



**RNM v SMM (Matrimonial Cause 11 of 2021)
[2023] KEHC 19725 (KLR) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE 11 OF 2021**

**G MUTAI, J
JUNE 26, 2023**

BETWEEN

RNM APPLICANT

AND

SMM RESPONDENT

JUDGMENT

1. The Applicant and the Respondent got married on 8th December 1990 at Kakuyuni African Inland Church, Kangundo, in Machakos County. The marriage was dissolved on 17th September 2010. On the 24th day of May 2011 the decree nisi of divorce was made absolute.
2. Vide an Originating Summons dated 25th October 2021 the Applicant sought the following orders: -

“ 1. That a declaration be made that: -

- CR xxxx Subdivision No xxxx (Original No. xxx/x) Section III MN, Kilifi together with the developments thereon;- Plot No. Mombasa/Kanduguni/xxx;- Farms at Kakuyuni in Kangundo;- Pickup registration number KAH xxxN;- Saloon Car registration number KBB xxxB

1. Are matrimonial properties acquired and owned jointly by the Applicant and the Respondent.
2. That a declaration be made that any property registered in the names of either party alone is held in trust for the other party.
3. That the properties mentioned in paragraph 1 above be distributed and shared equitably between the parties.
4. That costs of the application be borne by the Respondent.”



3. The grounds upon which the Originating Summons is brought are that the Applicant and the Respondent contracted a Christian marriage. That some properties are registered in the name of the Respondent only despite the fact that they had been jointly acquired. It is also argued that the Applicant contributed materially and in kind to the acquisition of the said properties. That being the case it urged that she is entitled to an equal or higher share of the same. Lastly that the parties are now lawfully divorced by a decree of a competent Court.
4. The Originating Summons was supported by the affidavit of the Applicant. In the said affidavit she gave the chronology of events in her marriage and justified her application for division of the matrimonial properties. As what she deposed is similar to the contents of her testimony, and to avoid a repetition, I will at this point only mention the highlights thereof; the substance of her contentions will be dealt with later. She deposed that she got married to the Respondent on 8th December 1990 at Kakuyuni African Inland Church Kangundo within the Republic of Kenya. Upon getting married they worked in Mombasa and Lamu as teacher and junior quantity surveyor respectively. In Mombasa they resided in Mtopanga Estate, at first, but later moved to Mikindani. The couple were blessed with 3 children, EMM, a daughter born in 1991, AKM, a son born in 1994 and a daughter, MZM, who was born in 1996. The Applicant deposed that the Respondent abandoned the family in 2007, leaving her to raise the children singlehandedly, to cohabit with other women. Their marriage was officially dissolved in 2011.
5. The Applicant stated that on 8th September, 2008 she placed a caveat with the Land Office in respect of Plot No. CR xxx Subdivision No. xxxxx (Original No. xxx/x Section III MN) (I will hereafter refer to this property as “the Mtwapa house”) to safeguard her interest. The Respondent had since applied for the removal of the said caveat. The Applicant was apprehensive that the removal of the caveat would be injurious to her as the Respondent could then be free to sell that particular disputed property.
6. The Applicant attached to her Originating Summons the certificate making decree nisi absolute, a copy of the application to remove caveat placed against Plot No. CR xxxxx Subdivision No. xxxxx (Original No. xxx/x) Section III MN by the Respondent, copy of the Certificate of search dated 20th August 2021, Notice of Intention to remove caveat dated 7th September 2021 and her witness statement vide which she restated what she had deposed in her affidavit.
7. On 2nd November, 2021 the Applicant filed an application through which she sought injunctive relief. This application was not determined and is deemed as having been abandoned.
8. The Respondent on the other hand filed an application on 6th December, 2021 vide which he sought to stay the instant suit and all consequential proceedings for being sub-judice Misc Civil Application No. 310 of 2009; Rose Nthambi Mutuku versus Shadrack Mutuku Mutuma. He also sought that as a consequence of the finding that this cause was sub-judice a declaration be made that the Court lacked jurisdiction. I however note that in a Supplementary Affidavit sworn and filed on 14th April 2022 the Applicant annexed a Notice of Withdrawal of Application dated 17th May 2011 through which the earlier suit was withdrawn. In light of that the Respondent’s application was also abandoned.
9. The Originating Summons is opposed. The Respondent filed a Replying Affidavit sworn on 20th May 2022. The Respondent admitted that he got married to the Applicant on 8th December 1990. He averred that due to irreconcilable differences their marriage was dissolved in May 2011. The Respondent averred that he had 3 children with the Applicant. He denied that the properties that the Applicant had listed matrimonial properties. He categorically stated that the Mtwapa house was not a matrimonial property as it was his own property. He averred that neither he nor the Applicant or their children had occupied or utilized the said property as a family home and that the Applicant had unlawfully taken possession of it and leased it out to unsuspecting tenant.



10. The Respondent denied that he owned Plot No. Mombasa/Kanduguni/xxx. Regarding the parcels of land in Kakuyuni, he averred that he acquired them after the marriage was dissolved. He deposed that he didn't own pick-up registration number KAH xxxN (hereafter "the pickup"). The Respondent admitted that he owned motor vehicle registration number KBB xxxB (hereafter "the saloon car"). He expressed a willingness to have certain household items shared out between him and the Applicant as some of these items have great sentimental value to him. The Respondent averred that the Applicant purchased Plot No. xxx measuring 72 feet by 35 feet in the year 2003 and laid claim to it as matrimonial property.
11. The Respondent stated that they did not stay in separate places after getting married as they secured rental accommodation in January 1991 and were subsequently able to get accommodation at government quarters at Kizingo. He was categorical that the Mtwapa house was not a matrimonial home. The Respondent therefore prayed for the removal of the caveat lodged on the Mtwapa house, mesne profits from 1st September 2020 until the date of judgment and dismissal of the suit.

The Evidence of the Applicant

12. The Originating Summons came up for hearing before me on 16th February 2023. On the said date both parties testified and were cross-examined. The Applicant relied on her witness statement. She claimed that she was entitled to a share of the house in Mtwapa, several parcels of land in Kangundo, of which she was aware of 4, the pickup and. It was her testimony that they jointly bought the plot on which the Mtwapa house is erected and developed it together. She stated that she had been taking care of it since 2001. She testified that she lived in the Mtwapa house between 2001 and 2015 and that whenever she comes to Mombasa she resides at the said place. The main house was let to a tenant. It was her wish that the house be retained as a family home. She testified that she took part in the completion of the house and put up the water system.
13. The Applicant deposed that she used to farm the Kangundo lands. She testified that she paid most of the children's school fees and took care of household bills. Although she wasn't present when the Mtwapa land was bought the same was purchased during the subsistence of the marriage.
14. On cross-examination she insisted that she contributed towards the purchase of the Mtwapa house. She admitted that she didn't have receipts that would support this contention. The Applicant also admitted that she had leased out the property in Mtwapa and was only in occupation of a room therein that she used as her accommodation whenever she was in Mombasa. The Applicant denied that the Respondent had faithfully paid school fees. She stated that the Respondent stopped paying the 1st born's fees when she was in Form 2, the second born's fees when he was in Form 3 and failed to pay the college fees of the third born. She averred that she was the one who maintained the house. The Applicant is a teacher employed by the Teachers Service Commission earning Kes.60,000.00 per month. She conceded that she had acquired properties of her own.
15. On re-examination the Applicant stated that she rented out the house in Mtwapa so that she could pay school fees and also to support some of her children who are unemployed. She insisted that she farmed in Kangundo.

The Evidence of the Respondent

16. The Respondent testified that he is a retired quantity surveyor. He relied on his Replying Affidavit. He produced the annexures therefore as exhibits 1 to 9. It was his testimony that he was married to the Applicant for 21 years. They had a very acrimonious marriage. Their 3 children are all adults. He testified that the Mtwapa house and the saloon car were bought during the subsistence of the marriage.



The pick up on the other hand didn't belong to him as it was borrowed. The Kangundo lands were bought after the marriage was dissolved. He denied knowledge of Title No. Mombasa/Kandunguni/xxx.

17. The Respondent testified that he was transferred to Nairobi in 2001. He was forced to move the family to Mtwapa despite the fact that the house was incomplete as he made arrangements for them to relocate to Nairobi. He denied that he failed to pay school fees for his children. He claimed that the Applicant was reluctant to spend her own money in the interest of the family. He admitted that they farmed in Kangundo but denied that the land belonged to him.
18. The Respondent testified that parties shouldn't lay claim to each other's separate properties. He stated that just as he is not asking for her separate property, she on the other hand, should not demand what is his. Regarding the Mtwapa house he testified that the Applicant had unfairly benefitted from it and that whatever income she had made should revert to him.
19. On cross examination by Mr. Ochieng the Respondent stated that they had a house in Kakuyuni which was built on his father's compound. He conceded that their children stayed with the Applicant most of the time as he was usually away at work. When he moved to Nairobi the children stayed in Mombasa with their mother. He also conceded that the family moved into an incomplete house in Mtwapa. At the time they moved in the servant's quarters was incomplete. In re-examination he reiterated that he had no land in Kakuyuni during coverture and that what he presently owns was purchased subsequently.

The Submissions of the Parties

20. At the close of the case parties were directed by this Court to file and serve Written Submissions. Both parties complied with the directions of the Court.

Submissions of the Applicant

21. The Applicant gave a chronology of the relationship between the parties from the time they got married on 8th December, 1990 at Kakuyuni AIC church Kangundo until the time they got divorced. It was submitted that the parties had 3 children whose details have been given above. The relationship between the Applicant and the Respondent soured in 2007. The Applicant alleges that the Respondent abandoned the family and went to cohabit elsewhere with another woman whom he eventually married leaving the Applicant to shoulder the greater burden of rearing the children. The marriage between the two was dissolved in 2011 when the certificate making the decree nisi absolute was issued. The Applicant avers that during the pendency of the marriage the parties hereto acquired properties together through their joint effort and contribution. The Applicant submitted that this honourable Court should divide the matrimonial properties.
22. The Applicant identified 3 issues which she called upon the Court to determine: -
 1. Whether there are matrimonial properties owned by the parties herein;
 2. What the contribution of each party was; and
 3. What is the equitable distribution of the same.
23. It was submitted that the parties entered into a statutory marriage. The Applicant averred that the suit properties were acquired during the subsistence of the marriage and the same are therefore matrimonial properties under section 6 of the *Matrimonial Property Act*, 2013 that came into force on the 16th January 2014.



24. On contribution the Applicant submitted that the same could be monetary and non-monetary. She averred that she took loans from her SACCO to assist in the purchase and construction of the Mtwapa house. The Applicant stated that she singlehandedly brought up the children after the Respondent absconded. She also managed the matrimonial home by repairing the same and let it out, when not using it, so as to support the children. The Applicant submits that despite the fact that the property is in the name of the Respondent, the Respondent holds it in trust for her since the same is matrimonial property. I was referred to section 14 of the Matrimonial Property Act on presumptions that apply to properties acquired during the subsistence of a marriage.
25. The Applicant submitted that no mesne profits can accrue in this case as she used the proceeds of rent to maintain the property and also to take care of their children. I was referred to the case of Njoroge versus Ngari [1985]eKLR where the Court stated as follows:-
- “if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person, but the other spouse made contributions towards its acquisitions, then such spouse has a proprietary interest in that property”.
26. The Court was therefore urged to allow the Originating Summons as prayed.

Respondent's Submissions

27. The Respondent also gave the history of the relationship between the parties. He produced the documents in his bundle as exhibits 1 to 9 during his oral evidence. He conceded the following as not being in dispute: -
1. That he was married to the Applicant from 6th December 1990 up to 24th May 2011 when the certificate making decree nisi absolute was issued; and
 2. They had 3 children.
28. The Respondent denied that the listed properties were matrimonial properties. He argued that Plot No. CR xxxx subdivision No xxxx (original No xxx/x section III MN) “together with any development and improvements thereon and that the said property has never been occupied and or utilized by the Applicant and him as their matrimonial home and that neither did the Applicant tender any evidence to prove any contributions, monetary or otherwise to the said purchase and developments thereon”.
29. The Court was informed that the Applicant had leased the Mtwapa property for Kes.30,000.00 and was unjustly enriching herself. The Respondent produced a copy of a lease agreement between the Applicant and a third party in support of this contention. Mr. Mutuma submitted that the Applicant Had unlawfully placed a caveat on the Mtwapa property.
30. With respect to the other properties the Respondent averred that he does not own either Plot No Mombasa/Kandunguni/xxx or the pickup. Although he agreed that he owns saloon car registration number KBB xxxB the same had since broken down and was no longer in use. The Respondent admitted to owning parcels of land in Kakuyuni in Kangundo but averred that these were acquired in the period after 2011 when the parties hereto were no longer married. He denied that he neglected his children and relied on exhibit no. 8 which are copies of school fees receipts. He stated that the Applicant had her own property, to wit Plot No. xxx which he was seeking a portion thereof.
31. The Respondent also identified 3 issues for determination by the Court to wit: -
- a. Whether the properties herein are matrimonial properties;



- b. Whether the Applicant made any contributions towards the acquisition and development of the matrimonial properties, if any; and
- c. Whether the Applicant is entitled to an equal share or such higher proportion of the matrimonial properties, if at all.
32. Referring to sections 2 and 6 of the Matrimonial Properties Act the Respondent Submitted that the Mtwapa house was not a matrimonial home as it had never been used as such. It was urged that the same was acquired and developed solely by the Respondent, with no contribution from the Applicant, and that the latter had now unlawfully leased it out, at his expense. Regarding the Kakuyuni properties the Respondent submitted that had the Applicant contributed towards their purchase or development she would have been aware of their registration details. The Applicant had a duty of placing cogent evidence before the Court. It was further submitted that the Applicant “did not place before the Court any evidence of ownership of these properties nor did she rebut the claims by the Respondent that some of the properties did not belong to him”. I was referred to section 107 (1) of the Evidence Act which states that:-
- “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence or facts which he asserts must prove that those facts exist”.
- And section 112 of the Evidence Act which states that: -
- “in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him”.
33. On whatever the Applicant contributed towards the purchase and development of the suit properties I was referred to the Supreme Court’s decision in Joseph Ombugi Ogentoto versus Martha Ugentoto; Supreme Court Petition No. 11 of 2020 where the Court held that
- “we find that above opinions and finding persuasive and it is our finding that the stated equality under Article 45(3) means that Courts are to ensure that at the dissolution of the marriage each party to a marriage get a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she deserves”.
34. The Respondent further relied on the following cases in support of his contention that distribution of matrimonial property must be done fairly based on what each party contributed; Pettitt versus Pettitt [1897]AC777, Peter Mburu Echaria versus Priscilla Njeri Echaria [2001] eKLR. It was submitted that the Court has no jurisdiction under Article 45(3) of the Constitution to take away what belongs to one party and to award it to another merely because they are married to each other. To do so, it was said, would offend Article 40 (1) and (2) of the Constitution that protects private property rights. It was urged that “nowhere in the constitution do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property”. The Respondent referred the Court to what Kiage JA wrote in PNN versus ZWN [2017]eKLR.
35. The Respondent thus urged this honourable Court to dismiss the Originating Summons. Regarding costs, I was referred to section 27 of the Civil Procedure Act and was requested to award the Respondent costs of the suit.



Issues for Determination

36. I have looked at the respective pleading of the parties, their documentary evidence and their submissions. I have considered their oral testimonies in Court. I am in agreement with the parties that I must consider the following issues: -
1. Whether the suit properties are matrimonial properties?
 2. If they are, what contribution did the parties make towards their purchase and or improvements or developments?
 3. Based on my finding in (1) find (2) what orders should issue?
 4. Whether or not costs should be awarded to the successful party

The Applicant Law

37. Kenya has a very progressive Constitution. At the heart of our constitutional order is the equality of the sexes. That equality exists even in coverture. I will set out the relevant provisions of *the Constitution* of Kenya, 2010 and the law as these shall underpin the decision that I shall make.
38. Article 45(3) of *the Constitution* of Kenya 2010 provides 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”.
39. Section 6 and 7 of the *Matrimonial Property Act*, Act No 49 of 2013 provide that: -
- (1) For the purposes of this Act, matrimonial property means—
 - (a) the matrimonial home or homes;
 - (b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
 - (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
 - (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
 - (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

7. 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.”
40. Section 14 of the said Act provides that: -
- “Where matrimonial property is acquired during marriage—



- (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and (
- b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

Analysis of the Law and the Facts

41. I will look at each of the issues I have identified in turn as I make my determination.
Where the Properties Claimed by the Applicant and the Respondent Matrimonial Properties?
42. In the Originating Summons dated 25th October, 2021 the Applicant seeks a declaration that the following are matrimonial properties: -
 1. CR No. xxx Subdivision No. xxx (Original No. xxx/x) Section III MN together with the developments thereon;
 2. Plot No Mombasa/Kanduguni/xxx;
 3. Farms at Kakuyuni in Kangundo;
 4. Pick up registration number KAH xxxN; and
 5. Saloon car registration number KBB xxxB.
43. The Respondent, in paragraph 18 of his Replying Affidavit, sought to have a property he said belongs to the Applicant, to wit Plot No. xxx measuring approximately 72 feet by 35 feet, declared as a matrimonial property divided accordingly.
44. What amounts to matrimonial property has been defined in the [Matrimonial Property Act](#). There have also been numerous court decisions on the same. In *TMW versus FMC* [2018]eKLR the Court said as follows:-

“Firstly, I shall determine whether the suit property falls in the category of matrimonial property. Turning the provisions of the [Matrimonial Property Act](#), Section 6 of the [Matrimonial Property Act](#), 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Basically for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property. In the instant case, the marriage between parties herein commenced 1993 and was officiated through Kikuyu Customary Law in 2001. The property in question was acquired in 2010 and the same was acquired during the subsistence of the marriage between the parties herein. There is also evidence that the suit property was acquired for purposes of building a family home. As a result, there is no doubt whatsoever that the suit property including the Juja farm forms part of matrimonial property as far as the parties herein are concerned.”
45. Based on the foregoing are the above properties “matrimonial properties”? I shall look at each in turn: -
Plot No. CR No. xxxx, Subdivision No. xxxx (Original No xxx/x Section III MN together with improvements thereon



46. This property is registered in the name of the Respondent. The Respondent avers that he solely purchased the same and developed it. He submits that it has never been a matrimonial property. The Applicant is a possession of the same and has let it out to a rent paying tenant. The Applicant on the other testified that she contributed towards its purchase after taking loans from her SACCO. It was also her testimony that she took care of the children when the Respondent was away at work and also after he deserted his family. In her view this and counts as contribution.
47. The Applicant got married to the Respondent on 8th December 1990. Their marriage was dissolved on 24th May, 2011. From the evidence adduced the parties appear to have had a tumultuous marriage. the Respondent a quantity surveyor did not reside with the family for most of the time, due to his work exigencies; he was based in Lamu for some of that time. His family lived in Kizingo Mombasa in government quarters. They lived there until 2001 when the Respondent was transferred to Nairobi. It was at this point he moved his family to the Mtwapa house despite the fact that it was incomplete as he made plans to move them to.
48. Exhibit 3 of the Respondent to wit the certificate of Title shows that Plot No. CR xxxx Subdivision No. xxx (Original No. xxx/x Section III Mainland North) was transferred to the Respondent on 30th January 2003. This was during the subsistence of the parties' marriage. Contrary to what the Respondent pleaded the Respondent's own testimony shows that the Mtwapa property was used as a matrimonial home in 2001 when he was transferred to Nairobi. It is a common ground that the property was incomplete. The Applicant testified that the servant's quarters was incomplete, and that she is the one who completed its construction. Since moving to Nairobi to date the Respondent has not been in possession of the property. The Applicant has been maintaining the property and collecting rent. It is therefore my finding that this property is a matrimonial property.
49. Section 14 of the *Matrimonial Property Act* creates a reputable presumption that a property held by one spouse is held in trust for the other spouse. In this case although the same is registered in the name of the Respondent the Applicant improved the same and has maintained it since then. Although the Applicant did not produce receipts in support of her contention it is my view married couples rarely keep receipts, waiting for the day they will use term in Court. Marriage by its very nature requires trust. Fastidious record keeping in a Kenyan setting has the clear and present risk of creating discord. Couples often do things together on the basis of trust and custom. In any case the Applicant provided the Respondent with companionship and took care of the children when he was away.

Plot No. Mombasa/Kanduguni/xxxx

50. As the Applicant Rose Nthambi Mutuku was under a duty to provide evidence that Plot No. Mombasa/Kanduguni/xxx belongs to the Respondent. She failed to discharge her duty. No title or search was availed to the court. I therefore, find and hold that Plot No. Mombasa/Kanduguni/xxx, if at all it exists, is not a matrimonial property.

Farms at Kakuyuni, Kangundo

51. The Applicant's claim in this respect was vague. She did not provide the Court with their registration details or search or evidence of ownership. Just as with Plot No. Mombasa/Kanduguni/xxx I find that the unspecified properties in Kakuyuni, Kangundo are not matrimonial properties. In any case, the Respondent's assertion that these properties were acquired after coverture was unchallenged.
52. Any property in Kakuyuni that the Respondent inherited is not matrimonial property.



Pickup Registration No. KAH xxxN

53. The Applicant provided no evidence of ownership of this motor vehicle by the Respondent. I therefore find and hold that this particular motor vehicle is not a matrimonial property.

Saloon Car Registration Number KBB xxxB

54. It is a common ground that this motor vehicle was acquired during coverture for use as a family car. Although it is registered in the name of the Respondent I find and hold that it is a matrimonial property and belongs equally to the parties hereto.

Plot No. xxx

55. The Respondent provided no evidence of ownership of the said land by Applicant. I therefore find and hold that this particular parcel of land is not a matrimonial property.

Furniture and Personal Effects

56. The Respondent sought return of some furniture items which have sentimental value to him. He also sought to give back to the Applicant some items that are in his possession. There was no contestation on this matter. Consequently, I will make the appropriate orders.

What Contribution did the Applicant and Respondent Make Towards the Purchase of Plot No. xxxx Subdivision No. xxxx (Original No. xxx/x Section III Mainland North and Motor Vehicle Registration No. KBB xxxB)?

57. Although the aforementioned 2 properties are registered in the name of the Respondent it is my finding that the Applicant contributed towards their purchase, maintenance and improvement. To hold otherwise would be inequitable and unjust. The Respondent was only able to buy the Mtwapa property as the Applicant took care of the home, cared for the children and provided him with companionship. Although there is no direct evidence I take judicial notice of the Kenyan African culture where wives, recognizing their husbands as heads of the families, entrust them with funds for capital purchases. I must also bear in mind that the Mtwapa Property has been in the possession of the Applicant for almost 20 years now during which time she has maintained and improved it. In the circumstances I find and hold that the Applicant and the Respondent have equal share in the Mtwapa property. I also find that the family car is jointly owned.
58. My decision is based on my assessment of the law. Section 2 of the [Matrimonial Property Act](#) defines contribution as: -

“... monetary and non-monetary contribution and includes: -

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

59. “Family business” is defined as “any business which

- a. Is run for the benefit of the family by both spouses or either spouses; and



- b. Generates income or other resources wholly or part of which are for the benefit of the family”
60. The Court in AWM versus JGK [2021]eKLR held that

“in respect of non-monetary contribution, I take the view that the Applicant made her contribution in the manner defined under section 2 or the *Matrimonial Property Act*. I have considered the argument by the Respondent that the Applicant had domestic workers and did not do household chores. However, a mother’s contribution to a home cannot be quantified in monetary terms. Even where there is domestic help in most cases it is the duty of the mother to ensure that the home runs smoothly and that all the needs of the children and the husband are catered for. Even where she is gainfully employed as claimed in this matter, her duties once she gets home do not end until all is well at home. This is what the Applicant is claiming. She also provided companionship to the Respondent. The Respondent argues that companionship does not constitute a contribution towards matrimonial property. Section 2 of the *Matrimonial Property Act* defines the contribution to include companionship”.

I agree wholeheartedly with the holding above. Thus in this case not only must I consider what each contributed monetarily. I must also bear in mind the non-monetary contribution.

Who Should Bear the Costs of the Originating Summons?

61. It is trite law that costs follow the event. I have been referred to section 27 of the *Civil Procedure Act*. I do not consider it appropriate to order costs in the circumstances of this matter. Costs will not promote harmony or reconciliation. I therefore order that each party shall bear its own costs.

Disposition

62. The upshot of the foregoing is that the Applicant has succeeded in part. I, therefore, order as follows: -
1. I declare that Plot No. CR xxx Subdivision No. xxx (Original No. xxx/x Section III Mainland North, Mtwapa and saloon car registration number KBB xxxB are matrimonial properties owned by the Applicant and the Respondent equally;
 2. I find and hold farms at Kakuyuni, Kangundo, Plot No. Mombasa/Kanduguni/xxx, Plot No. xxx and Pick up registration number KAH xxxN are not matrimonial properties;
 3. I order that plot No CR xxx Subdivision No. xxx (Original No. xxx/x Section III Mainland North, Mtwapa and saloon car registration number KBB xxxB be valued within 60 days. Each party shall have the right to buy out the other party. In the event that there is no agreement within 90 days the properties shall be sold by way of public auction and the proceeds therefrom shall be shared equally;
 4. I order the Applicant to release to the Respondent the following items within 30 days of the judgment; dining table, six chairs and 4 stools all inscribed “LAMU 1990”, a wall unit and an old wooden- boxed television set;
 5. I order the Respondent to release the following items to the Applicant within 30 days; 5 seater blue sofa set, 2 floor carpets, refrigerators, gas cooker, gas cylinder, television set, video player and curtains; and
 6. Each party shall bear own costs.



Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 26TH DAY OF JUNE 2023 AT MOMBASA VIA MICROSOFT TEAMS

.....

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Mulei for the Applicant

Mr. Kithome for the Respondent

Mr. Arthur Ranyundo – Court Assistant

