



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: G.V Odunga– J

CIVIL SUIT NO. 4 OF 2019

(Formerly Machakos ELC No.38 of 2015)

LMP.....PLAINTIFF

VERSUS

TMM.....1ST DEFENDANT

DENNIS MUNENE.....2ND DEFENDANT

DEMSEA TRAVEL SOLUTIONS LTD.....INTERESTED PARTY

JUDGEMENT

1. By an Originating Summons dated 12th February 2015, supported by an affidavit sworn the same day, the Plaintiff herein seeks the following orders:-

1. **THAT** the property known as LR No. [...], Original Number [...] Title No.LR [...] which is currently registered in the name of the 1st Respondent's name be declared a jointly owned by the Applicant and the Respondent.
2. **THAT** there a declaration that the applicant is entitled to half a share in the property known as LR [...] together with the buildings and improvements therein.
3. **THAT** upon declaration in (1) and (2) herein above there be an order directing the Land Registrar to rectify the register/ records so as to incorporate the Applicant as a co-owner of the said property.
4. **THAT** the 2nd Respondent be evicted or ordered out of the said property.
5. **THAT** the costs of this application be provided for.

Plaintiff's Case

2. In support of her case, the Plaintiff relied on her witness statement as part of her evidence in chief. According to the Plaintiff, he got married to the 1st Defendant, who was then working at [Particulars withheld] in the year 1997. At that time, the Plaintiff was working with the [Particulars withheld] and had been allocated a house at Makongeni Estate by her employer where they established their first matrimonial home. She averred that their union was blessed with two children.

3. It was averred that in or about the year 2002 the 1st Respondent lost his employment and stayed at home without employment until 2004 when he got a job in Eldoret but he lost it again after 6 months and returned home where was stayed until 2006 when he got a job in Sudan. All the time that he was not working, the Plaintiff was taking care of everything in the family including food, rent and school fees for their young son.

4. In the year 2007 the couple decided to look for a plot where they could build their home and the Plaintiff, through the assistance of her cousin and brother, identified a plot in Syokimau since the 1st Defendant was most of the time out of the country. Upon being shown the plot the 1st Defendant liked it and a decision was made by the couple to buy the same. The said property was then registered in the name of the 1st Defendant and they commenced its construction as their matrimonial home. According to the Plaintiff, both of them contributed towards its

development with her contributing the initial sum of Kshs. 190,000/= from her savings while the 1st Defendant too contributed the rest. The Plaintiff also paid the Architect the fees for adjusting the plan which they had been given by her cousin since by then the 1st Defendant had returned to Sudan and would only visit once every three months.

5. When they started the construction, it was averred that the 1st Defendant would send to the Plaintiff money when he was away to continue with the construction which the Plaintiff was supervising after work. Further, the Plaintiff would spend the weekends at the site doing so while also taking care of the children and their home at Makongeni. In 2009, even before the house was complete, they moved in and continued with finishing the septic tank while there. According to the Plaintiff they considered the house their permanent matrimonial as they had no other plans for another house.

6. However, in 2013 the 1st Defendant told her to resign from her employment so that we could start a business in December which the Plaintiff did awaiting to start a business. Upon his return in December, the 1st Defendant did not return to his place of work and in February 2014, they started a small business at Kamukunji to which the Plaintiff contributed Kshs. 250,000 while the 1st Defendant contributed Kshs. 150,000.00. However, the business did not pick and it failed.

7. In June, 2014 the 1st Defendant told her that they should sell their home, a proposal which the Plaintiff declined since they had children. It was then that the 1st Defendant changed and started threatening her. He also became moody and violent especially when the issue of the house arose.

8. On 28th August 2014 evening when the Plaintiff returned home, she was shocked to find the house empty with only a T.V and an old empty fridge there. Even her children were not there. She however saw a man there whom she came to know was the 2nd Defendant's houseboy while the 1st Defendant was assisting him to move things. Upon asking the 1st Defendant what was happening, he informed her that they were moving to another house and that he had already taken the children away. The 1st Defendant assisted by **Timothy** removed the remaining things but the Plaintiff declined to go to the said rented house but instead went to her cousin's house and narrated to them what had happened and started living there. It was however the Plaintiff's case that before he went to stay with her cousin, he followed the 1st Defendant and found that he had shifted with the children shifted to Lone View Estate. The same month the Plaintiff placed a caution on the land and on the 1st of September, 2014 instructed her advocate who immediately wrote a letter to the occupants of the house informing them that she had not given the consent to sell their matrimonial home. By then, the occupants of the house were unknown to her. In her case that said occupants entered the house immediately the 1st Defendant moved the things out.

9. When she went to deliver the said letter she found the 2nd Defendant and his mother, whom she came to know later was the Director of the interested party. In the presence of some visitors, she served them with the said letter. However, the 2nd Defendant's mother informed her that she was an advocate and that what the Plaintiff had delivered was just a social letter. She also told her that "*sisi tuko ndani na wewe uko nje*", and that there was nothing that she could do to get her house. After delivering the letter, the Plaintiff left.

10. The Plaintiff however went back to her employer and pleaded for her job which she got back. Thereafter the 1st Defendant pleaded with her severally to go and remove the caution. According to the Plaintiff, in September, 2014, through the intervention of their respective parents they tried to resolve their difference but the 1st Defendant insisted that the Plaintiff removes the caution after which the 1st Defendant left in the middle of the discussion and declined to pick calls from the Plaintiff's parents. According to the Plaintiff the 1st Defendant who was staying with the children refused to allow the children to go and see her and would not even allow them pick her calls. As a result, the Plaintiff went to court for custody of the children but was hampered by lack of legal representation and fear instilled on the children by the 1st Defendant.

11. It was averred by the Plaintiff that the 1st Defendant is in a spree of selling the properties that they have worked for since he joined his new church. It was disclosed that they had also bought some other plots with the 1st Defendant which included one acre of land in Kamulu, which they bought through her employer [particulars withheld] and which was in their names and they had planned to sell and use the money to develop another plot. However, the 1st Defendant took the money but no development was done. He also sold other plots as well one at Syokimau and 2 others in Kitengela where he started a church which later closed down. The Plaintiff however had no supporting documents for these properties because the 1st Defendant carried everything including her clothes.

12. The Plaintiff stated that when she learnt that the 1st Defendant was intending to sell the land near Machakos town, she wrote a letter to the society involved with the land thus the 1st Defendant was unable to dispose of the same.

13. The Plaintiff averred that the children, who are now older, have been asking why they cannot not go back to their house. According to the Plaintiff, her interest in the suit property and the welfare of the children is prejudiced as they keep on moving from one rental house to another. She stated that while the 1st Defendant had entered into another relationship and was living with another wife, herself and her children had nowhere to call home despite the fact that the Plaintiff and the 1st Defendant worked for their matrimonial home and other properties. The Plaintiff lamented that she now finds herself and her children without a place they can call a home. She therefore pleaded with the court to save their matrimonial home for the sake of herself and her two boys. It was her prayer that this Court confirms and declares that the subject house a matrimonial property which should not be sold without her consent and that the same should be registered in her name and 1st Defendant's in order to safeguard it for their children. She also sought orders against the 2nd Defendant directing him to move out of our house due to illegality of the transaction arising from lack of the aforesaid consent. She sought for an order of reinstatement to the said house. Also sought were the costs of the suit.

14. In her oral evidence, the Plaintiff who testified as PW1 insisted that she is still legally married to the 1st Defendant since 25th June 1997. She stated that she sued the Defendants and Interested Party because they purchased the matrimonial home without her consent. According to her, she contributed Kshs. 400,000.00/- and Kshs. 190,000.00/- towards the construction and was the one overseeing the construction. She

stated that whenever she was at work, the 1st Defendant would invite people to view the house. She reiterated that she found strangers in their house with the 1st Defendant removing things from the house together with another person whom the Plaintiff later learnt was the houseboy. At that time, she did not even know the buyer and she was not involved in the removal of the properties from the house which included even her clothes. She lamented that she was left to live with the children in a one bedroomed house yet they have a 5 bedroomed house with a garage. She insisted that they have never sold any house as they did not even have one to sell.

15. In answer to the questions posed to her by **Mr Nzavi**, learned counsel for the 1st Defendant, the Plaintiff stated that she was not aware that the house had been sold and that the children had been carried away. The plaintiff insisted that she was evicted from her house by the 1st Defendant and the people she found in the house. By then the 1st Defendant had already removed all the properties from the house and the 1st Defendant was in the process of moving out but she did not accompany him to where he had relocated but followed behind him in her car to where he had gone with the children and confirmed that the children were in the new house.

16. According to the Plaintiff after she refused the idea of selling the house, the 1st Defendant proceeded to do so secretly since she was unaware of the fact of the advertisement of the house and only came to know of it when the matter was already in court. Though she insisted that she was involved in the purchase of the house, she admitted that she was not a party to the sale agreement but insisted that she gave the 1st Defendant Kshs 190,000/0 which the 1st Defendant withdraw from the Plaintiff's KCB Account. However, the 1st Defendant carried away all the documents including her withdrawal slips and ATM Card. She however did not seek for the bank statement.

17. In further cross-examination, she reiterated that they had other properties in Kamulu, Syokimau, Kitengela, Namanga and Machakos but they had no country home. They however had a 2 and ½ acre farm in Machakos with 2 single rooms, a toilet, granary and a kitchen where they were farming and had a worker there. She denied that the 1st Defendant informed her that it was their matrimonial home. She was however unaware that the 1st Defendant had another 5-acre home in Machakos. She explained that the 1st Defendant did not sell any other property apart from the subject property though he was buying and selling vehicles without her consent, which the Plaintiff found problematic.

18. She stated that the 1st Defendant left his [particulars withheld] job in Southern Sudan due to the war and registered [particulars withheld] Limited after the 1st Defendant lost his employment. The said company was meant to be in the business of selling take away products and they had a shop in Nairobi which was being managed by the Plaintiff on behalf of both of them. She however denied knowledge that part of the business involved buying and selling properties and insisted that she contributed Kshs 250,000/- for the shop.

19. The Plaintiff however came to learn later that the 1st Defendant was paid Kshs 5,000,000.00 towards the purchase of the subject house though she saw no evidence of such payment. She was informed by the 1st Defendant that the house was sold for Kshs 13.5 million but she never received any part of it hence she could not refund the same. In her evidence, she came to court to pursue the matrimonial home having tried all the options including the family intervention. It was her evidence that it was the 1st Defendant who was pressurizing her to remove the caveat. She stated that she contributed to the purchase of the Kitengela and Kamulu properties and that her name was in the Kamulu property though she could not recall its particulars which she had in her office. She was however told by the 1st Defendant to keep off the development of the Syokimau property at the foundation level.

20. In cross-examination by **Ms Ndorongo**, learned counsel for the 2nd Defendant and interested party, the Plaintiff confirmed that her statement stated that they had the first matrimonial home at Makongeni and that they also had one at Syokimau but not in Machakos or any other property. According to her, the 1st Defendant was not in the business of buying developing and selling properties. He was however buying and selling vehicles. While she protested the selling of the house, at that time she did not place a caution on it. She confirmed that she stated in her statement that the 1st Defendant was bringing people to view the house but she did not know the motive. This, she was told by the children when she returned home. She however insisted that she was not in agreement with the 1st Defendant and that they had no financial problems prior to the sale though she had resigned from her job to start the business.

21. It was her evidence that she had been given over Kshs 1,000,000.00 and had spent the balance of Kshs 250,000.00 in sustenance. She confirmed that in her statement, she stated that she contributed Kshs 190,000/- but admitted that the 1st Defendant would wire money from Southern Sudan towards the developing of the plots which was ¼ acre with 5 bedrooms with a toilet, servant quarters and a garage. In her evidence, she placed the caution on the plot immediately the people moved in on 28th August, 2014 though her lawyer had the receipt for the same. Referred to the caution, she confirmed that it was dated 26th August, 2014. She however denied that the caution was placed after their disagreement.

22. It was the Plaintiff's case that the home was within a gated community and that there was a watchman at the time though they had some neighbours. She stated that she did not place a notice that the property was not for sale. It was her evidence that upon her return from work, she drove her car, a *probox* and found a lot of waste and another man there. Though the 1st Defendant was there, **Timothy** arrived later but the children were not there. By then only the TV and some clothes remained which **Timothy** took away since even the curtains had been taken away. The clothes were however returned after the Plaintiff sought to know why they were being taken away. After getting to know where the 1st Defendant was going, the Plaintiff stated that she went away. It was her testimony that she did not have problems with the 1st Defendant before the sale of the suit property. After one month the 1st Defendant moved from Lone View to Ngong Road. According to the Plaintiff though the 1st Defendant mentioned that he was paid Kshs 13.5 million, she never saw any such evidence and never stated that there was a balance. It was her evidence that she did not talk to the man whom she found in the compound and that the following day when she went for the charcoal they did not resist and she picked the same and left. The Plaintiff however insisted that she was forcefully evicted.

23. In re-examination, the Plaintiff clarified that she had involved her parents to see if they could assist in settling the matter and that she had no other issue with the 1st Defendant apart from the sale of the house. She stated that when she took the letter from her advocates, she did not know the people who had taken possession of the house and it was not more than a week after that that she took steps to place the caveat on

the property. Her intention of following the 1st Defendant was however to know where the children were and after that she left for her cousin's house and that since then they have never stayed together. It was her evidence that she came to know of the sale after she placed a caveat on the property and it was then that the 1st Defendant informed her that he sold the property at Kshs 13.5 million and had received Kshs 5 million. He did not however disclose to her what he intended to do. She insisted that she was not aware of any other family home and that the 1st Defendant and the children have been moving from one rental house to another in different estates. She clarified that the 1st Defendant mentioned the issue of the sale in June and sold the property in August, 2014.

24. At the close of her case, the 1st Defendant, **TMM**, in his testimony relied on his witness statement in which he stated that the plaintiff was his wife and the suit property L.R NO. [...] was their commercial residential house where they were temporarily living as a family from 2009 up to 28th August 2014 when he sold it to Demsa Travel Solutions Limited with the consent of the plaintiff. According to him, together with the plaintiff, they agreed to dispose of the house and utilize the proceeds therefrom to further develop their matrimonial home in Machakos town and also for him to get initial capital to fully venture into real estate business for which they had registered a company, [particulars withheld] Company Limited since he was no longer in employment. He also disclosed that on similar accord they had opened a shop in Nairobi town in the same company name and it was solely managed by the Plaintiff and subsequently he was to solely manage the real estate business on behalf of the company jointly owned by them. According to the 1st Defendant, after they sold the house they peacefully moved out to a three-bedroom rental house near Mlolongo (Lone View Estate) and the plaintiff did not have any issue at all.

25. According to the 1st Defendant, their matrimonial home has been and was always their Machakos town house which he had personally acquired and developed in year 2000 while he was still working and residing in Machakos. The said home lies on a one-acre plot where he developed a two bedroomed house, a separate kitchen and a store and where they had been farming to date and where they have one domestic servant and domestic animals. He disclosed that he was in the process of building a four bedroomed family house and some of the materials for the same are on the site. It was his position that the claim of another house, particularly the Syokimau house that he had already sold, as their matrimonial home was untruthful.

26. According to the 1st Defendant, after they moved into the rental house, he left the plaintiff in the house with their two children but when he came back late, he found that the plaintiff on her own volition had packed her things and had moved out of the house to an unknown destination and had left the children alone in the house. Later, the Plaintiff sent him a text message informing him that she had left and that the 1st Defendant should take care of the children. He therefore denied that he forced the plaintiff out of their residence. To the contrary, he stated that he was still keen on her to return to join him and their children whom she left him with but she has remained adamant to the plea. He therefore denied that the intention of selling the house was to make the Plaintiff and the children suffer. In his view it was the Plaintiff's action of leaving the children alone in the house that was intended to cause suffering to the 1st Defendant and the marriage. Since they were in agreement to sell the house, he stated that there was no need to threaten the Plaintiff.

27. The 1st Defendant further disclosed that since her departure from the house, the Plaintiff had been occasionally sending him intimidating and abusive messages through her own phone which he did not personally respond to because he found them very hurting and directed to making the marriage issues to suffer more. According to him, since he had been paid the sale proceeds and they had given vacant possession of the property to the purchasers, he processed all the completion documents and handed them over to the purchaser on 15th November, 2014.

28. It was averred that had the Plaintiff objected to the sale or had she been unaware of the sale, she would not have accepted to move out peacefully to another location. He asserted that the Plaintiff was present when they moved out contrary to her averments that she was away at work. It was his case that the sale of the house had been publicly advertised on "OLX" and circulated to various real estate agents who kept on taking clients to view the house day in day out even in the presence of the plaintiff contrary to her claim that she only got the information regarding the interested buyers through the children.

29. The 1st Defendant averred that there was no moment that the plaintiff discussed with him the issue of the title deed being in whoever names because it was not a matter for debate for he had personally acquired the Syokimau plot solely for commercial purposes and the plaintiff was not involved in the whole process of the purchase.

30. He stated that when the plaintiff left him and the children, it became quite clear that there was need for a family meeting to look into the issue at length and find a solution to the same. In this accord, they held a family discussion in September regarding the matter at the plaintiff's home and the two families were in agreement that the plaintiff's act of placing a caveat in the lands office against the sale of the property and also walking out of the house and leaving the 1st Defendant with the children was not in order. The Plaintiff then agreed to remove the caveat but when the 1st Defendant, doubting her sincerity, requested her to put that in writing in front of both parents, the Plaintiff promptly and as a result the meeting ended. Later, after going back to Nairobi from the family meeting, they also held two other separate meetings between him and the plaintiff in which she clearly indicated that she would totally frustrate the sale and was not ready to return back because on a prior meeting she requested that her clothes be taken to her at the meeting place but because the 1st Defendant was still hopeful of a mutual agreement, he declined to do so.

31. The 1st Defendant stated that he left employment with the [particulars withheld] in Southern Sudan in December 2013 after it became quite apparent that he could not continue with the job because of the civil war in the country at that time. He considered that to be the best time to return home and venture into real estate business given that he had already purchased some plots for commercial purposes and he would also sell the house that they were temporarily living in to get enough start up capital. He stated that the plaintiff was in full knowledge that his fulltime business upon leaving employment would be real estate business as his only sole way of earning income. He added that this was not his first plot to develop and sell because some years back he had built a three bedroomed house on a four-acre plot in Machakos town which he later sold, a sale which was not disputed by the Plaintiff. Accordingly, he built the Syokimau plot with the same intention because that had been his line of business all along contrary to the plaintiff's claim that it is a new idea that he came up with in 2014 after leaving employment with the [particulars withheld] in South Sudan.

32. The 1st Defendant disclosed that they had two sons, the first born being in form 3 while the second born was in class 6 and together with the Plaintiff they sat down and explained to them their plans of moving from that house and they had no problem at all. He confirmed that he was staying with the said children who were in boarding schools and the plaintiff had access to them at any time of her choice either in school or during school holidays, accessibility which the 1st Defendant had no problem with.

33. Since he no longer had any proprietary interest in the suit property, he was of the view that he was wrongly sued in view of the fact that he was in agreement with the plaintiff that they sell the property when he did and the two families were in agreement that she was being unfair in frustrating the sale and the marriage.

34. According to the 1st Defendant, the plaintiff did not financially contribute at all to the acquisition and/or development of the property. He stated that at the time of acquisition and development he was working for the [particulars withheld] and he was the one who solely funded the acquisition and development. In his evidence, the only time he involved the plaintiff in the issues concerning the construction of the house was a period of about four weeks when he had requested her to follow up with the final approval of the house plan at Mavoko municipality and the purchase of some materials at the initial stages of starting the foundation of the house. He was however shocked when he returned and found that that the Plaintiff had seriously misappropriated the funds having been left with the 1st Defendant's ATM card for his personal account. He therefore barred her from all the dealings regarding the house because she had withdrawn a lot of money which she could not account for. From that time henceforth, the 1st Defendant engaged a foreman to take care of the construction work on his behalf and used to send money directly to him to buy the materials but he would come to Nairobi for a one week break after every two months to inspect the construction.

35. In his oral evidence the 1st Defendant reiterated the foregoing averments.

36. In answer to questions posed to him by **Ms Mwai**, learned counsel for the Plaintiff, the 1st Defendant stated that he worked in Southern Sudan from 2006-2013 with the [particulars withheld] during which time the children were with the Plaintiff. Between 2009 and 2010 they moved to Syokimau but he insisted that the Plaintiff was not involved in the building as he used to send the money to the workers whose supervisor was called **Bosco**. They stayed in the said house for 4-5 years and he built it from his own business. In his evidence that was a house for prospecting and not a home since he had a matrimonial home in Machakos. After leaving employment he got involved in business while the Plaintiff was working with [particulars withheld]. He stated that they were planning to develop their Machakos home and had even purchased materials. He insisted that they had discussed the sale of the house as a family and he did not know the reason why the Plaintiff decided to leave a day after they moved in. In his evidence, after she told the Plaintiff what he had received the Plaintiff changed her mind. He was initially paid Kshs 5 million by way of cheques and was paid the balance later. In his evidence he wanted them to agree on how to move forward since she was blocking the transaction. However, by the time of the family meeting he had only been paid the deposit and the Plaintiff had already placed a caveat on the land and that was the reason they had the family meeting at which the Plaintiff agreed to remove the caveat. He however denied that he forced the Plaintiff to do so and insisted that the Plaintiff was involved in the sale.

37. In re-examination, he clarified that the Plaintiff was involved in the construction for 2 weeks when she was supervising the development. He reiterated that the Machakos property was in the process of development since there were materials still there. He disclosed that he had built another home in Makueni and kept the Plaintiff informed of the transactions. In his evidence, he executed a binding sale agreement with the purchasers and there was no reason to breach the agreement.

The 2nd Defendant's Case

38. The 2nd Defendant herein, **Dennis Munene**, testified as DW2, relied and adopted the contents of his witness statement. In the said statement he confirmed that his family was in occupation of the house situated in I.R. [...] Number I.R. [...] Land Reference Number [...] situated North West of Athi river in Machakos County measuring approximately 0.0915 Ha. He stated that he was actually present through his agent **Kipkurui** when the 1st defendant and the plaintiff moved out of the house on 28th August, 2014. In his evidence, the interested party bought the house and the plaintiff was aware as they inspected the house in her presence and she did not put up any resistance or implied that she disapproved of the sale which was even advertised through OLX and he was aware that many people would go to view the house.

39. On 29th August, 2014 they cleaned the house and took possession on 30th August 2014 after the plaintiff and the 1st defendant moved out peacefully. The Plaintiff however requested his agent not to burn or hand over to the disposal unit of the waste they had left behind (outside the house) as she intended to go through the waste again to ascertain if any valuables had been left behind by mistake. The following day on 6th September, 2014, the plaintiff returned and took away what she considered valuable after which they disposed of the waste she left behind. According to him, all along there was no indication that the plaintiff had any issue. In his evidence, if the plaintiff had any matrimonial issues with the 1st defendant, the same must have cropped up after they moved out of the house and she should not drag them into such issues.

40. Cross-examined by **Ms Mwai**, the 2nd Defendant stated that he was a director of Demsa, the Interested Party herein which bought the property from the 1st Defendant. He stated that he was involved in the transaction leading to the sale of the property but the negotiations were carried out by **Jacinter Waitrimu**, his mother. He recalled sitting down with the 1st Defendant in the presence of the 1st Defendant's two children who were then minors one being in High School while the other in Primary School though he was not very sure of their academic status. The minors were however not involved in the negotiations. Present were the 2nd Defendant's wife, his mother and the 1st Defendant. Though he saw the Plaintiff she was not present during the negotiations but was present when they were viewing the house. In his evidence, he got into the house on 30th August, 2014 at which time the house was vacant but they had taken possession on 28th August, 2014. He stated that the final negotiations took place at a Hotel in Syokimau. He confirmed that he knew that that property was their home since he found them living there but was only interested in the house. He was however not aware that it was their matrimonial home. In July when he went to view the house, he talked to the Plaintiff and saw her a week after he moved into the house though he did not see her when he as taking possession since he was not there in person but was there through his agent who was his houseboy. According to him, it was his mother who

was involved in the payments.

41. In re-examination, he clarified that he was looking for a house for his family. According to him, when he took possession the 1st Defendant's family was not in the house though he was not personally present having sent someone to do cleaning. He however reiterated that the first time he saw the Plaintiff in the same property was when he went to view it when he was told to hoot and one of the sons opened and they were introduced by the 1st Defendant to the Plaintiff and they exchanged pleasantries before the Plaintiff left for work. According to the 2nd Defendant, the Plaintiff knew the purpose of his visit being to purchase the house as that was the second time he was visiting. The next time he saw the Plaintiff was a week after taking he moved in when the Plaintiff went to pick up her properties that she had not picked up and which she had requested not to be disposed of. At that time, she did not express any reservation and he never thought that the Plaintiff would have any objection.

42. DW3, **Gilbert Kipkurui Kosgey**, relied on his statement in which he stated that on 28th day of August 2014 he was engaged by the 2nd defendant to do some work for him which involved tidying up a house in Syokimau which was to be vacated by the previous occupants. He was instructed to receive the house keys from the occupants who happened to the plaintiff and 1st defendant and ascertain that the 1st defendant's family removed their household items from the house. He was taken to the said house by the 2nd Defendant where he found the 1st defendant and his two sons in the house. By then, the bedrooms were cleared that is to say the beds had been disassembled and other items had already been cleared from the rooms save for the master bedroom where some clothes were hanged in the wardrobe.

43. According to him, the 1st defendant's minor sons were excitedly assisting to move items out of the house and he could make out that items had been moved earlier on and the 1st defendant confirmed to him that they had already made two trips to their new place. The 1st Defendant then took him around the house, showed him the switches, kernel outside house and even showed where he kept dogs food. After a short while a lorry and a salon car drove in the compound and he established later that the saloon car belonged to the 1st defendant and the lorry had been hired to transport the items to the new house. He further learnt that the lorry was coming for the 3rd time to collect the items and the items which were already outside the house were loaded onto the lorry, except for some empty jerry cans, a sack of charcoal, some envelopes and papers.

44. According to DW3, the plaintiff arrived into the compound driving a white *probox* car, greeted him hurriedly and asked in Kiswahili *zimeisha?* At this time the lorry was already leaving the compound. By then the 1st Defendant and the children were in the house and the plaintiff inspected all the rooms to ascertain that the rooms were empty and nothing had been left behind. She then went to the master bedroom which was upstairs and came down carrying some clothes and other items in paper bags and loaded them onto her *probox* car and some in 1st defendant's car. The 1st defendant's car then left the compound driven by a driver/ agent of the 1st defendant while the plaintiff, 1st defendant and the children got into the *probox* and drove off together with the 1st defendant driving.

45. DW3 stated that there were some items which were to be left behind like empty jerry cans, charcoal, some papers/envelops and electric cables. Though the plaintiff wanted to carry jerry cans the 1st defendant asked her to leave them behind and the plaintiff requested DW3 not to burn or dispose of anything as she would come back for them. The following weekend, the plaintiff went to collect the items as she had requested. DW3 called 2nd defendant who had already moved into the house and informed him that the plaintiff had come to collect the items and the 2nd Defendant stated that it was ok she could go ahead. The plaintiff then sorted them and gave DW3 a go ahead to dispose of what remained while she loaded them on her vehicle.

46. Though the plaintiff asked him to call the 2nd Defendant, before he could do so, the 2nd Defendant came from the house accompanied by his mother and they greeted each other then he left them sharing general conversation.

47. In his view, the Plaintiff did not look surprised that they were shifting or resisted to shift and when she returned for her other items the following weekend she did not look agitated.

48. In cross-examination by **Ms Mwai**, DW3 stated that he was just a friend of the 2nd Defendant and that the 2nd Defendant just called him and told him to accompany him to his new place since and requested him to organize for its cleaning. According to him there was a driver who was removing properties since the house was being vacated. By then he had not known the 1st Defendant or his children.

The Interested Party's Case

49. On behalf of the Interested Party, **Jacinter Wairimu Rugatia**, an advocate of the High Court and a director of the interested party and the mother of the 2nd Defendant, testified as IPW1 and relied on her statement and the documents filed. In her statement, she stated that the suit property herein was sold by the 1st defendant, who is the plaintiff's husband with full knowledge and consent of the plaintiff. According to her, the plaintiff admitted that in the year 2014 the 1st defendant informed her of his intention to sell the house and that the Plaintiff never denied any averments that the house was publicly on sale by use of agents and even social media and she never cautioned or restricted the same until they purchased the same.

50. She disclosed that the plaintiff, 1st defendant and their two children were residing in the suit house at the time of sale and purchase and that before entering into a sale agreement herself, the 1st defendant and his wife actually went to view the house and the plaintiff gave them access to view the entire house including inside without resistance or even informing them that she was not in agreement with the sale. It was her case that the plaintiff voluntarily moved out of the house to enable the 2nd defendant take possession, otherwise if she had no intentions of moving, she would have easily refused to vacate the house or even obtained a court order to restrain her husband from selling the house. It was therefore stated that the plaintiff never indicated any sign that she was forcefully thrown out, coerced, dumped or in any way evicted from the house and that she never cautioned/restricted the suit house since she knew of the sale since 2014 and was not opposed to it.

51. It was noted that the 1st defendant confirmed that he actually received the full sum of the purchase price and has no claim whatsoever and that the Plaintiff was at liberty to go through all the copies of cheques that were used to clear the purchase price. IPW1 confirmed that she had no dispute with the 1st defendant, who admitted to have received the whole amount of purchase price and stated that any party wishing to nullify the agreement is at liberty to reimburse her full claim.

52. In her oral testimony, IPW1 stated that the 2nd Defendant was the second director of the Interested Party and relied on the acknowledgement by the 1st Defendant of receipt of Kshs 2.4 million from the Interested Party as well as the various cheques drawn in favour of the 1st Defendant amounting to Kshs 8.5 million totaling Kshs 13.5 million which was in respect of the purchase of LR No. [...], Nairobi. She also relied on the sale agreement dated 23rd August, 2014 as well as the other documents filed by her.

53. In response to questions from **Ms Mwai**, learned counsel for the Plaintiff, IPW1 confirmed that she was financing the purchase of the said property and was involved in the negotiations. On the first day of negotiations, present were the 1st Defendant, the Plaintiff and their two children at the parking. The negotiations were as a result of the 2nd Defendant having seen the house on sale and they went to view it. She was unaware if it was a matrimonial home since she found the Plaintiff, the 1st Defendant and their children waiting at the parking and the Plaintiff informed them that she was going to town. It was after viewing that they proceeded with the negotiations and the 2nd Defendant moved in. She denied knowledge of the letter referred to by the Plaintiff since she was not living in the said house and she was not in Nairobi on the day of the alleged delivery. It was her evidence that the first time she went to the house was on 6th September, 2014. Though she admitted that she saw the Plaintiff on 2nd September, 2014, she denied seeing the letter. It was her evidence that she paid Kshs 5 million on the execution of the agreement and paid Kshs 8.5 million later. Kshs 6 million was paid by cheque. In her evidence, had she had any inkling that there was a problem she would not have risked her money till the issue was resolved.

54. She confirmed that according to the agreement she was meant to pay the balance on completion and she was given all the completion documents. Referred to the agreement she stated that it was stipulated that she received the documents on 15th November, 2014. However, upon payment of the full purchase price the 1st Defendant gave her all the documents and she gave him all the documents for registration of the transfer. However, towards the end of October after she had paid, the 1st Defendant, a land agent, informed him that the Plaintiff had lodged a caution and therefore he could not complete the transaction and the documents were returned to her. She confirmed that she did not seek the Plaintiff's consent since they met her and she welcomed them to view the house. It was her belief that the 1st Defendant would seek the Plaintiff's consent but from the Plaintiff's behaviour there was no indication that she was objecting.

55. According to IPW1, she did due diligence and there was no evidence of the caution and only came to know of the problem when she was informed by the 1st Defendant that he was unable to lodge the documents towards the end of October.

Plaintiff's Submissions

56. On behalf the Plaintiff, the following issues were identified for determination:

- 1) Is the property in question i.e. LR [...] a matrimonial property and was it built during the subsistence of the marriage between the Plaintiff and the 1st Defendant.**
- 2) If the said property was a matrimonial property did the Plaintiff give consent for the sale of the same as is required by the law?**
- 3) Is the Plaintiff entitled to her prayers as set out in the originating summons?**

57. On the first issue, it was submitted that the house was built during the subsistence of the marriage. That they lived in the house between 2009 and 2014. It was submitted that the Plaintiff's case was that she contributed financially to acquisition and development of suit property. She also oversaw the construction of the house while the 1st Defendant was away in Sudan and took care of the children. It was submitted that as they were organizing themselves to construct the house, they stayed in a house that she used to pay her employer. According to the Plaintiff, the suit property is their matrimonial home.

58. On whether the consent to sell the house was given by the Plaintiff, it is submitted that there was no written consent or an affidavit from her consenting to the sale hence the sale was void.

59. On the third issue, it was submitted that the Interested Party was aware that the 1st Defendant's family was residing in the house and that it was admitted by the Interested Party that the Plaintiff was not involved in the sale transaction or negotiations at any stage. Yet, the Interested Party proceeded to pay the balance of the purchase price despite the Plaintiff through her lawyer and verbally informed the Defendants and Interested Party that she was opposed to the sale of the house and she had not consented to the sale. Since the Interested Party's director is an advocate, she cannot claim ignorance of the law.

60. The Plaintiff places reliance on Article 45(3) of Constitution, 2010, Section 6 and 7 of **Matrimonial Property Act**, Section 28, 93(3)(b) of **Land Registration Act, 2012** and the case of **MWK vs SKK & Others [2018] eKLR** and urged court to uphold the rights of parties in a marriage and grant the orders as prayed.

1st Defendant's Submissions

61. It is submitted on behalf of the 1st Defendant, that the Plaintiff admitted that they own a property in Machakos town which is partially

developed. The Plaintiff did not deny that they had registered Palmax Enterprises Limited jointly for the 1st Defendant to trade under the company. According to the 1st Defendant he had informed the Plaintiff of the intention to sell the house. The Plaintiff confirmed to have not been evicted from the house. According to the 1st Defendant, the Plaintiff admitted leaving the rental house after vacating from the house on the suit property but changed her mind after sale and handover to the 2nd Defendant and Interested Party. It was submitted that he lost proprietary interest upon receiving the purchase price, handover of the completion documents and possession of the suit property by the 2nd Defendant.

62. According to the 1st Defendant, acquisition and development of the suit property was solely done by him. It was submitted that he stopped the Plaintiff for misusing the funds for the project. Reliance was placed on Section 7 and 14 of the **Matrimonial Property Act** and the court was urged to rely on the case of **FS vs. EZ (2016) eKLR** on the proposition that the Plaintiff did not contribute to the acquisition and development of the suit property. According to the 1st Defendant, their matrimonial home is in Machakos that was acquired in 2000 and developed partially. The 1st Defendant referred to Section 12(1) of the **Matrimonial Cause Act** No.49 of 2013 on the proposition that a matrimonial home can be sold with the consent of both spouses but the Act does not say that the consent must be in writing. The 1st Defendant urged court to find the Plaintiff consented to the sale of the suit property and dismiss the suit with costs.

63. To distinguish the case of **MWK vs SKK & Others** (supra) from this case, it was submitted on behalf of the 1st Defendant, that the said case was undefended by not filing appearance and defence yet this case was defended.

2nd Defendant and interested party's Submissions

64. According to the 2nd Defendant and the Interested Party (hereinafter referred to as the Purchasers) the following are the issues that fall for determination:

- 1. Whether Matrimonial Property Act applies to 2nd defendant and the interested party.**
- 2. Whether consent of the plaintiff was required.**
- 3. Whether Doctrine of Estoppel and waiver applies to the plaintiff.**
- 4. Whether the interested party is a bonafide purchaser of the suit property for a value.**
- 5. Whether the plaintiff was evicted from the suit property by the 2nd defendant.**
- 6. Whether the 2nd defendant should be evicted from the suit property.**
- 7. Who should pay cost of the suit?**

65. It was submitted that the Interested Party purchased the suit property at Kshs. 13,500,000.00/- and paid the full price to the 1st Defendant who acknowledged receipt. On the first issues, whether the **Matrimonial Property Act** applies to the 2nd Defendant and Interested Party, it was submitted that the court lacks jurisdiction since the 2nd Defendant and Interested Party are parties to the suit yet Section 2 and 17(1) of the **Matrimonial Property Act** as well as the Preamble to the Act provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. Section 2 defines a *spouse to mean a husband and wife*. Section 17(1) provides that *a person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person*. It is submitted that the 2nd Defendant and Interested Party have not been defined in the Act hence not applicable to them and the court has no jurisdiction. They urged the court to dismiss the suit.

66. On whether consent was mandatory, it is submitted that pursuant to Section 12(5) of the Act spousal consent only applies to mortgage or lease and not in sale agreements hence the sale transaction between the Interested Party and 1st Defendant did not fall under the ambit of Section 12(5).

67. On whether the Plaintiff was estopped, it is submitted that the Plaintiff was present when the 2nd Defendant went to view the house. The Plaintiff did not disprove the viewing. According to the 2nd Defendant and Interested Party, the Plaintiff, 1st Defendant and their children drove out of the suit property in the presence of the 2nd Defendant's witness **Gilbert Kipkurui**. The Plaintiff is estopped from claiming lack of informed consent about the transaction. According to them, the Plaintiff ought to have placed the caution or restriction to stop the interested party from carrying on with the sale transaction. Reliance is placed on Section 120 of the **Evidence Act**.

68. It is urged by the 2nd Defendant and Interested Party that the 2nd Defendant should not be evicted for the premises since the Environment and Land Court has jurisdiction over this claim and not this court, 2nd Defendant is in possession of the suit property that the Interested Party paid purchase price in full and that the balance of convenience tilts in favour of them. They prayed that the suit should be dismissed with costs and that the caution registered against the suit property be removed to allow the registration of transfer documents.

Determination

69. I have considered the pleadings, evidence as well as the submissions filed. The Originating Summons the subject of this Judgement is expressed to be brought pursuant to sections 12(3)(4) and (5) and section 17 of the **Matrimonial Properties Act, 2013** (hereinafter referred to

as the Act) and Order 37 Rules 1 and 8 of the **Civil Procedure Rules**. Since the dispute before me revolves around a claim in respect of an alleged matrimonial property, it is important to set out the legal provisions dealing with the subject matter.

70. Article 68(c)(iii) of the Constitution provides that Parliament shall enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage. It follows that matrimonial property now has constitutional underpinning. This is in appreciation of the provisions of Article 45(1) of the Constitution that the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State. Pursuant to that constitutional edict, Parliament enacted **Matrimonial Properties Act, 2013**.

71. Section 12 of the Act provides as hereunder:

(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution / or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.

(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except— (a) on the sale of any estate or interest in the matrimonial home in execution of a decree; (b) by a trustee in bankruptcy; or (c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.

(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.

72. In this case, the Plaintiff's case is that LR No. [...] was their matrimonial property with her husband, the 1st Defendant herein. Though it was registered in the name of the 1st Defendant, they both contributed towards its acquisition and development. In her evidence, she contributed both financially and materially towards the said acquisition and development. However, one day when she returned from work, she found strangers in the house which had been stripped of nearly everything. It was then that she was informed that the 1st Defendant had vacated the house with the children after disposing of the same to the interested party. Upon following behind the 1st Defendant she discovered that they had moved to Lone View Estate. She then went to stay with her cousin and soon thereafter placed a caution on the suit property. It was her evidence that the 1st Defendant, without her consent, purported to alienate the same to the interested party herein and the same is now occupied by the 2nd Defendant herein. She therefore seeks an order declaring that the said property is their matrimonial home and that the alleged alienation is unlawful and that she ought to be reinstated back to the same having been forcefully evicted therefrom.

73. On the other hand, the 1st Defendant's case is that the said property was bought by himself alone and that it was part of his commercial business of buying and selling properties. The same, according to him was acquired for the purposes of speculation and was not their matrimonial home. Their occupation according to him was only temporary as they had their matrimonial home in Machakos. It was therefore his case that, following the termination of his service in Southern Sudan with the [particulars withheld] as a result of instability in that country, he decided to return back to Kenya to concentrate fully on his business of buying and selling properties. Consequently, they agreed that they would dispose of the suit property and use some of the proceeds therefrom in improving their matrimonial home while investing part of the proceeds therefrom in their business. As a result, they placed adverts for the sale of the suit property.

74. Upon seeing the same, the 2nd Defendant who was looking for property brought the same to the attention of IPW1, his mother with whom they were directors of the interested party herein. Accordingly, an arrangement was made to view the suit property. On the day they visited the property they found the Plaintiff, the 1st Defendant and their two children. Though the Plaintiff who welcomed them and was aware of their mission soon thereafter left for town, the negotiations were carried out by the 1st Defendant. After the deal was struck, a deposit was paid and the balance eventually paid after which the 1st Defendant and the Plaintiff moved out and the 2nd Defendant peacefully moved in without any problem.

75. The foregoing is a summary of the respective cases of the parties herein. I agree with the Plaintiff that the issues that fall for determination before me are as follows:

1. Whether the property in question i.e. LR [...] is a matrimonial property and whether it was built during the subsistence of the marriage between the Plaintiff and the 1st Defendant.

2. If the said property was a matrimonial property whether the Plaintiff gave consent for the sale of the same as is required by the law?

3. Whether the Plaintiff entitled to her prayers as set out in the originating summons?

76. Before dealing with the said issues, an issue was taken with regard to the jurisdiction of this Court to entertain this suit on the grounds that the interests of the 2nd Defendant and Interested Party and their rights cannot be determined under the **Matrimonial Property Act**. In my view since the substantive matter for determination revolves around the Plaintiff's interest in the suit property pursuant to her claim that the same is matrimonial property, this court is clothed with the jurisdiction to handle matrimonial properties disputes.

77. As Muchelule, J. in N.C.K. vs. G.V.K [2015] eKLR observed:

“In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court’s adjustive power. The Family Law Act 1966 at Section 33 (4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of Arif vs. Anwar [2015] EWHC 124 (FAM) the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party’s beneficial interest in the matrimonial property without severing the same...It would appear to me that a spouse can, under section 17 of the Matrimonial Property Act 2013, either where there is a divorce matter pending, or where, for whatever reason, he can no longer live together with the other spouse but it is not seeking to divorce, come to court to resolve any questions about beneficial interest in the matrimonial property without severing the same.”

78. I hasten to clarify that it is not only in cases where the couple’s union is in problems that one of them can move the court for a determination of their respective beneficial interests. The law, as I understand it, permits perfectly happy marriage partners to move the court for whatever reason to make such a determination even where they are still in the union and do not contemplate divorce or even separation.

79. As appreciated by the Court of Appeal (Waki, JA) in PNN vs. ZWN [2017] eKLR:

“An inquiry may thus be made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in Petit vs. Petit [1970] AC 777:

“One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?”

80. The same Court in AKK v PKW [2020] eKLR had this to say;

“...a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant’s prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.”

81. I therefore find that this Court has jurisdiction to determine the issues raised in this suit.

82. Section 6 of the Act defines what matrimonial property is and states that:

(1) For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

83. In this case, it is contended that the suit property was a matrimonial home in occupation by both the Plaintiff and the 1st Defendant. Section 2 of the Act defines matrimonial home as follows:

"matrimonial home" means 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;

84. In this case, it is not in doubt that the suit property was registered in the name of the 1st Defendant, the Plaintiff’s husband. It is also not

in doubt that the said property was occupied by both the Plaintiff and the 1st Defendant. The only issue is whether it was occupied as a family home. It is unfortunate that the Act does not define what constitutes family home. It is however clear that the suit property was constructed by the couple who moved in as a family and was being occupied by the family. According to the Plaintiff before the construction of the suit property, the couple was staying in Makongeni which was a house allocated to her by virtue of her employment.

85. Whereas the 1st Defendant contended that the suit property was a commercial property and was not meant for use by the family and that the matrimonial home was in Machakos, in my view, family home is not to be determined but what the couple or one of them terms it to be, but by the manner in which it is being utilized and understood by the family. I agree with the opinion expressed by **J G Kemei, J** in **MWK vs SKK & Others [2018] eKLR** at para 48 that a couple may have 2 matrimonial homes. Similarly, what may have been a matrimonial home may change its attribute due for example to the same being rented out or sold. While the change in its attribute does not affect the respective contributions of the spouses, it takes a different attribute and ceases to be a matrimonial home. The converse is also true where for example a property which was formerly rented is acquired by the spouses and used as their matrimonial home. Therefore, the fact that the Plaintiff and the 1st Defendant may have had another matrimonial home in Machakos does not necessarily mean that the suit property cannot have been their matrimonial home. In this case it is clear that for all intents and purposes, the suit property was considered as the family home. It had been occupied by the family even before it was fully completed and the 1st Defendant who at one time was working out of the country, even assigned the Plaintiff the task of overseeing its construction before a disagreement arose as regards the manner in which the expenses were being expended.

86. Based on the evidence placed before me I have no hesitation in finding that the suit property constituted the couple's family home and therefore was their matrimonial property.

87. The next issue is whether the Plaintiff consented to its disposal. That there is no requirement that such a consent be in writing is not in doubt. The consent may be construed from the conduct of the parties. In this case the Plaintiff's evidence was that she was unaware that the property was being sold. According to her, when the 1st Defendant broached the subject, she disagreed with him and from then the 1st Defendant became moody and violent. She however stated that whenever she was at work, the 1st Defendant would invite people to view the house and that she was made aware of this by her children though she was not aware of the motive. While she stated that after getting to know where the 1st Defendant had moved with the children, she went to stay with her cousin and never stayed with the 1st Defendant after that, she lamented that she was left to live with the children in a one bedroomed house yet they had a 5 bedroomed house with a garage.

88. From the evidence on record, it is clear from the Plaintiff's own evidence that the Plaintiff had been put on notice as early as June, 2014 that the 1st Defendant harboured intentions of selling the house. Thereafter, she was aware that the 1st Defendant would take people to view the house. This, in my view would have put her on notice that the 1st Defendant was intent at disposing of the property. She however did nothing until after the 1st Defendant moved out with the children. While it was her evidence that she never accompanied the 1st Defendant and the children, she however stated that she was compelled to stay with the children in a one bedroomed house. The evidence of the Plaintiff seems to corroborate the Defendants' case that the Plaintiff was well aware of the fact that prospective purchasers of the suit property were viewing the same and she was aware that the said property was on sale. According to DW3, on the day of vacation of the house, the Plaintiff, the 1st Defendant and the children left together in the Plaintiff's vehicle. According to the 1st Defendant, the next day, the Plaintiff left the house they had moved to leaving the children there alone. This evidence is in synch with the Plaintiff's evidence that she was unhappy with the fact that she was compelled to occupy a one bedroomed house.

89. Having considered the totality of the evidence on record I find that the Plaintiff was aware that the suit property was being sold and did not object to the same. She did not raise any issue when they were vacating the house but did so peacefully. It was not a forceful eviction as she contended. Disagreement may have arisen as to the manner in which the 1st Defendant intended to utilize or did utilize the proceeds from the sale but that is something totally different from lack of consent.

90. Accordingly, I find that by her actions and inactions, the Plaintiff consented to the sale of the suit property.

91. The next issue is whether the Plaintiff contributed towards the acquisition of the suit property. According to the Plaintiff she contributed Kshs 190,000.00 towards the development of the house as well as Kshs 200,000.00 towards the family shop and was at one time taking care of the family during the time when the 1st Defendant was out of work.

92. Section 2 has defined *Contribution* to mean both monetary and non-monetary contribution. Non-monetary contribution includes: ***Domestic work and management of the matrimonial home; Child care; Management of family business or property; and Farm work.***

93. However, Section 7 of the Act 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.

94. Section 9 of the Act provides that:-

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made"

95. It follows therefore from the above provisions that there must be an aspect of contribution despite the parties in marriage viewed under the law to have equal rights.

96. In Federation of Women Lawyers Kenya (FIDA) vs. Attorney General & Another [2018] eKLR the court stated that;

“The law recognizes equal worth and equal importance of the parties in marriage. Thus, the beneficial share of each spouse as the 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.”

97. The court in FMG vs. MNG [2019] eKLR, 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.”

98. According to the Plaintiff the suit property was registered in the name of the 1st Defendant but on behalf of the family. In the case of Njoroge vs. Ngari [1985] KLR, 480, the court stated that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property.

99. In the case of PWK vs. JKG 2015 eKLR the Court said;

“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 of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788.”

100. The Plaintiff testified that she contributed Kshs. 190,000.00 towards the purchase of the suit property, though no documentary evidence was tendered in court. Again the Plaintiff stated that she contributed Kshs. 200,000.00 for the family shop. In T M W vs. F M C [2018] eKLR, 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.”

101. In F.S vs. E.Z [2016] eKLR the court held that:

“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.”

102. In DV vs. PB [2019] eKLR, 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.

103. The 1st Defendant has not disputed the fact that at one point he was out of work and that the Plaintiff took care of the family. Though the Plaintiff did not adduce any evidence as regards the monetary value that she expended in the construction of the suit property, the 1st Defendant also did not adduce evidence that he was solely responsible for the construction of the same. When two people meet and the marriage ship takes off from the dock, none of the passengers ever foresee that the ship would hit the turbulent waters in future. It is only when they are in deep seas and the ship has hit a rock and is about to capsize that they realise that they ought to have taken certain measures during the course of their voyage. By then too much water has gone under the bridge and there is little in terms of documentary evidence that can be retrieved as regards their monetary contributions. Consequently, none of them sees the need to keep documentary evidence of the expenses they incur towards the sustenance of the family. In fact, the keeping of such documents may bring problems to the couple as it may be deemed to lack of trust.

104. Accordingly, it is my view that even monetary contributions ought not to be simply pegged on documentary evidence. 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.

105. I have considered the evidence before me and seen the Plaintiff and the 1st Defendant testify and I am prepared to believe and I find that the Plaintiff did contribute Kshs 190,000,00/- towards the construction of the suit property as well as non-monetary contributions. I also find that the Plaintiff contributed Kshs. 200,000.00/- for the family shop. The Plaintiff also made non-monetary contributions towards the development of the suit property. Taking the cue from VMW vs. FN Nairobi Court of Appeal Civil Appeal No. 3 of 2014, I therefore find,

based on the evidence before me that the Plaintiff's contribution towards the suit property was 30% while the 1st Defendant contributed 70%.

106. I therefore make the following orders:

a. A declaration that the property known as LR No. [...], Original Number [...] Title No.LR [...] which is currently registered in the name of the 1st Defendant was a matrimonial property belonging to the Plaintiff and the 1st Defendant.

b. A declaration that the Plaintiff's contribution in the said property was 30% while the 1st Defendant's contribution towards the suit property was 70%.

c. A declaration that the Plaintiff did consent to the sale of the suit property by the 1st Defendant to the interested party.

d. A declaration that the Plaintiff is entitled to 30% of the proceeds of the sale of the said property by the 1st Defendant to the interested party.

e. A declaration that the interested party paid the agreed purchase price of Kshs 13.5 million to the 1st Defendant.

f. An order that the caution registered by the Plaintiff on the suit property be removed.

g. Each party will bear own costs of this suit.

107. Judgement accordingly.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9TH DAY OF JULY, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Mwai for the Plaintiff

Ms Chelangat for Mr Nzavi for the 1st Defendant

Ms Ndorongo for the 2nd Defendant and the Interested Party

CA Geoffrey