



REPUBLIC OF KENYA



SM v PWM (Civil Cause 3 of 2018) [2023] KEHC 1522 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1522 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL CAUSE 3 OF 2018
RPV WENDOH, J
FEBRUARY 16, 2023**

BETWEEN

SM APPLICANT

AND

PWM RESPONDENT

JUDGMENT

1. By an Originating Summons dated 9/4/2018, brought under Articles 45 (3), 68 (iii) of *the Constitution* of Kenya 2010, Sections 3, 3A of the *Civil Procedure Act*, Order 40 of the Civil Procedure Rules, Sections 2, 6, 7, 9, 14 and 17 of the *Matrimonial Property Act*, 2013, the applicant through the firm of Odhiambo Kanyangi & Co. Advocates is seeks the following orders:-
 1. Spent.
 2. That an order do issue declaring that the applicant has equal beneficial interest in the property and the proceeds from joint matrimonial properties listed below:-
 - a. Bugumbe/Mabera/950
 - b. Bugumbe/Mabera/937
 - c. Bukira/Buhirimonono/648
 - d. Bugumbe/Mabera/214
 - e. Bugumbe/Mabera/676
 - f. Bugumbe/Mabera/199
 - g. Bugumbe/Mabera/839
 3. That an order do issue declaring that the above listed properties which are registered in the name of the respondent are held in trust for the applicant.



4. That an order do issue declaring that the applicant is entitled to 50% of all the joint properties, income or proceeds therefrom and properties held in trust for her.
 5. That an order do issues compelling the respondent to render a true and proper account of the proceeds from the disposal of any of the matrimonial properties so far sold.
 6. That in the alternative to (5) above, an inquiry into the profits so far gained by the applicant from the unlawful and unprocedural sale of the parties' matrimonial property.
 7. That this court be pleased to grant such further or other reliefs as may be just in the circumstances.
 8. That the respondent be ordered to pay costs of this suit.
2. The application is anchored on the grounds found on the face of the application and a supporting affidavit sworn by the applicant dated 9/4/2018.
 3. The respondent, through the firm of Abisai & Co. Advocates opposed the application through a replying affidavit dated 16/7/2018.
 4. The cause proceeded through viva voce evidence before Mrima J with the applicant testifying on 20/11/2019. The respondent testified on 11/3/2020 while his two witnesses testified on 30/9/2021 before this court. Parties also filed submissions.
 5. The applicant was married to the respondent on 21/10/1989 and they were blessed with four issues who are now all adults. Their marriage was dissolved via court proceedings on 9/3/2017.
 6. The applicant, PW1, testified that she is an elected leader for [Particulars Withheld] Ward; that she no longer lives with the respondent, after being chased from their matrimonial home in the year 2014; that at the request of her parents - in - law she went to live with them until the year 2018.
 7. She testified that during their marriage, they acquired several properties; that the respondent already had Bugumbe/Mabera/937 but they eventually acquired other 5 properties being Bugumbe/Mabera/950, 839, 214, 676 and 199 and another being Bukira/Buhirimono/648. However, land parcel number Bugumbe/Mabera/199 was erroneously entered as belonging to them.
 8. PW1 stated that Bugumbe/Mabera/950 was jointly acquired on 8/5/2001; that at that time the respondent had resigned and she made a part - payment of Kshs. 30,000/= in the year 2002. Later the land was changed to Bugumbe/Mabera/2025. The whole parcel of land was 10 acres (4.39 ha) but the respondent sold part of the land being around 5 Acres (2 Ha) with the remainder being 2.39 Ha; that the land was sold for Kshs. 1,500,000/= to develop rental units; that the respondent did not account for the proceeds but only said that it was used to develop another parcel of land Bukira/Buhirimono/648; that the sold part was given a new title no. 2678 while the remaining area given the title 2679.
 9. PW1 testified that by a sale agreement dated 11/10/1999, they jointly acquired land parcel number 937 which was 0.4 ha. It was her kitchen garden. The said parcel has never been issued with a title to date. She testified that land parcel number 648 (0.03Ha) is registered in the name of the respondent with a title deed dated 12/10/1990 which was used to lease to farmers with an expected minimum income of Kshs. 1,500/=. It was later agreed that Bugumbe/Mabera/950 be sold so as to develop plot number 648 which is situate in Isebania near the bus park. The parcel of land has been fully developed and it has 13 tenants each paying Kshs. 7,000/= monthly which the respondent wholly receives.



10. She testified that Bugumbe/Mabera/839 is in their joint names and this is where their matrimonial family/home stands where she has lived since 1996 until when she was chased. She said that Bugumbe/Mabera/214 was jointly acquired and the sale agreement dated 29/10/2004 is in both their names; that the respondent paid Kshs. 20,000/= while she paid Kshs.30,000/= and as part of the balance of the purchase price, she educated the vendor's daughter upto diploma level and she graduated in Supply Chain Management. The said parcel of land was eventually sold.
11. PW1 stated that Bugumbe/Mabera/676 was jointly acquired but it was later subdivided to parcel 839 while parcel 199 that was inadvertently listed as one of the matrimonial properties was purchased by her sister.
12. She testified that she was employed as an untrained teacher at [Particulars Withheld] Primary School and was later transferred to [Particulars Withheld] Primary School; that she joined Asumbi Teachers College as an in-service trainee and paid for her fees; that she worked for and looked after the family, gave birth to children and her salary was used in the home; that when the respondent resigned, she took up all the family's responsibilities like paying school fees and contributed to the acquisition of the properties. She said that the respondent suffered mental illness in the year 2008 and she took care of him and the children; that he eventually recovered but relapsed in the year 2012; that during this period, she received no assistance from other family members. PW1 testified that the respondent was being treated in Eldoret but she left all the hospital documents when she was chased away. PW1 adopted her statement dated 19/10/2018 as part of her evidence.
13. On cross-examination, she testified that she did not attend the divorce proceedings as she was advised so by her parents - in - law not to do so but she filed a response to it. She testified that they moved to parcel 839 after they built a home together from 1993 to 1996; that the said parcel had already been acquired by her husband before they got married. Her husband took a loan from KCB Bank and built the house upto the roof stage before the funds were depleted; that they had to use the proceeds from the farm to complete the house. She said that she developed the home fully and her contribution towards the home is more than half; that she has a sentimental value to it and the children know it as their home.
14. On land parcel 950 which changed to land parcel 2025 after mutation, PW1 testified that it was registered in the name of the respondent but she contributed Kshs. 30,000/= towards it purchase; that she does not have an acknowledgement receipt since at that point she was living in harmony with her husband; that the said plot was later sold for Kshs. 1,500,000/=; that by the time the parcel had changed to land parcel 2025 she had already left the home. It was her further testimony that land parcel 937 and also 839 was jointly acquired as family property with the vendor being one Stephen Ntoori. They gave him the money and also took him to the hospital but he later passed on. She testified that her contribution was Kshs. 4,000/= but the same was not captured in the title as it was a joint purchase. She gave the money to the respondent but the title is yet to be issued. The vendor died before the transfer. She testified that part of their matrimonial home lies on this parcel of land.
15. The applicant testified that land parcel 648 is in the name of the respondent but it was a joint purchase; that her contribution was in kind and not in cash; that the respondent charged the land after acquiring the title; that she used to take care of the respondent when he bought the land; that the respondent earns an income from the said parcel and updates her.
16. PW1 also said that land parcel 214 was purchased jointly from one Catherine Nyamohanga (Deceased) on 29/10/2004; that the entire purchase price was Kshs. 70,000/= but they assisted to educate the daughter of the deceased; that she has never sold that land nor is she aware of any sale agreement and the signature therein was forged. On land parcel 676 she testified that it was sub - divided into various portions for purchasers and their portion became land parcel 839 and it was acquired before marriage.



17. The applicant also testified that the respondent last assisted the children in 2008 having left employment in the year 2000; that her brother assisted the respondent to get a job in Tanzania in 2008 but he immediately fell sick.
18. The applicant further stated by the applicant that she acquired land parcel Bugumbe/Mabera/1368 in 2015 long after separating from the respondent; that she has put up rental houses therein earning Kshs. 32,000/= and that is where she also resides. The applicant denied buying motor vehicle registration number KBZ xxxx in the name of her daughter. She said that when she was nominated as an [Particulars Withheld] in 2013, she still used to assist the family since the respondent was still unemployed.
19. The applicant testified that her salary is not part of matrimonial property; that the respondent leased their lands and sold trees; that she did not acquire property when she was the nominated [Particulars Withheld] since she was paying fees for her children in the university. She concluded that the children have a cordial relationship with the respondent; that she is not an enemy of the respondent; that the reason why she left was because the respondent was cruel to her and he chased her away from their matrimonial home; that the reason why she came to court is because the respondent texted her, he wanted to sell the properties and leave Migori.
20. On re-examination, the applicant testified that land parcel 950 was a subdivision from land parcel 2025. That the land was sold to one Lynne Achieng and she consented to that sale. She further stated that land parcel 1368 was acquired when she had separated from the respondent and that is where she lives with her children; that the respondent made no contribution to acquisition of the said land. She also testified that the motor vehicle KBZ xxxx is not hers; that she never consented to the divorce. She fully contributed to the family during and even after marriage; that the respondent cannot counter - claim against her properties.
21. Before proceeding with the respondent's case, the parties filed a consent to have the applicant's and respondent's documents in support of their respective cases to be produced as their respective exhibits in the manner in which they were filed. The second limb of the consent was to amend the originating summons dated 9/4/2018 by correcting the entry of the parcel of land referred to as Bugure/Magemba/937 with the parcel of land known as Bugumbe/Mabera/937 and the statement of the applicant as well stood amended as such.
22. The respondent testified on 11/3/2020. He adopted his witness statement dated 22/10/2018 as part of his evidence. He stated that he married the applicant on 21/10/1989 through a Christian Marriage and he paid 24 heads of cattle as dowry; that at that time, he was working with Kenya Commercial Bank (KCB) and the applicant had just finished form four. At that time, he had already acquired land parcel 637 but it was not subdivided and it had no title deed. He further stated that he had already settled thereon and there were houses which he improved; that he was given a staff mortgage by KCB to construct a house for himself and he assigned his wife the duty to follow up on the title. The title had two names of the applicant and the respondent which he had no problem with since she represented him before the Land Control Board.
23. He testified that he took the applicant to Asumbi Teachers College in 1992 where she trained as a teacher and he paid her fees; that in 1995, she advanced to a degree at the University of Nairobi and she graduated with a Bachelor of Education degree in 2008. He also financed her education. He said that all his children have finished school and he paid their school fees in secondary school and partly in the University. He stated that he paid partly since the applicant deserted him and left with the children; that problems started when the applicant was nominated to the County Assembly of Migori County in 2013; that she used to return home late and became arrogant. In the year 2014, when the respondent



left for Nairobi to register their business, he found that the applicant had left their matrimonial house. The applicant was not asked to leave the matrimonial home by anyone.

24. Further, land parcel number 950 does not belong to the respondent but to Makela Nchagwa and Mwita Mahiri Ngabiva and it has not been transferred to him; that the transfer forms produced in court by the applicant were absolute as they were not excised from the owner of the land; that they do not carry any value in land. The respondent testified that he was aware of the sale agreement dated 8/5/2001 for plot 950 and the applicant was not a party to it; that plot 937 is registered in the name of Stephen Mwita Ntoori (Deceased). There is a sale agreement dated 11/1/1999 and he was the buyer of that land for a consideration of Kshs. 50,000/=. The applicant was not a party thereto and did not contribute anything.
25. The respondent testified that he is aware of land parcel Bukira/Buhirimono/648 which is registered in his name; that he purchased it through a mortgage and the land is still charged to KCB; that he developed it in the year 2019 and the applicant did not contribute to it. The respondent also testified that he was aware of land parcel number 839 which is in their joint names; that the first instalment was paid in the year 1988 and the last instalment in the year 1999; that there was an agreement dated 10/3/1989 before he married the applicant. That the said parcel is related to land parcel number 676 which was sub divided into several portions and the parcel where the matrimonial home stands is land parcel 839. The respondent testified that he was the purchaser and the respondent was not married to him then. He developed the land through a mortgage. The respondent referred to a letter dated 14/4/1993 from KCB to that effect. The respondent stated that their matrimonial home which the applicant deserted stands on that land and he has no other home. He refurbished the house after the applicant left.
26. On land parcel number 214, there is a sale agreement dated 9/5/2013 and it is on the same land; that he was the seller together with his family and he sold the land for Kshs. 450,000/= that the applicant was his witness and the land now belongs to one Samuel Kerario Marwa.
27. Further, the respondent stated that by the time they were divorced, he was unemployed and the applicant was then an Political leader for [Particulars withheld] Ward in Migori County; that the applicant used to support him before the divorce; that the applicant acquired properties. He testified that he is aware land parcel number 1368 has a residential house and the applicant resides in one of the houses and she wholly receives rent from the rented houses. The respondent also stated that the applicant has a motor vehicle registration number KBZ xxxx in his daughter's name; that the applicant used to buy vehicles and register them in the names of his daughter and other third parties; that at the time of registration of the said vehicle, his daughter LCM was a student at the Kenya School of Law.
28. The respondent stated that he now relies on rental income from land parcel number Bukira/Buhirimono/648 and the applicant is being unfair in her proposed distribution since he sold his car and land and paid her fees and now, she wants his only remaining property; that his children are also entitled to the properties. He also stated that the applicant ought not to get anything since there was nothing to be shared. He paid a lot of dowry for his wife, paid her school fees and that has to be taken into account. The respondent testified that between February 2014 and March 2017, they were still married and he is entitled to the income she earned at the County Assembly of Migori, the rental income she earns and the comfort of a motor vehicle. He asked the court to consider that he is at the lowest in life whereas the applicant can have anything in life.
29. On cross - examination, the respondent testified that land parcel 839 formerly land parcel 676 was acquired before marriage and through a mortgage. That he had developed the land. He further stated that he took the mortgage in the year 1993 at a time when he had already married the applicant . On



- plot 214 the land was sold and he produced a sale agreement to that effect. He testified that the purpose of the sale was to take his children to school and he is not aware of the claims that the applicant was not part of the sale.
30. He further stated that he recognized the applicant discharged her various roles as a wife and mother and she paid part of the children's University fees; that the applicant owns two properties being plot no. 1368 and a car motor vehicle registration number KBZ xxxx. The respondent stated that the applicant has not denied ownership of the land despite not having a search to that effect.
 31. Further to the foregoing, the respondent testified that he will be seeking a refund of the dowry and the fees; that he did not settle with the applicant to sell part of the land to develop plot no. 648 which has rental houses. Most of the sale agreements were entered into during their marriage.
 32. On re-examination, the respondent testified that he has not been charged with forgery of the applicant's signature; that throughout their marriage they had a house maid whom he used to pay; that plot no. 1368 owned by the applicant was purchased in the year 2014.
 33. DA testified as DW2. She is the mother to the respondent. She testified that she knows that applicant as her daughter - in - law and understood why both of them are in court. She adopted her witness statement dated 10/12/2018 as her evidence. In her written testimony, she testified that her son married the applicant in the year 1989 at a church wedding; that before the ceremony, the respondent paid 24 herds of cattle as her dowry; that during the pendency of their marriage, the son educated the applicant upto university level as a teacher; that later on the respondent lost his job and resorted to farming to cater for the family's needs.
 34. She further testified that sometime in the year 2014, the applicant moved out of their matrimonial home and went to stay in Maberera where she bought a plot and built her residential home; that she left the respondent destitute and in the plot where the matrimonial home stands which was purchased before they got married; that she has learnt that the applicant is seeking a share of the matrimonial properties yet in the Kuria culture only the children can inherit from their father; that her son is not gainfully employed like the applicant who is a Political leader and it is not fair for her to strip off her son of the land and home which is the only property he had been left with.
 35. On cross - examination, she testified that the applicant and respondent got married in the year 1989 and they were blessed with four children; that the applicant performed her duties as a wife but now they are separated and they do not live together; that the respondent is the one who built their matrimonial home; that the respondent was working in a bank but she couldn't recall when he bought the land. DW2 denied knowing the properties acquired during the period of the marriage.
 36. Further, DW2 stated that the respondent took the applicant to college and later to the university; that she is also aware that the applicant worked as an untrained teacher. It was her further testimony that the respondent sold a vehicle, land and posho mill to educate the applicant and the children. She also testified that the applicant left her home in the year 2014 and came to live with her while the divorce proceedings were continuing but she left in the year 2017 after the divorce case had been determined.
 37. It was her testimony that the applicant took care of the children but she left when all the children had gone to university and some married; that the applicant has many vehicles and plots which she acquired after the divorce, since she got a job.
 38. On re-examination, DW2 reiterated that the respondent sold some of his properties to educate his children and the applicant; that the home where they lived was built by the respondent. She further stated that the applicant has three vehicles but the respondent has none; that all her grandchildren are married except one son who lives with the applicant.



39. JCM is DW3. He is the eldest brother of the respondent. He adopted his witness statement dated 10/12/2018 as his evidence in chief. In his written testimony, he testified that the respondent paid dowry of 24 hears of cattle for the applicant in the year 1989 and celebrated their marriage in church; that at that time the applicant was not working and it is his brother who took the applicant to a teaching college; that he does not know why their marriage broke down but he knows that the applicant deserted her matrimonial home and went to stay alone in Maberera after being nominated as a Political leader ; that by the time the applicant was leaving, his brother had lost his job and resorted to farming to cater for the need of his family. DW2 further stated that the only plot which the respondent has, is the plot where the matrimonial home stands.
40. On cross - examination, DW3 testified that the applicant and the respondent got married in the year 1989 but they separated in the year 2017; that they did acquire properties also; that the applicant had four children and she fulfilled her role as a wife and mother. It was his further testimony that the respondent sold a vehicle, posho - mill to educate the children; that the applicant wants to take away the only property which the respondent has which is where their matrimonial property stands; that the land was bought in the year 1986 and completed in the year 1987.
41. DW2 also testified that a loan was given from KCB but he could not tell when; that the home was not completed when the applicant and the respondent got married but the house was already built. He said that the respondent took the applicant to university; that the applicant has a salary and many vehicles.
42. On re-examination, DW2 testified that it is the respondent who built the house where the applicant and the respondent lived; that the respondent educated the children until university; that some of the children are now married; that the applicant has three vehicles and three plots.
43. The applicant's submissions dated 22/11/2021 mainly addressed the issue of contributions towards the purchase of the matrimonial properties herein. The applicant proposed that the issues to be determined as regards the properties are:-
- i. How they were acquired
 - ii. Who acquired them between the two parties?
 - iii. What supportive role, monetary or non – monetary, did the applicant play in their acquisition and subsequent development.
 - iv. When were they acquired?
 - v. Whether the properties are registered in the respondent 's name and/or physical possession, control and occupation thereof.
 - vi. Costs of the suit.
44. The applicant defined what contribution means and what constitutes matrimonial property by making reference to various provisions of the *Matrimonial Property Act*, 2013. It was also submitted that Article 45 (3) of *the Constitution* provides for equal rights that parties have in marriage.
45. On the proof of contribution, the applicant submitted that she is entitled to a 50:50 share as she has demonstrated her contribution particularly non - monetary on a balance of preponderance; that the applicant being a teacher by profession and a politician, definitely played her role in the family.
46. The applicant also proceeded to outline the various properties in contention and the contribution she made to their acquisition. She further submitted that the respondent has tried to conceal some of the



- properties; that she has proved that even though they are not in his name, he has the actual possession thereof.
47. On the respondent educating her, the applicant submitted that no evidence was adduced to support that the respondent sold his car and posho mill to facilitate her education. She further submitted that she paid for her own education at the University of Nairobi between the years 2004 and 2008 when the respondent was jobless; that she also took care of the children since the year 2007 when the respondent had no proper means.
 48. On the vehicles and the parcels of land, it is claimed that she owns, the applicant submitted that no vehicle registration numbers were given and no parcel numbers were provided; that the allegations were mere hearsay. In any event, the properties acquired after divorce cannot be classified as Matrimonial Properties. The applicant also submitted that on their matrimonial property, she made a contribution towards its improvement thus she acquired a beneficial interest.
 49. The respondent submitted that Section 6 of the *Matrimonial Property Act*, 2013 should guide the court on what constitutes Matrimonial Property. The respondent singled out two properties not being part of the matrimonial properties being Bugumbe/Mabera/676 and Bugumbe/Mabera/199 as the former one is no longer existing after being subdivided to Bugumbe/Mabera/839 and the latter one belongs to the applicant's sister.
 50. It was further submitted that for Bugumbe/Mabera/950 it was acquired during the subsistence of their marriage in the year 2001 but the applicant was not part of the sale agreement. The sale was frustrated and the title still remains in the names of Marcela Nchagwa Marwa and Mwita Mahiri Ngambia and not the respondent. The respondent submitted that for Bugumbe/Mabera/937 which was purchased in the year 1999, the applicant was not party to the sale agreement. The vendor Stephen Ntoori Mwita died before executing the transfer forms to the respondent who to date, has not acquired title to the land.
 51. Of Bugumbe/Mabera/214 the respondent submitted that the property was disposed of by way of sale agreement executed sometime in 9/5/2013 to one Samwel Kerario Marwa. The sale agreement was witnessed by the applicant and therefore she is well aware that the property does not belong to the respondent. The said parcel is currently registered in the name of Mwirimi Nyambaria and Butube Ohero thus, it does not belong to the respondent.
 52. It was further submitted that Bukira/Buhirimono/648 is registered in the sole name of the respondent which was acquired during their marriage. This particular land lies within the definition of matrimonial property. The same case applies to Bugumbe/Mabera/839 where the matrimonial home stands; that if there is property to be considered for divisions it is only these two.
 53. The respondent submitted that the applicant is not entitled to a share in the properties listed as matrimonial properties and relied on various cases from the Court of Appeal. It was further submitted that applicant was a form four leaver and therefore she had no means of acquiring finances to sponsor her education; that it is not in dispute that when the applicant was furthering her education at the University of Nairobi, the respondent catered for the applicant's and the children's education.
 54. It was submitted that the applicant insisted on 50% share while she did not produce any slips to prove her allegations that at the time of acquiring this property she was not being fully sponsored by the respondent; that the applicant cannot substantiate her claims on monetary contribution in the acquisition of Bugumbe/Mabera/839.
 55. As regards to Bukira/Buhirimono/648 where the alleged thirteen shops are constructed, the title is in the name of the respondent and it is encumbered with a loan from KCB; that the claims of the rental



- income received have not been proved by receipts or by pictures of the alleged 13 rental units by the applicant; that the applicant has not produced evidence on how she contributed in the acquisition of the property since it was registered in the name of the respondent around the year 1990 the same period she was still in school. Thus, she was not in a position to financially contribute to the acquisition of the property and the rental units either directly or indirectly.
56. In conclusion, the respondent submitted that the applicant is now educated and empowered. She is currently the Political leader of Nyamosense Komosoko Ward, she has gained wealth and amassed properties in her home area of Maberera. The children are of age and do not need school fees. The applicant filed this cause maliciously to wipe out the remaining investment the respondent has.
57. The respondent also submitted that in regard to prayers 5 and 6, the applicant was on a mere fishing expedition and was using this court to acquire information. The applicant had the opportunity to apply to court under Order 41 of the Civil Procedure Rules and Sections 68 and 69 of the *Evidence Act* for accounts and other documents pertaining to this prayer. The respondent urged this court not to find that the applicant was entitled to a 50% share by merely being married to the respondent and dismiss the summons with costs.
58. I have certainly considered, read and well understood this application, the response thereto, and the rival submissions by both parties. On that account, it is this court's opinion that the issues for determination that arise therefrom are: -
- a. Which suit properties constitute matrimonial properties.
 - b. What was the contribution of each party towards the acquisition of the matrimonial properties?
 - c. Appropriate division of the matrimonial properties.
 - d. Any other orders.
59. Section 6 (1) of the Matrimonial Properties Act defines what constitutes matrimonial properties as:-
- (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
60. The applicant listed the following properties as matrimonial properties:-
- a. Bugumbe/Maberera/950.
 - b. Bugumbe/Maberera/937.
 - c. Bukira/Buhirimono/648.
 - d. Bugumbe/Maberera/214.
 - e. Bugumbe/Maberera/676.
 - f. Bugumbe/Maberera/199.
 - g. Bugumbe/Maberera/839.
61. By admission of both parties, they agreed that Bugumbe/Maberera/199 belongs to the applicant's sister and hence should not form part of the matrimonial properties.



62. The respondent singled out three properties Bugumbe/Mabera/950, Bugumbe/Mabera/937 and Bugumbe/Mabera/214 as not being part of the matrimonial properties since he does not have titles to the said properties. The respondent also stated that Bugumbe/Mabera/676 is non - existent as it was subdivided into Bugumbe/Mabera/839 and the register closed.
63. The respondent urged that the only properties available for distribution if any, is Bugumbe/Mabera/839 where the matrimonial home stands and Bukira/Buhirimono/648 which was acquired jointly. This is the land where the alleged rental units stand.
64. The applicant submitted that the matrimonial properties which the respondent alleges he does not have title to, the respondent has actual possession of the suit parcels of land and she contributed to their purchase.
65. On the properties which the respondent stated that they cannot form part of the matrimonial properties, the applicant stated that for Bugumbe/Mabera/839 (PEXH - 9) is a land measuring 10 acres. The purchase price was Kshs. 70,000/=. Her contribution was Kshs. 30,000/= while the respondent gave Kshs. 20,000/= and the parents gave Kshs. 10,000/=. She further submitted that there are trees and farming going on in the land. The respondent stated that for this land, it has already been disposed of.
66. The applicant also stated that Bugumbe/Mabera/937 lies next to the matrimonial home. The purchase price was Kshs. 50,000/= and she contributed Kshs. 4,000/= towards its purchase. This particular parcel of land was her kitchen garden.
67. On Bugumbe/Mabera/950 which the respondent stated that it was still in the names of Marcela Nchagwa Marwa and Mwita Mahiri Ngambia. The applicant's position is that it was a sub-division of many units including parcel no. 1155. The respondent sold part of the land, 2 Ha for Kshs. 1,500,000/= which was used to develop the rental units in Bukira/Buhirimono/648.
68. Section 14 of the Matrimonial Properties Act creates two rebuttable presumptions in respect to properties acquired during marriage. The law states as follows:-

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.
69. In line with the above provision, the rebuttable presumption is that the property acquired by one spouse, is held in trust for the other spouse. This was the finding in the case of Njoroge -vs- Ngari (1985) KLR 480. This decision was made before the enactment of the *Matrimonial Property Act*, 2014. It was held that if a property is held in the name of one person but the other spouse made a contribution to it, then each spouse has a proprietary interest in that property.
70. It is clear from the definition of what constitutes matrimonial property under Section 6 (1) (c), of the *Matrimonial Property Act*, that it is property that was acquired during the subsistence of the marriage and further, under Section 14 of the Act, there is a rebuttal presumption that even if property acquired during marriage is registered in the name of one spouse, it is presumed to be held in trust for another spouse.



71. I have taken time to consider the properties which the respondent alleges they should not form part of the matrimonial property since he does not have titles to them.
72. In regard to Bugumbe/Mabera/950 there is a sale agreement (PEXH - 2), which shows that it was purchased in the year 2001, for Bugumbe/Mabera/937 there is a sale agreement (PEXH - 6) which shows that it was purchased in the year 1999 and for Bugumbe/Mabera/214 there is a sale agreement which shows that the land was purchased in the year 2004.
73. The above properties which the respondent submitted that they should not be counted as part of matrimonial properties, were actually purchased during the subsistence of the marriage. They therefore form part of matrimonial properties.
74. The respondent conceded that Bugumbe/Mabera/839 and Bukira/Buhirimono/648 where the matrimonial property stands and the rental units are built respectively can be considered as matrimonial properties for division (if any).
75. I am further inclined to address the said parcel of land which the applicant submitted is an extension of the matrimonial home. The applicant stated that it was her kitchen garden.
76. On Bugumbe/Mabera/839 where the matrimonial property stands, the common ground is that the title is in the name of both parties. It is also a fact that the suit land was purchased vide a sale agreement dated 10/3/1989 (PEXH-10) the vendor being Stephen Mwita Ntoori (Deceased). The sale agreement states that the property which was being purchased was BUGUMBER/MABERA/676 measuring approximately 3 acres for a consideration of Kshs. 19,000/=. The consideration was paid in two instalments of Kshs. 3,000/= paid on 31/10/1988 and the balance thereof of Kshs. 16,000/= vide a KCB Bankers Cheque No. 000362.
77. It is noteworthy that the current parcel number where the matrimonial home stands was a sub-division from the parcel number which was indicated in the sale agreement. The respondent's position is that after the sub-division, that particular parcel in the agreement ceased to exist and a new number was issued which is where the matrimonial home stands; therefore, it cannot be part of the matrimonial properties as it is non-existent. The applicant's position is that the said land did not cease to exist, but it is adjacent to the land where the matrimonial home stands. She further stated, that is the portion of land where she did her kitchen garden.
78. I have carefully considered the documents on record. The sale agreement dated 10/3/1989 refers to a different parcel number from the one on the title where the current matrimonial property stands. There is no document or a mutation form on record which shows the alleged portion of land where the alleged did her kitchen garden stood.
79. Clause 3 of the sale agreement states that:-
- ‘The Vendor for avoidance of doubt whatsoever states that the Vendor sells to the purchaser part of the Vendor's said parcel of land...and the Vendor shall effect the transfer of the purchased portion of the said parcel of land to the Purchaser without any undue delay.’
80. I believe the respondent's position that the parcel of land where the matrimonial home stands is a sub-division of the larger portion of land which is stated in the sale agreement. It was also admitted by the applicant in her testimony that the parcel number indicated in the sale agreement was later sub-divided to the current parcel number where the matrimonial home stands. Therefore, it cannot form part of the matrimonial property. The only parcel available for distribution is the parcel where the matrimonial home stands alone and the title deed is in the joint names of the parties (PEXH-8).



81. From the foregone, the properties which shall be considered as matrimonial properties are:-
- a. Bugumbe/Mabera/839 - matrimonial home property.
 - b. Bugumbe/Mabera/937 - purchased in the year 1999.
 - c. Bugumbe/Mabera/950 - purchased in the year 2001.
 - d. Bugumbe/Mabera/214 - purchased in the year 2004.
 - e. Bukira/Buhirimono/648 - rental units property.
82. Having considered which properties constitute matrimonial properties, the second issue for determination is the contribution each party made towards the purchase of the properties.
83. The ownership of matrimonial property is determined by the contribution that either spouse made towards its acquisition. Section 7 of the *Matrimonial Property Act* provides:-
- “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.”
84. On what constitutes contribution, Section 2 of the *Matrimonial Property Act* provides 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;
85. On the beneficial ownership arising out of the development or improvement by a spouse, Section 9 of the Act provides:-
- “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.”
86. Having set the above legal principles, when determining division of matrimonial properties, the court has to consider the time when the property was acquired, the contribution both monetary and non-monetary either spouses made towards the acquisition and or improvement of the properties and the beneficial ownership either spouse has towards the matrimonial properties.
87. I shall now proceed to analyse the matrimonial properties and the contribution either party had towards its ownership and/or improvement.

Bugumbe/Mabera/839

88. This is where the matrimonial property stands. The title is in the name of both parties even though the respondent had acquired it before their marriage.



89. On the development of the matrimonial home, the applicant testified that house was built until roof stage and then the funds depleted. They had to farm and use the proceeds thereof to finish the house. The matrimonial home was built between the years 1993 - 1996.
90. The respondent's position is that he developed the land himself through a mortgage facility which he obtained from KCB. To support this assertion, the respondent produced a letter dated 14/4/1993 (DEXH-5).
91. I have considered the contents of the letter giving the respondent a loan. The loan was specifically taken to enable the respondent to construct a residential house on the land where it currently stands. The security to the loan was a motor vehicle worth Kshs. 35,000/=. There is another letter dated 10/12/1993 addressed to the respondent from the Manager of KCB. The letter was an update of the developments in construction of the matrimonial home. As of 1/12/1993, the letter stated among other things that the roof was complete. However, the letter opined that the respondent may require further loan facility to enable him to purchase more construction materials specifically cement and sand for plastering, door and window fittings (frames), windowpanes and paint.
92. It is not in doubt that the respondent did purchase the land where the matrimonial home stands and did a substantial amount of work in developing it. There is no evidence that a further loan was taken to complete the incomplete parts of the matrimonial home. The applicant testified that it was around this time when the funds were depleted, that they farmed in order to get money to finish the construction.
93. The respondent submitted that the applicant had no capacity to contribute to the expenses in construction of the matrimonial home since she was enrolled at Asumbi Teachers College to train as a teacher in the year 1992. The applicant testified that she went to Asumbi Teachers College in the year 1994. None of the parties and in particular the applicant produced the College Certificate from Asumbi Teachers College to prove the time when she was in school. This would have enabled the court to ascertain when the applicant was in school and if during that period, she was capable of contributing.
94. However, the applicant testified that she worked as an untrained teacher. She did not disclose what her salary was. The applicant did not even tell this court when she started teaching as a trained teacher after her training at Asumbi Teachers College. The respondent testified that the applicant started teaching in the year 1995. This has not been controverted.
95. I am therefore inclined to believe that the applicant started training as a teacher in the year 1992, thereafter, she started teaching in the year 1995. Thereafter, the second child was born in the year 1998.
96. Be that as it may, I am of the opinion that the applicant contributed to the improvement of the matrimonial home through farming on the then leased property Bugumbe/Mabera/937. The extent to which she did contribute to its construction, finishing and furnishing is unknown. The applicant has not specifically outlined what her contribution was.

Bugumbe/Mabera/937

97. This property was purchased in the year 1999. It is approximately 0.4 HA (0.98acres) in size. The applicant's position is that she contributed Kshs. 4,000/= towards its purchase. The applicant further contended that this land partly formed part of their matrimonial home and she used to do some farming there. The respondent's position is that the applicant was not part of the sale agreement and in any event, the property is not in his name since the Vendor is deceased and that therefore the property cannot form part of matrimonial property.



98. The sale agreement to this property is (PEXH-6). The vendor is Stephen Ntoori Mwita the same person who sold to the respondent the land where the matrimonial property stands. The consideration was Kshs. 50,000/=. The sale agreement shows that the property was purchased in instalments. A total of Kshs. 46,000/= was paid via several cheques and Kshs. 4,000/= was paid by cash. The evidence by the applicant that she contributed Kshs. 4,000/= in cash was not controverted.
99. The respondent testified that the applicant started teaching in the year 1995. I am therefore inclined to believe that the applicant contributed Kshs. 4,000/= towards the purchase of the property being Bugumbe/Mabera/937 which was purchased in the year 1999, because during this time she was earning an income. I am also of the view that this land, forms part of the matrimonial property as a kitchen garden.

Bugumbe/Mabera/950

100. This property was purchased in the year 2001. There is a sale agreement dated 8/5/2001 (PEXH-2). The property is approximately 10 acres bought for a consideration of Kshs. 80,000/=. The respondent's position is that this property should not form part of the matrimonial property since it is not in his name. The applicant's position is that she contributed Kshs. 30,000/= towards the purchase of this property and a portion of it approximately 2 Ha was sold for Kshs. 1,500,000/= which was used to develop the rental units in BUKIRA/BUKIRIMONONO/648. The applicant stated that she consented to the sale. She further stated that there are trees grown on the land and farming is ongoing.
101. I have considered the annexures produced in relation to this parcel of land. PEXH-3 is a mutation form which shows that this land was subdivided and given new parcel numbers, 1154 measuring 13.94 Acres and 1155 measuring 4.05 Acres. There is also a transfer form (PEXH-5) which shows that the parcel of land was transferred to the respondent from the vendors. The assertion that the land cannot form part of the matrimonial property cannot hold. The respondent has the duly executed transfer forms at his disposal but he chose not to pursue acquisition of the title.
102. The portion belonging to the parties was 1155 the one measuring 4.05 ha an equivalent of 10 acres. The parcel later acquired a new number Bugumbe/Mabera/2025 whose approximate area was 4.39 Ha and a title deed was issued to the respondent on 3/5/2019. After the sale of the portion of land around 2 Ha, the land was further subdivided and the purchasers were issued with a title on 6/2/2020 (PEXH-1) and the remaining portion was given a new number 2678 which the respondent has never actively pursued the title to it. The remaining portion is approximately 3.99 Ha which is also 9.85 acres. It forms part of the matrimonial property.

Bugumbe/Mabera/214

103. This property was purchased in the year 2004. The respondent submitted that this land cannot form part of matrimonial property since it was sold on 9/5/2013 to Samwel Kerario Marwa. He attached a search (DEXH-6) which shows that the land belongs to other different persons. The applicant submitted that she did not consent to the sale and it was a forgery. It is her position that the land was a joint purchase from one Catherine Nyamohanga (PEXH-9). They bought part of the land measuring 10 acres. The purchase price was Kshs. 70,000/=. She stated that her contribution towards the purchase was Kshs. 30,000/= while the respondent gave Kshs. 30,000/= and the parents gave Kshs. 10,000/=.
104. I have considered the sale agreement dated 9/5/2013. It shows that a portion of the parcel of land measuring 5 acres was sold to Samwel Kerario for Kshs. 550,000/=. Although the applicant has strenuously submitted that the sale was a forgery of her signature, there is no evidence that she pursued



possible criminal charges against the respondent. I am of the view that the remaining land, 5 Acres is the matrimonial property for division.

Bukira/Buhirimonono/648

105. The respondent conceded that this portion of land can be considered as matrimonial property for division. He further stated that the land is currently encumbered as he has not offset the loan advanced to him from KCB. He is using the land to sustain himself financially. The respondent denied that there are rental units thereon from which he is receiving some income as alleged by the applicant.
106. The applicant's position is that a portion of another land was sold for Kshs. 1,500,000/= and used to develop rental units. The shops are 13 in number which attract approximately Kshs. 130,000/= per month.
107. The applicant did not state the amount which she contributed towards the purchase of the parcel of land where the rental units stand; but she signed a spousal consent for the sale of a portion of land which money was used to build the rental units. It is not lost to this court that the portion which was sold for Kshs. 1,500,000/=, the applicant made a contribution of Kshs. 30,000/= towards its purchase. I would term this as a joint contribution towards the development of the rental units by both parties.
108. The respondent has stated that this parcel of land is currently charged to KCB Bank. The entry in the search (DEXH-3) shows that there are two loan facilities that were charged to this parcel of land which he is still allegedly repaying. The loan facilities were taken in the year 1990 and 1997 with one loan facility being for Kshs. 36,000/= and Kshs. 56,000/= respectively. The search is one dated 18/4/2018. I find it hard to believe that the true reflection of the property is that it is still encumbered. A loan issued in the year 1997 cannot be still subsisting to date and yet the bank had not made any move to realise the security, may be the respondent has not done a discharge of the charge.
109. None of the parties has attached a sale agreement to show when the sale of the portion sold for Kshs. 1,500,000/= to one Lyne Achieng was done and neither did any of them testify to that fact. I take cue of the fact that the sale of the portion was done when the applicant was still living with the respondent.
110. Turning to the subdivision of the properties, the applicant contended that she is entitled to 50% of the property. The respondent stated that it is not tenable since the applicant's contribution to the properties is unsubstantiated. He also submitted that the applicant failed to establish why the matrimonial property should be held in trust for her. The respondent further stated that the applicant is now empowered and she has gained wealth and amassed properties.
111. Article 45 (3) of *the Constitution* provides that parties are entitled to equal rights at the time of marriage, during and at the time of dissolution of the marriage.
112. It is now a settled principle that matrimonial property is distributed according to the peculiar circumstances of each case. The court has to consider the facts presented to it independently when determining distribution of matrimonial property. There is no hard and fast rule. It is an exercise of judicial discretion.
113. Among the things to be considered is the principle of direct and indirect contribution made by each party in the acquisition of the properties. Section 7 of the *Matrimonial Property Act* in my view vests matrimonial property in both parties but according to their contribution. The spouses can own some properties together but not necessarily in equal shares. At the end of the day, the question of what one brought on the table has to be thoroughly scrutinized before distribution is done. This in itself, eliminates the argument that property must be shared on a 50:50 basis. If that was the case, then what



the law would be encouraging is lazy spouses who sit and wait when the marriage hits the rocks and reap where they did not sow. See the Court of Appeal decision in PNN -vs- ZWN (2017) eKLR.

114. Further, Section 9 of the *Matrimonial Property Act* provides that if property is acquired before or during marriage, and one spouse makes a contribution towards its improvement, the other spouse acquires a beneficial interest in it. The argument that since a property is not registered in the name of both spouses then another spouse does not have a right to it, cannot stand in law. The Court of Appeal in C W N v B N (2015) eKLR held that distribution of property does not depend on whose name the property is registered.
115. The distribution herein shall be determined on both the monetary and non-monetary contribution by both parties. Monetary contribution I would say is the direct contribution made as it is tangible. Non - monetary contribution is the indirect contribution which more often than not is not tangible but it cannot be taken as non-weighty. The respondent together with his witnesses recognized the role the applicant made in taking care of the home. The respondent also testified that she took part in educating the children. The applicant's testimony that she took care of the respondent when he suffered some bout of mental illness was also not controverted.
116. I shall now proceed with the distribution of the properties. Unfortunately, the parties did not file any valuation reports or give the estimate values of the properties for this court to consider while making the distribution. I shall do my best to strike a balance.
117. The matrimonial home stands on Bugumbe/Mabera/839 and partly on Bugumbe/Mabera/937 which land was purchased in the year 1999. The respondent bought the parcel of land where the matrimonial home stands before the marriage and developed a substantial part of it. The contribution of the applicant although not monetary in nature cannot be ignored. I note that currently, the applicant has built her own home where she is staying. This fact she has not denied. I found earlier that the extent of the applicant's contribution to the building of the house is unknown and considering the fact that she was not working and was a student at the beginning of their marriage, her contribution may have been very minimal. For those reasons, I am of the view that the matrimonial house and homes should remain with the respondent wholly.
118. Bugumbe/Mabera/937 was purchased in the year 1999. The purchase price was Kshs. 50,000/=. The uncontroverted evidence is that the applicant contributed Kshs. 4,000/= in cash. This part of land, forms part of the matrimonial home. It was the kitchen garden. The applicant is therefore entitled to ½ of the value of this land.
119. Bugumbe/Mabera/950 was purchased in the year 2001 for a consideration of Kshs. 80,000/=. The applicant's contribution was Kshs. 30,000/=. A section of the property 2 Ha was sold for Kshs. 1,500,000/= to develop rental units. The remaining portion is 2.39 Ha an equivalent of 9.85 acres. The applicant is entitled to ½ of the remaining land.
120. Bugumbe/Mabera/214 was purchased in the year 2004. The property was 10 acres in total. The consideration was Kshs. 70,000/=. The applicant testified that she paid Kshs. 30,000/= while the respondent paid Kshs. 20,000/= the balance thereof, she used to educate the Vendor's daughter. There is a sale agreement dated 9/5/2013 which shows that 5 acres was sold to one Samwel Kerario. Although the applicant stated that her signature was forged, she has not made any criminal complaint. I find that the applicant is entitled to ½ of the remaining portion.
121. Bukira/Buhirimono/648 is where the alleged rental units stand. The applicant did not produce pictures to show the existence of the rental units. Similarly, she did not produce any rental agreement or receipts to prove that there are tenants in that property and the rent payable.



122. However, I am convinced that there may be some rental properties therein since the respondent testified that it is his only source of income as he has to sustain himself. On the contribution made by the applicant to develop the rental units, there was a sale of another portion of land which was sold for Kshs. 1,500,000/= to develop the rental units. The applicant had contributed Kshs. 30,000/= to purchase the said land in the year 2001. I take into account the fact that the applicant has also developed her own rental houses on her property. The applicant is entitled to 30% of the rental proceeds from the rental units during her lifetime.
123. The final orders are as follows:-
- a. The Respondent is entitled to the matrimonial home situate on Bukira/Mabera/839.
 - b. The applicant is entitled to $\frac{1}{2}$ of the value of the property Bugumbe/Mabera/937 purchased in the year 1999.
 - c. The applicant is entitled to $\frac{1}{2}$ of the property on the remaining portion of the land in Bugumbe/Mabera/950 purchased in the year 2001, that is 1.195 acres.
 - d. The applicant is entitled to $\frac{1}{2}$ of remaining portion of the land in Bugumbe/Mabera/214 purchased in the year 2004, that is 2 $\frac{1}{2}$ acres.
 - e. The applicant is entitled to 30% of the rental proceeds from the rental units built on Bukira/Buhirimonono/648.
 - f. Each party bears their own costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 16TH DAY OF FEBRUARY 2023

R. WENDOH

JUDGE

Judgment delivered in the presence of: -

Mr. Oywer holding brief for Mr. Kanyangi for the Applicant

Mr. Abisai for the Respondent

Nyauke Court Assistant

