



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**WKM v JWM & another (Civil Suit E008 of 2020)
[2023] KEHC 21584 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT E008 OF 2020
SN MUTUKU, J
JULY 19, 2023
IN THE MATTER OF MATRIMONIAL PROPERTY ACT, NO 49 OF 2013**

BETWEEN

WKM APPLICANT

AND

JWM 1ST RESPONDENT

VWW 2ND RESPONDENT

JUDGMENT

1. The Applicant, WKM, brought this suit through an Originating Summons (OS) dated 27th November, 2020, against the 1st Respondent seeking the following reliefs:
 - i. That this Honourable court be pleased to issue an order declaring that the following properties are matrimonial properties owned by the Applicant and the 1st Respondent and are available for distribution between them:
 - a. Kajiado/Olchoro- Onyore/52xxx.
 - b. Plot xxxx Dandora
 - ii. That this Honourable court be pleased to divide the following matrimonial properties between the Applicant and the Respondent and apportion 50% or such higher portion of the properties to the applicant.
 - a. Kajiado/Olchoro – Onyore/5xxx
 - b. Kajiado/Olchoro – Onyore/52xxx
 - c. Kajiado/Kitengela/3xxx



- d. Plot xxx on L.R No. 11344R Block UCL Dandora Terminus
- e. Plot M xxx Dandora
- iii. That an order to issue declaring that the Appellant is entitled to at least 50% of all the rental income that the Respondent has been collecting from the following matrimonial properties.
 - a. Plot xxx on L.R No. 11344R Block UCL Dandora Terminus
 - b. Plot M xxx Dandora
- iv. That in the alternative to prayer 2 and 3 above this Honourable court be pleased to divide the matrimonial properties namely:
 - a. Kajiado/Olchoro – Onyore/5xxx
 - b. Kajiado/Olchoro – Onyore/52xxx
 - c. Kajiado/Kitengela/3xxx
 - d. Plot xxx on L.R No. 11344R Block UCL Dandora Terminus
 - e. Plot M xxx Dandora as follows:
 - A. That the Respondent Joseph Wainanina Mwicigi to retain the following properties already registered in his name.
 - (a) Kajiado/Olchoro – Onyore/52xxx
 - (b) Plot M xxx Dandora together with all income therefrom.
 - B. The Applicant Winfred Kanini Maleli to retain the following properties already registered in her name.
 - (a) Kajiado/Olchoro – Onyore/5xxx
 - (b) Plot xxx on L.R No. 11344R Block UCL Dandora Terminus
 - C. That in respect of Kajiado/Kitengela/3xxx the same to be sold and the net proceeds be shared equally between the parties Winfred Kanini Maleli and Joseph Wainanina Mwicigi.
 - D. That the Respondent Joseph Wainanina Mwicigi to account for all the rent he has collected from the Dandora properties from such date as the court may determine and pay the applicant her due share.
- v. That the Officer Commanding Dandora Police Station (OCS) be directed to supervise enforcement of orders that the court may issue in this matter in respect of properties under his jurisdiction.
- vi. That this Honourable court be pleased to grant such further or other relief as may be just in the circumstances.
- vii. That the Respondent be ordered to pay the costs.



Applicant's Case

2. The court records show that in the course of these proceedings, the 2nd Respondent was enjoined in these proceedings as a party. This judgment will reflect the parties as the Applicant against the 1st and 2nd Respondents respectively.
3. The evidence in support of the Applicant's case is contained in her Affidavit in support of the Application dated 27th November, 2020, her Affidavit sworn on- 10th February 2021 and her two other affidavits both sworn on 19th January 2022. The Applicant also testified in court in support of her case.
4. It is her case that she got married to the 1st Respondent in 2000 under Kamba Customary Law after cohabiting together since 1995 but that they are now divorced. She stated that at the time they started cohabiting she was working at [Particulars withheld] while the 1st Respondent was working as a driver at [Particulars withheld] Bank up to 1998 when he resigned in 1998 and remained unemployed.
5. It is her case that during the subsistence of their union they jointly acquired Kajiado/Olchoro – Onyore/5xxx, Kajiado/Olchoro – Onyore/52xxx, Kajiado/Kitengela/3xxx, Plot xxx on L.R No. 11344R Block UCL Dandora Terminus and Plot xxxx Dandora. She deposed that they also acquired Kajiado/Olchoro-Onyore/12582, Kajiado/Olchoro/12583, Kajiado/Olchoro/12585 and Ngong/Ngong/16904 which properties were divided by consent in a previous suit HCCC No. 13 of 2017.
6. She has stated that in HCCC No. 13 of 2017, the court determined that the Kajiado/Olchoro – Onyore/5xxx, Kajiado/Kitengela/3xxx, and Plot xxx on L.R No. 11344R Block UCL Dandora Terminus were matrimonial properties subject to division upon dissolution of the marriage.
7. She stated that the properties Kajiado/Olchoro – Onyore/5xxx and 5280 were originally acquired as one property known as Kajiado/Olchoro/Onyore/149; that they subdivided into two portions; that she was registered as the proprietor in Kajiado/Olchoro-Onyore/5xxx while the 1st Respondent was registered in Kajiado/Olchoro-Onyore/52xxx; that on the two properties they built their matrimonial home comprising two houses; that she financed the purchase and construction of the 2 houses while the 1st Respondent supervised the construction; that her source of funds was her salary and loans as shown in her exhibit 6.
8. It is her case that in respect of property xxxx Dandora, it was acquired by the 1st Respondent before she married him but she financed him to complete construction of 28 rental units on that plot; that she was allotted the neighbouring plot xxx on L.R No. 11344R Block UCL Dandora Terminus on which they also constructed rental units and that they each collect rent from their respective units.
9. It is her case that she consented to the 1st Respondent to collect rent amounting to about Kshs 120,000/- monthly; that when she retired, she requested the 1st Respondent to let her collect rent from her unit but he refused and that in an effort to settle the issue she proposed that the property be divided so as the 1st Respondent retains Kajiado/Olchoro-Onyore/52xxx and Plot M xxx , Dandora together with all income therefrom while she retains Kajiado/Olchoro-Onyore/5xxx and Plot No. xxx on L. R. No. 11344R Block UCL Dadora Terminus; that Kajiado/Kitengela/3xxx be sold and proceeds shared equally between them and that the 1st Respondent gives an account of all the rent he has collected from the Dandora properties but the 1st Respondent has turned down that proposal.
10. The Applicant further affidavit stated, in response to both the 1st and 2nd Respondents Affidavits dated 19th January, 2022, that she had acquired property before being married to the 1st Respondent; that the 2nd Respondent did not stake any claim to the properties in HCCC No. 13 of 2017 despite



participating as a witness; that the decision of the court in that case has not been appealed against or set aside.

11. The Applicant denied having relied on the 2nd Respondent to run her errands; that the alleged indirect contribution by the 2nd Respondent was to the 1st Respondent and not to her and that the 2nd Respondent should therefore seek a share of the properties her husband gets. She denied ever having joint accounts or monies and that she took care of her children whom she came with to the marriage and the 1st Respondent took care of his.
12. It is her case that contrary to what is alleged by the Respondents, they never raised their children together; that she is not re-litigating matters already concluded in HCC No. 13 of 2017 as the court stated that sharing of the property should await dissolution of the marriage.

The Respondents' Case

13. The 1st Respondent has opposed the OS through his Replying affidavit dated 7th December, 2021. It is his case that he was married to both the Applicant and the 2nd Respondent and that the three of them acquired Kajiado/Olchoro-Onyore/5xxx, Kajiado/Olchoro-Onyore/52xxx, Kajiado/Kitengela/3xxx and Plot xxx on L.R No. 11344R Block UCL Dandora Terminus; that he had acquired Plot No. M xxx Dandora before he married the Applicant and therefore that this property is not matrimonial property.
14. It is his case that since both he and the Applicant were employed, they depended on the 2nd Respondent to take care of their homestead; that they agreed that some of the properties be registered in the name of the Applicant as she financially contributed directly to their acquisition and that they agreed that all properties were registered in trust of each one of them and all their children.
15. It is his case that for reasons unknown to him the Applicant sued him in HCCC No. 13 of 2017 where the following properties were declared matrimonial Kajiado/Olchoro – Onyore/5xxx Kitengela/3xxx, Plot xxx on L.R No. 11344R Block UCL Dandora Terminus; that the Applicant has disregarded the orders of the court in that suit and has included properties already adjudicated upon making the doctrine of res judicata applicable and therefore this application is an abuse of court process and should be dismissed.
16. The 2nd Respondent through her affidavit dated 7th December, 2021, stated that she is the 1st wife of the 1st Respondent; that the three of them used to live together and that she would be depended on by the Applicant and the 1st Respondent to take care of the homestead; that she was left out of the HCCC No. 13 of 2017 and therefore her interests in the matrimonial property were not considered.
17. It is her case that since she is also married to the 1st Respondent the matrimonial property was held in trust for her as she contributed indirectly to its acquisition; that the following matrimonial properties Kajiado/Olchoro-Onyore/5xxx/5280, Kajiado/Kitengela/3xxx and Plot xxx on L.R No. 11344R Block UCL Dandora Terminus be shared in three equal portions.

Submissions

18. In her submissions dated 11th April, 2022, the Applicants wants the court to determine three issues, namely:
 - i. Whether the Originating summons is competent and properly before the court.
 - ii. What are the matrimonial properties of the parties available for division?
 - iii. Is the 2nd Respondent entitled to share in the matrimonial property.



19. In respect of the first issue, the Applicant has submitted that this OS is properly before the court and that the same is not res judicata as alleged by the Respondents. She submitted that in HCCC No. 13 of 2017, the court only made declarations as to what the matrimonial properties were without dealing with the division of those properties as the marriage was not dissolved at the time.
20. In respect to the second issue, the Applicant reiterated the contents of her pleadings. It is her submission that Kajiado/Olchoro-Onyore/52xxx should be declared matrimonial property as the same is identical to Kajiado/Olchoro/5279 and that the properties are in the same compound where parties herein lived during subsistence of their marriage; that she contributed financially to the development of Plot No. xxxx Dandora though the same had been acquired by the 1st Respondent.
21. In respect to the third issue, it is her submission that the 2nd Respondent knew of the previous suit HCC No. 13 of 2017 but did not lay claim to any of the properties; that during cross examination the 2nd Respondent claimed that she contributed both indirectly and directly through rearing chicken and selling eggs, she failed to support this claim with documentary evidence; that section 8(2) of the *Matrimonial Property Act* is relevant to this matter and that the properties the subject to this suit are registered either in her name or that of the 1st Respondent and that it was intended as such and was as such agreed upon.
22. The 1st Respondent through his submissions dated 26th April, 2022, stated that the parties herein were in a polygamous marriage and therefore the 2nd Respondent should be considered with regards to any property acquired during the subsistence of the marriage. He cited section 8(1) (b) of the *Matrimonial Property Act*.
23. It is his submission that all properties acquired during the subsistence of the marriage were acquired with the direct contribution of his wives; that the property Plot No. M xxx Dandora should not be considered matrimonial property as he acquired it before marrying the said wives; that should this court find that the same is matrimonial property, then the Applicant does not have greater interest than that of the 2nd Respondent as they both assisted in improving the property.
24. With regards to the rent collected from the two properties in Dandora, it is his case that the amount the applicant is asking for of Kshs.3,600,000/- from January 2019 to April 2022 is outrageous; that Plot No. xxx was declared matrimonial property in the previous suit and she therefore cannot claim the full amount and that the Applicant has stated that she allowed him to collect rent from the property and cannot again claim that she is owed money. He relied on the case of MAA-vs-AR[2018] eKLR to support his arguments.
25. The 2nd Respondent, through her submissions dated 27th April, 2022, raised the issue of whether she is entitled to a share of the matrimonial property. She relied on sections 6 and 8 of the *Matrimonial Property Act* and TMV- vs- FMC (2018) eKLR on what constitutes matrimonial property.
26. It is the case for the 2nd Respondent that she made both monetary and non- monetary contributions to the acquisition of the property; that both the Applicant and the 1st Respondent were working while she was left to take care of their homes, children and family farm business; that section 2 of the *Matrimonial Property Act* defines what constitutes contribution. She cited CWM -vs-JPM (2017) eKLR where the court of appeal held that:

“Parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of the respondent at the time of such coverture. In our view, that



contribution, be it domestic work and management of the matrimonial home, child care; or companionship falls within the definition of contribution under the Act.”

27. She submitted that she made monetary contributions by rearing chicken and selling eggs at City Market. In support of her case she relied on the case of EKTM -vs- ECC [2021] eKLR, where the court had this to say:

“It must however be appreciated that when two people meet and the marriage ship takes off from the dock, none of the passengers ever foresee that the ship would hit the turbulent waters in future. It is only when they are in deep seas and the ship has hit a rock and is about to capsize that they realised that they ought to have taken certain measures during the course of their voyage. By then too much water has gone under the bridge and there is little in terms of documentary evidence that can be retrieved as regards their monetary contributions. Consequently, none of them sees the need to keep documentary evidence of the expenses they incur towards the sustenance of the family. In fact, the keeping of such documents may bring problems to the couple as it may be deemed to lack of trust.”

28. It was her case that though she did not participate in the previous proceedings in HCCC No. 13 of 2017, the same does not negate her rights to what is rightfully hers. She prays that the division of any matrimonial property to be done in three equal portions.

Analysis and Determination

29. I have taken time to read and understand the issues raised by the parties to this OS. That the Applicant and the 1st Respondent were married is not in dispute. It is also clear from the evidence that this was a polygamous marriage and that the Applicant came into this marriage with four children from a previous relationship although she testified that one of the children passed on leaving three children and that by the time she married the 1st Applicant she was a widow.
30. I have also read the judgment in Kajiado HCCC No. 13 of 2017 brought by the Applicant against the 1st Respondent seeking, inter alia, declaratory orders that she was the absolute proprietor of the properties named in that case including Kajiado/Olchoro-Onyore/5xxx, Kajiado/Kitengela/3xxx and Plot No. xxx on L.R No. 11344R Block UCL Dandora Terminus. After considering the evidence adduced, the court (Nyakundi, J) declared the above properties as matrimonial properties that may be liable for distribution among the parties, the Applicant and the 1st Respondent, upon dissolution of marriage.
31. I have noted that in Kajiado HCCC No. 13 of 2017, Kajiado/Olchoro – Onyore/52xxx and Plot M xxx Dandora were not subject of litigation. It is for that reason that the Applicant seeks to have the two properties declared matrimonial property and subdivision of Kajiado/Olchoro – Onyore/5xxx, Kajiado/Olchoro – Onyore/52xxx, Kajiado/Kitengela/3xxx, Plot xxx on L.R No. 11344R Block UCL Dandora Terminus and Plot M xxx Dandora.
32. I consider the following as the issues arising from this suit and requiring determination by this court:
- i. Whether the issues raised by the Applicant are re judicata?
 - ii. Whether Kajiado/Olchoro-Onyore/52xxx and Plot No. xxx Dandora are matrimonial property?
 - iii. What share of matrimonial property should each party get?



- iv. Whether the Applicant is entitled to 50% of rental income collected by the 1st Respondent from Plot xxx on LR No 11344R Block UCL Dandora terminus and Plot xxxx Dandora?

Whether the issues raised by the Applicant are re judicata

33. Section 7 of the *Civil Procedure Act* provides that:

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

34. In discussing the doctrine of res judicata, the Court of Appeal in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), stated that:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

35. The 1st Respondent claims that the Applicant is raising the same issues adjudicated upon in the earlier suit and therefore this matter is res judicata. The Applicant, on her part, stated that this matter is not res judicata because in the earlier suit the court was involved in declaring the properties subject of that suit as matrimonial property and not division of the said property since the Applicant and the 1st Respondent were in a subsisting marriage and further that the properties sought to be declared matrimonial property in this OS were not subject of litigation in the earlier suit.

36. I have considered this issue. While I find that the parties are the same, especially the Applicant and the 1st Respondent, it is clear to me that the properties the Applicant seeks to be declared matrimonial property were not subject of litigation in the earlier suit. I also find that the court, in the earlier suit, did not order for division of the properties that were declared matrimonial property. It is clear that the court declared three properties as matrimonial property in the earlier suit but left out distribution of those properties to after the dissolution of marriage. The properties adjudged matrimonial properties in *Kajiado HCCC No. 13 of 2017* are Plot No. xxx on L.R No. 11344R, Block UCL Dandora Terminus Scheme, Kajiado/Kitengela/3xxx and Kajiado/Olchoro-Onyore/5xxx. To my mind, the suit before me is not res judicata for the above reasons.

Whether Kajiado/Olchoro-Onyore/52xxx and Plot No. xxxx Dandora are matrimonial property

37. Section 6 of the matrimonial property defines matrimonial property in the following terms:

- (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.

38. In respect to Kajiado/Olchoro-Onyore/52xxx, it is not in dispute that this property was originally bought as Kajiado/Olchoro-Onyore/149 and was later subdivided into Kajiado/Olchoro-Onyore/5xxx registered in the name of the Applicant and Kajiado/Olchoro-Onyore/52xxx registered in the name of the 1st Respondent. On both plots is constructed homes for the Applicant and 1st and 2nd Respondent respectively. This fact has been admitted by parties. The applicant and the 1st Respondent have agreed that the property was acquired by them during the subsistence of their marriage. They have agreed that the two identical parcels of land formed their matrimonial home. It is therefore clear that the two parcels of land fit the definition of matrimonial property as under section 6 of the *Matrimonial property Act*.
39. It is clear to me that this property, Kajiado/Olchoro-Onyore/52xxx was not subject to litigation in Kajiado HCCC No. 13 of 2017 and therefore the court in that case did not make its pronouncements on this property. It is my considered view, going by the evidence adduced, that this property is a subdivision of Kajiado/Olchoro-Onyore/149. For ends of justice to be met in this matter, it is my finding that Kajiado/Olchoro-Onyore/52xxx is matrimonial property acquired through joint efforts, monetary or otherwise, of the Applicant and the 1st Respondent. There is no evidence to demonstrate that the 2nd Respondent made any contributions towards the acquisition of Kajiado/Olchoro-Onyore/149 that gave birth to Kajiado/Olchoro-Onyore/5xxx and Kajiado/Olchoro-Onyore/52xxx.
40. With regard to Plot xxxx Dandora, the 1st Respondent has stated that the property was acquired by him before he married the Applicant and therefore is not matrimonial property. This is the view taken by the 2nd Respondent. The Applicant in her testimony agreed that the property was acquired in the early 1990s before she was married to the 1st Respondent. She however stated that she contributed to the development of the said property by financing the completion of the rental units on the said property. The 1st Respondent has admitted that both his wives assisted him in improving the aforementioned property. Section 9 of the Act therefore applies where a spouse's beneficial interest in the property is recognized through her contribution towards the improvement of the property in the following terms:

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the 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.

41. I am satisfied that the Applicant made contributions, as admitted by the 1st Respondent, towards the development of to Plot xxxx Dandora. To apply the law equally between the Applicant and the 1st Respondent, it is my finding that this property is matrimonial property with the Applicant having beneficial interest in the same.

What share of matrimonial property should each party get?

42. In respect to this issue, it is clear to my mind that the Applicant and the 1st Respondent deserve a share of the properties adjudged matrimonial properties. This suit was lodged against the 1st Respondent in the first instance. The 2nd Respondent was enjoined as a party later on. Does the 2nd Respondent have any claim against the properties declared to be matrimonial properties? Did she make any contribution in the acquisition of development of any of the properties declared as matrimonial properties? Is her claim against the Applicant or the 1st Respondent?



43. The issue of the marriage between the parties is between the Applicant and the 1st Respondent and the 2nd Respondent and the 1st Respondent. It is not, in my view, between the Applicant and the 2nd Respondent. In his evidence in court, the 1st Respondent stated that the 2nd Respondent took care of the family affairs when he and the Applicant were busy working. The Applicant has denied this and stated that she had grown up children who were running errands for her when she was not available. The 2nd Respondent told the court that she used to rear chicken and other businesses which aided her in contributing to the family properties. I however find that her evidence falls short of proving her contribution towards the acquisition and/or development of the property acquired by the Applicant.
44. Given that the issue is not whether the 2nd Respondent assisted the 1st Respondent in acquiring or developing matrimonial property, it is my considered view that the 2nd Respondent has failed to demonstrate that she deserves a share in the property that was acquired by the joint efforts of the Applicant and the 1st Respondent. It is my view that her share can only be determined upon evidence to that effect, which evidence is lacking. I decline to determine whether the 2nd Respondent has a stake in her husband's share of the matrimonial property given that this is not what this suit is about and that both the Respondents are in a subsisting marriage.
45. It is also not lost to me that the 2nd Respondent did not stake a claim in any of the properties being litigated in Kajiado HCCC No. 13 of 2017. Her coming onboard this late in this suit can only mean that her claim against the Applicant is an afterthought. As stated, she may have a claim against her husband, the 1st Respondent, if both of them were to pursue shares of matrimonial properties between them but not against the Applicant.
46. On the issue regarding rental income from Plot xxx on L.R No. 11344R Block UCL Dandora Terminus, the court in the previous suit found that the property was matrimonial property and that it was clear that the Applicant and the 1st Respondent worked together towards its acquisition. The Applicant now wants this court to declare that she is entitled to 50% of the rental income.
47. I have noted that the Applicant in her own words conceded that she allowed the 1st Respondent to collect rent on both Dandora properties and utilize the same to take care of the family. Therefore, to claim that the 1st Respondent ought to render accounts of how much he collected is unfair to the 1st Respondent given that he acted with consent of the Applicant. My view is that the Applicant's claim against the 1st Respondent in respect of rental income given the circumstances under which the 1st Respondent started collecting rent in the two Dandora properties is prejudicial to the 1st Respondent.
48. Parties to a marriage have equal rights under the law. However, any party claiming share in the matrimonial property must demonstrate the contribution that party made towards the acquisition and or development of such property. This is what the court had in mind in *U M M vs. I M M* [2014] eKLR, when it reasoned thus:

“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 must be taken into account, it is congruent with the Constitutional 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 imperil 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 the sense of equality contemplated by Article 45(3).”

49. I have given this matter due consideration. I have considered that the court in the earlier case did not pronounce itself on the division of matrimonial property and that all the court did was to declare three properties, Kajiado/Olchoro-Onyore/5278., Kajiado/Kitengela/3xxx and Plot No. xxx on L. R. No. 11344R Block UCL Dandora Terminus as matrimonial property.
50. In addition, and given the evidence before me, I have declared the following two properties matrimonial properties acquired through joint efforts, monetary and non-monetary contribution, of the Applicant and the 1st Respondent: Kajiado/Olchoro-Onyore/52xxx and Plot M xxx Dandora.
51. I have considered the orders sought by the Applicant in the OS and the alternative orders. To my mind and in fairness to all parties, I make the following orders:
- a. That this Honourable court be and is hereby pleased to issue an order declaring that the following properties are matrimonial properties owned by the Applicant and the 1st Respondent and are available for distribution between them: Kajiado/Olchoro-Onyore/52xxx and Plot xxxx Dandora.
 - b. That this Honourable court be and is pleased to divide the matrimonial properties in the following manner: that the 1st Respondent, Joseph Wainaina Mwicigi shall retain Kajiado/Olchoro – Onyore/52xxx and Plot M xxx Dandora together with all income therefrom, which properties are already registered in his name, while the Applicant, Winfred Kanini Maleli, shall retain Kajiado/Olchoro – Onyore/5xxx and Plot xxx on L.R No. 11344R Block UCL Dandora Terminus, which are already registered in her name.
 - c. That Kajiado/Kitengela/3xxx shall be sold and the net proceeds be shared equally between the Applicant, Winfred Kanini Maleli, and the 1st Respondent, Joseph Wainanina Mwicigi.
 - d. Each party shall bear own costs of this OS.
 - e. I decline to order OCS, Dandora Police Station, to supervise the execution of this court order.
 - f. Either party is at liberty to apply.
52. Orders shall issue accordingly.

Dated, signed and delivered this 19th July 2023.

S. N. MUTUKU

JUDGE

