



**CWN v PNK (Civil Case 36 of 2010)  
[2023] KEHC 25661 (KLR) (Civ) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 25661 (KLR)

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

**CIVIL**

**CIVIL CASE 36 OF 2010**

**MA ODERO, J**

**OCTOBER 17, 2023**

**BETWEEN**

**CWN ..... PLAINTIFF**

**AND**

**PNK ..... DEFENDANT**

**JUDGMENT**

1. Before this Court is the Amended Originating Summons dated 29<sup>th</sup> March 2017 by which the Plaintiff CWN seeking determination of the following questions:-

- “ 1. That plot No. NRB/197/0895/197-97/0704, 97/0895/197, 97/0870/198, 97/0870/199, 97/0872/200, 97/0872/201, 97/0871/202, 97/0871/203, 97/0872/204, 97/0872/205, 97/0871/206, 97/0704/207, 97/0704/208, having been purchased, and a school known as Junior Campus Academy but subsequently known as New Junior Campus Academy erected thereon, having been founded, developed and improved during the period of coveture and thereafter, though registered in the joint names of the plaintiff and defendant but later defendant alone, what is the extent of the Plaintiff’s interest in the said property and school?
2. That Plot L.R. No. Nairobi/Block 82/3966/20800, together with the house thereon and household items therein, having been purchased, developed and or improved during the period of coveture and subsequently through the contribution of the Plaintiff, though the same being in the Defendant’s name, as well as land in Kirinyaga, what is the extent of the Applicant’s interest in the said property?



3. That motor vehicle numbers KAP 914U, KAP 496U and KBL 644W, KCB 470R, KCF 109K, KBT 742Z, KBX 427Z, or any more or other vehicles the defendant may buy subsequently as well as money in bank account Nos. 117XXXXX95 (Kenya Commercial Bank) 0060XXXXX583 (K-Rep Bank) and 00102XXXXXX265 (Equity Bank), K-Rep Bank (Sidian Bank) A/C NO. 010060XXXXXX133 Buru Buru Branch, Consolidated Bank A/C No. 11813XXXXXX97 Taj Mall, Family Bank Ltd. A/C No. 0330XXXXXX516, M-pesa Business No. 94XXX0, or in any other account numbers into which school fees is paid having been acquired during coverture, though being in the Defendant's (or school's) name, what is the extent of the applicant's in the said properties?
  4. That pending the hearing and determination of this suit, should the Honourable Court in the meantime restrain the Respondent from selling, charging, parting with possession – save to Applicant – disposing of, alienating, running the school known as Junior Campus Academy or allowing anyone else to run the said school as a school manager, save the Applicant, or in any other way dealing with the said properties in the manner prejudicial to the Applicant's interests or contrary to law?
    - 4A. That the Plaintiff having been induced and or lured by the Defendant to retire as a T.S.C. teacher to take up full time job at New Junior Campus Academy, should the Plaintiff be compensated with loss of employment at the rate equivalent to her TSC salary and benefits for a period of 14 years?
  5. That pending the hearing and determination of this suit should the Honourable Court in the meanwhile order the freezing of accounts Nos. 117XXXXX95 (Kenya Commercial Bank) 0060XXXXX5836 (K-Rep Bank) and 00102XXXXXX265 (Equity Bank)?
  6. That should the assets comprising the matrimonial property be valued?
    - 6A. In the alternative to paragraph 4A, should the plaintiff be compensated for the loss of her position in the New Junior Campus Academy as manager/director/ shareholder in the business and school?
  7. That should the Plaintiff's portion in the said property properties – land and buildings as well as motor vehicles and shares – be transferred to her name?
  8. That which party is to bear the costs of this proceedings?
2. The Respondent PNK opposed the summons through the Grounds of Opposition dated 19<sup>th</sup> May 2016 and his Replying Affidavit dated 27<sup>th</sup> November 2012.
  3. The matter was canvassed by way of *Vive Voce* evidence in open court.

### **Evidence**

4. The Plaintiff CWN told the court that she got married to the Defendant on 8<sup>th</sup> August 1987. Their union was blessed with four (4) children.
5. Later the marriage ran into problems and couples union was dissolved on 6<sup>th</sup> November 2012 vide Divorce Cause No. 29 of 2010.



6. The Plaintiff told the court that throughout the marriage she worked as a teacher employed by the Teachers Service Commission (TSC). That in the year 2010 she was transferred to Nile Road Girls Secondary School where she only worked for one (1) year.
7. Thereafter the Plaintiff agreed with the Respondent that she resign from the TSC to work as Director and Manager at Junior Campus Academy a school owned by the couple.
8. The Plaintiff stated that during the subsistence of the marriage the couple acquired and/or developed the following properties:-
  - (i) Plot No. Nairobi/197/0895/197-97/0704 upon which a school known as Junior Campus Academy was erected registered in their joints names.
  - (ii) Plot LR. Nairobi/Block 82/3966/20800 together with all development thereon including household items registered in the name of the Defendant.
  - (iii) Land in Kirinyaga
  - (iv) Motor vehicles Registration Number KAP 914U, KAP 496U, and KBZ 644W, KCB 470R, KCF 109K, KBT 742Z, KBX 427Z as well as any other vehicles subsequently purchased by the Defendant
  - (v) Money in the following Bank Accounts:-
    - (a) Kenya Commercial Bank Account No. 117XXXXX95
    - (b) K-Rep Bank Account Number 0060XXXX583
    - (c) Equity Bank Account No. 00102XXXXXX265
    - (d) Consolidated Bank Account No. 1181302000097
    - (e) Family Bank Account 033XXXXXX2516
    - (f) M-pesa Business No. 94XXX0, or in any other account numbers into which school fees is paid
9. The Plaintiff asserts that she contributed towards the acquisition and/or development of the above assets and claims a fifty per cent (50%) share of the same.
10. The Respondent PNK confirms that he got married to the Plaintiff in the year 1987. That at the time of the marriage the Respondent was a full Lieutenant in the Kenya Army whilst the Plaintiff was a student at Kenyatta University.
11. The Respondent also confirms that their union was blessed with four (4) children. The Respondent further confirms that the couple are now divorced.
12. The Respondent confirms the existence of a Plot in Tena Estate upon which the matrimonial home was constructed. He states that he purchased the vacant plot in Tena Estate in 1989 from Continental Developers. That he commenced construction in 1990 and in 1993 the couple occupied the house. He states that the property is registered in his name. That the Plaintiff was still a student when he purchased the plot and therefore she made no contribution towards its purchase.
13. The Respondent told the court that he has worked in Morococo for a period of thirteen (13) months during which period he earned Kshs.3,500,000 and decided to utilize the money to purchase plots in Tassia. A copy of his Certificate of Service dated 11<sup>th</sup> February 2022 appears at Page 190 of



the Respondent's bundle of Documents. That he put up a school which was registered as a joint proprietorship but of which he is now the sole director.

14. The Respondent concedes that the Plaintiff initially worked as the manager of the school. However, he states that the Plaintiff mismanaged the school by squandering finances and that the school is now being run professionally
15. The Respondent denies the Plaintiff's claim that she is entitled to a fifty (50%) percent share of the properties. He states that the Plaintiff also acquired assets during the marriage which she registered in her own name and which she has not declared to the court. Nevertheless the Respondent states that he is willing to relinquish the Tena Property entirely to the Plaintiff.
16. I have carefully considered the originating summons before this court, the evidence adduced by the Plaintiff as well as the written submissions filed in court. Since this is a Civil matter the required standard of proof is "on a balance of probabilities" i.e. the court must be satisfied that the occurrence of the events was more likely than not.
17. In RE H & C (Minors) 1995 UKHL the House of Lords in defining what is meant by the term "preponderance of probability" or a "balance of probability" stated:-  

"The balance of probability standard means that the court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not...."
18. Two main issues arise in this case:-
  - (a) Whether the properties in question constitute Matrimonial property.
  - (b) Whether the Plaintiff is entitled to the orders prayed for.

**(a) Matrimonial Property**

19. It is not in dispute that the Plaintiff and the Respondent got married to each other on 8<sup>th</sup> August 1987. A copy of their Marriage Certificate serial Number 49XXX8 is annexed appears at Page 1 of the Plaintiff's list of Documents filed on 26<sup>th</sup> November 2013. It is also common ground that the marriage of the parties was dissolved vide the judgement delivered on 6<sup>th</sup> November 2012 in Divorce Cause No. 29 of 2010.
20. The Plaintiff told the court that the properties cited in her Amended Summons were all acquired and/or developed during the subsistence of the marriage. This claim is not disputed by the Respondent.
21. The Respondent has annexed to his bundle of documents filed on 20<sup>th</sup> December 2013 documents to show that the property known as Nairobi/Block 82/3966/20800 is registered in the name of PNK (the Respondent herein). Likewise the Respondent has annexed documents to prove that the plots in Tassia are all registered in his name and that he made the requisite payments towards the mortgage, land rates and land rent for the said properties. All the above assets were acquired during the subsistence of the marriage but as conceded by the Plaintiff they are all registered in the name of the Respondent.
22. The Plaintiff told the court that the couple established their matrimonial home on LR No. LR. Nairobi/block 82/3966/20800 in Tena Estate where they constructed a house. The Respondent concedes that this property was indeed the matrimonial home.



23. Section 6(1) of the Matrimonial Act 2013 provides as follows:-

“ 6

- (1) For the purpose of this Act, matrimonial property means
  - a. The matrimonial home or homes
  - b. Household goods and effects in the Matrimonial home or homes.
  - c. Any other immovable and movable property jointly owned/and acquired during the subsistence of the marriage.” [own emphasis]

24. Section 14 of the Matrimonial Property Act sets out two rebuttable presumptions in regard to property acquired during marriage as follows:-

- “ 14. Where matrimonial property is acquired during the 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 a rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

25. The Plaintiff claims that she made substantial monetary contribution towards the acquisition and development of the suit properties. As such, she insists that the said properties constituted matrimonial property which the Defendant was holding in trust for her.

26. It is trite law that he who alleges must prove. The Evidence Act places the burden of proof of any fact on the person who wishes to rely on the same section 107 of the Evidence Act Cap 80, Law of Kenya Provides as follows:

“ Burden of Proof

1. Whoever desires any court to give judgment as to any legal 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.”

27. In the case of Njoroge v Ngari [1985] KLR 480 the court stated that where a property is held in the name of one spouse, even if that property is registered in the name of one person but the other spouse made contributions towards its acquisition, then each spouse has a proprietary interest in said property. The Court in that case held thus-

“ where a property is registered in the name of one spouse only the other spouse is required to prove contribution towards the acquisition of said property in order to establish beneficial interest thereto”.



By this holding, the court gave effect to section 14 of the *Matrimonial Property Act*.

28. In the case of *PWK v - JKG* [2015] eKLR the court stated as follows:-

“where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective properties of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in *Gissing v Gissing* [1070] 2ALL ER 780 Page 788” [own emphasis]

29. Similarly in *ALM -v- JNN* 920220 eKLR the court held that:

“Further Section 14(a) of the Act provides that where matrimonial property is acquired during the marriage in the name of the one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. In the instant case, the suit properties being matrimonial property as it was acquired during the subsistence of the marriage and being registered in the name of the defendant it can only be said that the said was held in trust for the Applicant.”

30. Finally in the celebrated case of *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR it was held thus:-

“It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in *Pettit* are those of English law of trusts. The House of Lords specifically decided so in *Gissing v. Gissing*. According to the English law of trusts it is only through the wife’s financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property.” [own Emphasis]

31. It manifest that Section 14 of the *Matrimonial Property Act* creates a trust in favour of the Plaintiff with respect to the properties in question. It is not disputed that the properties though registered in the sole name of the Defendant were acquired and developed during the period when the couple were in a marital union from 1987 to 2012 a period of twenty-five (25) years.

32. Any party seeking division of Matrimonial property is under an obligation to prove their contribution towards the acquisition and development of said matrimonial property.

33. Contribution by a spouse for purposes of sharing matrimonial property may be monetary or non-monetary or both. According to section 2 of the *Matrimonial Property Act*;

“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; [own emphasis]

34. Non-monetary contribution is defined in the Act to include Domestic work, management of the matrimonial home, child care, management of family businesses farm work, and companionship

35. Section 7 of the Act provides that:-

“Subject to section 6(3), ownership of matrimonial property vests in the spouse 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.”

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 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. In UMM -v- IMM [2014] eKLR the court was of 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 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).” [own emphasis]

38. This issue of how matrimonial properties should be divided was conclusively settled by the Supreme Court of Kenya in the case of Joseph Ombogi Ogentoto -v- Martha Bosibori Ogentoto Petition No. 11 of 2020 where it was held as follows:

“...we also find that Article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in the Constitution do we find



any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and Article 45(3) was not designed of the purpose of enabling this court to pass property rights from one spouse to another by fact of marriage only...

...our view is that, while Article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married...

...it is our finding that the stated quality under Article 45(3) means that the courts are to ensure that at the dissolution of a marriage, each party to a marriage gets 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 contributed...

...Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of Article 45 (3) of the *Constitution*. To hold that Article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyot, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.” [own emphasis]

39. Based on the above legal provisions and a plethora of other decided cases it is clear that despite the constitutional requirement that parties to a marital union shall have equal rights, each party must be able to prove either monetary or non-monetary contribution in order to merit entitlement to a share of matrimonial property.
40. Regarding the matrimonial home in Tena Estate, the Respondent testified that he solely purchased the land upon which that home is built. He stated that at the time he purchased said land the Plaintiff was still a student at Kenyatta University – she was not earning any income and therefore had no capacity to make any financial contribution towards the purchase of the land.
41. The parties commenced construction on the Tena Estate land in 1992-1994. The Title Deed for the Tena Property is in the sole name of the Respondent.
42. The Plaintiff claims that she made both direct and indirect contribution towards the construction of the matrimonial home.
43. On his part the Respondent concedes that construction of the matrimonial home commenced during the subsistence of the marriage. He also concedes that the plaintiff did contribute a sum of Kshs.48,000 towards the said construction which funds were utilized for construction of the slab.
44. Aside from direct financial contribution it is not disputed that during the marriage the Respondent who was a military officer was often out of the country on duty – leaving the Plaintiff to take care of the management of the home and the children. The Plaintiff stated that the Respondent paid for all the children’s education all costs up to University and thus she made no contribution towards education.



45. The parties both state that aside from the matrimonial home the couple put up five (5) rental units on the Tena Property. That the said rental units currently fetch a monthly income of Kshs.35,000 all of which is collected and utilized by the Plaintiff to the exclusion of the Respondent.
46. I find that taking into account her proved financial contribution of Kshs.48,000 as well as indirect or non-monetary contribution like home management, child care, companionship etc the Plaintiff share in this matrimonial home would amount to thirty percent (30%).
47. However the Respondent told the court that he was ready and willing to cede all his interest in the matrimonial home as well as the rental units thereon to the Plaintiff. The Plaintiff has not declined this offer.

**(ii) New Junior Campus Academy**

48. This is the other property that is in contention between the parties. The school which is built on twelve (12) plots in Tassia Estate was originally known as Junior Campus Academy. The name was later changed to New Junior Campus Academy.
49. The Plaintiff states that she contributed towards the establishment and running of the school. That upon persuasion by the Respondent the Plaintiff resigned from her job with the TSC to take role of Manager/Director of the school. She further states that they were only able to register the school due to her qualification as a Teacher as the Ministry at the time required that in order to register a school one needed to be a certified Teacher. Indeed under cross-examination the Respondent admits that:-

“It is true for one to register a school one needs a teacher. I needed her [the Plaintiff] to register the school. I could not register the school without her. I needed a certificate from a teacher to register the school.”
50. The Plaintiff claimed that as the school grew the Respondent began to exclude her from the management and running of the same. The Plaintiff concedes that the money to put up the school came from the Respondent. Under cross-examination the Plaintiff says that the Respondent earned money from a Peacekeeping Mission in Morocco she states:

“He [the Respondent] was earning money. We used the money to open the school. It was less than Kshs.3,000,000 we put up the school from his money business, his money from the United Nations.”
51. However the Plaintiff insists that she made direct financial contribution towards the purchase of the plots upon which the school was built. She claims that she took several loans to finance the purchase of the Plots at Tassia. She claims to have pumped about Kshs. 1.5 Million into the running of the school. The Plaintiff states:

“I recall at one time I got a loan of Kshs.1.5 Million and put into the school and it was repaid from the proceeds of the school. He [the Respondent] contributed about 10 Million towards the school.....”
52. By this the Plaintiff admits that it was the Respondent who largely contributed towards the setting up of the school. All in all the use of her certificate to register the school as well as the Plaintiff's contribution towards the setting up of the school would in my view entitle her to a thirty percent (30%) share in the said school.



53. The Plaintiff also claims compensation for loss of employment on grounds that the Respondent persuade her to resign from her job with the TSC in order to manage the school. First there is no evidence that the Respondent persuaded and/or compelled the Plaintiff to resign from her job. There is no proof that the Respondent is responsible for her loss of employment as the Plaintiff did not lose her job. She voluntarily resigned.
54. Secondly it is not entirely true that the reason why the Plaintiff resignation from the TSC was to manage the school. The letter dated 17<sup>th</sup> January 2011 bears the heading “Resignation on Marriage Grounds” reveals the reason the plaintiff gave her employer for her resignation was ‘marriage’ not that she was leaving to run another school.
55. Finally any claim for lost wages cannot be brought under this court for division of Matrimonial Property. The Plaintiff ought to sue the school in a Civil case to claim what she believe is due to her. I find no merit in this claim and the same is hereby dismissed.
56. It is alleged (which allegation has not been denied by the Plaintiff) that the Plaintiff also purchased assets during the subsistence of the marriage which assets she has failed to disclose to the court.
57. In his bundle of Documents the Respondent has annexed copies of certificates of ownership of Plot Numbers 191 and 119 issued by Komorock Estate Market. The two plots are registered in the name of CWN and were purchased in November 2002 during the subsistence of the marriage.
58. The Respondent has also annexed a copy of an Agreement for sale dated 25<sup>th</sup> November 2004 for purchase by the Plaintiff of a motor vehicle Registration KAP 914U Nissan Matatu as well as the log-book for the same vehicle indicating it is registered in the names of the Respondent.
59. The Plaintiff does not deny having acquired these assets during the subsistence of the marriage to the Respondent. Yet surprisingly the Plaintiff made no mention at all of these assets in her summons. As such the Plaintiff was concealing relevant information.
60. The Plaintiff has also laid claim to several motor vehicles which are all registered in the name of the Respondent. The motor vehicle Registration No. KAP 914U is actually registered in the name of the plaintiff herself as proved by the registration certificate serial No. K190220L issued by the National Transport Safety Authority (NTSA).
61. Regarding the remaining motor vehicles. The Plaintiff has not demonstrated what contribution she made towards the purchase of the same. I therefore find no merit to the Plaintiff’s claim to a share of said motor vehicles.
62. Finally, I find as follows:
  - (1) The Plaintiff entitled to a 30% share of the Property known as LR No. Nairobi/block 82/3966/20800 together with the developments thereon.
  - (2) The Plaintiff is entitled to a 30% share of New Junior Campus Academy.
  - (3) The above properties to be sold and the proceeds divided between the parties on a 70:30 basis in favour of the Respondent.In the Alternative
  4. The Respondent to relinquish his share in LR No. Nairobi/block 82/3966/20800 and the said property be transferred entirely to the Plaintiff.



5. The Plaintiff to relinquish any claim to New Junior Campus Academy and the school and all buildings to be transferred entirely to the Respondent.
6. This being a family matter each side will bear their own costs.

**DATED IN NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER, 2023.**

**MAUREEN A. ODERO**

**JUDGE**

