



REPUBLIC OF KENYA



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**MMK v JON (Originating Summons 14 of 2020)  
[2023] KEHC 23597 (KLR) (9 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23597 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
ORIGINATING SUMMONS 14 OF 2020  
JN ONYIEGO, J  
OCTOBER 9, 2023**

**BETWEEN**

**MMK ..... APPLICANT**

**AND**

**JON ..... RESPONDENT**

**JUDGMENT**

1. The Applicant herein through the firm of P.A Osino Advocates brought this suit by way of an originating summons dated 30.07.2020 against the respondent seeking the following orders:
  - i. Spent.
  - ii. That the respondent be ordered to provide for the applicant's interim share of property business to cater for her personal maintenance in the sum of Kes. 300,000.00 per month pending the hearing and determination of these proceedings.
  - iii. That it be declared that the following properties registered in the names of the applicant and the respondent separately and some through company shares as per the table below are owned jointly by the applicant and the respondent.
    - a. 1-acre unsurveyed piece of land at Mwakirunge with 25 pigs; plant and equipment and Trees and vegetables.
    - b. Nonico Ltd (700 shares) – Land at Bububu Settlement Scheme originally known as Mombasa/ Bububu 'A'/9 and later subdivided into the following: Mombasa/ Bububu / (A)/ 1232; Mombasa/



Bububu / (A)/ 1234; Mombasa/ Bububu / (A)/ 1235; Mombasa/ Bububu / (A)/ 1236; Mombasa/ Bububu / (A)/ 1237; Mombasa/ Bububu / (A)/ 1238; Mombasa/ Bububu / (A)/ 1239; Mombasa/ Bububu / (A)/ 1240; Mombasa/ Bububu / (A)/ 1241; Mombasa/ Bububu / (A)/ 1242; Mombasa/ Bububu / (A)/ 1243; Mombasa/ Bububu / (A)/ 1244; Mombasa/ Bububu / (A)/ 1245; Mombasa/ Bububu / (A)/ 1246; Mombasa/ Bububu / (A)/ 1247; Mombasa/ Bububu / (A)/ 1248; Mombasa/ Bububu / (A)/ 1249; Mombasa/ Bububu / (A)/ 1250; Mombasa/ Bububu / (A)/ 1251; Mombasa/ Bububu / (A)/ 1252; Bank Accounts.

- c. LR. No. Gongoni Settlement Scheme/2335 (Property at Kilifi County).
- d. KCC 427A
- e. KCR 628 E
- f. Proway Trading Ltd (50 Shares).
- g. Wintouch Ltd (200 Shares).
- h. Bazooka Fast Foods Ltd (500 Shares).
  - i. Shoreline Properties Ltd (500 Shares).
  - j. Edafos Properties Ltd
  - k. Education Insurance Number 026/CEA/071306 (I.C.E.A. Lion).
  - l. Shares in Legal Firms held by the respondent.
- iv. That a temporary injunction do issue restraining the respondent his servants and/or agents from evicting the applicant and the issue of marriage from the suit properties and/or selling, alienating, wasting, charging, damaging and/or otherwise interfering with the said properties pending hearing and determination of the originating summons herein.
- v. That this Honourable court be pleased to order the sale, division and/or apportionment of the properties between the parties.
- vi. That further in the alternative and in the event that title and ownership in any way of the suit properties has/have already been transferred in favour of any third party an order that the respondent does account for the proceeds and the same be divided between the applicant and respondent equitably and equally.
- vii. That an order that the respondent does execute all documents where necessary to transfer the applicant's portion in the properties or in default the same be executed by the deputy registrar, lands registrar or registrar of titles or in the alternative that the same be valued by a qualified and reputable valuer, sold and the proceeds be shared equally between the applicant and the respondent.



- viii. That the respondent be restrained from withdrawing, transferring, pledging or borrowing against any sums standing in any and all bank accounts held with any of the following banks until the hearing and determination of these proceedings or until the respondent secures the applicant in terms of prayers (2), (3) and (4) above and such order be served upon the said banks to wit: Consolidated Bank (Joshua Otieno Ndere ) a personal savings account and any other bank where funds may have been transferred from prior to existing accounts.
- ix. That the respondent be compelled to render a full bank and frank disclosure to the applicant on all bank statements and financial records and/or reports of the Family Business detailing all credit and debit entries in those accounts from the year 2014 to date pending the hearing and determination of these proceedings.
- x. That any order made in terms of prayer (ix) above relating to the respondent's bank accounts and Family Business accounts be subject to such monthly amounts as may be certified by the court as necessary to meet the respondent's own expenses so that she is not rendered destitute.
- xi. That any order made in terms of prayer viii above relating to the respondent's personal bank accounts and Family accounts be subject to such monthly amounts as may be certified by the court as necessary to meet the applicant's own expenses so that she is not rendered destitute.
- xii. That this Honourable court be pleased to dissolve and/or wind up the following companies registered in the joint names of the applicant and the respondent including all and any moveable and/or immovable assets held in the company names (Family Business) and the proceeds be shared equally and equitably between the parties. (Proway Trading Ltd- 50 Shares; Wintouch Ltd – 200 Shares; Bazooka Fast Foods Ltd – 500 Shares; Shoreline Properties Ltd- 500 Shares; Edafos Properties Ltd and Nonico Ltd (700 Shares).
- xiii. That the respondent does render complete statements of account in respect of all the above companies and provide an account for all cash flows and profits obtained from the Family Business.
- xiv. That it be declared that the law firm known as Ndere & Company advocates registered in the name of the respondent is owned jointly by the applicant and the respondent in partnership.
- xv. That this Honourable court be pleased to dissolve and/or wind up the Family Practice and the proceeds be shared between the parties.
- xvi. That the respondent be restrained from withdrawing, transferring, pledging or borrowing against any sums standing in the credit of Ndere & Company Advocates or Joshua Otieno Ndere in any way and all the bank accounts held with any of the following banks until the hearing and determination of these proceedings or until the respondent secures the applicant in terms of prayers (b) (c) and (d) above and such order be served upon the said banks: Family Bank; CFC Stanbic and ABSA Ltd. Any other bank where funds may have been transferred to or from prior existing accounts.



- xvii. That the respondent be compelled to render a full and frank disclosure to the applicant on all bank statements and financial records and/or reports of the Family Practice detailing all credit and debit entries in those accounts from the year 2016 to date pending the hearing and determination of these proceedings.
  - xviii. That this Honourable court be pleased to declare that the shares held by the respondent in the following companies is matrimonial property and the proceeds of sale be shared equally between the applicant and the respondent. (CJ Law associates LLP and GM Gamma Advocates Ltd).
  - xix. That the respondent does render complete statements of account in respect of all the above companies and provides an account for all cashflows and profits obtained from them.
  - xx. That the respondent be compelled to make payments towards loan number LN02232 at the Law Society of Kenya Sacco.
  - xxi. That all the costs of the suit be awarded to the applicant.
2. The originating summons was supported by the applicant's affidavit sworn on 30.07.2020 wherein she deponed that the respondent was her husband whom she married on 28.04.2015 via Luo-Kikuyu Customary marriage but prior to that, they were already in a relationship with a view to evolve the same to a marriage. That their relationship was blessed with one child.
  3. She averred that when the parties met in the year 2012, they did not own any property. That it was after she formally got married to the respondent in 2015 that they started acquiring properties from the profits made from the family businesses mentioned above. The applicant thus urged this court to determine their rights in the said matrimonial properties according to their respective contribution.
  4. The respondent through the firm of Kamunda Njue Advocates filed a replying affidavit sworn on 27.10.2020 admitting that the applicant was his wife but are now divorced. He deponed that he never undertook any joint investment with the applicant in any form of family businesses or otherwise during the subsistence of their marriage. He deposed that the applicant's claim to the effect that she had been locked out of income from family business are untrue and without basis. That they got married in the year 2015 under the Luo-Kikuyu Customary Law and that cohabitation started on the same year.
  5. It was his case that all family expenses were largely shouldered by him as the applicant focused all her energy and resources in acquiring assets for herself and her side of the family. He decried the fact that the applicant only seemed to be in the know of his alleged finances and acquisitions but kept under wraps her very own.
  6. He stated that the applicant being a government employee in the rank of prosecution counsel in the DPP's office based at Kwale County, could not by any stroke of imagination have managed to run a private practice and also work as a prosecution counsel. He went further to state that the alleged family farm in question has been his sole endeavour and the same has never had the input of the applicant as alleged. That the same continued being his sole preserve just like the applicant's ventures in Kirinyaga are her preserve.
  7. He stated that the allegation by the applicant that she loaned him money is a hoax as all the monies that she gave him, she always insisted that the same be returned and he has been repaying the same. He reiterated that he was the sole proprietor of the law firm said to be family property and that the



cited companies are legal entities which were registered between willing parties to the exclusion of the applicant.

8. He stated that; Proway Trading Ltd, Wintouch Company Ltd and Shoreline Properties Ltd are startup companies that never took off; Bazooka Fast Food is a family business co-owned between him and his wife and that the same was started after the applicant and him had separated; Edafos Properties Ltd was a startup company co-owned jointly with two friends and colleagues and the same is not a family business as alleged. That the applicant did not disclose anything acquired by her as matrimonial property, and notably she put more emphasis on what he acquired even before they got married on 18.04.2015. He therefore urged this court to dismiss the suit herein for the reason that the applicant did not approach the court with clean hands.
9. The court therefore gave directions that the hearing of the suit herein be by way of viva voce evidence and further, parties to file witness statements and thereafter written submissions if need be.

### Hearing

10. During the hearing, parties adopted their respective witness statements with the applicant reiterating her averments contained in the affidavit in support of the case. Basically, she told the court that when she got married to the respondent, he had nothing and that whatever property they acquired during marriage, it was through their joint effort whether direct or indirect. She denied the allegation that she invested secretly at her home in Kirinyaga. She therefore prayed for the property to be shared out equally. On cross examination, she admitted that she was salaried being an employee working in the civil service as a prosecution counsel.
11. In reference to 1-acre unsurveyed piece of land at Mwakirunge, it was her case that the same was meant to be a plot where the matrimonial home was to be built and parties engaged in farming business on it. That in December, 2015, when the applicant went to Mombasa for her leave, the respondent intimated to her that he had identified a piece of land in Mwakirunge which would be ideal for farming and requested that she contributes to its purchase.
12. She averred that she drew some loan from LSK Sacco and thereafter withdrew the amount from her bank and gave the respondent in cash as her contribution. She contended that she financed the debt and the remaining interest to a tune of Kes. 800,000.00 which she sent via RTGS. That the respondent acknowledged the debt but only refunded Kes. 40,000.00 towards repayment of the said loan;
13. On LR Gongoni Settlement Scheme, it was her case that this land was bought in the year 2016 for a sum of Kes. 330,000.00 and registered in the name of the respondent though from the proceeds of the family business. That in respect to KCC 427A, she paid for the vehicle on behalf of the respondent via a loan she acquired from LSK Sacco and that she forwarded an amount of Kes. 300,000.00 to the respondent towards the acquisition of the said motor vehicle.
14. In reference to KCR 628E, she stated that she acquired the same during the subsistence of the marriage and the it was acquired through a car loan facility which her employer made available to her and that she is being deducted directly from her salary.
15. In reference to Proway Trading Limited, Wintouch Ltd, Bazooka Fast foods and Shoreline Properties Ltd, the same were said to have been created and run from the proceeds of the family businesses and the shares held in the name of the respondent should therefore be shared equally between the parties herein.
16. Regarding the Insurance Policy Number 026/CEA/071306 at ICEA Lions Assurance Company amounting to Kes. 302,686.00, she claimed that the same was an investment cover for the sum of Kes.



1,085,552, and that it should also be shared equally as it was paid for from the family proceeds. That shares held by the respondent at Edafos Properties, CJ Law & Associates LLP. GM Gamma Advocates and Ndere & Company Advocates to be shared equally by the parties.

17. Equally, the respondent adopted the content contained in his affidavit in response to the originating summons. He vehemently denied the claim by the applicant that she made both direct and indirect contribution towards the acquisition of the listed properties. According to him, all the properties were acquired through his own effort as the applicant concentrated in her secret investments at her parents' place. He stated that he fully met all house hold expenses including payment of the house girl's salary. He deposed that even the money he obtained from the applicant to purchase part of the property in question it was on repayable loan which he fully refunded the applicant.
18. Upon close of the case, parties agreed to file written submissions. Unfortunately, the respondent did not file any.

### **Applicant's submissions**

16. The applicant through the firm of Osino and Co. Advocates submitted in reference to six issues listed as hereunder:
  - i. When did cohabitation as husband and wife begin?
  - ii. Whether the properties disclosed in this suit are matrimonial properties acquired during the subsistence of the marriage
  - iii. Whether the applicant directly or indirectly contributed to the acquisition of the said properties as to entitle her to the benefit of the same.
  - iv. Whether the alleged registration and any transfers of motor vehicles made in favour of the third parties are null and void ab initio for want of spousal consent and signature.
  - v. Whether the applicant is entitled to accounts.
  - vi. Who should pay the costs.
17. Regarding the 1<sup>st</sup> issue, the applicant submitted that the parties herein started cohabiting as husband and wife before formalizing their union since the year 2012 while at the university. It was counsel's submission that all the assets subject of these proceedings were acquired during coverture hence matrimonial property. That in compliance to section 17 and 14(a) of the *Matrimonial Property Act*, the respondent has continued to hold the suit properties in trust for the applicant to date and that the applicant has a legal right to make the current application before this court.
18. On the 2<sup>nd</sup> issue, it was submitted that matrimonial property is clearly defined under section 6(1) as read together Section 14 of the Act. That it is essentially the property acquired by either spouse during marriage; It was counsel's submission that where the property is acquired jointly or is registered in the joint names of the parties, the presumption would be that it has to be divided equally between them in the event of divorce.
19. Counsel contended that the presumption is rebuttable more so where it is acquired by one spouse or is registered in the name of one spouse. To advance that position, reliance was placed on section 14(a) as read with section 2 of the *Matrimonial Property Act*. To buttress the point that contribution could be either monetary or non-monetary, reliance was further placed on the case of ENK v JNK (2015) e



KLR where it was held that whatever property acquired by the parties during the subsistence of their marriage must have been intended to be for the benefit of the family.

20. Touching on the 3<sup>rd</sup> issue, the applicant contended that the properties listed herein were acquired exclusively by the applicant and the respondent and that the applicant continued to be heavily involved until her divorce. That the alleged second wife did not participate in the running of the businesses and the property acquisitions nor was any evidence produced in court on her alleged marriage to the respondent.
21. It was therefore counsel's submission that the listed properties constituted family business as enumerated under section 2 of the *Matrimonial Property Act*. In that regard, the court was referred to the case of PWK v JKG (2015) eKLR to support her contention that the said properties though some are registered in the names of the respondent and third parties and others in the name of law firms in favour of the applicant, they were acquired during the subsistence of their marriage and bought from the profits made by the companies formed during marriage.
22. It was contended that the respondent failed to rebut the legal presumptions as his independent sources of income were not disclosed. That no single pay slip was produced in court or audited accounts of the businesses or law firms.
23. Regarding the 4<sup>th</sup> issue, the applicant submitted that when the parties met in the year 2012, they did not own any property and further, that at the time of marriage being 18.04.2015, the parties herein did not own any property. That it was after the applicant got married to the respondent that they started acquiring properties from the profits made from the family businesses mentioned above.
24. M/s Osino submitted that the applicant was the focal point in the marriage herein and the parties began acquiring assets including their matrimonial homes upon their marriage; that the respondent and the applicant continued to run the business and her share on contribution is equal to that of the respondent. The applicant contended that by virtue of section 6(1) as read together with section 14 of the Act, the respondent failed to rebut the presumption of the applicant's shares in all the properties as the burden to do so remained with him and never shifted to the applicant. The applicant relied on the case of Echaria v Echaria [2007] eKLR to urge this court that the property herein should be divided equitably based on both monetary and nonmonetary contribution between the parties herein.
25. On the 5<sup>th</sup> issue, it was her case that the company registered as Nonico Ltd, is their joint property and that if any of the parcels have been sold, then this court should declare the transactions null and void ab initio as this would affect the value of the shares of the company. Reference was made to section 12 of the *Matrimonial Property Act* No. 49 of 2013 and the case of Mercy Njeri Mwangi v Peter Mwangi Muchoki (2015) eKLR where shares held by the respondent in the company or any other property was sold and the proceeds therefrom divided between the parties equally.
26. As stated above, the respondent did not file his submissions despite all parties having been given an opportunity to do so.

### **Analysis and determination.**

27. Having considered the pleadings herein, oral evidence by both parties and submissions by the applicant, issues that germinate for determination are; whether the parties herein were married as husband and wife; whether the properties in question were acquired during the subsistence of their marriage and therefore constitute matrimonial property; What was the contribution of each party if any and who bears costs of the suit.



28. In the case of ENN v SNK [2021] eKLR, the court expressed itself that division of matrimonial property ought/shall have the following facets proved by either party:
- a. The fact of a valid, legal, regular marriage in law;
  - b. Dissolution of such marriage by/through an order of the Court;
  - c. That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage;
  - d. Contribution by each party to the acquisition/development.
29. Concerning the first issue, the parties herein agreed that; they started cohabiting sometime the year 2012 while in university as students; formalized their marriage under Luo-kikuyu customary law the year 2015; separated June 2019 and; formally divorced June 2021. They are however not in agreement as to what constitutes matrimonial property in this case and the extent of contribution of each party.
30. There is no doubt that from 2012 to 2015, the two were cohabiting as boyfriend and girlfriend. Apparently, there was no marriage during this time hence time started running from 2015 when they formally started staying together as husband and wife until their separation in June 2019.
31. It is worth noting that the respondent did not deny that indeed, he was married to the applicant but the same commenced from the date of swearing of the affidavit of marriage on 28.04.2015. It is my finding that their marriage commenced as per the affidavit of marriage attached herein. Therefore, any properties acquired outside the stated time of marriage cannot constitute matrimonial property and vice versa. A perusal of the listed properties shows that some properties were acquired during the subsistence of their marriage and others after. I will later in this judgement isolate them.
32. The key question would then be, whether those properties acquired between 2015 and June 2019 qualify to be matrimonial property. Section 6 of the *Matrimonial Property Act* defines ‘matrimonial property’ as:
- (a) the matrimonial home or homes;
  - (b) household goods and effects in the matrimonial home or homes; or
  - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
33. Under Section 2 of the Act, ‘Matrimonial home’ has been defined as: -
- “any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property”.
34. In the case of T.M.V. v F.M.C (2018) eKLR, Nyakundi J, expressed that:
- “...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.”



35. Similarly, in the case of Paul Kagwa v Jackline Muteteri (Matrimonial Cause-2005/23) [2006] UGHC 17 (18 May 2006) while citing Bossa, J in John Tom Kintu Mwanga v Myllious Gafafusa Kintu (Divorce Appeal No. 135 of 1997) (unreported) Mwangusywa J expressed himself as hereunder: -

“On the last issue of whether the petitioner is entitled to matrimonial property, I clearly believe that she does and I so hold. Matrimonial property is understood differently by different people. There is always that property which the couple chose to call home. There may be property which may be acquired separately by each spouse before and after marriage... The property to which each spouse is entitled is that property which the parties choose to call home and which they jointly contribute to.”

36. From the above definition and caselaw, all the properties acquired during the subsistence of their marriage (between 2015 and June 2019) are for purposes of this case deemed to be matrimonial property.

37. Having held that properties acquired during coverture are matrimonial property, the critical question begging for an answer is the extent of contribution of each party towards their acquisition.

38. Proof of contribution towards the acquisition of matrimonial property is a critical component in division of matrimonial property. There is no joy riding in a marriage. A spouse must add value in her or his marriage both socially and economically. One cannot harvest where he or she has not sown. Under Section 7 of the *matrimonial property Act*, ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between spouses if they divorce or their marriage is otherwise dissolved. Section 2 of the said Act goes further to state that contribution means; monetary and non-monetary contribution which includes;

- a. Domestic work and management of the matrimonial house
- b. Child care
- c. Companionship
- d. Management of family business or property; and
- e. farm work

39. In the case of Esther Wanjiku Mwaura Vs Mwaura Ole Mashua Civil Appeal No. 261 of 2019 court of appeal at Nairobi the court emphasized on the point that matrimonial property is all about contribution be it monetary or non-monetary. See also R.M.M Vs T.S.M(2015) eKLR where the court held the position that each party’s contribution ought to be assessed and the same ought to form the basis for Division.

40. The court in Echaria vs Echaria(2007) e KLR set out clear principles on what constitutes contribution in a matrimonial dispute by stating 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 proportions 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 by lord Pearson in Gissing v Gissing...”



41. However, section 14 of the *matrimonial property Act* does recognize that a spouse can be registered as the sole owner of property but hold in trust of the other spouse. For avoidance of doubt, Section 14 does provide as follows;

Where matrimonial property is acquired during marriage;

- a. In the name of the 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 interest in the matrimonial property are equal.

42. In the case of *PWK Vs JKG (Supra)*, the court had this to say;

“We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50;50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five judge bench of this court in *Echaria v Echaria(Supra)*”.

“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 proved respective proportions 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 maximum equality is equity while holding the caution of lord Pearson in *Gissing Vs Gissing (19700 2 All ER 780 page 788*”. Despite the respondent submitting that the said properties were acquired by him to the exclusion of the applicant, the applicant on the other hand painstakingly averred that the same were acquired through proceeds from family business.

43. Based on section 7 aforesaid, it is my understanding that where contribution towards the acquisition of matrimonial property can be identified, in the event of divorce or dissolution of the marriage, the said property will be divided between the spouses in accordance with their respective contribution towards the acquisition. In that event, there is no automatic presumption of 50:50 ownership of the said property. In my view, the 50:50 presumptions is only to be invoked where there is evidence that both spouses contributed towards the acquisition of the property and there is no way of determining each spouse’s contribution thereto. It is in that light that I concur with the position in *Falconer vs Falconer [1970] 3 All ER* where Justices of Appeal held that:

“And the principles applicable to whether a matrimonial home standing in the name of the husband belonged to them both jointly (in equal or unequal shares) were that the law imputed to the husband and the wife an intention to create a trust for each other by way of inference from their conduct and the surrounding circumstances; an inference of trust would be readily drawn when each had made a substantial financial contribution was stated to be such or indirectly as where both parties went out to work and one paid the housekeeping and the other paid the mortgage instruments; but whether the parties held in equal shares would depend on their respective contributions.”



44. Out rightly, this court notes that there is no rule of the thumb that in the event of a divorce, the property must be shared in the ratio of 50:50. That each case must be decided on its own facts was appreciated by the Court of Appeal in *TKM v SMW* [2020] eKLR where it stated as follows:

“We bear in mind the edict in *Muthembwa v Muthembwa* (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.”

45. In the case of *Federation of Women Lawyers Kenya (FIDA) v Attorney General & Another* [2018] eKLR it was held that: -

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

46. It follows from the foregoing that despite the constitutional requirement that parties in a marriage have equal rights, each party must prove either monetary or non-monetary contribution lest a party will not be entitled to any share in the matrimonial property. The onus squarely falls on the party who alleges contribution to prove such contribution in the acquisition of the subject property, be it monetary or non-monetary.

47. In my view, monetary contribution ought not to be simply pegged on documentary evidence but on any viable proof that this court may find irrefutably convincing. The Court may, based on the evidence presented before it be able to ascertain whether or not there was in fact any monetary contribution which was due to the fact that the spouses never contemplated that the marriage would go south, never documented.

48. In Civil Appeal No. 142 of 2018 in *CWM v JPM* [2017] eKLR, the Court of Appeal recognized this reality and held as follows:

“...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 Respondent at the time of such overture. 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”.

[See also *White vs White* (200) UKHL 54 and *Miller v Miller & McFarlane* {2006} UKHL 24].

49. In the instant case, it is not in dispute that the parties herein are advocates; the applicant being a state counsel working with the O.D.P.P while the respondent, a private practicing advocate. From the evidence on record, it is also not in doubt that their marriage was formalized sometime on 28.04.2015 and that they finally divorced on 21.06.2021.

50. The applicant listed various properties as constituting matrimonial property acquired during the subsistence of her marriage to the respondent. In reference to the same, I will proceed to determine each



property separately to ascertain individual party's contribution and whether it is subject to distribution or not.

51. In reference to the 1-acre unsurveyed piece of land at Mwakirunge with 25 pigs; plant and equipment and Trees and vegetables, the applicant submitted that she drew some loan from LSK Sacco and thereafter withdrew the amount from her bank and gave the respondent in cash as her contribution. The respondent on the other hand dismissed the same stating that he bought the said land all by himself. He attached a sale agreement dated 07.04.2018 proving the same and further, attached a sworn affidavit of one Gibson Malingi wherein it was deponed that he was in charge of running the farm and has been since the respondent purchased the same. As such, as the old adage goes, he who alleges must prove. I hold the view that the applicant did not prove direct nor indirect contribution to the acquisition of the land herein.
52. The next property is Nonico Ltd (700 shares) – Land at Bububu Settlement Scheme originally known as Mombasa/ Bububu 'A'/9 and later subdivided into the following: Mombasa/ Bububu / (A)/ 1232; Mombasa/ Bububu / (A)/ 1234; Mombasa/ Bububu / (A)/ 1235; Mombasa/ Bububu / (A)/ 1236; Mombasa/ Bububu / (A)/ 1237; Mombasa/ Bububu / (A)/ 1238; Mombasa/ Bububu / (A)/ 1239; Mombasa/ Bububu / (A)/ 1240; Mombasa/ Bububu / (A)/ 1241; Mombasa/ Bububu / (A)/ 1242; Mombasa/ Bububu / (A)/ 1243; Mombasa/ Bububu / (A)/ 1244; Mombasa/ Bububu / (A)/ 1245; Mombasa/ Bububu / (A)/ 1246; Mombasa/ Bububu / (A)/ 1247; Mombasa/ Bububu / (A)/ 1248; Mombasa/ Bububu / (A)/ 1249; Mombasa/ Bububu / (A)/ 1250; Mombasa/ Bububu / (A)/ 1251; Mombasa/ Bububu / (A)/ 1252; Bank Accounts.
53. The said company was formed on 18.09.2017. The applicant submitted that she took a loan from LSK Sacco and financed an outstanding debt and the remaining balance to a tune of Kes. 800,000.00 she sent via RTGS to the respondent. The respondent acknowledged receipt of the said amount which the applicant gave to him as a loan subject to refund which he did refund upon demand from the wife. The applicant did acknowledge receipt of the refund in her evidence hence no indirect nor direct contribution made towards the acquisition of the said property by the applicant.
54. The above notwithstanding, the properties herein are in regards to a company. Of importance to note is the fact that the same is a person although artificially created.
55. The question that I must grapple with is whether the same company is available for distribution as a matrimonial property. I am alive to the various decisions where superior courts have held that property registered under the name of a company can only be dealt with in accordance with the dictates of company law and do not therefore fall for determination in a family property proceeding unless proven that the applicant contributed in terms of shares.
56. In the case of *SNK v MSK & 5 Others* [2015] e KLR the Court of Appeal reversed a decision of the High Court ordering that certain properties owned by a limited liability company be transferred to the benefit of the wife and the children of the marriage. The Court faulted the Judge of the High Court for failing to give due regard to the settled principle of company law in *Salomon v Salomon* [1897] AC 22 as to the separate legal personality of a company distinct from its shareholders and directors.
57. As such, shares owned by the Respondent in the company cannot be construed as matrimonial property and be distributed under the principles set out in the Matrimonial Properties Act as the said property belongs to the company and the applicant did not prove any contribution direct or otherwise towards the acquisition of any shares of the company by the respondent.
58. LR.No. Gongoni Settlement Scheme/2335 (Property at Kilifi County), the applicant submitted that this land was bought in the year 2016 for a sum of Kes. 330,000.00 and registered in the name of the



- respondent though from the proceeds of the family business. Apart from noting that the land was bought at the said amount, the applicant did not prove any direct or indirect contribution towards the acquisition of the same as the sale agreement dated 25.07.2016 showed the name of the respondent and not that of the applicant. She did not specify from which family business the money was obtained.
59. In regards to KCC 427A and KCR 628 E it was not controverted that the said motor vehicles were acquired during the pendency of the marriage between the parties herein. However, the applicant claimed that she single-handedly acquired the vehicles through a loan obtained from her Sacco. Although there was no proof of that loan, the respondent did not adduce any evidence on how he acquired the two motor vehicles. In that respect, I will find that they acquired the two motor vehicles through joint effort hence share them equally in the ratio of 50%:50%.
60. In reference to Proway Trading Ltd (50 Shares), Wintouch Ltd (200 Shares), Shoreline Properties Ltd (500 Shares) and Edafos Properties Ltd and Bazooka Fast Foods (500shares), the applicant submitted that the same were companies created and run from the proceeds of the family businesses and the shares held in the name of the respondent should therefore be distributed equally between the parties herein. The respondent submitted that Bazooka Fast Food is a family business co-owned between him and his wife and that the same was started after the applicant and him had separated; and Edafos Properties Ltd being a startup company co-owned jointly with two friends and colleagues and the same is not a family business as alleged.
61. On Bazooka Fast Foods Ltd (500 Shares) and Shoreline Properties, the court has perused the records and finds that the said companies were registered sometime on 05.07.2020. and 05.07.2020 respectively.
62. It is also not controverted that the parties herein separated and ceased living together since June, 2019 as a result of irreconcilable differences that existed between them. The claim that the properties were obtained using family resources was not substantiated. There was no proof of the specific family resources that were used to fund them. As a consequence, it is my finding that the said companies having been formed after the separation of the parties herein, the same did not form part of matrimonial property.
63. Regarding Proway Trading Ltd (50 Shares), Wintouch Ltd (200 Shares), Edafos Properties Ltd, the same were registered on 18.04.2018, 25.04.2018 and 24.08.2017 respectively. The principle on a limited liability company applies as already discussed above. Therefore, the shares owned by the Respondent in the company cannot be construed as matrimonial property and be distributed under the principles set out in the *Matrimonial Property Act*. The Applicant has not proved that she contributed in monetary or non-monetary terms towards the acquisition or development of the property, or that she bought any shares in the company or even supported the respondent in acquiring his shares.
64. Touching on Insurance Policy Number 026/CEA/071306 at ICEA Lions Assurance Company amounting to Kes. 302,686.00 as an investment cover for the sum Kes. 1,085,552, the applicant sought the same to be shared equally on grounds that the same was paid for from the family proceeds. The respondent reiterated that the same was his life insurance policy paid for from his own funds. The applicant did not produce any evidence to show that she made any direct contribution to the personalized insurance cover.
65. As regards Shares in Legal Firms held by the respondent, the applicant contended that the same be shared equally by the parties. The respondent in opposing the same deponed that the applicant is a counsel working under the ODPP and therefore, there was no way she could have worked and or



- contributed to the said law firms. Further, he stated that he had one Nick who acted as his assistant and therefore, the applicant did not indirectly contribute to the said law firms.
66. It was not controverted that indeed, the applicant was working and still works at the office of the ODPP while the respondent has been in private practice. It was thus incumbent upon the applicant to adduce evidence to support her claim that despite working as a prosecution counsel, she involved herself in the establishment and operation of the said private law firms. I say so for the reason that the respondent adduced evidence in form of receipt and a tenancy agreement to support his averments of being responsible for the payments of rent for the office law firm. As such, I find that nothing tangible was placed before the court to support such averments. In any event, as a civil servant she could not be allowed to engage in legal practice while serving in a public office.
67. Regarding the alleged family accounts and or closure of accounts held in the names of various law firms, the same was too general and lacking in specificity. Accounts held in the names of law firms to which the applicant was/is not a partner cannot be a subject of these proceedings. The applicant has no interest in law firms where she does not practice. As to the accounts associated with alleged family business, she did not specify the family business from which the alleged income was generated with her direct or indirect contribution. I do not find merit in this claim.
68. Having considered the totality of the evidence on record and the submissions thereof, the only properties that qualify to be matrimonial property in these proceedings for distribution are;
- i. KCC 427A and KCR 628 E acquired during the subsistence of marriage and therefore matrimonial property to be shared equally in the ratio of 50%:50%.
  - ii. LR. No. Gongoni Settlement Scheme/2335 (Property at Kilifi County),
  - iii. 1-acre unsurveyed piece of land at Mwakirunge with 25 pigs; plant and equipment and Trees and vegetables.
69. Having already found that the applicant did not prove that she made any direct contribution to the acquisition of the said matrimonial property listed above save for the two mentioned motor vehicles, it is still not lost in my mind that both the applicant and respondent were married for some time as already shown elsewhere in this judgment and that all were involved in different works. It is unfortunate that the applicant could not account for her earnings thus vindicating the respondent's claim that she may have had her investments unknown to him.
70. It was not controverted that indeed the union between the two parties bore a child and it could therefore be safely stated that there was indirect contribution from the applicant towards the realization of the properties herein and that while the applicant was busy nursing the baby, the respondent was enabled an opportunity to invest. In any event, companionship is a contributing non-monetary factor which cannot be ignored completely.
71. In view of the above holding, I find that the applicant fairly is entitled to 30% against the respondent's 70% share in the two properties listed as matrimonial properties in paragraph 70 herein above i.e LR. No. Gongoni Settlement Scheme/2335 (Property at Kilifi County) and 1-acre unsurveyed piece of land at Mwakirunge with 25 pigs; plant and equipment and Trees and vegetables.
72. The two motor vehicles and two landed properties can be subdivided and shared in the stated ratio and if not possible, the same be valued by a mutually agreed valuer and then sold and proceeds thereof shared out accordingly. Either party shall be at liberty to buy out the share of the other on priority basis. Regarding costs, I take note that this is a family matter hence each party shall bear own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF OCTOBER 2023

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J.N. ONYIEGO

JUDGE

