 of the [Land Registration Act](#) which provides as follows:

“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the [Matrimonial Property Act](#).”

50. I now turn to consider whether the Plaintiff made contribution in the acquisition and/or development of the suit 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 such acquisition and/or development as aforesaid.

51. From the documentary evidence on record, the parties herein got married on 11/12/2002 at which time the Plaintiff was aged 25 years and the Defendant 31 years. The only property in contention is the suit property, namely, Uasin Gishu/Kimumu Scheme/1XX2, which is solely registered in the name of the Defendant. From the Certificate of Official Search produced in evidence, the title deed for the property was issued in the Defendant’s name on 28/07/2015, 13 years after the parties got married. The Defendant has produced the Certificate of Confirmation of Grant given on 15/06/2015 in Eldoret High Court Succession [No. 92 of 2013](#) which shows that the suit property was transmitted to the Defendant from the estate of the said MSL (Deceased). The parties are also in agreement that the said MSL was the wife to the Defendant’s uncle, one AKL and also that indeed, the suit property used to be owned by her.

52. The point of departure between the parties is how the suit property ended up being transmitted to the Defendant from the estate of the late MSL. According to the Plaintiff, the property was purchased from the late MSL and that she (Plaintiff) contributed money for such purchase. On the other hand, according to the Defendant, the property was simply a gift from the said MSL who was his uncle’s wife and therefore fondly referred to as “aunt”. According to the Defendant therefore, the same was



- never a purchase from MSL but was a gift from her since his said uncle, AKL and his said wife, MSL, took in the Defendant and his 2 siblings when they were still young and took care of them as their own children after the Defendant's parents separated.
53. On his part, the Defendant called 2 witnesses who corroborated his version that the property was given to him as a gift by his uncle's said wife. DW2, one LKL, is the Defendant's cousin, being the son of the Defendant's said uncle, AL (now also deceased) and his wife, the said MSL. He confirmed that indeed the Defendant and his 2 siblings grew up in their home and further confirmed that when the Defendant and his 2 siblings became of age, his mother, the said MSL allocated to them respective parcels of land, including the suit property herein, Uasin Gishu/Kimumu Scheme/1XX2, which was allocated to the Defendant.
54. I also note from the Certificate of Confirmation of Grant that DW2, together with his late father, AL, were the two joint Administrators of the estate of the late MSL and therefore participated in the transmission of the suit property to the Defendant. His word that the suit property was a gift is to the Defendant therefore believable. I also observe that in any event, in the Certificate of Confirmation of Grant, the Defendant's name, as for all the other beneficiaries, including his siblings, is listed as "heir" which term indeed connotes a non-monetary transmission of property. Had there been a monetary consideration, then I would have expected the Defendant to have been listed as a "purchaser" or at the least, a "creditor". DW3, one MKL, the Defendant's brother also testified in favour of the Defendant and echoed the sentiments made by DW2 above.
55. Under the above circumstances, I have no hesitation in accepting the Defendant's version that the suit property was indeed a gift from his "aunt". This is because the Plaintiff, apart from making mere sweeping statements, has produced absolutely no evidence to back up her claims that the property was purchased. Worse still, the Plaintiff has not produced an iota of evidence to prove her claim that she made financial contribution in raising the purchase price for the suit property. She did not produce any documentary evidence, or Sale Agreement, or payment records and neither did she call any witness to corroborate her allegations. Under cross-examination, the Plaintiff was clearly at pains to justify her allegations. She was evidently evasive and appeared economical with the truth.
56. The Defendant and his witnesses were also all emphatic that the Defendant took possession of the suit property in the 1990s and constructed the house thereon and which house he lived with his 1<sup>st</sup> wife, AM and their children. The witnesses were all also categorical that by the time that the Plaintiff was being married by the Defendant in the year 2002, the Defendant had already lived in the same house for many years with his 1<sup>st</sup> wife and children long before he married the Plaintiff. This position was not contradicted by the Plaintiff through evidence.
57. From the evidence, I also gather that the Plaintiff was only employed for a period of about 3 years, between 2000-2003 when she worked at [Particulars Withheld] Investments. She however did not produce any evidence to support her claim of taking the loan and neither did she even disclose how much it was, how much she was repaying in monthly instalments and for how long she repaid it. I also find it unlikely that within such short period of employment, she was able to take a loan from the employer for purposes of contributing to construction of the house and to also fully repay the loan within such short period. Her claim that she used her retrenchment benefits to fund the construction has also not been substantiated. Further, she also did not provide any evidence to prove that indeed she was paid such terminal benefits upon retrenchment and also did not disclose how much she was paid.
58. Regarding the Plaintiff's claim that upon retrenchment, she operated a hardware business with the Defendant, the Defendant and his 2 witnesses all categorically denied any knowledge of such hardware business. The Plaintiff did not, again, provide any evidence of the existence of such business. Even



assuming therefore that the house was indeed constructed after the Defendant was married, which itself has not been proved, as demonstrated above, the Plaintiff has failed to prove her source of funds which would have enabled her to contribute to the same. The allegation of contributing to the construction of the house therefore falls flat.

59. I am also not persuaded that the mere fact that the Confirmation of Grant in the Estate of the late MSL transmitting the suit property to the Defendant was made on 15/06/2019, during the subsistence of the marriage between the parties rendered the property as having been “acquired” during the subsistence of the marriage.

60. Even assuming that my findings above are incorrect, the provisions of Section 107, 108 and 109 of the Evidence still mitigate against the Plaintiff since she is the party seeking judgment in her favour. The said provisions stipulate as follows:

“ 107. Burden of proof

- (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.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

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.”

61. In view of the foregoing, it is clear that the general rule is that the burden of proof always lies on a Claimant. It is therefore the Plaintiff who will fail in this case if the Court is left in a position where it is unable to conclusively resolve which of the two conflicting set of facts presented is the true position.

62. 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 burden of proof. Regrettably, she failed to discharge this burden.

63. For the above reasons, I find that the Plaintiff has failed to demonstrate that she made any contribution to the acquisition of the suit property or to the construction or development of the main house erected thereon.

64. However, there is also the issue of the other structures erected separately on the remaining portion of the suit property and which the parties referred to as “rental houses”. Regarding such rental houses, I note that the parties were married for about 17 years, from 2002 to 2019. According to the Plaintiff, they constructed the rental houses between 2011 and 2019. This was not seriously challenged by the Defendant. Considering that they married in the year 2002, and there being indication that the rental houses were constructed between 2011-2019, the same must have been constructed when the parties



were still cordial. They must have still been in a happy union by then. They had also by this time, already got their 2 children, in 2004 and 2007, respectively. During this period, the Plaintiff, no doubt gave the Defendant support and companionship as his wife and also reared their 2 children as their mother. It is also not denied that the Defendant was away in employment in Nairobi for a good period of the marriage. I would therefore accept the Plaintiff's claims that it is her who supervised the building of the rental houses even if a foreman was also present, as alleged by the Defendant. In short, I did not hear the Defendant arguing that the Plaintiff did nothing for the family during the entire 17 years that they were married. I cannot therefore accept that the Plaintiff did not play any role in the growth and development of the family.

65. I am therefore satisfied that even if the Plaintiff did not make direct contributions to the construction of the rental houses, she made indirect non-monetary contribution thereto by playing a major role 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 raising money for constructing the rental houses. 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 rental houses 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.
66. In the circumstances, doing the best I can, I make the conclusion that while it is clear that the Defendant acquired the suit property as a gift from his uncle's wife long before she married the Plaintiff, and is also the one who solely bore the cost of constructing the main house erected on the property, regarding the rental houses erected separately and subsequently on the property, both parties directly or indirectly contributed to the construction thereof.
67. Accordingly, I make the finding that in view of the either direct (monetary or material) or indirect (non-monetary) contribution made by the Plaintiff to the construction of the rental houses constructed separately on the remaining portion of the suit property, she (Plaintiff) is entitled to 50% of the value of such rental houses.

### **Final Orders**

68. In the premises, I order as follows:
- i. A declaration is hereby issued that Land parcel No. Uasin Gishu/Kimumu Scheme/1XX2 (suit property), including the main house constructed thereon, is not matrimonial property within the meaning of Section 7 of the *Matrimonial Property Act* and is therefore not available for division between the parties.
  - ii. A further declaration is however made that regarding the rental structures erected subsequently and separately on the remaining portion of the suit property, the Plaintiff did contribute, either directly or indirectly, to the construction thereof and is therefore entitled to and is awarded 50% share of such rental houses.
  - iii. Consequently, 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 rental structures erected separately on the remaining portion of the suit property, and thereafter, the Defendant shall pay to the Plaintiff 50% of such value of the rental structures, in full and final discharge of the Plaintiff's claims over the suit 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 a proposed valuer.



- v. Within a period of sixty (60) days from the date of receipt of the said 50% value of the rental houses in full, the Plaintiff shall move out of the suit property 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 20<sup>TH</sup> DAY OF SEPTEMBER 2024.**

.....

**WANANDA J. R. ANURO**

**JUDGE**

**Delivered in the presence of:**

Kibii for Petitioner

Ms Cherono h/b for Ms Isiaho for Defendant

Court Assistant: Brian Kimathi

