



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL SUIT NO. 6 OF 2019 (OS)
IN THE MATTER OF MATRIMONIAL PROPERTY ACT 2013

BETWEEN

SNM.....PLAINTIFF

-VERSUS-

DWM.....DEFENDANT

JUDGEMENT

Introduction

1. The Plaintiff and the Defendant were until their union was dissolved on 13th June, 2018 husband and wife gotten married in the year 1994 under the Kikuyu customary law which marriage was later solemnized under the *African Christian Marriage and Divorce Act* (Repealed) on 6th December, 2008. As a result of the said union, the parties had two issues of the marriage.

2. By an originating summons dated 13th February, 2019 supported by his affidavit sworn on 7th February, 2019 the Plaintiff seeks the following orders:-

a. A declaration be issued that all the under listed properties which are jointly registered in the name of the Plaintiff and Defendant are owned jointly by the Plaintiff and the Defendant;

- i. Mlolongo Phase 2A Plot No.[...] Mavoko Land Development Company Limited**
- ii. Mlolongo Phase 2B Plot No.[...] Mavoko Land Development Company Limited**
- iii. Motor vehicle No.KBB [...] (Toyota Hiace Noah)**

b. The joint ownership in respect of MLOLONGP PHASE 2A PLOT NO.[...] Mavoko Land Development Company Limited and PLOT NO.[...] Mavoko Land Development Company Limited be severed and that the same be held by the parties herein as ABSOLUTELY.

c. Alternatively an order do issue that parcel of land known as MLOLONGO PHASE 2A Plot No.[...] Mavoko Land Development Company Limited be sold and proceeds divided taking into consideration of;

- i. Mlolongo Phase 2A Plot No.[...] Mavoko Land Development Company Limited**
- ii. Mlolongo Phase 2B Plot No.[...] Mavoko Land Development Company Limited**
- iii. Motor vehicle No. KBB [...] (Toyota Hiace Noah)**

d. An order do issue declaring that the Defendant is accountable to the Plaintiff in respect of all the income derived from the said properties.

e. This Honourable court be pleased to declare that the disposal of Motor Vehicle No. KBB [...] (Toyota Hiace Noah) was done without the Plaintiff's consent and that the Plaintiff is entitled to a 50% share of the proceeds;

f. This Honourable court be pleased to order that the rental proceeds be deposited in a joint account and the same be shared equally between the Plaintiff and the Defendant.

g. An order do issue declaring that the Defendant is accountable to the Plaintiff in respect of all the income derived from the said properties.

h. This Honourable court be pleased to order that the properties and the income aforesaid be settle in proportions aforesaid or as the court may order

i. The costs of the Summons be provided for.

3. The Originating Summons is based on the following grounds:-

a. The properties set out herein above were acquired by the joint efforts of the Plaintiff and Defendant during the course of their marriage.

b. The said properties are registered in jointly in the names of the Plaintiff and Defendant.

c. The monetary contribution towards the acquisition of the two (2) parcel of land and the motor vehicle registration number KBB 785L mentioned above was done by the Plaintiff single handedly.

d. The Defendant has been in occupation of the said parcels of land from the year 2011 and has received rental income from the said parcels of land without remitting to the Plaintiff his rightful share.

e. Though the parties herein were married, the union between the Plaintiff and Defendant has since been dissolved.

f. It is in the interest of justice that the orders above be granted by the court.

Plaintiff's case

4. In his supporting affidavit, the Plaintiff averred that the suit properties were acquired through a joint effort and contribution with him sourcing finances from KEMRI Sacco loans, personal loans from Standard Chartered Bank, Kenyatta Avenue Branch and gratuity which he was paid upon resigning at [Particulars Withheld]. According to him, he took a loan of Kshs. 600,000.00/- from KEMRI Sacco which he used to construct rental houses in Plot No.66. While the Defendant has received rents of more than Kshs 11,000,000.00 from the said properties, he has never received income therefrom since 2011 despite the fact that he is taking care of the needs of the children. Further, without his consent, the Defendant sold motor vehicle registration KBB [...] whose proceeds he ought to be entitled to 50% share.

5. The Plaintiff lamented that unlike the Defendant, he was staying in a rented single family home paying an equivalent of Kshs 70,000/= monthly rent while the Defendant who is staying in the matrimonial home is solely receiving the rental income from the houses he built.

6. It was the Plaintiff's prayer that the ownership of the aforesaid properties be severed in which he should retain Mlolongo Phase 2A Plot No.[...] and in the alternative proceeds of sale for Plot No.[...] ought to be shared unequally for the reason that the Defendant has not reimbursed the rental income and remitted proceeds of motor vehicle KBB [...]. He also implored court to take into consideration the value of Mlolongo Phase 2A Plot No.[...] which he stated can be retained by the Defendant.

7. In his Supplementary affidavit sworn on 1st November, 2019 and filed on 12th November, 2019, it was deposed by the Plaintiff that the matrimonial properties were mainly acquired through his own financial contribution and that that he single-handedly serviced the loans with the Defendant making no contribution towards their acquisition and subsequent construction. He denied that he jointly owned a *matatu* with the Defendant between 2003 and 2004 but asserted that he paid Kshs. 30,000.00/- to enable the *matatu* be allowed to ply Kangemi-Nairobi route and Kshs.25,000.00/- to enable it ply the new route of Nairobi Imara Daima-Mukuru. The said vehicle was later sold as scrap metal at Kshs. 50,000.00/-

8. The Plaintiff denied that the Defendant had a shop known as *Anointed Cereal Shop* and averred that the Defendant never operated a tailoring shop in Kasarani Sportsvue and Mwiki as alleged. He termed the allegation by the Defendant that she owned or operated a hairdressing business between 1999 and August 2011 as unfounded.

9. In his oral evidence, the Plaintiff who testified as PW1 stated that he was staying in Boston where he was working in the Public Health Department having left Kenya on 30th August, 2011. While relying on his affidavits filed in support of his case, the Plaintiff explained that they have four children namely; **CMM**, **DWM**, **CNM** and **JWM**. However, they divorced as a result of matrimonial differences and exhibited the decree absolute. According to him, they acquired three properties during the subsistence of the marriage being Mlolongo Phase 2A Plot No.[...] under Mavoko Land Development Company Limited, Mlolongo Phase 2B Plot No.[...] under the same company and Motor Vehicle No. KBD [...], Toyota Hiace Noah (hereinafter referred to as "Noah").

10. It was his evidence that because he contributed most of the finance to buy and develop the same, the properties have generated good annual income but he has never gotten any himself. It was his wish that he gets Plot [...], the matrimonial home, which is bigger while the

Defendant gets Plot [...]. The said property on Plot [...] also has a shop and two rental houses which comprises of one bedroom and two bedrooms. He testified that there were other two rental houses which comprise of two bedrooms each. According to him, in 2011, the rentals accruing therefrom was Kshs. 80,000.00/- when fully occupied.

11. Plot No.[...] is smaller measuring 40 x 60 as opposed to 40 x 80. The plot has one gate, septic tank, two houses, one bedroom, shop and 3 to 2 bedroom houses. When he started renting out the same, it was fetching Kshs. 40,000.00/- when he started renting the houses.

12. It was his evidence that when they started renting out the houses, they decided to open a separate bank account whose particulars they gave to the tenants but the tenants could also pay the Defendant through Mpesa or cash and issue special receipts for each of the houses. The Plaintiff insisted that he has never received even a single cent from the Defendant for a period of 10 years though he admitted that the rents were meant to take of the family expenses in his absence.

13. Though he was meant to come back to Kenya on 20th November, 2014, he was unwell and only returned in 2014 and when he did so, there were no further developments except two containers outside Plot No.[...] and this was despite the fact that he sent the Defendant Kshs. 1,500,000 in September, 2013. He reiterated that he stays in a single family house paying a rent of 700 US \$ per month. The Plaintiff denied that the Defendant sold the vehicle to obtain the Visas for the children. According to him, he bought the vehicle from NIC Bank for which he paid Kshs 600,000/-.

14. Upon getting the green card he started the process for the Defendant and the children and they agreed that the vehicle be sold in good time and in order to do so, he signed the transfer forms for the Defendant in February, 2014. According to the Plaintiff, the Defendant sold the vehicle for Kshs 450,000.00 though in October, she had told him that she insured the said vehicle for Kshs 53,000.00 and he sent her 640 US Dollars for the said purpose. However, upon his arrival 2 weeks later, he found that the vehicle had been sold and the Defendant informed him that the money was used to pay the fees. This was despite the fact that it was him who sent the money for C's fees. He insisted that he was the one who acquired Plot No. [...] using his own money and paid for it by a Banker's Cheque.

15. In cross-examination, the Plaintiff was referred to his supporting affidavit in which he deposed that the properties were acquired through joint contribution and that they opened a bank account. In response he stated that due to logistics, the Defendant opened the account in her name though that was not agreed. He disclosed that the last time he was on the property was in 2015 when he went to show the family how to go to the Embassy for Green Card. However, as they disagreed on the issue of the properties he cancelled the issue of the Green Card. He reiterated that the houses were fully occupied by the time he left though the receipts were left in the Defendant's custody including the evidence for purchase of materials by the time he was leaving for the United States. According to his evidence, he sent 2500 US Dollars for Catherine's fees. He however insisted that he had exhibited evidence of having taken the loans.

16. He stated that after the divorce he stopped sending money to the Defendant though he would pay fees through other people as well as through Mpesa to the girls to make payments themselves.

Defendant's case

17. On her part the Defendant swore the Replying affidavit dated 13th March, 2019 and filed on 15th March, 2019 in which she asserted that she contributed to the acquisition of the matrimonial properties, management and the overall development of the properties with minimal help from the Plaintiff apart from contributing the initial capital. According to her, she used proceeds from rental income earned from the properties to develop and manage the properties and to cater for children school fees and family expenses while the Plaintiff was away in the United States.

18. It was the Defendant's desire that since she has resides with the children in the matrimonial house built on Plot No.[...] for a long time, it is in the best interest of the children that she should retain it with the children Plot No.[...] o avoid relocating to a different area. She proposed that the Plaintiff retains Plot No.[...] whose value has appreciated as a result of her efforts to construct and manage the properties therein.

19. In her counterclaim the Defendant proposed that the properties be severed to enable her hold and manage her separate property.

20. In response to the Supplementary Affidavit, the Defendant swore a further affidavit on 17th February, 2020 denying that the Plaintiff solely acquired and developed the properties and asserted that she utilized the proceeds from her business towards the acquisition and development of the matrimonial properties. According to her, she contributed Kshs. 100,000.00/- while the Plaintiff contributed Kshs.180,000.00/- towards the purchase of the *matatu* which she did manage its operations. In so doing, she paid Kshs. 15,000.00/- to be allowed to ply Kangemi-Nairobi route. According to her to the Plaintiff did not use his entire salary, gratuity and loans to acquire and develop the properties since there were other family expenses that were to be taken care of.

21. The Defendant asserted that *Anointed Cereal Shop* was her business that she operated until 2018 when she rented it out to another person who was operating an M-pesa shop and it was her savings from the shop income that enabled her to contribute towards the acquisition and subsequent development of the matrimonial properties. The Defendant averred that she operated mobile hairdressing services by going to clients' home and locations of their choice hence lack of a business premises does not negate that she operated a hairdressing business. Referring to the Agreement for sale attached to the Plaintiff's Supporting Affidavit, the Defendant stated that this buttresses her assertions that the purchase of Plot No.[...] was done jointly. While conceding that the Plaintiff paid Kshs. 27,000/- for her daughter, **DWM**, to undertake a computer course, the Defendant insisted that all the income generated from the matrimonial properties was used towards the development and maintenance of the children and reiterated that the court should give her Mlolongo Phase 2A Plot No. [...] while the Plaintiff is granted Mlolongo Phase 2A Plot No.[...].

22. In her oral evidence the Defendant reiterated the foregoing and added that she was a business lady who was in the business of developing and renting out properties and she was staying on Plot [...] Mlolongo. In her evidence the purchase price for Plot No. [...] was Kshs

490,000/- out of which she contributed Kshs 190,000/-. As for Plot No. [...] she contributed Kshs 210,000/- towards its purchase. It was her evidence that she was involved in various business including commercial farming wherein she leases plots, cultivate the same and sell the produce apart from running her said cereals shop and hairdressing.

23. It was her evidence the in 200o, the Plaintiff purchased a plot in Kasarani and they developed it but due to insecurity they decided to leave that place. It was however her evidence that she was the one paying rents for the place they moved to. In the meantime, the Kasarani plot was sold by the Plaintiff. Since she was in Table Banking, the Defendant saved some money and identified the two Mlolongo Plots and was the one who developed the same from her savings and supervised their construction. She insisted that the Plaintiff never contributed towards their development apart from paying the children's fees whenever he was in good mood. The Defendant denied that by the time the Plaintiff left for the United States.

24. According to her, she together with her children have always occupied Plot No. 52 as the matrimonial home and two of the children were born there and that is where the Defendant was carrying out her business from since the other businesses were not doing well due to the COVID 19 Pandemic and business competition. She testified that she mainly relies on rents and reiterated that it is her wish to continue staying in the said Plot No. [...] since she was still developing the same through support from Micro-Finance.

25. In her evidence the proceeds from the sale of the Hiace was utilised towards the payment of fees due to low income from the business and was with the consent of the Plaintiff for the said purpose. The Defendant stated that she got a buyer who proposed to pay for the same by instalments. As regards the Voxy, it was her evidence that it was bought by the money she got from Micro Finance and that she was utilising the proceeds of the rents, her loan and business income in developing the other units.

26. In cross-examination, the Defendant stated that Plot [...] was purchased from one Lucy and this was indicated in the agreement. She reiterated that while the purchase price was Kshs 490,000/- her contribution was Kshs 190,000/- which she paid in cash to the advocates but could not recall what the Kshs 300,000/- mentioned was for. Se however insisted that she was the one supervising the development and paying for the same since the Plaintiff was always travelling and was never in the county for long and never did any development. In her evidence, she started developing Plot No. [...] in 2005 but the progress was slow. She denied that they jointly developed the property and stated that she was developing the property from the completed rents. In 2012, Musomi Microfinance Bank Limited started granting her financial facilities. She further denied that the Palintff also contributed towards the construction of Plot No. [...]. According to her the first unit in plot [...] on the ground floor was completed in 2012 but some units were unoccupied.

27. The Defendant admitted that she never sent the Plaintiff any money since he left the country and that the Plaintiff would send money when he was in good mood. She conceded that the rents fluctuate between 100,000/- and Kshs 140,000/-. She denied that she took only two loans but averred that she had taken several loans and was still continuing with the construction of Plot No. [...] which was on the second floor.

28. In her evidence the Hiace vehicle was purchased by the Plaintiff. However, the Voxy which she bought after the said vehicle was sold in February 2014 she later sold towards the end of that same year and used the proceeds in development.

29. According to her, they jointly took out children's insurance policy but it was the Plaintiff who was paying Kshs 5,000/- towards the premium. She however learnt from the insurance that the said policy had a loan against it and she eventually got Kshs 372,000/- from the insurance after the Plaintiff authorised for its release which spent in VISA processing.

30. In support of her case, the Defendant called one **Thomas Mwangi Kamau**, who testified as DW1, on her behalf. In his affidavit filed herein, he deposed that he was involved in construction works for both individual and corporate clients with 38 years experience. According to him, she had known the Defendant since 2005 as the owner of 2 parcels of land known as Mlolongo Phase 2A Plot No. [...] and Mlolongo Phase 2A Plot No. [...] situated within Mlolongo Area in Machakos County.

31. According to him, between 2005 and 2019 he was retained by the Defendant to *inter alia* purchase building materials and undertake construction on the said parcels in phases. It was his evidence that Plot [...] comprises a three bedroomed matrimonial home, 4 rental houses and 2 shops on the Ground Floor with 5 rental houses on the first floor. In his said affidavit he set out in details the works carried out on the said Plot [...] between 2005 and 2017.

32. As regards Plot [...], it was his deposition that the same currently comprises 5 self-contained houses and one shop on the ground floor and 5 incomplete units on the first floor details of whose construction between 2007 and 2019 he set out. According to him, in the course of his work, he never interacted with the Plaintiff and he never played any part in the construction of the said properties.

33. In cross-examination, DW2 stated that he was a mason and confirmed that he got to know the Plaintiff when they were building a residential house in Mwiki at the time he was just a builder. It was his evidence that the person he mostly used to see was the Defendant though occasionally, the Plaintiff would also be present. At Mwiki he never purchased any materials. He was however informed by the Defendant they had another property at Mlolongo and they started its construction in 2005 during which time he would occasionally see the plaintiff oversighting the construction though the Defendant was the one supervising its construction and paying the workers. According to him, it was the Defendant who was actually overseeing the construction. On further questioning he stated the he would only see the materials being brought but would not know who was doing the actual purchase. They would simply make orders for the materials and the same would be brought on site. At times the Plaintiff would be present. In his evidence, he was unaware of the actual amount spent on the construction since he was only ordering for the materials and his job was simply to build and was not keeping the receipts.

34. While admitting that he was also the mason for Plot [...], he could not tell when it was completed though he could confirm that its construction started after Plot No. [...] but by the time of his testimony, it was still not completed. However, the construction for both properties was proceeding simultaneously. Though the Plaintiff would occasionally be present, it was the Defendant who was mostly present and who was doing the payments.

Plaintiff's Submissions

35. On behalf of the Plaintiff, the following issues were identified for determination:-

a. Are the suit properties Mlolongo Phase 2A Plot No. [...] and Mlolongo Phase 2B Plot No. [...] and Motor Vehicle Registration Number KBB [...] matrimonial properties?

b. What was the contribution of the Plaintiff and Defendant to the purchase and development of the suit properties?

c. How best should the suit properties be divided?

36. Regarding the first issue, it was submitted that pursuant to Section 6 of the *Matrimonial Property Act, 2013* for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties. In the instant case, the Plaintiff and Defendant, got married in 1994 under Kikuyu Customary Law and later solemnized their wedding on 6th December, 2008. That due to matrimonial differences their marriage was dissolved on 11th June, 2018 at Milimani Commercial Court in Divorce Cause No. 598 of 2015. From the evidence on record Mlolongo Phase 2A Plot No. [...], Mlolongo Phase 2B Plot No.[...].and Motor Vehicle Registration Number [...] were acquired in 2005, 2006 and 2010 respectively which was during the subsistence of the marriage. Further, the two parcels of land are jointly registered in the names of the Plaintiff and the Defendant. As such, the evidence at hand supports the assertions that all the suit properties were acquired in the course of the marriage.

37. As regards the issue of contribution, the Plaintiff relied on the definition of "contribution" in section 2 of the *Matrimonial Property Act, 2013* and relied on **Federation of Women Lawyers Kenya (FIDA) vs. Attorney General & Another [2018] eKLR** and **FMG vs. MNG [2019] eKLR**.

38. In the Plaintiff's submissions, he solely contributed to the purchase and development of the two parcels of land. He could not have foreseen the breakup of the marriage he thus registered the matrimonial properties in his name and that of the Defendant. It was his plan that the matrimonial properties would form a secure investment that would provide a regular and steady stream of income to support of his family. In his supplementary affidavit, the Plaintiff clearly illustrates and outlines various sources through which he contributed financially to the acquisition and development of the matrimonial properties. He was an employee at [Particulars Withheld], throughout the subsistence of their marriage. At the time his resignation in the year 2011, he was earning Kshs. 216,600/=. As is evidenced by copies of Contracts of service exhibited. While still an employee he received, Kshs. 1,350,000/= in September, 2008 and Kshs. 775,000/= in the year 2011 as gratuity. Which monies he channelled to the development of the matrimonial properties. He took up loans through KEMRI Sacco, to the tune of Kshs. 2.5 million, which he used on the construction of the matrimonial property and the purchase of motor vehicle registration number KBB [...], which he purchased in the year 2010 at Kshs. 600,000/= from one **Christopher Ngure Gathina**. In support of the same he attached his Sacco members' statement. He as well took up personal loans totalling to Kshs. 1,240,000/= which monies he invested in the acquisition and development of matrimonial properties. In support of the same he attached his Sacco members' statement. He purchased the parcel of land known as Mlolongo Phase 2A Plot No. [...], at Kshs. 400,000/= from one **Lucy Waihera Waweru**, in proof of the same he attached a copy of the sale agreement, dated 12th August, 2005.

39. Regarding the evidence of contribution by the Defendant, it was submitted that in the year, 2003 and 2004, the parties herein jointly owned a *matatu* which would earn approximately Kshs. 3,000/= per day. From the evidence, which *matatu* business collapsed before the acquisition of the matrimonial properties as it was not making any profits. As for the grocery and tailoring shops, it was submitted that the single business permit which was relied upon was issued in the year 2016, which was during the divorce proceedings. It was therefore submitted that the Defendant failed to prove her assertions that she had a grocery shop during the subsistence of the marriage as no evidence was placed before this Court in proof of the same. Regarding the hair dressing business, the only evidence produced was that the Defendant completed a hair dressing course but not that she engaged in such business.

40. As for the income from the rental income from the container shops which she has erected outside Mlolongo Phase 2A PLOT NO. [...], it was noted that from the annexed receipts, they are dated between 2014 and 2016, which time the construction on the two parcels of land had been completed hence during the acquisition and development of the properties the containers were non-existent. Regarding the loan of Kshs. 400,000/= from Musomi Microfinance Kenya Limited to supplement the development of second floor, it was submitted that no evidence has been placed on record on whether the second floor has been completed. In any event, the loan was disbursed after the construction of the ground and first floors. Despite receiving the rental income from the properties, the Defendant to date has failed to reinvest part of the proceeds towards the completion of the rental units on the second floor and has made minimal financial contribution towards completing the second floor.

41. In support of his submissions, the Plaintiff relied on **T M W vs. F M C [2018] eKLR** and submitted that similarly in this case, there is no cogent evidence that has been placed before this Court to support the Defendant's claim that she operated businesses through which she contributed financially to the acquisition and development of the matrimonial properties. She failed to prove the figures quoted therein and in fact admitted during cross- examination that she did not come up with the said figures. The court was therefore urged to disregard the particulars of contribution in toto.

42. It was submitted that from the evidence on record, the Plaintiff was in formal employment and contributed directly through financial input as demonstrated by his sources of income and acquisition of loans for acquisition and development of properties and he is thus entitled to the share of the properties. On the other hand, the Defendant failed to prove monetary contribution on a balance of probability as such it cannot be said that she made monetary contribution, from the proceeds of the businesses which were non-existent.

43. Though the Plaintiff appreciated that under section 2 of the Act contribution includes domestic work and management of the matrimonial home, child care, companionship, management of family business and property and farm work, it was submitted that the Defendant admitted to have received the proceeds of the sale of the Motor Vehicle Registration Number, KBB [...] to take care of the children and house

expenses. Contrary to her assertions, the Plaintiff has placed before this Court cogent evidence in form of statements and school deposit slips to prove that, he has been providing for the family especially paying university fees for his children. Further, the Plaintiff has made non-monetary contribution by providing overall oversight of the construction. He was fully involved in every phase of the construction of the matrimonial properties from 2005 to 2011. He purchased building materials (machine-dressed stones from Thika, ballast from Syokimau, sand, steel bars, high quality paint, flash doors, and utilities) and water tanks. He applied for electricity from KPLC, bought all the electrical materials, and installed power meters to all the rental units, and the matrimonial home.

44. While acknowledging that while the Plaintiff was tirelessly working to provide a good life for his family, the Defendant took care of the children and over saw the management of the rental houses, it was submitted that this is not a good reason, to enjoy the benefits of his hard work through using the rental income for her personal use, since the same is not accounted for, to the exclusion of the Plaintiff who is yet to earn even a single coin from his investment that he made in his economical productive age. It is to say the least unfair and undue-advantage as against the Plaintiff.

45. It was therefore submitted that it is clear that the Plaintiff has made non-monetary contribution and is entitled to the share of the matrimonial property and the proceeds thereof which the Defendant has failed to do so since the year 2011.

46. As regards the third issue of how the properties ought to be divided, reliance was placed on section 7 of the Act and also relied on the decision of the Court of Appeal in **P N N vs. Z W N [2017] eKLR**.

47. In this case it was submitted that it is not in dispute that, the matrimonial properties herein were acquired during the subsistence of the Plaintiff's and Defendant's marriage. Having divorced there is need to ascertain the beneficial share of the Plaintiff in the said properties since the Defendant has since the year 2011, received the rental income from the two (2) parcels of land and utilized the same to the exclusion of the Plaintiff. She has adamantly refused to account for the rental proceeds and the sale proceeds of motor vehicle registration number KBB [...]. The Court was urged to take into account that the Plaintiff;

- a. Solely provided the large financial resources for the acquisition and development of the matrimonial properties.
- b. Invested his entire earnings and gratuity after working for 17 years at the [Particulars Withheld] to acquire and develop the matrimonial properties.
- c. The Defendant has failed to provide evidence of her monetary contribution towards the acquisition and subsequent development of the matrimonial properties from 2005 to 2011.
- d. Made significant non-monetary contribution by providing overall oversight of the construction by being fully involved in every phase of the construction of the matrimonial properties from 2005 to 2011 and purchasing building materials (machine-dressed stones from Thika, ballast from Syokimau, sand, steel bars, high quality paint, flash doors, and utilities) and providing for his children.
- e. The Defendant has earned millions of shillings in rent from the matrimonial properties, but she has diverted most of it for her personal use and to the exclusion of the Plaintiff. With the Defendant's confirmation that she received a rental income of Kenya Shillings 100,000/= to 150,000/= per month, the same sums to over Kenya Shillings 12,000,000/= to date from the period the Plaintiff left for the United States of America.
- f. The Plaintiff does not own a house in America but is a tenant paying rent of approximately Kenya Shillings 80,000/= for a single room.
- g. The Plaintiff is suffering from cancer of the eye and uses a substantial amount of his income for treatment, including annual medical checkup, purchase of special eye glasses, and specialized care and regular replacement of the prosthetic (fake right eye).
- h. The Plaintiff has never failed to cater for the children needs and despite his personal health predicament and that he has never received any rental income, he has faithfully sent monies to cater for this children needs.

48. According to the Plaintiff, he is entitled to equal benefit of the matrimonial properties in light of the financial and non-financial contribution he made in acquiring the properties, seeing that the Defendant has greatly benefited from the rental income and sale proceeds of the motor vehicle to the exclusion of the Plaintiff. In this regard, the Plaintiff relied on the case of **M W G v W P G [2016] eKLR**.

49. With respect to the ratio of contribution the Plaintiff relied on section 14 of the Act and cited the case of, **T M W v F M C [2018] eKLR**. According to the Petitioner, in this case though the matrimonial properties are jointly registered in the name of the Plaintiff and Defendant, it does not mean the properties should be divided equally but equitably depending on the contribution of each spouse. It is clear that the Plaintiff contributed greatly through investing his entire earnings and gratuity after working for 17 years at the [Particulars Withheld] to acquire and develop the matrimonial properties. As such, the division should be done equitably and not equally and reliance was placed on the case of **U M M vs I M M [2014] eKLR**.

50. Under the circumstances and in light of the above mentioned case, it was submitted on behalf of the Plaintiff that The ownership of the said matrimonial properties be severed, the Plaintiff retains ownership of parcel of land known as Mlolongo Phase 2A, Plot Number [...]. The Defendant be granted Mlolongo Phase 2B, Plot Number [...]. That in the alternative the parcel of land known as Mlolongo Phase 2A Plot No-[...] Mavoko Land Development Company Limited should be sold and the proceeds of the sale shared. However, sharing of the proceeds of the sale of the said property should not be done equally (50%:50%), but equitably. The Defendant should reimburse the Plaintiff the rental income that has accrued to him over the period and his entitlement to the proceeds of the sale of the motor vehicle.

Defendant's Submissions

51. The Defendant's counsel submitted that since both parties produced documents showing that all the properties in issue were acquired during the subsistence of their marriage, pursuant to section 6 of the Court, the Court was urged to find that the 2 properties alluded to above constitute matrimonial property that can then be the subject of distribution in the manner envisaged under the law following dissolution of the parties marriage *vide* Milimani Divorce Cause No. 598 of 2015.

52. As regards the issue of account for the rental income and proceeds from the sale of the motor vehicle registration number KBB [...], it was submitted that there is a dearth (sic) of authority governing the principles that the Court should take into account before granting an Order requiring any party to account for money that either of them may have received from the matrimonial property during the subsistence of their marriage. According to the Defendant, in order to sustain a claim requiring the Court to order distribution of income derived from matrimonial property, it is incumbent upon the party making this claim to produce evidence upon which the Court can base its decision. In support of this position, the Defendant relied on **Z.W.N vs. P.N.N [2012] eKLR** and **M A A v A R [2018] eKLR Matrimonial Cause No.1 of 2017** and submitted that in the instant case the Plaintiff has failed to discharge the burden imposed upon him by law to warrant issuance of the Orders seeking *inter alia* to compel the Defendant to account for the proceeds from the sale of the motor vehicle and rent earned over the years from the 2 properties or for the Court to factor the same into its decision on how these properties would be shared between the parties as he has sought for the following reasons.

53. According to the Defendant, the Plaintiff's assertion that rental income derived from the 2 matrimonial properties amounted to approximately Kshs. 100,000/ per month or any other amount for that matter for the past 10 years is based on pure conjecture since he has not adduced audited accounts to substantiate his claims. Additionally, as the Defendant rightfully maintained, he was not involved in the day today management of the properties to enable him authoritatively state the amount of rent that the properties were earning for the period when he was in Kenya and when he eventually relocated from Kenya in the year 2011.

54. Secondly, it was submitted that the Plaintiff has not adduced any evidence to substantiate his claims that the Defendant had misappropriated the proceeds from the sale of the motor vehicle bearing registration number KBB [...], rental income derived from the 2 properties or failed to account for the same as alleged by the Plaintiff or at all. To the contrary, as the Defendant testified, the rental proceeds were not only used to maintain the 4 issues of their union in the manner envisaged by the parties but also to develop and maintain the 2 properties during the period and in the process enhanced their net value to approximately Kshs. 41,600,000/ as evidenced by the valuation reports dated 16th July 2019 that were produced in evidence by the Plaintiff. Additionally, the decision to sale the motor vehicle bearing registration number KBB [...] was according to RW1's testimony initiated by the Plaintiff to enable them defray the costs of their children's school fees and general upkeep owing to the fact that the 2 of them were at the time not doing well financially. The Defendant's assertions that the proceeds from the sale of this motor vehicle were actually applied in the manner that was mutually agreed between the parties, it was contended, has not been controverted by any evidence to the contrary. In any event, the Plaintiff has failed to adduce any evidence to substantiate his assertions that he at any time voiced his displeasure about how the proceeds from the sale of the motor vehicle were misappropriated or misapplied through correspondence, text messages or any other means. The fact that this issue is being raised for the first time in the pleadings is clear evidence of the fact that there is no truth to these assertions and we urge the Court to so find.

55. It was therefore submitted that in the absence of audited accounts and proof of misappropriation of the proceeds from the sale of the motor vehicle and rental income, the Plaintiff has failed to discharge the burden imposed upon him by law and consequently, there is no basis for the Court to grant him the reliefs sought for in relation to that aspect.

56. As regards the **distribution of the matrimonial property, the Defendant relied on the relevant statutory provisions and authorities such as F.S vs. E.Z [2016] eKLR and DV vs. PB [2019] eKLR**, and submitted that what is evident from the provisions of the Act and the decisions alluded to above, is that the Court in apportioning matrimonial property between spouses upon dissolution of their marriage is enjoined to take into account their respective monetary and non-monetary contributions towards their acquisition, management and improvement.

57. According to the Defendant, she clearly demonstrated that she was the one who identified the above parcels of land and even contributed funds towards their purchase resulting in the properties being registered in their joint names. To buttress the Defendant's averments that the 2 properties were indeed acquired through their joint effort and contribution, the Court was invited you to also take note of the Plaintiff's unequivocal admission in his Supporting Affidavit dated 17th February 2019, prayer (a) sought in the Plaintiff's Originating Summons and ignore his subsequent attempts in his Supplementary Affidavit dated 1st November 2019 to unprocedurally depart from his pleadings and deny the same.

58. It was therefore submitted that the Plaintiff has not adduced any evidence to rebut the presumption provided for in Section 14 of the Act that the properties are equally owned by the parties and the Court was urged to so find.

59. According to the Defendant, she testified that she made the following monetary and non-monetary contributions towards the overall development, improvement, management of the 2 parcels of land and caring for the family:

- a. She contributed financially towards development of the houses and shops erected on the 2 properties using proceeds derived from her farming and hairdressing businesses and loans obtained from table banking and Musoni Microfinance;
- b. She singlehandedly hired contractors and supervised the process of construction of the houses and shops erected on the 2 properties whose aggregate value based on the annexed valuation reports is now approximately Kshs. 41,600,000/- since the Plaintiff who was at the time working for [Particulars Withheld] had a very busy schedule that required him to travel outside the country for extended periods of time before he eventually relocated to the United States of America in the year 2011;
- c. She oversaw the day-to-day management of the 2 properties that entailed *inter alia* following up on payment of rent by tenants,

paying for the costs of various utilities-water, electricity, sewage extraction/disposal; &

d. Taking care of and bringing up the 4 issues of the union in the Plaintiff's absence.

60. My Lord, based on the nature of businesses that the Defendant was engaged in viz grocery, tailoring, hairdressing and farming, the Court was invited to take judicial notice of the fact that most proprietors of small scale businesses of these nature rarely keep formal records and will therefore not have documentary evidence to prove their involvement in these businesses and attendant revenues that they generate. Additionally, it is worth noting that the bearing in mind that the Defendant would not in her wildest imagination reasonably have foreseen dissolution of her marriage and the fact that she would in the course of these proceedings be required to produce evidence of her earnings and extent of her contribution towards acquisition of the matrimonial properties, she cannot be expected to have kept records for all her business activities, receipts for all income earned and expenses incurred in relation to the construction, maintenance of these properties and upkeep of the children. The absence of these records should therefore not form the basis of discounting the Defendant's account regarding her monetary contribution towards not only the acquisition but also the construction and improvements erected on the properties over the years.

61. As for the distribution of the properties, it was submitted that in determining what orders to issue, the Court should not only be guided by each party's contribution towards its acquisition and development but also by the period that either party has been occupation of any of the properties with the issues of the union and also the impact that this division is likely to have on them one of whom, **Joyce Wanjiku Muchohi** was born in the year 2010 and is still of tender years.

62. It was submitted that by dint of the provisions of Article 53(2) of the Constitution and Section 4 (2) of *Children Act*, this Court is enjoined to take into account the best interests of the child in making any determination regarding distribution of the matrimonial properties between the parties. In this respect the Defendant relied on **M B O vs. J O O [2018] eKLR**, **PWK vs. JKG [2015] eKLR** and **F.S vs. E.Z [2016] eKLR** and contended that in the instant case the Defendant and her children have been living in Mlolongo Phase 2A Plot No. [...] since the year 2005 and it is the place that they all call home and where the Appellant still operates a container rental business. To destabilize the whole family that has occupied it for an aggregate of 15 years, forged friendships and developed fond memories by either selling the property or granting the same to the Plaintiff, it was submitted, would fly in the face of the decision in **M B O v J O O [2018] eKLR** that enjoins the court not to render a decision that would be manifestly unfair, contrary to human dignity and in the overall scheme of things render the Defendant and her children destitute.

63. Bearing in mind the duration that the Defendant and her children have occupied Mlolongo Phase 2A Plot No. [...], the best interest of the children coupled with her substantial monetary and non-monetary contribution towards the development and management of the properties that comprise matrimonial properties, it was submitted that the Defendant should be awarded Mlolongo Phase 2A Plot No. [...] and the Plaintiff Mlolongo Phase 2B Plot No. [...].

64. In the alternative, it was urged that bearing in mind the rebuttable presumption of equal interest/ownership arising where matrimonial property is registered in the joint names of the spouses, that is provided for under Section 7 of the Act, the Court should make a similar finding in this matter based on the decisions in **NWM vs. KNM (2014) eKLR** and **AKM vs. NNN [2019] eKLR** since in the present case, with each party giving competing versions regarding the extent of their contribution towards acquisition and overall development of the matrimonial properties, should the Court be unable to ascertain the actual extent of each party's monetary contribution then in exercise its discretion and as a measure of last resort, it should direct that they should be sold and each party given half share of the proceeds. Of particular importance in tipping this scale in favour of the Defendant is also the substantial non-monetary contribution that she made in the overall construction and management of the 2 properties which would have cost the parties colossal sums of money if other individuals had been hired to undertake these tasks.

65. It was otherwise submitted that the Plaintiff has not discharged the burden of proof imposed upon him by law that would warrant the Court granting him the orders sought in his Originating Summons (OS) dated 13th February 2019. He has failed to rebut the presumption of equal interest/ownership of the 2 properties arising from the fact they are registered in their joint names and to substantiate his spurious allegations of misappropriation of the proceeds of rent derived from the 2 properties and sale of the motor vehicle bearing registration number KBB [...] by the Defendant.

66. Consequently, he is not deserving of this Honourable court's reliefs and it was therefore urged that this Court in exercising its discretion and guided by the principles enumerated hereinabove do find and order in favour of the Defendant in the following terms:

a. That the Plaintiff be awarded Plot No. [...] whose value has substantially increased as a result of the Defendant's single efforts in constructing and managing it while he was away

b. That the Defendant be awarded Plot No. [...] as this has been the only place where her children and herself have called home for more than 10 years.

c. That no order be issued requiring the Defendant to account for the proceeds from either the sale of motor vehicle bearing registration number KBB [...] or the rental income derived from both properties.

d. That in the alternative and without prejudice to the foregoing Plot No. [...] and [...] be sold and the proceeds therefrom divided equally between the parties.

e. That each party bears its own costs.

67. According to the Defendant, since she has discharged the burden of proof imposed upon her and proved that she made both a monetary and non-monetary contribution towards acquisition, development, management of their matrimonial properties and taking care of the family, it is just and equitable that the Court makes its determination in her favour as prayed for above since this will not occasion any prejudice to

the Plaintiff.

Determination

68. I have given due consideration to the pleadings, the evidence on record and the submissions made on behalf of the parties herein. The matter before me is a dispute regarding the distribution of matrimonial property under the provisions of the *Matrimonial Property Act, 2013*, which is an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. According to section 2 of the said 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.**

69. Section 6 of the said Act defines “matrimonial property” as meaning:

- (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.**

70. However, section 7 thereof provides that:

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

71. On the other hand, section 14 of the Act provides that:

Where matrimonial property is acquired during marriage—

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

72. In determining this suit, this Court will therefore be guided by, *inter alia*, the above legal provisions.

73. In this case it is not in dispute that there was a legal marriage existing between the Plaintiff and Defendant and the same was dissolved in 2018 vide Divorce cause number 598 of 2015. By the time of the dissolution of the said marriage the parties herein had four children and they acquired some properties. I agree with the Plaintiff that the issues that fall for determination herein are as follows:

- a. Whether Mlolongo Phase 2A Plot No. [...] and Mlolongo Phase 2B Plot No. [...] and Motor Vehicle Registration Number KBB [...] are matrimonial properties.**
- b. Whether the Plaintiff and Defendant contributed to the purchase and development of the suit properties.**
- c. If the answer to (b) is in the affirmative, what were their respective contributions.**
- d. What is the mode of distribution of the said properties.**
- e. Whether the Defendant ought to account for the proceeds of the rents and disposal of the said properties.**
- f. Who should bear the costs of the suit.**

74. As regards the first issue, going by the pleadings, it is not in dispute that Mlolongo Phase 2A No.[...], [...] Mavoko Land Development Company and motor vehicle registration number KBB [...] were jointly owned by the Plaintiff and Defendant. Section 6 of the said Act

defines “matrimonial property” as meaning, *inter alia*, any immovable and movable property jointly owned and acquired during the subsistence of the marriage. From the evidence on record, it is clear that all the three properties which are the subject of this suit were acquired during the subsistence of the marriage. From the pleadings it is clearly stated that the same were jointly registered in the names of both parties. Accordingly, I have no hesitation in finding that Mlolongo Phase 2A Plot No. [...] and Mlolongo Phase 2B Plot No. [...] and Motor Vehicle Registration Number KBB [...] are matrimonial properties of the Plaintiff and the Defendant herein.

75. As regards the issue whether the Plaintiff and Defendant contributed to the purchase and development of the suit properties, from the affidavits in support of and in opposition to the Originating Summons, both parties recognised that they both contributed to the acquisition of the said properties. Though the Plaintiff in his evidence alleged that no contribution was made by the Defendant, in his supporting affidavit, he averred on oath that the suit properties were acquired through a joint effort and contribution. It is therefore clear that notwithstanding the denial by the Plaintiff in his oral evidence that the Defendant never contributed to the acquisition of the said properties, she actually did contribute to the same.

76. That leads me to the issue of their respective contributions. According to the Plaintiff, his source of finances were from KEMRI Sacco loans, personal loans from Standard Chartered Bank, Kenyatta Avenue Branch and gratuity which he was paid upon resigning at [Particulars Withheld]. He produced evidence of the loans he took as well as the said gratuity. It is however important to note that whereas a person’s source of income may be evidence of his or her capability to contribute towards the purchase and development of a property, it does not necessarily follow that the person did actually make the said contribution. As rightly held in **Federation of Women Lawyers Kenya (FIDA) vs. Attorney General & another [2018] eKLR**;

“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.”

77. That is also my understanding of the holding in the case of **FMG vs. MNG [2019] eKLR**, where it was held that;

“...no single party will enter into a marriage relationship with nothing and leave with more than he or she contributed during the subsistence of the marriage. In other words, courts must be vigilant in interrogating the actual role played by each spouse in a marriage relationship in terms of investment or property acquisition whether indirect or direct to discourage undue advantage, indolence or dependency on a co-spouse marital union.”

78. The same view was adopted in the case of, **T M W v F M C [2018] eKLR**, where the court held that:

“As regards ownership of matrimonial property, Section 7 of the Matrimonial Property Act, states as follows: -

“Subject to section 6 (3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

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

79. I also agree with the view in the case of **U M M vs. I M M [2014] eKLR**, in which the court opined 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).”

80. It is therefore clear that it is necessary that the spouses prove their respective proportions of the financial contribution either directly or indirectly towards the acquisition of the property rather than merely waving the source of income. It is not unheard of for certain parties to spend all their income a marriage in their own personal gratification while the other spouse invests. Accordingly, financial muscle alone is

not necessarily proof of contribution.

81. On the other hand, the Defendant's case was that she had a cereals shop, that she operated until 2018 when she rented it out to another person who was operating an M-pesa shop and it was her savings from the shop income that enabled her to contribute towards the acquisition and subsequent development of the matrimonial properties. She also operated mobile hairdressing services by going to clients' home and locations of their choice. According to her, she also ploughed the income generated from the matrimonial properties towards the development and maintenance of the children. In her evidence, she was engaged in the business of developing and renting out properties as well as various businesses including commercial farming wherein she was letting plots, cultivating the same and selling the produce. According to her, in 2012, Musomi Microfinance Bank Limited started granting her financial facilities and she attached financial statements and loan schedule from Musomi Microfinance Bank Limited to show that she had acquired loans. Again just as in the case of the Plaintiff the mere fact that she had access to financial facilities does not necessarily mean that the said facility was spent towards the development of the said properties though it would be evidence of her capability in doing so. I agree with the position in the case of **T M W vs. F M C [2018] eKLR**, where the court held that:

“The Petitioner herein stated in her supporting affidavit that she sometimes ventured into small businesses for the purposes of helping her husband to take care of the family however no proof of the existence of such endeavours was produced before. I therefore find that the Petitioner's contribution cannot be said to have been in the realm of monetary contribution since the same was not proved on a balance of probability.”

82. In this case however, the fact that Defendant's spent her energy in developing the properties cannot be in doubt since the said properties seemed to have improved even in the absence of the Plaintiff who testified that the last time he visited the properties was in 2015. She made both monetary and non-monetary contributions both towards the purchase and development of the said properties.

83. It is however clear that none of the parties had actual documents of the amount they respectively spent in the development of the said properties. While the Plaintiff alleged that his documents were left in the Defendant's custody when he went to the United States of America, the Defendant stated that since she was not contemplating the breakup of the union she did not keep the receipts. However, DW2 testified that while the Plaintiff would occasionally oversight the constructions, it was the Defendant who was actively involved in the supervision. He however was unable to tell where the source of material was coming from since he would simply get the same upon placing an order. However, as held in **F.S vs. E.Z [2016] eKLR**:

“The parties herein have been married for about 10 years. The Plaintiff dedicated all this period to her marriage. Although she never made any financial payments towards the purchase of the properties, she also indirectly contributed to the acquisition of the properties. The Defendant maintains that the companionship was quite intermittent. That is true as the Defendant is not a resident of Kenya. However, still there was companionship whenever the Defendant came to Kenya. The Plaintiff oversaw the purchase of the properties. She could have inflated the prices if she had any ill intention. She was honest enough and followed all the lawful procedures towards the acquisition of the properties. That amounts to indirect non-monetary contribution.”

85. Similar circumstances are to be found in **DV vs. PB [2019] eKLR**, where the Court held that the Plaintiff's supervision of the development and management of matrimonial property whilst the Defendant was abroad also amounted to non-monetary contribution.

85. Having considered the evidence on record, I am unable to find with certainty the actual contributions made by each of the parties herein. As provided in section 14 of the Act, where matrimonial property is acquired during in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal. In my view that legal presumption has not been rebutted by any of the parties herein.

86. It therefore necessarily follows that as regards the mode of distribution of the said properties, the same ought to be 50:50. In arriving at this decision I associate myself with the decision of the Court of Appeal in **P N N vs. Z W N [2017] eKLR** where it held expressed itself as follows;

“Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement. The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in **FRANCIS NJOROGE vs. VIRGINIA WANJIKU NJOROGE, Nairobi Civil Appeal No. 179 of 2009;“ ... a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in **Lock Yeng Fun v Chua Hock Chye [2007] SGCA 33**;**

‘It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – be precise mathematical exercise.’

87. I also rely on the decisions in **NWM vs. KNM (2014) eKLR** and **AKM vs. NNN [2019] eKLR**.

88. Regarding the issue whether the Defendant ought to account for the proceeds of the rents and disposal of the said properties, I agree that there is no cogent evidence placed before me that the said proceeds were applied in a manner other than one beneficial to the parties herein.

According to the Defendant the same was applied in developing the properties and for the family upkeep. Apart from paying school fees to one of the daughters, there was no evidence that the Plaintiff made any other contribution towards the family upkeep. The Defendant has adduced evidence showing that there has been improvement in the value of the two properties. Without any audited accounts, I associate myself with the decision in **Z.W.N v P.N.N [2012] eKLR** and decline to make orders with regard to distribution of the said resulting income. Just like in **M A A vs. A R [2018] eKLR Matrimonial Cause No.1 of 2017**, in the absence of evidence of misappropriation of rents derived from the matrimonial property and the proceeds of the sale of the motor vehicle in question, I decline to order the Defendant to render a statement of rental income.

89. As regards the actual distribution, I agree with the view expressed by the Court of Appeal in **M B O vs. J O O [2018] eKLR** that the period of time that a spouse and her children had been in occupation of the matrimonial property is a relevant factor to consider in determining the mode of distribution that is to be adopted by the Court. In that matter the Court expressed itself as hereunder:

“...every case was determined on its own merit while bearing in mind the principles of fairness and human dignity. Once a spouse has been in occupation of a matrimonial home for a considerable period of time, where she lived with her children and established herself like the Defendant did by even starting a business of selling cereals to support herself after she was retrenched from employment, all these are relevant factors to consider in determining the mode of distribution...the foremost question was to seek a mode of distribution that will not disadvantage one party and render them destitute.”

90. I have also considered the decision in **PWK vs. JKG [2015] eKLR** where the court awarded to the Appellant the matrimonial home and the adjoining land that acted as the kitchen garden solely on the basis that she had been living there even after the Defendant deserted her as well as the finding in **F.S vs. E.Z [2016] eKLR** that since the Plaintiff had been living in the matrimonial home for 10 years since her marriage to the Defendant, she was entitled to retain the house plus the household goods.

91. Before concluding this judgement in light of the enactment of the **Matrimonial Properties Act, 2013**, spouses may well be advised, whenever they are acquiring joint properties to agree on their respective shares therein in order to avoid any future disagreements. Such arrangements ought not to be taken as lack of faith or trust in each other but may also act as security to the parties in event of any claims made by third parties taking into consideration the fact that under the said Act, parties to a marriage retain their respective estates which they are entitled to have determined notwithstanding the fact that they are still in a matrimonial union. In other words, contrary to the previous legislation where it was necessary that a marriage be dissolved before a determination on distribution of matrimonial property could be made, parties who are still in a union and who have no issues at all are at liberty to have a determination made as regards their respective shares in the union without necessarily parting ways.

Disposition

92. Based on the foregoing findings, I therefore make the following orders:

a. A declaration that be issued that Mlolongo Phase 2A Plot No.[...]Mavoko Land Development Company Limited; Mlolongo Phase 2B Plot No.[...] Mavoko Land Development Company Limited; and Motor vehicle No. KBB [...] (Toyota Hiace Noah) are owned jointly by the Plaintiff and the Defendant.

b. The joint ownership in respect of Mlolongo Phase 2A Plot No. [Particulars Withheld] and Plot No. [Particulars Withheld] be and is hereby severed and shall be distributed in equal shares of 50:50.

c. That the same be held by the parties herein based on the mode of distribution stated hereunder.

d. That Mlolongo Phase 2A Plot No. [Particulars Withheld] and Plot No. [Particulars Withheld] shall be valued by an agreed valuer and upon being done, the Plaintiff shall be entitled to Mlolongo Phase 2B Plot No. [Particulars Withheld] while the Defendant shall be entitled to Mlolongo Phase 2A Plot No. [Particulars Withheld]

e. That the party acquiring the plot whose value is higher than the other shall compensate the other party to the tune of the amount over and above the value of the property to which the disadvantaged party has been allocated.

f. That in the event that there is no agreement as to the compensation as envisaged in (d) above, both properties shall be sold and the proceeds divided equally amongst the parties herein.

g. That the prayer for accounts of the rental income and proceeds of the sale of the motor vehicle in question is disallowed.

h. That there will be no order as to costs.

i. Liberty to apply granted to the parties.

93. Those shall be the orders of the Court.

Judgment read, signed and delivered in Court this 9th day of March, 2021

G.V. ODUNGA

JUDGE

In the presence of:

Mr Muli for Mr Nalianya for the Defendant

CA Geoffrey