



REPUBLIC OF KENYA



KENYA LAW
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**MWG v DGW (Civil Suit 21 of 2018)
[2023] KEHC 3636 (KLR) (Family) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY
CIVIL SUIT 21 OF 2018**

MA ODERO, J

MARCH 24, 2023

BETWEEN

MWG APPLICANT

AND

DGW RESPONDENT

JUDGMENT

1. Before this court is the originating summons dated 16th April 2018 by which the applicant Milka Waihiga Githinji seeks the following orders:-

- “1. It be declared that the Town House No. 38 on L.R. No. 12715/29 in Syokimau; registered in the joint names of the Applicant and the Respondent and whose mortgage has since inception been serviced by the Applicant is the exclusive property of the Applicant.
2. That it be declared that the Apartment No. A5, I.R. No. 115643 on LR No. 209/17522 registered in joint names of the applicant and the respondent whose mortgage was fully serviced by the respondent [applicant] is exclusive property of the applicant.
3. That it be declared that property L.R No. Tassia-II-97/723/412 secretly and fraudulently disposed off by the respondent was matrimonial property to which the Applicant is entitled to 65% the proceeds being the proportion of her contribution to the purchase of the same.
4. An order do issue requiring the respondent to vacate the Syokimau property immediately.



5. An order do issue to the respondent when called upon to execute the appropriate transfer documents transferring ownership of town House No. 38 on L.R. No. 12715/29 Syokimau to the Applicant within Fourteen (14) days of the judgement.
 7. An order requiring the respondent to execute the transfer documents transferring ownership of Apartment No. A5, L.R No. 209/17522 to the applicant.
 8. That this Honourable Court be pleased to grant such or other reliefs as may be just and expedient in the circumstances.
 9. That costs be in the cause.
2. The summons was premised upon Article 45 (3) of *the Constitution* of Kenya 2010, Section 17 of the *Matrimonial Property Act*, 2014, Order 37, Order 40, Rule 1 of the Civil Procedure Rules and all other enabling provisions of the Law was supported by the Affidavit of even date and the supplementary Affidavit dated 25th February 2019 both sworn by the Applicant.
 3. The Respondent David Githinji Wanjohi opposed the application through his Replying Affidavit dated 19th June 2018.
 4. The matter was canvassed by way of vive voce evidence. The hearing commenced before this court on 3rd November 2021. The Plaintiff called one (1) witness in support of her case whilst the Defendant also called one (1) witness.

The Evidence

5. The Applicant Milka Waihiga Githinji relied on her witness statement dated 15th September 2021. The Applicant told the court that she and the Respondent got married on 7th December 1996. A copy of their Marriage Certificate Serial No. 744550 is annexed to the supporting Affidavit dated 16th April 2018 (Annexure MWG-‘1’).
6. The couple’s union was blessed with two (2) children – a son MW born on 11th September 1997 and a daughter B.N.G born on 2nd August 2003. Copies of the birth certificates for the two (2) children are annexed to the summons as (Annexure MWG-‘2’). The children are now both adults. The Applicant states that she is a trained Accountant and was in paid employment during the entire period of the marriage. That she worked at Amity Equipment Limited
7. The Applicant left the matrimonial home on 2nd December 2017 due to cruelty and later filed a Divorce Petition No. CMCC 225 of 2018 at the Milimani Chief magistrates Court. The Divorce was granted in December 2018, and the marriage is now dissolved. The Applicant now seeks division of the property acquired during the subsistence of their marriage.
8. The Applicant stated that during the period of coverture the following properties were acquired:-
 - (i) House No. 38 on LR No. 12715/29 – Syokimau

House No. 38 on LR No. 12715/29 – Syokimau (hereinafter referred to as ‘the Syokimau House’ registered in joint names’). The Applicant testified that sometimes in November 2012 the family identified a house at Lifestyle Estate in Syokimau which house was being sold for Kshs.12,500,000/= . That she paid a sum of Kshs.1.250,000 as a deposit and obtained a loan from Barclays Bank to cover the balance of the purchase price being Kshs.11,250,000/=



9. The Applicant states that contrary to their agreement the Respondent did not assist her in repaying the loan and thus she had to struggle to single handedly make all the loan repayments of Kshs.135,000 per month which she continues to do so to date even after the couple separated. That despite her shouldering the entire burden of meeting the loan repayments the Respondent continues to reside in the Syokimau house with his new wife.
10. The Applicant states that the Respondent has failed to comply with court ruling of 31st May 2021 directing him to pay 50% of the outstanding arrears on the loan facility in respect of this property. That despite this Ruling the Respondent has made no payments to offset this loan.
 - (ii) Apartment on L.R No.209/17522 (L.R. 115643) Sunrise Park Estate
11. Apartment on L.R No.209/17522 (L.R. 115643) Sunrise Park Estate (hereinafter referred to as the 'Sunrise Apartment' registered in joint names). A copy of the Title document for the said property is Annexure MWG '5' to the Applicants supporting Affidavit dated 16th April 2018.
12. The Applicant testified that the purchase price for this property was Kshs.4,250,000/=. That the Respondent only contributed Kshs.500,000/= towards the purchase of this 'Sunrise Apartment'.
13. The Applicant states that she paid the entire balance of the purchase price through a loan taken from Barclays Bank which loan she serviced single handedly. That she paid a further Kshs.40,000 towards the common borehole.
14. The Applicant states that she currently receives the rental income of Kshs.40,000 per month from the Sunrise Apartment which income she utilizes towards paying her rent in 'South B' where she currently lives and in providing for the maintenance education and upkeep for the two (2) children of the marriage since the Respondent has made no contribution towards the maintenance of said children, since the couple parted ways.
 - (iii) Tassia Estate Plot No. L.R Tassia – II-97/723/412
15. Tassia Estate Plot No. L.R Tassia – II-97/723/412 hereinafter referred to as the ('Tassia Plot') which is registered in the sole name of the Respondent. The Applicant states that she contributed Kshs.500,000 which amounted to 65% of the purchase price for the plot. That additionally she constructed the perimeter wall and gate for the plot at a cost of Kshs.100,000.
16. The Applicant states that the Respondent later secretly sold off the Tassia Plot without her knowledge and/or consent for amount of Kshs.3,600,000. She demands to be refunded her financial input into the said plot.
17. The Respondent David Githinji Wanjohialso testified in this matter. He relied upon his written statement filed in court on 22nd February 2019. The respondent concedes that he and the Applicant got married on 7th December 1996. He also confirms that their union was blessed with two (2) children who are now both adults.
18. The Respondent states that their marriage had no problems until the Applicant abruptly vacated the matrimonial home on 2nd December 2017 taking with her the two (2) children only sending the Respondent an e-mail to inform him of her departure.
19. The Applicant states that he is an IT specialist and was working at the Grand Regency Hotel. That upon being retired from his job in August 2011 the Respondent started an IT Company called Regent Computers which he runs together with the family Company Wamesh Enterprises.



20. The Respondent states that he singlehandedly purchased the Tassia Plot paying Kshs.1,793,100/= for it and that is why the said plot is registered in his sole name. The Respondent admits that he later disposed off the plot but insists that he did inform the Applicant when he was selling the same. That he sold the Tassia Plot Kshs.3.3 Million and not Kshs.3.6 Million as alleged by the Applicant.
21. The Respondent states that he deposited the entire proceeds of the Tassia Plot into the family business account which funds were used for the benefit of the entire family and to pay school fees for the children.
22. The Respondent confirms that sometimes in the year 2008 he and the Applicant purchased the Sunrise Apartment where they lived together as a couple until the year 2013. That he made financial contribution towards the payment of the purchase price as well as paying legal fees and other taxes. That in recognition of their joint efforts in purchasing the Sunrise Apartment the same was registered in their joint names. That the Applicant continues to receive alone the rental income of Kshs.40,000/= from the said Apartment which rent is deposited into her account held at Co-operative Bank of Kenya.
23. The Respondent further confirms that in the year 2012 he and the Applicant identified the Syokimau House and decided to purchase the same. He denies the Applicant's claim that he made no contribution towards the purchase of the house. However the Respondent concedes that the Applicant took out a loan from Barclays Bank and continues to pay the monthly loan repayment, for the Syokimau House. The Respondent insists that he had over time covered maintenance and reconstruction of the house as well as payment of various bills. The Respondent admits that he currently occupies the Syokimau House with his new wife.
24. The Respondent claims that he has been unable to comply with the orders made in the ruling of 31st May 2021 because neither the Applicant nor the bank have been willing to supply him with information regarding the loan account into which the payments were to be made. The Respondent also states that he filed an application seeking a review of the courts orders which application is yet to be heard and determined.
25. The Respondent asserts that as the husband and provider in the family he made several cash payments to the Applicant to assist in offsetting the loan repayments and that he made indirect contribution by catering for some household expenses. He states that the Applicant vacated the matrimonial home on her own volition leaving him behind and states that she is free to occupy the Sunrise Apartment.
26. The Respondent asserts that he has made greater financial contribution towards the acquisition of the three properties than made by the Applicant. He prays that the originating summons be dismissed entirely.
27. Upon close of oral evidence the parties were invited to file their written submissions. The Applicant filed the written submissions dated 26th September 2022 as well as the Further submissions dated 19th December 2022. The Respondent relied upon his written submissions dated 11th November 2022.

Analysis and Determination

28. I have carefully considered the originating summons before this court, the reply filed by the Respondent, the evidence adduced before the court as well as the written submissions filed by both parties. The first question to be answered is whether the properties in question constitute 'Matrimonial Property'.



29. Section 6(1) of the *Matrimonial Property Act* 2014 defines Matrimonial Property thus:-

“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”

Therefore in order for property to qualify as ‘Matrimonial Property’ it must have been acquired during the subsistence of a legal marital union between the parties.

30. The fact that the Applicant and the Respondent solemnized their marriage on 7th December 1996 is not disputed. A copy of their Marriage Certificate serial Number 744550 is annexed to the Applicants supporting Affidavit (Annexure MWG ‘1’) Neither is it in dispute that their union has now been legally dissolved. The Applicant has claimed that the three properties namely:-

- (i) House No. 38 on LR No. 12715/29 – Syokimau
- (ii) Sunrise Park Estate Apartment on L.R No.209/17522 (L.R. 115643)
- (iii) Tassia Estate Plot No. L.R Tassia – II-97/723/412

were all acquired during the subsistence of her marriage to the Respondent and therefore all constitute “Matrimonial Property.”

This is not denied by the Respondent, who in his evidence confirms that the three properties were all acquired during the period of coverture.

31. The Applicant now seeks for division of the said matrimonial property in accordance with the contribution made by each spouse towards the acquisition of the same. The Applicant has further claimed that she made significant contribution towards the purchase and or acquisition of the three properties in question.

32. Section 107 of the *Evidence Act* Cap 80, Laws of Kenya which deals with “Burden of Proof” provides thus:-

“107 (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”

33. Therefore a party seeking the division of matrimonial property is under a legal obligation to prove his/her contribution towards the acquisition of the property in question. In other words a party claiming a share of matrimonial property has the burden to prove his/her contribution towards the acquisition of the said property.

34. Section 2 of the *Matrimonial Property Act* defines the term ‘contribution’ as follows:-

“

“2. In this Act unless the context otherwise requires-



“contribution” means monetary and non-monetary contribution and includes-

- a. domestic work and management of the matrimonial home.
- b. Child care
- c. Companionship
- d. Management of family business or property’ and
- e. Farm work.....”

35. To round up this discussion on the relevant law I will cite Section 7 of the [Matrimonial Property Act](#) which provides that:-

“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.” [own emphasis]

36. In [Federation of Women Lawyers Kenya \(FIDA\) v Attorney General & another](#) [2018] eKLR the court stated that:-

“The law recognizes equal worth and equal importance of the parties in marriage. Thus, the beneficial share of each spouse as the law on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. First, the Act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.” [own emphasis]

37. Similarly in [UMM v IMM](#) [2014] eKLR the court held the view that:

“As far as I can see it is the provisions of Sections 2,6 and 7 of the [Matrimonial Property Act](#), 2013 fleshes out the right provided by Article 45 (3). By recognizing that both monetary and non-monetary contribution provisions of article 45 (3) of [the Constitution](#) that 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. I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that article 45(3) decrees an automatic 50:50 sharing could imperial the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be sense of equality contemplated by article 45 (3).” [own emphasis]

38. It is clear therefore based on the relevant law and the above cited authorities, that despite the provisions of article 45 (3) of [the Constitution](#) of Kenya 2010 guaranteeing parties to a marriage equal rights during and after dissolution of the marriage, a party to a marriage must prove monetary or non-monetary



contribution in order to be entitled to a share of matrimonial property. With this in mind I will now proceed to consider each of the three properties individually.

(i) House No. 38 on LR No. 12715/29 – Syokimau

39. The parties agree that this Syokimau house was the matrimonial home where the family lived. In his evidence the Respondent has conceded that this was the position.
40. The Applicant states that she single handedly financed the purchase of this property. That the Respondent did not contribute any funds towards the acquisition of the Syokimau House. That despite not making any contribution at all towards its purchase the Respondent continues to enjoy alone the benefits of said property where he now resides with his new wife.
41. The Syokimau House is registered in the joint names of the parties. A copy of the title Document appears as Annexure MWG '14' to the Applicant supporting Affidavit dated 16th April 2018.
42. The Applicant told the court that she and the Respondent together with their two (2) children identified the house. That the purchase price was Kshs.12,500,000/=. That the couple agreed to purchase the house as a family home and that she paid house deposit of Kshs.1.25 Million from her savings and later took a loan from Barclays Bank of Kshs.11,250,000/= to cover the balance of the purchase price. The Applicant avers that by April 2018 she had made payments amounting to Kshs.9,500,000 towards the purchase of the Syokimau House.
43. The Applicant states that though the parties agreed that the respondent would assist in repaying of this mortgage, he reneged on this promise and failed to make any contribution towards off-setting the loan. The applicant was left to make the loan repayments of Kshs.135,000 on her own and she continues to make the monthly repayments to-date despite the respondent now residing in the house and deriving benefits from the property alone.
44. On his part the Respondent concedes that the Applicant paid the deposit of Kshs.1,250,000 required for the Syokimau House. He also concedes that the Applicant took out a mortgage to cover the balance of the purchase price. However the Respondent insists that he too made substantial financial contribution towards the purchase of this property. The Respondent insists that he made several cash payments to the Applicant which were to be utilized towards meeting the monthly loan repayments. That he catered for certain household expenses and the children's educational costs thus freeing up the Applicants income to enable her meet the loan repayments. The Respondent states that he has also financed the maintenance costs for the house as well as cost for renovations.
45. The Respondent concedes that he currently occupies the Syokimau House with his new wife but counters that the Applicant is free to occupy the Sunrise Apartment if she wishes.
46. The Applicant has annexed to her supporting Affidavit dated 16th April 2018 proof of the mortgage she took to finance the purchase of this Syokimau House (Annexure MWG '4'). There is a letter of offer dated 8th September 2008 from Barclays Bank to the Applicant Milka Githinji for a Home Loan of Kshs.3,150,000/= for purposes of buying a House.
47. The Respondent despite claiming to have assisted the Applicant in repaying the loan taken to purchase the house has not produced any documentary evidence to support his claim. The Respondent has not availed proof of any payments made by himself into the loan account. There are no credit slips for payments made to the bank by the Respondent. There is no evidence of direct payments made to the Applicant to assist in making the loan repayments either by way of bank or M-Pesa transfers Neither nor has Respondent availed any evidence to prove that he has paid maintenance costs and/or paid for any renovations to the House. Despite the Respondents claim that he is paying the service charge for



the house, the documents which he has annexed actually reveal that the service charge payments are in arrears. Indeed under cross examination the Respondent conceded that the Applicant was single handedly making the loan repayment for the mortgage taken to purchase the Syokimau House.

48. It is pertinent to note that on 31st May 2021 this court delivered a Ruling directing the Respondent to meet 50% of the arrears due on the loan and to meet 50% of the loan repayment for the Syokimau House. The Respondent did not comply with that Ruling. He made no payment at all towards the loan outstanding on the house in which he is living.
49. The Respondent claimed that he was unable to comply with the court orders because neither the Applicant nor the Bank were willing to provide him with details of the loan account to facilitate payment into that account. There is no evidence that the Respondent ever wrote to the Bank seeking to be supplied with information regarding the loan account. Neither did the Respondent come back to the court to seek orders that this information be supplied to him.
50. The Respondent clearly has no interest whatsoever in getting information regarding the loan repayment for the house which he currently occupies. He admitted under cross examination that he has no idea how much of the loan taken to purchase the said house is still outstanding. The Respondent is simply comfortable living in a house which he is not paying for.
51. Secondly the Applicant claimed that he had filed an application seeking review of the court orders of 31st May 2021 which review application was yet to be heard. A review application cannot act as a stay on orders made by the court. The orders of 31st May 2021 remained binding on the Respondent. It is clear that the Respondent had no intention at all to comply with the courts orders of 31st May 2021. Indeed by defying those orders the respondent is in fact a contemnor who does not deserve any favourable consideration by the court.
52. It is quite evident that the Respondent is a man who is very comfortable residing in and benefitting from a house which was acquired largely through the efforts of his ex-wife. This is a man who wants to reap where he has not sown.
53. The *Matrimonial Property Act* recognizes both monetary and non-monetary contribution towards the acquisition of an Asset. In *NWN – VS KNN* [2014] eKLR Hon. Lady Justice Achode (as she then was) stated thus:-

“ this court must endeavor to give effect to both monetary and non-monetary contributions that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.”
54. In deciding upon the share due to the Applicant I take into account the fact that the couple lived in this house as a family together with their two (2) children. Certainly the Respondent as a husband must have provided for some of the household expenses even if minimally. The Respondent has also availed receipts to prove that he has made some payment towards the service charge and utility costs like water electricity for the Syokimau House. He certainly provided the Applicant with companionship during the period they cohabited as man and wife.
55. Registration of an Asset in the joint names of a couple in a marriage gives rise to a rebuttable presumption that each spouse is entitled to a 50% (half) share of said property. The court will rely on the evidence adduced in contribution of each spouse in order to determine the respective share of each spouse.



56. In the case of *TMW – VS- FMC* [2018] eKLR the courts held as follows:-

“As regards ownership of Matrimonial Property, Section 7 of the *Matrimonial Property Act*, states 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.”

The above provision of law entails that ownership of matrimonial property vests with the husband and wife/wives according to what each party contributed towards the acquisition of the same. This section introduces yet another aspect as far as ownership of property by spouses is concerned, that is the aspect of contribution of each party towards the acquisition of such property. In my view, what this provision of law entails is that it is possible for spouses to own certain properties but not in equal shares. Thus in case of divorce, the court would look at what each party brought to the table for the purposes of the distribution of such properties if any dispute concerning distribution of matrimonial property arise.... Registration of property in both spouses names is essentially regarded that the property is held by both spouses in equal right. However, this clause does not negate the fact that spouses receive from the marriage in accordance with their contribution whether monetary or in kind....” [own emphasis]

57. Similarly in the case of *GNK –VS MWNN* (Civil Appeal No. 559 of 2019 the Court of Appeal in finding that the presumption on equal contribution to a jointly owned property had been rebutted held that:-

“The appellant was able to rebut the presumption that the properties which were jointly registered were equally owned.....”

The court went on to observe that:-

“.....we do not understand why the Respondent wants to benefit from the hard earned labour of the Appellant”

58. The same applies in this case. The Applicant has produced evidence to show that she has paid and continues to pay the larger share of the money used to acquire the Syokimau House. Despite paying the bulk of the purchase price for the House, the Applicant is currently deriving no benefit whatsoever from the said property. I find that she is entitled to an eighty percent (80%) share of the said property.

(ii) Sunrise Park Estate Apartment known as LR 115643 on on L.R No.209/17522

59. The above property is registered in the joint names of the Applicants and the Respondent. A copy of the Title Document appears as MWG –‘5’ to the Applicants supporting Affidavit. The parties agree that the purchase price for this Apartment was Kshs.4,250,000.00. The Applicant states that the Respondent only paid Kshs.500,000.00 towards the acquisition of the apartment. That she paid the balance of the purchase price together with interest thereon alone through a Mortgage taken from Barclays Bank which mortgage the Applicant repaid over a five (5) year period between 2007 - 2012. The Applicant stated that the Sunrise Park Apartment is currently rented and that she collects the monthly rental of Kshs.40,000/= which she uses to meet her expenses like rent, as well as maintenance for herself and the children since the Respondent has made no provision for the family since the couple separated.

60. The Respondent on his part confirmed that he made a cash payment of Kshs.500,000/= towards the purchase of the Sunrise Park Apartment. The Respondent has annexed to his Replying affidavit



dated 19th June 2018 a copy of a cheque dated 16th June 2008 he paid to Beco Properties Limited for Kshs.500,000/= as well as a receipt for this payment (Annexure DCG “6”).

61. The Respondent also confirms that the property is currently rented out and the rental income is paid directly into the account of the Applicant held at Standard Chartered Bank. He told the court that he would have no objection to the Applicant retaining the Sunrise Park Apartment while he keeps the Syokimau House.
62. The evidence available shows that the purchase of this Apartment was financed largely by the Applicant. The Respondent was only able to prove contribution of Kshs.500,000/= towards the acquisition of this property.
63. Once again this court will take into consideration the fact that the couple resided in this Apartment for a period of time. It was their first matrimonial home. The Respondents as a husband provided companionship to the Applicant. As the Husband I have no doubt that the Respondent must have catered for some of the household expenses. Therefore he did make non-monetary contribution even if minimal. Here again I find that since the Applicant made the larger contribution towards the acquisition of this property, she is entitled to an eighty percent (80%) share of the Sunrise Park Apartment.

(iii) Plot in Tassia L.R No. Tassia – II-97/723/412

64 This Tassia Plot is registered in the sole name of the Respondent. The Applicant claims to have contributed fifty percent (50%) of the purchase price for said Plot. She states that she paid the entire cost for erecting a perimeter wall around this property as well as putting up the gate. The Applicant states that the Respondent later sold off the Plot for Kshs.3,600,000 and pocketed the money himself.

65. The Respondent stated that he single handedly purchased this plot. That he took a loan of Kshs.315,000/= from NSSF in order to purchase the Tassia Plot. He has annexed a copy of the Sale Agreement dated 13th October 2006 (Annexure DGW ”4”) as well as receipts for payments totalling Kshs.538,960/= (Annexure DGW “4”).
66. The Respondent concedes that the Applicant assisted in developing the plot by putting up a wall. He admits that he later sold the plot for Kshs.3.3 Million and not for Kshs.3.6 Million as alleged by the Applicant. However the Respondent was unable to give a satisfactory explanation as why the sale Agreement indicated purchase price of Kshs.3.6 Million.
67. The Applicant insists that the Respondent sold off the Tassia Plot without any reference and/or consultation with her. That it was only when her lawyers wrote to the NSSF enquiring about the Plot that it was revealed that the Respondent had sold the plot for Kshs.3.6 Million (see letter dated 7th February 2018 (Annexure ‘MWG 6’ to the Applicant’s Affidavit dated 16th April 2018) I find that infact the evidence shows that the Respondent sold the Tassia Plot for a price of Kshs.3.6 Million.
68. The Respondent insists that he did inform the Applicant of the sale of the Tassia Plot. The Respondent further claims that he invested the sale proceeds from Tassia Plot into the Account of Wamesh Enterprises which the Respondent claims was a family business which he ran together with the Applicant.
69. However under cross-examination the Respondent admitted the Applicant was not a Director of Wamesh Enterprises. He further admitted that the business was a sole proprietorship registered in his name alone. There is therefore no proof that this was a family business as claimed by the Respondent.



70. The Respondent further admitted that the funds he received from the sale of the Tassia Plot were deposited directly into an Equity Bank Account held in the name of his company. The Respondent admitted that he ran that Equity Account alone. There is no evidence that the Applicant had access to the funds deposited in that account. More importantly the Respondent admits that he sold the Tassia Plot after he and the Applicant had separated.
71. The Respondent tries to argue that part of the proceeds of sale were utilized to pay for university education at USIU for the couples children. That he paid the fees by M-Pesa. The Respondent has not annexed any M-Pesa statement and/or receipt from USIU to support his claim that the money realized from the sale of the Tassia Plot was used to pay university fees for the couples children.
72. All in all I find that by his own admission the Respondent sold this Tassia Plot and retained the entire proceeds of sale solely for himself.
73. The Tassia Plot was purchased during the subsistence of the marriage. The Applicant has proved that she paid Kshs.500,000/= towards its purchase. She also financed the building of the perimeter wall and gate. The Applicant was this time also paying off the loan taken to purchase the Syokimau Plot leaving the Respondent with available funds to purchase the Tassia Plot. She made non-monetary contribution by bearing and raising the couples two (2) children and by providing companionship to the Respondent. I find that the Applicant is entitled to a fifty percent (50%) share of the Tassia Plot.
74. Finally I wish to reiterate that on the question of distribution of matrimonial property the court can only make a decision regarding the share of a property due to each party based on evidence of contribution made towards the acquisition of said property. In *AWN –VS- FMN* [2018] eKLR the court stated as follows:

“ ... the Court cannot infer what is not tendered in evidence. As a general rule, a Court of Law will not rely on conjecture or assumptions. Neither can it be left to the Court to speculate on what contribution the Plaintiff could have made. Direct evidence must be tendered in support of such contribution. It is the duty of a claimant to lay cogent evidence before Court.” [own emphasis]

Conclusion

75. In conclusion based on the foregoing this court makes the following orders:-
- (i) House No. 38 on L.R. No. 127/5/29 – Syokimau is to be distributed between the Applicant and the Respondent on an 80:20 ratio. The Applicant is entitled to an eighty percent (80%) share of the property whilst the Respondent is entitled to a twenty percent (20%) share.
 - (ii) Apartment No. 5 Sunrise Park Estate L.R. 115643 on L.R. No. 209/17522 is to be distributed between the Applicant and the Respondent at 80:20 ratio in favour of the Applicant.
 - (iii) The Applicant and the Respondent are each entitled to a fifty per cent (50%) share in the Tassia Estate Plot No. L.R Tassia – II-97/723/412
 - (iv) The Applicant is at liberty to buy out the Respondent’s respective share of the three properties and thereafter the properties be registered in her name.
 - (v) In the alternative the properties are to be valued and sold at the best available price and the proceeds be divided between the parties in the proportions indicated in (i), (ii) and (iii) above.
 - (vi) Each party shall bear it own costs for this summons.



DATED IN NAIROBI THIS 24TH DAY OF MARCH, 2023.

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MAUREEN A. ODERO

JUDGE

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