



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: D.K Kemei, J)

MATRIMONIAL CAUSE NO. 11 OF 2019(OS)

LMN.....APPLICANT

VERSUS

MWM.....RESPONDENT

JUDGEMENT

1. The Applicant and Respondent got married under Kikuyu customary law in 1992. The marriage was later dissolved vide **Mavoko SPMC Divorce Cause No.7 of 2018** on 28th November 2018. The union had two (2) issues from the Respondent's previous relationship and one (1) in the marriage.

2. By an Originating Summons dated 29th March 2019, supported by an affidavit sworn on the same day, the Applicant herein seeks the following orders:-

1. **THAT** a declaration do issue that the matrimonial home together with the buildings and improvements thereon, (where applicable) erected on Title No. MAVOKO TOWN BLOCK xxxx forms part of matrimonial property between the parties herein.

2. **THAT** a declaration do issue that the matrimonial home on Title No. MAVOKO TOWN BLOCK xxxx was acquired during the subsistence of the marriage between the Applicant and Respondent.

3. **THAT** a declaration do issue that the Matrimonial Home on Title No. MAVOKO TOWN BLOCK xxxx being registered in the name of the Applicant be divided between the parties according to the contribution of each party towards its acquisition and development thereof.

4. **THAT** the Matrimonial Home on Title No. MAVOKO TOWN BLOCK xxxx be shared at the ratio of 80:20% in favour of the Applicant and according to each party's contribution.

5. **THAT IN THE ALTERNATIVE** if the suit property is incapable of being shared as it is, that the same be sold and the net proceeds be shared at the ratio of 80:20% in favour of the Applicant and according to each party's contribution.

6. **THAT** the Respondent be condemned to pay the costs of the suit.

3. The Originating Summons is based on grounds:-

a. **THAT** the Applicant and the Respondent were married under Kikuyu customary law between the years 1992 and 2013.

b. **THAT** the union was blessed with one (1) issue by the names jnm (Adult).

c. **THAT** the Applicant and the Respondent have officially divorced vide Mavoko Spmcc Divorce Cause No.7 of 2018.

d. **THAT** the matrimonial home on Title No. MAVOKO TOWN BLOCK xxxx was acquired during the subsistence of the marriage between the parties and forms part of the matrimonial property.

4. In his supporting affidavit, he averred that in 2006, he used his savings to start a bar business at Kiganjo market in Gatundu and tasked the Respondent to run the business on his behalf but the Respondent never brought home any income or disclosed profits from the said business. According to the Applicant, on 5th January 2009, he bought ¼ acre piece of land within Joska area in Mavoko from his colleague one Philip Kipngetch Tonui. He averred that he paid Kshs.20, 000/- to process the title that was registered in his name. The parcel of land came out as Title No. Mavoko Town Block 3/6962 measuring ¼ acre. He averred that in the year 2007 and 2010 he took a loan of Kshs.320, 000/- and Kshs.591, 100/- consecutively from Harambee Sacco to buy the suit property and construct a matrimonial home. He averred that in 2011 when he started building the matrimonial home, he made several cash withdrawals between August, 2010 to November 2010 and gave the cash to the Respondent to buy building materials. Further, he averred that between 7th February 2011 to 3rd June 2011, he withdrew Kshs.500, 000/- and gave the Respondent to buy building materials and pay workers. To enable the Applicant take care of further construction of the Matrimonial Home, he borrowed a loan of Kshs.200,000/- from his friend Simon Mbugua of ID No.xxxx. According to the Applicant, the matrimonial home was completed in the year 2012 without any monetary contribution from the Respondent although the construction was supervised by the Respondent. The Applicant averred that he should get 80% of the suit property since there was no monetary contribution by the Respondent. According to the Applicant, the Respondent is entitled to 20% for supervising the construction and taking care of the child. He urged the court to grant him the orders lest he will suffer irreparable loss if not granted.

5. In his oral evidence, the Applicant, (PW1) adopted the contents of his witness statement dated 29th March 2019 as his evidence. He produced all the list of documents dated 29th March 2019 as exhibits excluding list of document No.10. He also produced a copy of the loan agreement and marked as *PMF1-11*. He averred that in 2009 he purchased LR No. Mavoko Town/Block xxxx which measured ¼ acre within Joska area in Mavoko from his colleague one Kipngetch Tonui at Kshs.275, 000/- and constructed a residential house on the land in 2011 which was completed and occupied in 2012. He stated that he took loans from Harambee Sacco and used his salary while the Respondent supervised its construction. He stated that he constructed a cowshed on the land. It was the Applicant's assertion that the house constructed on LR No. Kiganjo/Mundoro/xxxx belonging to his mother RWN and maintained that the house was constructed in 1989 before their marriage. The Applicant asserted that it is not true that the Respondent received a personal loan from her sister. He stated that the Respondent did not avail the profits from the bar business. He denied that he only contributed Kshs.500, 000/- towards the construction of the house since the Respondent was not working. He urged the court to order that the property be sold and proceeds be shared as proposed by himself.

6. Upon being cross-examined by **Ms.Machio**, PW1 stated that he had no receipts to show that he paid rent for the stall. He stated that the bar business in 2006 was managed by the Respondent on his behalf. He stated that no agreement was entered into between him and Kipngetch but there was a transfer document from Novette Realtors to change ownership. That he paid Kshs.20, 000/- to process the title deed. He asserted that Kshs.320, 000/- and Kshs.591, 000/- were the 1st and 2nd loan respectively. According to him, he gave the Respondent Kshs.500, 000/- for the construction of the house but the statement does not show withdrawal from the bank. He stated that he withdrew the money in bits and gave the Respondent. According to him, the documents from KRA were made purposely for this case. He disputed that the Respondent used money from the bar business towards the construction of the house. He admitted that he left the house in 2013 and could not know of any development since he had not gone back since he left. According to him, the loans sought by the Respondent were for her personal use and not for the house. He stated that he didn't know that his sister in law J operated a hardware and that the Respondent got some materials from her. According to the Applicant, motor vehicle KAC xxxx belonged to him. He stated that the Respondent sold the motor vehicle but he does not know how the Respondent used the money. He also bought KAZ xxxx which was used by the Respondent to run the family business. He denied having taken the sale proceeds from the said vehicle. According to him, it is possible to sub-divide the plot into two and isolate the part where the house is built. He stated that the children are now adults who can take care of themselves. He stated that he borrowed Kshs.200, 000/- from Simon Mbugua but he had not indicated that in his affidavit. According to the Applicant, the loan monies were savings since they were credits on his accounts. He stated that a valuer can give the correct position of the property. He asserted that the Respondent is only entitled to 20% of the share of the suit property.

7. In re-examination, he stated that the bank statements show disbursement of a loan. According to the Applicant, he allowed the Respondent to run the business in her name due to his employer's regulations. He stated that the title deed was prepared early before he had cleared the processing fee of Kshs.20,000/- and the same could only have been given to him upon payment.

8. The Respondent opposed the Applicant's case vide her replying affidavit sworn and filed on 2nd May 2019. She averred that part of her contribution was to do all household chores, attending to the children before they go to school, taking and picking the children from school, attending school functions as well as meetings and ensured the family was comfortable including the Applicant. She stated that she contributed towards the purchase of food, school fees and clothing from the sweater proceeds. According to the Respondent, her father had put up for her the sweater knitting business in 1989. She averred that when the Applicant was sick, she catered for the medical bills and house help salary. According to her, in the year 2000, she sold her sewing machine and equipment after she jointly agreed with the Applicant to open a kiosk outside the police line gate at Kasarani. She averred that she solely managed the kiosk. She averred that she singly sourced for a secondary school for the children and the Applicant paid school fees at [Particulars Withheld]Secondary School. She averred that they had built a small house at her mother in law's matrimonial home on land parcel No. Kiganjo/Mundoro/xxx which the Applicant had inherited from his father. According to her, they both made improvements by constructing additional rooms and plastering the floor. She asserted that she bought a new set of seats worth Kshs.12, 000/- from her savings.

9. The Respondent averred that the suit property was acquired jointly. According to her, it was the Applicant who requested her to go visit the suit property to confirm its feasibility. She negotiated the reduction of the purchase price from Kshs.300, 000/- to Kshs.275, 000/-. She averred that in the year 2008 they had to sell a property they had bought jointly situated in Githurai at a cost of Kshs. 200,000/- to enable them finance the purchase of the suit property. In the year 2006, the Respondent stated that they agreed to close the kiosk and open a bar business in Kiganjo. According to the Respondent, the bar business was started jointly through a loan borrowed from the Respondent's sister known as **GNM**. According to her, they celebrated upon repaying loan whereby they invited her sister and her husband and gave them a goat as a token of appreciation. She averred that she had to stop knitting sweaters to take care of the bar business since the Applicant was busy at work but would go to Kasarani over the weekends to visit the children who were under the care of a house help. She denied that she did not disclose the bar business records, purchases including profits and loss incurred. According to the Respondent, the profits were utilized to meet the family's basic needs and other expenses like school fees. She stated that the Applicant neglected the responsibilities of managing the bar business hence she managed it solely by spending a lot of her time at the bar. According to the Respondent, the loan of Kshs. 320,000/- was to be used to pay school fees. She averred that no loan had been borrowed from Simon Mbugua since the agreement revealed that the signatures had been forged by being drawn in the Applicant's handwriting. According to the Respondent, their daughter **JWM** who

had a hardware business assisted them with tiles, plumbing and electrical materials.

10. The Respondent averred that the Applicant only contributed Kshs.591, 600/- to finance the construction of the matrimonial home. According to the Respondent, she is a stranger to the loan of Kshs.320, 000/- since the Applicant had not shown the connection of the loans to the acquisition and development of the matrimonial property. According to the Respondent, in the year 2008, through a joint contribution of Kshs.130, 000/- they purchased motor vehicle registration number KAC xxxx to operate as taxi car and hired the Applicant's cousin as a driver. She averred that the Applicant abandoned the motor vehicle for over a year and when they decided to sell the motor vehicle at a cost of Kshs. 80,000/-, the Respondent incurred an extra cost of Kshs. 70,000/- to repair it. According to the Respondent they purchased another motor vehicle registration number KAZ xxxx with proceeds of the sale of motor vehicle KAC xxxx but she contributed another Kshs. 150,000/- on 30th August 2010 towards its purchase. According to the Respondent, the purchase price was Kshs.420, 000/-. She averred that the Applicant on 1st April 2013, sold the motor vehicle but did not share the proceeds with her. She stated that in the year 2009 she furnished their rental house at Gatundu town, bought sofa set and a wall unit at a cost of Kshs. 17,000 and Kshs.23,000/- respectively together with other items. According to her, on several occasions she paid the rent for the house and bar premises while the Applicant was repaying a loan.

11. According to the Respondent, they embarked on constructing the matrimonial home on 7th February 2011 whereby she purchased building materials with the bar business proceeds and a loan of Kshs.100, 000/- she got from her sister JWM who had promised to buy them iron sheets at a costs of Kshs. 126,000/-. They also used Kshs.150, 000/- paid as their daughter's dowry to construct the matrimonial home. She averred that if she was to be compensated for the supervising job it would not amount to 20% share as proposed by the Applicant. She asserted that the construction was only halted once on 23rd June 2011 whereby she was forced to take several loans to construct cow shed, shop and two additional rooms for the children. Additionally, she stated that she planted trees, built a water tank, cemented the floor, refurbished and painted the house and greatly improved the value of the property. She averred that since 23rd June 2011, her savings were used to construct the matrimonial home when the Applicant was unable to make any contribution towards the construction of the matrimonial home. She deponed that she has never abandoned her duties as a wife before they moved into their matrimonial home in November 2012. She lamented that she paid the hostel fees for their last born without any contribution from the Applicant who rarely visited home. According to the Respondent, the Applicant had constructed a house in Ruiru where he was cohabiting with one Jedidah Njeri. According to the Respondent, the matrimonial home is the only home they have since in 2014. The house built on property Kiganjo/Mundoro/xxx was sold by the Applicant who never shared the sale proceeds hence the Applicant will not suffer any prejudice since he has built a house in Ruiru. She asserted that the Applicant severally tried to evict her from the matrimonial home forcing her to seek assistance from FIDA.

12. In conclusion, the Respondent asserted that she made both monetary and non-monetary contribution towards the purchase and construction of the matrimonial home. She averred that it would be easier to pay the Applicant back the monetary contribution proved to have been contributed. According to her, the court should grant her 80% of the share of the matrimonial home and be allowed to pay the Applicant 20% or she pays the money proved to have been contributed by the Applicant towards the purchase and construction of the matrimonial home.

13. On the Respondent's documents, she stated that she was business lady. She relied on the averments in her replying affidavit sworn on 2nd May 2019, further affidavit sworn on 28th May 2019 and her bundle of documents. She stated that they acquired plot No. Kiganjo/Mundoro/xxxx, Mavoko Town/Block xxxx, motor vehicles number KAC xxxx and KAZ xxxx. According to her, she repaired motor vehicle KAC xxxxx. She stated that she used to get income from the sale of sweaters and coffee. She stated that she contributed Kshs.70, 000/- towards the purchase of motor vehicle KAZ xxxx. She denied that she was involved in the sale of the motor vehicle. According to her, she has not received any proceeds from the sale of the motor vehicles. She asserted that they sold their Githurai parcel of land at Kshs.200, 000/- to enable them purchase the suit property. According to her, she built the house on the suit property herself since the Applicant didn't participate in the construction. She stated that she used to buy and sell cereals. According to her, during her pregnancy her business stalled whereby she sought help from her sister who gave her Kshs.100,000/- which was used to operate the bar business at Kiganjo. She stated that the business used to generate good profits. She had bank accounts at Equity and Family Bank where she used to be advanced with loans as per the attached statements in pages 247 to 267. That she took a loan of Kshs.500, 000/- from Family Bank. According to her, the Applicant only assisted in the initial stages when excavating the black cotton soil on the suit property. She stated that she purchased the timber for construction. According to her, she contributed a big part and also her daughter JWM who assisted her with logistics. According to her, she indirectly contributed by taking care of the children and the Applicant as a wife and mother. She stated that at Kiganjo they had rented the premises whereby she paid for all the utility bills while the Applicant paid school fees. She had also started a business of manufacturing detergents. According to the Respondent, the Applicant had abandoned assisting the children forcing her to take care of them alone. She opposed the sale of the suit property since herself and children will have nowhere to stay. According to her, she is entitled to 80% of the suit property. She asserted that the suit property can be split into two. According to her, it is possible to sub-divide the building into two. She opposed the sale of the suit property and offered to pay the Applicant 20% share in the suit property. She relied on her bundle of documents annexed to her replying affidavit excluding pages 13-34, 37-47 and 52-65.

14. Upon being cross-examined by **Ms. Chebon**, she stated that the Kiganjo property is registered in the name of her mother in law but stated that they jointly renovated that house built on the land. She admitted that she sold motor vehicle KAC xxxx. She denied that the Applicant bought motor vehicle KAZ xxxx. According to her, she was the one who worked at the coffee farm. She confirmed that the suit property is in the name of the Applicant. She admitted that the Applicant gave her money to buy the house. According to her, they started the bar business with money given by the Respondent's sister which was refunded after two years. She confirmed that the document signed by her sister had not been witnessed. According to her, she took a loan from Family Bank in 2015 after she had separated with the Applicant in 2013. She stated that in 2015, the house was awaiting final touches. Her daughter assisted her with iron sheets for roofing. She denied to have been given money by the Applicant to pay rent since the same came from the bar business. According to her, she purchased household items as per the receipts attached at pages 151-152. She stated that the accounts statements have not been prepared for the purposes of the suit but were prepared way back in 2010. According to her, the proceeds from the bar business were banked into her account.

15. In re-examination, she stated that the KRA records relate to the bar business. She filed returns with the KRA for issuance of a license. According to her, the loans were necessary to complete the house, build a shop and room for her children. The Applicant did not give her sale proceeds of motor vehicle KAZ xxxx. She asserted that the suit property was held in trust of the Respondent by the Applicant.

16. **RW2, JWM**, stated that the Applicant and Respondent are her father and mother respectively. According to her, she had promised her parents that she would give them iron sheets. The iron sheets were worth Kshs.126, 000/-. She stated that she had a hardware and assisted their parents. Upon being cross-examined by **Ms. Chebon**, she asserted that her hardware is called [Particulars Withheld] Hardware. In re-examination, she stated that both her parents were aware of her business.

17. **RW3, Gladys Njeri Muigai**, stated that she had advanced the Respondent Kshs.100, 000/- to start a bar business which was to be refunded. According to her, the bar business was to be operated by both the Respondent and Applicant. She stated that the balance of Kshs.20, 000/- plus a goat was given to them as an appreciation by the Applicant and Respondent. Upon being cross-examined by **Ms. Chebon**, she stated that she handed over the money to the Respondent in the presence of the Applicant. She stated that she gave Kshs.20, 000/- to the Respondent five times. However, in answer to Ms. Chebon's question whether she had sworn affidavit, she answered in the negative. In re-examination, she stated that she had no ill will in writing the letter.

18. In the Applicant's supplementary affidavit sworn on 14th May, 2019 and filed on 15th May, 2019, the Applicant averred that the two minors lived with a house help for about four years at [Particulars Withheld] in Gatundu where they attended school at [Particulars Withheld] Primary School but when schools were closed they would go to Kasarani. According to the Applicant, they had a house help in 1992. He asserted that the two minors were aged 13 years and 10 years and not as averred by the Respondent. According to the Applicant, he severally paid rent for the stall at Kahawa West since the Respondent's knitting business was not doing well. That even the kiosk at Kasarani police line only lasted for 5 months. He averred that he paid school fees, catered for clothing, food and other basic needs while the Respondent being the only child in her family, largely used to send her income to her mother. He denied that Kiganjo/Mundoro/xxxx was his property but his mother's, **Ms. Wangui Nduati**. According to the Applicant, he bought the suit property and negotiated the purchase price single handedly with his savings. He stated that he paid the seller and not the Respondent. According to the Applicant, the suit property is a ¼ acre and not 1/8 of an acre. He averred that he paid Kshs.20, 000/- to the property managers, Nouvelle Realtors to update their records with the Applicant's name from Philip Kipngetch. He asserted that the Respondent has not shown any proof physical search and in any case when he bought the suit property there was no title deed but a mother title in custody of Nouvelle Realtors who processed the title once the purchase price was paid. According to the Applicant, the letter by Gladys Njeri Muigai who is said to have issued them with loan was prepared recently to support the Respondent's case. He stated that he is a stranger to the alleged loan of Kshs.100, 000/-. According to the Applicant, the Respondent was repaying loans which the Applicant was not aware hence a confirmation of Applicant's assertions that the Respondent never brought any income from the bar business. He averred that the Respondent's averments at paragraph 20 of her replying affidavit confirms that she spent nights at the bar and only used to go to Kasarani over the weekend. He stated that he had seen the statements of accounts now in court for the first time. According to the Applicant, he used to give money to the Respondent to renew the licenses, permits and tax payment receipts for the bar business.

19. The Applicant denied that the loan of Kshs.320,000/- was to be used for school fees since he took the loan in 2007 when their daughter JW had dropped out of school in 2002 and PW had cleared secondary education in 2005. That it was only the child from the marriage, JN who was in primary school and he could ably pay his school fees from his salary without taking a loan. He asserted that he did not forge Simon Mbugua signature in a loan agreement. According to the Applicant, he gave the Respondent money to buy construction materials and they did not have prior agreement that the children would be involved in the construction of the matrimonial home. He asserted that he furnished the matrimonial home with furniture and other household goods. According to the Applicant, it was the Respondent who sold their motor vehicle registration number KAC xxxx in 2007 which the Applicant averred that he had bought and was not to be used as a taxi. He stated that the Respondent did not share the proceeds from the sale. As regards the proceeds from motor vehicle registration KAZ xxxx which the Applicant averred that he bought, the proceeds were shared before their separation and also used to build a cow shed and purchasing livestock. According to the Applicant, the receipts marked as exhibit 8 attached do not show any receipts for new sofa set of Kshs.17,000/- and wall unit of Kshs. 23,000/- for the rented house in Gatundu. That the attached receipts were in respect of items bought in 2015 and 2017 when they had separate and did not live together. Further the receipt attached as exhibit 10 are inadmissible since they do not have names of the purchaser. According to the Applicant, the Biashara Boost Loan from Family Bank attached in the Respondent's replying affidavit at page 256 for 2017, page 260 for 2015, page 262 for 2015 and page 266 for 2018 are irrelevant since at that period they had separated and construction of the matrimonial home had been completed in 2012. He averred that he was not aware of the two additional rooms the Respondent claim to have constructed. He asserted that he built the water tank and cow shed before he left the matrimonial home. According to the Applicant, the agreement attached at page 273 to 286 attached to the Respondent's replying affidavit show that the Respondent used to lend cash to strangers instead of taking the income home. He asserted that if indeed the Respondent paid hostel costs then it was not brought to his attention. According to the Applicant the house on parcel of land No. Kiganjo/Mundoro/xxxx was built before they got married hence not matrimonial property. He denied to have evicted the Respondent from the matrimonial home since their separation in 2013. He stated that he had no other house of his own.

20. Lastly, the Applicant pleaded that the Respondent had not satisfactorily proved any monetary and/or non-monetary contribution towards the purchase of the suit property and construction of the matrimonial home. He asserted that he was entitled to 80% of the matrimonial home while the Respondent 20%.

21. In response, the Respondent filed a further affidavit sworn on 28th May 2019. According to the Respondent, at the time when the Applicant and Respondent got into the union in 1992, her daughter JW was 9 years old, born in 1983 and her son PM was 6 years, born in 1986. She denied that they had employed a house help and asserted that she would be left with JN whom she carried to work at her knitting stall in Kahawa West. She averred that she was surprised that the Applicant paid rent for the stall at Kahawa West when at that time the Respondent was doing well and could support herself. She averred that the kiosk lasted for 6 years and 2 months and not 5 months as stated by the Applicant. The Respondent deponed that the Applicant earned a meagre salary of Kshs.900/- since he was burdened with debts hence a reason why the Respondent became the breadwinner when the Applicant became sick. According to the Respondent, the house built on Kiganjo/Mundoro/xxxx was developed during the subsistence of their marriage. Their children resided in the house at Kiganjo while attending school at Ndundu primary. Further she averred that she had knowledge that the Applicant's siblings had been accorded share in the estate since at one time she was the registered recipient of the coffee proceeds from Thiririka Farmers' Co-operative Society Ltd in the Applicant's portion in the estate. She averred that she is the one who paid Philip Kipngetch the purchase price of Kshs.200, 000/- and a further Kshs.75, 000/-. The proceeds from the bar were used to construct the matrimonial home. She relied on her receipts to assert that she had continuously developed the matrimonial home hence she should be granted 80% share in the suit property. She largely reiterated the contents of her replying affidavit.

Submissions

22. On behalf of the Applicant, two issues were proposed for determination as follows:-

- 1. Which properties are available for division between the parties.**
- 2. What is the applicant's contribution in acquisition and development of the suit property.**

23. On the first issue, the Applicant contended that the house built on plot No. Kiganjo/Mundoro/xxxx was temporarily constructed by the Applicant before he married the Respondent. The Respondent asserted that she contributed Kshs.12, 000/- No documentary evidence has been produced to show contribution towards its construction and/or expansion. As regards motor vehicle registration No. KAC xxxx, it is submitted that they sold it together hence not subject to division. In addition, no documentary has been tendered in court by the Respondent to prove the alleged top up of Kshs.70, 000/- towards the purchase of motor vehicle KAZ xxxx.

24. On the second issue, it is submitted that the Applicant solely bought plot No. Mavoko/Town/Block xxxx, the suit property herein. He paid Kshs.20, 000/- to process the title which bears his name as registered owner. It is submitted that he used his savings to construct the house on the suit property. It is not disputed by the Respondent that the Applicant gave her money to buy construction materials. He took in 2007 as loan of Kshs.320, 000/- and in 2010 a loan of Kshs.591,000/-to construct the house. That between 7th February 2011 and 3rd June 2011, he withdrew and gave the Respondent Kshs.500, 000/- to buy construction materials. Further it is submitted that the Applicant borrowed Simon Mbugua Kshs.200, 000/- vide a loan agreement. According to the Applicant, the Respondent never accounted for the bar business income. It is submitted that the Respondent's Certificate of Registration for [Particulars Withheld] General Merchants is dated 13th May 2014 hence registered after their separation. Further the Biashara Boost Loans from Family Bank advanced to the Respondent relate to the period when they had separated hence not relevant. It is submitted that the Applicant bought the water tank and built the cow shed and is not aware of any further developments on the suit property. Reliance was placed on the case of **JNM vs. MM Nairobi HMC N0.31 of 2017, GKM vs. DR.MK Meru HC (OS) No.1 of 2018** and **RMA vs. JOA Nairobi HCCC No.28 of 2018 (OS)**. Lastly, from the evidence, it is submitted that the Applicant contributed 80% towards the purchase and development of the suit property. In the alternative, it is submitted that the suit property may be sold and proceeds be shared at 80:20 in favour of the Applicant. The Applicant urged the court to allow the orders sought in the Originating Summons.

25. On the Respondent's part, the law on division of matrimonial property was set out and several case law expounding on the same. It is submitted that the court has jurisdiction under section 7 of the Matrimonial Property Act, 2013 since the Applicant and Respondent are divorced. It is submitted that plot No.LR No. Mavoko/Town/ Block xxxx was registered on 22nd October, 2009 during the subsistence of the marriage. According to the Respondent, the house on Plot No. Kiganjo/Mundoro/xxxx was constructed during the subsistence of the marriage and the Respondent contributed to its development by furnishing the house and managing the coffee trees on the land hence she acquired interest over the land. It is submitted that the two motor vehicles were purchased during the subsistence of the marriage.

26. According to the Respondent, she has been able to demonstrate that she had various sources of income that played a role towards the purchase and development of the suit properties. In support, she submitted that it is admitted by the Applicant that the Respondent had a knitting and selling sweater business, a kiosk and bar. It is submitted that she took loans at Family Bank and Equity Bank. Lastly, she gave out loans to individuals at a profit she used for the family needs. Further in support were documentation in respect of the Whisper bar business expenses that are said to have been paid and obtained by her. The bank statement from Family Bank found at page 247 to 255 confirm that she made deposits when they had not separated. The court was urged to take judicial notice that the annual returns have been filed with the KRA despite the Accountant who prepared them failing to attend court to testify. According to the Respondent, the loan of Kshs.500,000/- and Kshs.300,000/- in 2015 advanced by Family Bank to the Respondent, were taken after the Applicant had left but asserted that the loans were utilized in the family business as well as in the development of the suit property. It is submitted that the Respondent was able to demonstrate her direct contribution as follows:-

- (i) Sale of the Githurai parcel of land at Kshs.200,000/- which they had both purchased;**
- (ii) She bargained the purchase price of the suit property to a less amount;**
- (iii) She conducted the physical search and visited the suit property;**
- (iv) She has produced the receipts for building materials and household items. She developed the home even after the Applicant deserted home in April 2013;**
- (v) She produced agreements in respect of purchase of trees for timber used for construction of the home worth Kshs.4500/- and 11,500/-;**
- (vi) She produced records of her daily expenses during the construction of the home;**
- (vii) She purchased the paint as per the receipts found at pages 242 to 245;**
- (viii) She took loans to improve further the home after the Applicant had left;**
- (ix) She contributed a total of Kshs.230,000/-towards purchase of motor vehicle registration number KAZ xxxx. There is no evidence to show that Kshs.255, 000/- withdrawn by the Applicant was used towards the purchase.**

27. As regards the indirect contribution, it is submitted that the Respondent:-

- (i) Visited the suit property to confirm its viability;*
- (ii) The purchase price was reduced by Kshs.25,000/- because she is the one who bargained the price;*
- (iii) She was in-charge of the construction while the Applicant was working;*
- (iv) She purchased the building materials and supervised construction;*
- (v) She sourced for the house plan for the house on the suit property and the approval from Mavoko Municipal Council;*
- (vi) With the help of her daughter they were able to obtain the iron sheets worth Kshs.126,000/- and cash in the sum of Kshs.100,000/- to construct the house on the suit property*
- (vii) The Respondent's sister assisted her with Kshs.100,000/- to start the bar business*
- (viii) During cohabitation she is the one who acted as a house help while attending to her business.*
- (ix) She was present at home with the children when the Applicant was away most of the time due to his nature of work;*
- (x) She provided food and clothes for the family through the income from the kiosk;*
- (xi) She ran the business alone to meet the family needs and develop the house on the suit property;*
- (xii) She managed the coffee farm at Kiganjo alone and hired coffee farms with an aim of increasing profits;*
- (xiii) She started [particulars Withheld] General Merchants on 13th May 2014 whose income was used to develop the home and family business;*
- (xiv) She paid school fees and related expenses for the children;*
- (xv) She attended to the children before going to school and picked them after school as well as attending school meetings and/or functions while the Applicant was away for work;*
- (xvi) During the subsistence of the marriage, she paid rent, water, electricity bills and laptop for the business.*

28. It is submitted that the Respondent played a great role towards the acquisition and development of the matrimonial home hence 20% is not enough. The Respondent differed with the Applicant proposal on the basis that:-

- i. No evidence was tendered in court to show that the savings were utilized to put up the bar business;*
- ii. The two loans given to the Applicant by the Harambee Co-operative Savings and Credit Society Ltd were given on 9th February 2007 and 29th October 2010 hence the Applicant cannot claim that the loan was partly used to buy the suit property since the suit property had already been bought and title deed issued on 22nd October 2009;*
- iii. Respondent assert that it was not possible for the Applicant to have given her money for construction four months prior since the construction properly began on 7th February 2011 and the withdrawal of money was done in early November 2010;*
- iv. The Applicant has only produced receipt for Kshs.20,000/- used to process the title and no evidence for payment of purchase price of the suit property;*
- v. Simon Mbugua was never called to testify in respect of the loan agreement and no evidence was adduced to show the loan of Kshs.200,000/-was used in the construction of the matrimonial house;*
- vi. The loan of Kshs.320, 000/- had been taken in 2007 for payment of school fees and not construction. The Respondent acknowledged Kshs.591,600/- is as the only contribution;*
- vii. The Applicant was unable to connect the withdrawals made from his account towards acquisition and development of the suit property.*

29. In conclusion, it is submitted that the Applicant should bear the costs of this suit and the prayers sought by the Respondent during examination in chief should be granted.

Determination

30. I have considered the pleadings, evidence on record as well as the submissions on behalf of the Applicant and Respondent.

31. The Applicant and Respondent's marriage and its dissolution by court in 2018 is not in dispute. It is disputed whether some of the properties qualify to be regarded as matrimonial properties since contribution towards their acquisition and development is disputed. The Applicant seeks the division of the matrimonial properties under the provisions of Matrimonial Property Act No.49 of 2013(*hereinafter referred to as the 'Act'*).

32. In *ENN vs. SNK [2021] eKLR* at paragraph 22, the court stated that it is trite law that a matter regarding division of matrimonial property ought/shall have the following facets proved by either party:-

- a. The fact of a valid, legal, regular marriage in law;*
- b. Dissolution of such marriage by/through an order of the Court;*
- c. That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage;*
- d. Contribution by each party to the acquisition/development.*

33. In my view the following issues fall for determination:-

- a. Which properties qualify to be regarded as matrimonial properties?*
- b. What was the contribution of the Applicant and Respondent towards the acquisition and development of the matrimonial properties (if any)?*
- c. What share in the matrimonial properties is the Applicant and Respondent entitled to?*
- d. Who should bear the costs of the suit?*

34. As regards the first issue, according to the Applicant, the only property available for division as matrimonial property is Plot No. Mavoko/Town/Block xxxx which he claims to have solely bought with his savings and loans. On the other hand it is submitted by the Respondent that the properties available for division are:-

- a. Inheritance house on plot No. Kiganjo/Mundoro/xxxx*
- b. Motor vehicle registration No. KAC xxxx*
- c. Motor vehicle registration No. KAZ xxxx*
- d. Plot No. Mavoko/Town/Block xxxx*

35. In this respect, I am guided by section 6 (1) of the Act. 'Matrimonial property' is defined as follows:-

“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.”*

36. Under section 2 of the Act, 'Matrimonial home' has been defined as follows:-

“...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;

37. In the case of *T.M.V. vs F.M.C (2018) eKLR*, *Nyakundi J.* stated that:-

“....Basically for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”

38. It follows therefore that matrimonial property is a property that has been acquired during the subsistence of the marriage. In the event that a property was acquired before marriage then under section 9 of the Act a spouse's beneficial interest in the property is recognized through her contribution towards the improvement of the property in the following terms:-

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

39. As regards the house built on Plot No. *Kiganjo/Mundoro/xxxx*, the Applicant asserted that he constructed the house before he got married to the Respondent. The Applicant disputed any contribution by the Respondent towards its construction and/or expansion. According to the Respondent, the plot was developed during the subsistence of their marriage. She asserted that she was only seeking contribution towards the development of the house. At paragraph 10 of her replying affidavit, the Respondent averred that she contributed in the construction of additional rooms, plastering the floors and bought a set of seats worth Kshs.12, 000/-for the house. She also claimed to have solely managed the coffee trees on the land.

40. The title deed exhibited show that the registered owner of Plot No. *Kiganjo/Mundoro/xxxx* is WN, the Applicant’s mother and not the Applicant. The Respondent stated that her two children resided at the house while studying at [Particulars Withheld] Primary School but no documentary evidence was tendered in court to prove the same. It is clear from the evidence on record that at no point did the Applicant and Respondent consider the house at *Kiganjo/Mundoro/xxxx* as matrimonial home. The Respondent also failed to tender any documentary evidence towards the improvement of the house or purchase of the set of seats. In my view the house does not qualify to be considered as matrimonial property.

41. In respect of Motor Vehicle Registration Number KAC xxxx and KAZ xxxx, the acquisition of the said motor vehicles during the subsistence of the marriage is not disputed. However, the only document availed in relation to motor vehicle KAC xxxx is a sale agreement marked as *exhibit 7*. The sale agreement is dated 28th April 2010 establish that motor vehicle KAC xxxx was acquired during the subsistence of the marriage. According to the Applicant, in her supplementary affidavit, he averred that he bought motor vehicle KAC xxxx in 2007 to be used as family car and not for use as a taxi. I note that no log book or copy of motor vehicle records from NTSA have been tendered in court for both motor vehicles. It is not in dispute that the motor vehicles were sold before the dissolution of their marriage. In my view, the motor vehicles qualify as matrimonial properties since they were acquired during the subsistence of the marriage but not available for distribution. No orders have been sought for distribution of the proceeds from the sale.

42. I have no doubt based on the evidence on record that Plot No. *Mavoko/Town/Block xxxx* was acquired and developed during the subsistence of the marriage as well as the house built on it. The title deed in respect of the plot was registered in the name of the Applicant on 22nd October 2009. The Applicant got married to the Respondent in 1992. The Applicant contention that the plot belonged to him since the title was registered in his name does not suffice since under section 14 of the Act it is stated that there is a rebuttable presumption that the property is held in trust of the other spouse and the beneficial interest in the property are equal. The provision is couched in the following terms:-

“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.”

43. In the case of *Njoroge vs. Ngari [1985] KLR, 480*, the court held 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. In the case of *CWN vs. BN: Nairobi Court of Appeal Civil Appeal No. 236 of 2009*, the court held that distribution of matrimonial property does not depend on whose name the property is registered.

44. The construction of the house started in 2011 and completed in 2012. It is not disputed that the Respondent supervised its construction as her contribution towards its completion. Based on section 6 (1) (a) as read with section 2 of the Act, the house qualifies to be considered as matrimonial property. Pursuant to section 2(a) of the Act, the house is a matrimonial home.

45. In summation, the only properties that qualify to be considered as a matrimonial property for purposes of division is the parcel of land namely *Title no. Mavoko/Town/Block xxxx, together with the house built on it and improvements thereon.*

46. As regards the second issue, the Applicant averred that he completed the construction of the house built on Plot No. *Mavoko/Town/Block xxxx* without the monetary contribution of the Respondent. According to the Applicant, the Respondent only supervised its construction when the Applicant was busy at work.

47. The court then is left based on the material placed before it, to examine the material in whole with a view of determining contribution made by each party. The parties seeking division of the matrimonial property are under an obligation to prove their contribution towards acquisition and development of the matrimonial property. In this context, either party is required under section 107 of the Evidence Act required to prove his/her contribution to the acquisition and development of the matrimonial property.

48. Under section 2 of the Act, ‘**Contribution**’ has been defined to mean both monetary and non-monetary contribution. It will be noted that monetary contribution has not been defined under the Act but under the *Black’s Law Dictionary Free Online 2nd Edition*, *monetary is that which relates to money*. Regarding, non-monetary contribution, the Act has defined it to include: **Domestic work and management of the matrimonial home; Child care; Management of family business or property; and Farm work.**

49. 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.”

50. 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.”

51. In *U M M vs. I M M [2014] eKLR* the court was of the view that:

“As far as I can see it is the provisions of Sections 2,6 and 7 of The Matrimonial Property Act, 2013 fleshes out the right provided by Article 45(3). By recognizing that both monetary and non-monetary contribution must be taken into account, it is congruent with the Constitutional provisions of Article 45 (3) of the Constitution that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by Article 45(3).”

52. Based on the above cited legal provisions and court decisions, it is clear that despite the constitutional requirement that parties in a marriage have equal rights, each party must be able to prove monetary or non-monetary contribution lest a party will not be entitled to any share in the matrimonial property.

53. It is not disputed that the Applicant paid Kshs.20,000/- to process the title for Plot No. Mavoko Town /Block xxxx. The Applicant contends that he has been a member of the Harambee Sacco since 1989. According to him, the Sacco advanced him a loan of Kshs. 320,000/- and 591,100/- in 2007 and 2010 respectively. A copy of the loan application for Kshs.320,000/- is exhibited as ‘LMN5’ together with a top up loan application for Kshs.591,000/- I note that at paragraph 27 of the Respondent replying affidavit, she averred that the Applicant only contributed Kshs.591, 600/- to finance the construction of the matrimonial home. According to the Applicant, the loans were used to buy Plot No. Mavoko/Town/Block xxxx and the remaining amount to build the house on it. In support of the loan repayment, the Applicant exhibited his accounts statement with the Sacco as ‘LMN6’. The Applicant averred that building stones, sand and ballast to in readiness to construct the house were purchased with money withdrawn in August 2010 to November 2010. A copy of the account statement was exhibited as ‘LMN7’. According to the Applicant, he further withdrew Kshs.500, 000/- from Equity Bank on 7th February 2011 to 3rd June 2011 and gave the Respondent. A copy of the bank statement is exhibited as ‘LMN8’. It is submitted that he further took another loan of Kshs.200, 000/- from his friend Simon Mbugua. A copy of the Agreement is exhibited as ‘LMN9’. The Applicant asserted that he gave the Respondent money to buy building materials and pay workers. The Applicant claim to have constructed a cowshed and bought a water tank but no documentary evidence was tendered in court. According to the Applicant, he was the one who set up the bar business and requested the Respondent to run it although the Applicant has not stated the capital used to set it up. However, I note that in 2006 through the Respondent, RW3 lend the Applicant and Respondent Kshs.100, 000/- to operate the bar business. According to loan agreement the loan was to be refunded in installments. A copy of the loan agreement is exhibited as *Exhibit 2*.

54. On the other hand, the Respondent asserted that she purchased all building materials with proceeds from the bar business and the loan of Kshs.100, 000/- she received from their daughter JWM. A copy of the letter from JWM is marked as *Exhibit 10*. I note in the letter that the daughter also bought iron sheets for them worth Kshs.126, 000/- and plumbing materials. According to the Respondent, she got from her sister, RW3 a loan of Kshs.100, 000/- for purposes of their bar business. A copy of the loan agreement is marked as *exhibit 2*. According to her, Plot No. Mavoko/Town/Block 3/6962 was purchased from the proceeds of the sale of a piece of land located in Githurai which she co-owned with the Applicant. She stated that the land was sold at a costs of Kshs.200, 000/-. However, I note that no title deed or details of the piece of land was tendered in court. The Applicant denied the existence of the piece of land. In her oral evidence, the Respondent stated that she took a loan of Kshs. 500,000/- from Family Bank. I note that the amount was not pleaded in either the Respondent’s replying or further affidavits. However I note that the bank statement found at page 256 to 267 show that money had been disbursed into the Respondent’s bank account and she was repaying the loans. On the face of the bank statements, it is indicated that the loan was advanced to the Respondent to boost the business with an aim of reducing a loan. However I note at paragraph 36 of her replying affidavit, the Respondent averred that she took several loans to construct and develop their home by constructing a cow shed, a shop, two additional rooms, and water. It is not in dispute that the Respondent supervised the construction of the house and ran the bar business while the Applicant was busy at work.

55. In my view, the documents in support of the Respondent’s case largely supported the expenditure at the bar business where the Respondent spent most of her time managing the business. I note that the Applicant stated that he was not aware of any new development on the plot since he left the house in 2013. The Respondent did attach photographs to show improvements which evidence was not challenged by the Applicant.

56. In my view having considered the evidence on record, I find that the Applicant’s contribution was largely monetary while the Respondent’s contribution was largely non-monetary. In my view the Respondent also participated in monetary contribution but not in a significant way. The Applicant did attach documentary evidence to show that he had taken two loans from Harambee Sacco at the early stage of their marriage in 2007 and 2010. It is not disputed that they used to reside at Kasarani police station before they completed constructing the house on Plot No. Mavoko/Town/Block xxx in 2012. I find that no sufficient reasons were adduced by the Respondent that the loan of Kshs.320, 000/- was to be used in payment of school fees and not in construction. On the other hand, the Respondent case is largely

supported by documents that show the expenditure at the bar business. She solely managed the bar business, the sweater business and the kiosk when the Applicant was busy at work. She also stated that she used to visit home over the weekend to check their children. She was able to get a loan of Kshs.100, 000/- from her sister. The Respondent continued to take care of the family even after the Applicant left the house in 2013. She attached agreements which show that she operated a lending money business. The contents of the agreements have not been challenged in Applicants affidavits but in the submissions.

57. On the third issue, the Applicant asserted that he was entitled to 80% of the matrimonial property while the Respondent 20%. According to the Applicant he solely acquired and developed plot No. Mavoko/Town/Block xxxx, the house and other improvements thereon. The Applicant prays that the property be shared at the said ratio or in the alternative, be sold and proceeds be shared at the said ration in his favour. According to the Respondent, she played a great role towards the acquisition and development of the matrimonial home hence 20% is not enough. She stated that the bulk of the construction was done by her. In her oral evidence, she was opposed to the sale of the property since herself and the children do not have another home. However, I note that their children are all adults. She preferred the parcel of land Mavoko/Town/Block xxxx be subdivided into half. According to her, it is possible for the house on the said land to be sub-divided. In the alternative, she was amenable to paying the Applicant the 20% contribution. I note that the Applicant does not dispute that he left the house in 2013 and does not know whether there have been any development on the land. The Respondent has never left the house since 2012 when the construction of the house was completed and they occupied it. The Respondent asserted that the Applicant has remarried and now residing at another house in Ruiru but no sufficient evidence was tendered or led in court to prove its existence.

58. Indeed, the Court of Appeal in *M B O vs. J O O [2018] eKLR* held 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.”

59. I have considered the court decisions relied on by the Applicant. Based on the evidence on record, I am satisfied that this is a proper case where the efforts of both the Applicant and Respondent were equal. The ratio of share would be 50:50 for the Applicant and Respondent respectively. This in my view is a fair and equitable sharing taking into account all their financial, physical and emotional efforts regarding the matrimonial property.

60. In the result, the originating summons dated 29/3/2019 is allowed in the following terms:

a. A declaration that the parcel of land namely Title No. MAVOKO TOWN BLOCK xxxx is a matrimonial property.

b. A declaration that the house and improvements thereon erected on parcel of land namely Title No. MAVOKO TOWN BLOCK xxxx form part of the matrimonial property.

c. A declaration that contribution towards acquisition and development of parcel of land Title No. MAVOKO TOWN BLOCK xxxx together with the house and improvements thereon was in the ratio of 50:50 between the Applicant and Respondent.

d. A declaration that the parcel of land Title No. MAVOKO/TOWN/BLOCK xxxx together with the house and improvements thereon be sold and the proceeds from the sale be shared equally in the ratio 50:50 between the Applicant and Respondent upon survey.

e. In the alternative either party has the option of buying out the other party's 50% share.

f. Each party to bear their own costs.

It is so ordered

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE

DELIVERED AT MACHAKOS THIS 14TH DAY OF OCTOBER, 2021.

G. V. ODUNGA

JUDGE