



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: G.V Odunga, J.)

MATRIMONIAL CAUSE NO. E001 OF 2021

IN THE MATTER OF DIVISION MATRIMONIAL PROPERTY

AND

IN THE MATTER OF MATRIMONIAL PROPERTY ACT, 2013

EKTM.....APPLICANT

VERSUS

ECC.....RESPONDENT

JUDGEMENT

1. The Applicant and Respondent got married under the Kalenjin customary law in December 2013 and thereafter solemnized their marriage on the 11th day of November 2016. Their union was blessed with 3 issues.
2. In December 2018, as a result of irreconcilable difference, the Applicant and Respondent separated and their marriage was dissolved thereafter on 2nd September, 2020 vide Mavoko CMCC No.3 of 2019.
3. By Originating Summons dated 11th January, 2021, the Applicant seeks the following orders:-
 - a. A declaration that the property known as House No. 6 Type B on LR No. xxxxx Lap Fund Gardens with all buildings and developments thereon acquired during the subsistence of their marriage and registered in the joint names of the Applicant and the Respondent is a matrimonial property.
 - b. The House No. 6 Type B on LR No. xxxxx Lap Fund Gardens be distributed to the Applicant and the Respondent as a ratio of 90 and 10 percent respectively on the value of principle paid to the bank being their respective contribution to the purchase of the said property.
 - c. That upon prayer (a) and (b) being granted, the Applicant consequently be at liberty to purchase the Respondents share of contribution on the House No. 6 Type B on LR No. xxxxx Lap Fund Gardens and the property be registered in the Applicant's name.
 - d. That in the alternative to prayer (b) and (c), the Applicant and the Respondent be allowed to get into private equity negotiations with the charger of the matrimonial property in order to pay off the outstanding facility and the proceeds be divided between the Applicant and the Respondent into the ratio of 90:10 respectively.
 - e. That all the household items be retained by the Respondent.
 - f. That the court be pleased to issue any other orders that it deems fit and just to the parties.

Applicant's case

4. In his supporting affidavit, the Applicant averred that on 20th August 2015, he acquired a mortgage facility worth Kshs. 8,700,000/- through Kenya Commercial Bank, where the Respondent is employed, to purchase House No. 6 Type B on LR No. xxxxx Lap Fund Gardens (hereinafter referred to as '*the suit property*') which suit property was registered in his name and that of the Respondent despite the fact that the Respondent only contributed Kshs. 580,000/- to the acquisition of the property. He deposed that a sale agreement dated 17th December 2015 between the Applicant, Respondent and the vendor was executed causing the Applicant to pay legal fees of Kshs. 796,095.75/- to Kipkenda & Co. Advocates and a charge dated 16th June 2016 was also registered against the suit property. He deposed that a monthly sum of Kshs. 55,519/- is being deducted from his salary towards payment for the mortgage.

5. The Applicant further averred that, to avoid repossession by Kenya Commercial Bank, he paid Kshs. 228,626/- into the Respondent's liquidation Account for all the consolidated loans inclusive of the Respondent's mortgage to the bank. He averred that there is a huge balance of Kshs. 7,245,694.39 which he is expected to continue paying. He averred that as a result of an arrangement between his employer and the bank, there exist a contractual relationship with the bank hence the loan cannot be inherited by a third party. It is on that basis that the Applicant asserted that he should be granted the option of buying off the Respondent with the Respondent retaining the household items in the suit property. According to the Applicant, the Respondent's contribution of Kshs.580, 000/- amounts to 6% of the total value of the suit property hence upon completion of the mortgage, he will have contributed 94% of the value. The said Respondent's contribution excludes interest that continues to accrue and expenses incurred during the purchase of the suit property.

6. The Applicant deposed that as a result of the said irreconcilable differences, he left the suit property in December, 2018 and that the suit property is occupied by the Respondent together with their three minor children MC, RC and NC. He averred that the children's court vide a judgement issued on 2nd December,2020 in CC No.1314 of 2019, directed him to continue paying the mortgage until this case was determined. However, the Applicant averred that the bank has an overriding interest in the suit property until the loan is cleared.

7. In his supplementary affidavit sworn on 26th May 2021, the Applicant admitted that though the suit property was purchased as a matrimonial home, the breakup of their marriage was caused by the Respondent. It was his averment that after he left the matrimonial home, the Respondent purported to undertake some developments in the suit property because she foresaw the divorce which would lead to division of the matrimonial property. Consequently, he sent a letter dated 21st August 2019 through his advocates to the Respondent to stop the purported repairs in the suit property. According to him, out of the quotations dated 22nd August 2019 and 5th September, 2020, there is only a single proof of payment and Kshs. 80,000/- used to purchase a steel gate which was in any case unnecessary since the area has adequate security. However, there was no proof of the alleged costs of Kshs.501, 550.00.

8. As regards the non-monetary contribution, the Applicant averred that he greatly contributed to the management of the matrimonial home, taking care of the children and companionship to the Respondent. He deposed that even after the Respondent was terminated from her employment at the bank in 2017, he continued to pay the Respondent's share in the mortgage plus household expenses. According to him, he is the one who successfully negotiated for the suit property and he has never defaulted to repay the loan for the house, yet he does not live in it. The Applicant asserted that he would lose so much in the event that the suit property was sold since he had contributed more than the Respondent and whatever might be recovered from the sale, may not clear the whole amount needed by the bank including what she is demanding.

9. It was his view that his proposal that the Respondent's contribution be determined at 10% is more than the Respondent's contribution towards the purchase of the house and maintenance of the home and children. He urged the court to consider each party's contribution and other underlying factors to divide the suit property in a fair and justifiable manner.

10. In his oral evidence, the Applicant stated that he was working for the Energy Regulatory and Petroleum Authority and He adopted his statements filed on 10th March, 2021 and dated 1st March, 2021 as evidence in chief and relied on his list of documents and supplementary list filed in court.

11. It was his evidence that the purpose of purchasing the house was for matrimonial purposes and that it was a staff benefit from his employer. However, at the time of taking the loan he was short of Kshs 580,000/- which he requested the Respondent to top up. This top up was done by a separate mortgage for the purchase of the house. According to him, it was not his intention that they have equal shares. He stated that registration in both names was a condition for the grant of the said Kshs. 580,000/= advanced by the Respondent's employer, KCB. He stated that at the time of purchase, the house was fully build both inside and outside with no need for improvement. In his evidence, the house is in gated community of over 120 houses hence there was no need for a gate and there were cabros hence no need to put the same.

12. He contended that as the father of their two children, he was surprised to find some developments going on without his knowledge. When he saw a gate being put up and the cabros being replaced, he instructed his lawyer to tell the Respondent not to proceed till the finalization of the case but Respondent did not agree.

13. On the issue of taking care of children, he asserted that it was a joint responsibility and that still pay for the children. He reiterated that at one point the Respondent was terminated from employment on disciplinary grounds hence he was solely responsible for running their home. It was his view as regards the issue of priority that the same was baseless as the Court had already pronounced itself on the issue. According to him, the value of the property was Kshs 9.8 million as at the time of the mortgage and it is not fully paid. As at December 2020, the balance was Kshs 7,245,694.39.

14. Apart from the house being a staff benefit, he explained that there is now a contractual obligation with the bank which has overriding interest in the property. Accordingly, in the event of the sale of the property which can only be where there is default, the Bank's interest will come first.

15. He stated that when the problems arose, he explained that the sums advanced was his employer's funds managed by KCB hence the house to be fully paid. It was his evidence that if the Respondent wants to take over the house, the balance must be settled otherwise she would have to enter into a contract with KCB having lost her job with KCB. Since by the time of losing her said job, the Respondent was still

servicing the said mortgage Kshs 580,000/-, the Applicant stated that he requested her Bank that the same be paid by a deposit in the liquidation account and that all her loans were liquidated. The Applicant insisted that they cannot have equal shares since the Respondent's contribution was not the same and that the only amount they are entitled to is the amount paid since the Bank still has an overriding interest.

16. To the Applicant, since the Respondent has no problem with the house being sold, the Applicant ought to be paid her share. After that she can be discharged and can vacate the house leaving the Applicant as the sole owner of the house to continue servicing the balance of the loan.

17. In cross-examination, the Applicant stated that the Respondent's salary stopped in July and that he made 12 installments of Kshs 229,000/- at a monthly installment of Kshs 45,000/-. Further, there were 3 installments of Kshs 6,783/- and one instalment of Kshs 161,000/-. It was his evidence that once the Respondent was terminated, default in payment of one installment meant default in all the loans. He however admitted that the purpose of the loan was for matrimonial home and that they did not intend to divide the property.

18. While the Applicant admitted that the Respondent did some improvement to the house, he insisted that these were done without his consent after he had left the house. According to him the said work degraded the property. While appreciating that parental responsibility is shared, he stated that the Respondent was equally employed full time till the time of her termination. Apart from the suit property, the Applicant denied owning any other property and that it was the Respondent who was residing in the suit property with the children pursuant to the directions of the Children Court. He however insisted that he was taking care of the minors responsibly and dutifully.

19. In re-examination, the Applicant while admitting that the Respondent was a home manager, countered that he also played an equal role and was paying fees and offering parental guidance to the said minors.

Respondent's case

20. On the part of the Respondent, she swore a replying affidavit on 10th March, 2021 in which she asserted that the suit property was being purchased as a home for their growing family. She admitted that a mortgage facility from Kenya Commercial Bank was acquired by the Applicant to enable them purchase the suit property. According to her, at the time, the Applicant only qualified for a loan of Kshs. 8,700,000/- and since she was an employee of the Said bank, to enable the Applicant get the loan, she took out a top up loan of Kshs. 580,000/-. The Respondent asserted that she has completed paying the loan as exhibited in her bank statements.

21. She admitted that the total mortgage facility advanced to them was Kshs.9, 280,000/-. She does not dispute that they accepted the offer, a sale agreement was executed together with lease and a charge was registered against the suit property. She admitted that the suit property was registered in their names hence a prima facie proof of ownership. According to the Respondent, the suit property is a matrimonial property since it was purchased during the tenure of marriage. She asserted that she has resided with the children in the suit property since its purchase but the Applicant left the suit property in 2018.

22. In terms of contribution, she averred that she has developed the suit property, including but not limited to landscaping, general repairs and the fixing of a new gate. She stated the total costs was Kshs. 501, 550/-. Based on the advice of her advocate, she believed that ownership of the matrimonial property vests in the spouses according to the contribution of either spouse. According to her, she has also made non-monetary contribution by doing domestic work, managed the matrimonial home, taken care of the children and offered companionship to the Applicant during the tenure of their marriage. She asserted that she has utilized her income to take care of the household expenses, buying food for the family and provided diverse need to the children.

23. According to her, she has contributed her time and effort in maintaining the home and taking care of the children hence her contribution cannot be measured at 10% but equal to the Applicant's. She averred that the suit property should be divided equally. She admitted that she was aware of the contractual obligation to the bank to settle the mortgage facility advanced to them. According to her, she is also at liberty to enter into negotiations with the bank to determine how she would fulfill her obligation under the charge. She strongly proposed that it is in the interest of justice that the suit property be sold and the proceeds therefrom be used to clear the mortgage facility and the balances be divided equally. Based on her advocate's advice, she asserted that the matrimonial home ought to be fairly and justly divided upon dissolution of the marriage.

24. In her further witness statement, the Respondent urged the court to consider the children who currently reside in the suit property and who do not have an alternative house. According to her, providing shelter is a parental responsibility. She was apprehensive that the Applicant will fail to provide shelter if she is removed together with the children from the house. She pleaded with court that sale of the suit property should be the last resort if the court deems it best for parties and in the interest of the children.

25. In her oral testimony, the Respondent adopted her statements and relied on her filed list and bundles of document and further list filed on 15th March 2021 and 24th June, 2021 respectively. She stated that she resided at Lapfund Gardens, Athi River. Though she was self-employed, prior to that she was working for Pronto Energy till August, 2020 when she was declared redundant.

26. According to her, she made improvements because the home was unkempt. She stated that there was no cabro apart from the front side with the back side left undone. Whereas the house was in a gated community there was an option of the owners putting their own gates. Due to the developments undertaken by herself, she stated that the value of the property had gone up.

27. It was the Respondent's case that had she not topped up the mortgage, the Applicant would not have gotten that property. She denied that she had other intentions in claiming the house but insisted that the value of her improvement was Kshs. 501,000/= because she could not stay with a leaking bathroom and insisted that she had to do the tiles.

28. Regarding the mortgage facility, the Respondent stated that she was working for [Particulars withheld], which company had an Agreement with the Bank at concession rate of 5.5%. According to her, the Bank required security for the Kshs. 580,000/= hence the joint registration was a condition to advance the amount. It was her evidence, that from end July 2017 when she left KCB, the Applicant did some

payment of Kshs. 4,500/= every month for 12 months but he stopped paying in July 2019 when the Respondent applied for loan and offset her share of the facility. According to her, she paid Kshs. 352,000/= to clear her part with KCB and that the said Kshs. 161,000/= had nothing to do with the mortgage.

29. According to her, she has maintained the property so that it does not lose its value by repairing the defects without asking Applicant. It was her evidence that while they were living together, she supported the Applicant as well as the children and made sure they had a beautiful home. While admitting that the Applicant made a bigger financial contribution to the purchase of the house, the Respondent insisted that she also did her share of non-monetary contribution. According to her, after their separation, the petitioner never contributed apart from school fees till the Children Court ordered him to pay monthly payments which he only paid twice and that to date, the Applicant has not fully paid and so the 90% that he is claiming would not be fair as he will not provide shelter for the children.

30. Respondent proposed the sale of the property as an alternative proposal. She stated that, that was the only property they had with children and the Applicant and that the children have nowhere to go. Accordingly, she proposed a 50:50 share considering the monetary contribution and care of the children.

31. In cross-examination, she stated that it was a matrimonial home purchased under mortgage facility which they both applied but it is the applicant who first applied. According to her, the Applicant has not cleared his part but she has cleared his part, the part which still has overriding interest. It was her evidence that the Applicant qualified for Kshs. 8.7 million and she topped up with Kshs. 580,000/-. She insisted that she spent Kshs. 501,000/= in developing the property. Referred to the attached invoice for Kshs. 372,800/-, she stated that she had receipt but she did not have it in Court. Same position applied to invoices for Kshs. 31,350/= and Kshs 17,400/-. The receipt for 80,000/=, she stated was for gate.

32. She admitted that the Applicant also offered companion to her and that the Applicant offered equal share to the children and participated in home management. However, most of the time the Applicant would travel out of the country and she used to stay at home. It was her testimony, that when she lost her job at KCB, they both took care of their family and she offered the Applicant emotional support.

33. The Respondent reiterated that when the Applicant left there were no cars apart from the parking space.

34. In re-examination, the Respondent stated that the purchase was meant to be a matrimonial home. According to her, she settled payment as per the invoices and that the Applicant acknowledged that she made improvements. She asserted that since the property was a matrimonial property, she had equal rights. It was her evidence that when she was working in the bank, she would secure her mortgage and take care of her family at home and improvements and landscaping of the home to make sure it was comfortable to stay in. It was therefore her case that her non-monetary contribution should be considered in taking care of children and in her view that would be 50:50.

35. On behalf of the Applicant, it is submitted that the Respondent has not tendered in court proof of Kshs.501, 550/- stated to have been incurred as expenses for landscaping, general repairs and fixing of a new gate. The Applicant asserted that he has equally catered for the minors and provided domestic needs while he was staying at the matrimonial home. According to the Applicant he has catered for the children needs more than the Respondent and equally provided companionship during the subsistence of the marriage.

36. In the Applicant's view, the issues that fall for determination in this suit are:

a. Whether the joint registration of the suit property entities, the Respondent is entitled to half of the share of beneficial ownership

b. Whether the beneficial interest in the suit property should be divided between the Applicant and the Respondent at a ratio of 90% to 10%

c. Whether the Applicant should be allowed to purchase the Respondent's share of contribution on the suit property and the property be registered in the Applicant's name.

37. On the first issue, it is submitted that the presumption under Section 14(b) of the *Matrimonial Property Act* hereinafter referred to as 'the Act' can be rebutted through evidence of parties in marriage due to their respective contributions made towards the purchase as well as the special circumstances surrounding the said mortgage facility. According to the Applicant, he has proved that he made more financial contribution and arrangement on the continuous payment of the balance which is exclusively on his shoulder. It was submitted that Kshs.580, 000/- contributed by the Respondent is only 6% of the value of the property excluding the interest which continues to accrue hence the Applicant has contributed 94% of the value. Reliance was placed on the cases of JMM vs. MM [2019] Matrimonial Cause No.31 of 2017 and FS vs. EZ [2016] eKLR. According to the Applicant, the position in the cases have been enunciated in Section 7 of the Act that matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition. Further reliance is placed on the case of PNN vs. ZWN Civil Appeal 128 of 2014(2017) eKLR.

38. It was submitted that the fact that the suit property was registered in the joint names of the Applicant and Respondent, it does not give the Respondent a right to an equal share as that alone did not take away the basic principles that every party to a marriage deserved a share proportional to his/her contribution. The court was therefore urged to consider each party's contribution.

39. On the second issue, it is submitted that since the Respondent's monetary contribution is 6%, it is in the interest of justice that the beneficial interest in the property be divided between the Applicant and Respondent on a ratio of 90:10 respectively taking into account the Respondent's contribution. Reliance was placed on the case of Francis Njoroge vs. Virginia Wanjiku Njoroge Civil Appeal No.179 of 2009 where it was held that a division of the property must be decided after weighing the peculiar circumstances of each case as well as the Court of Appeal of Singapore in Lock Yeng Fun vs. Chua Hock Chye 92007 SGCA 33 where it was stated that it is axiomatic that the division of matrimonial property under Section 112 of the Act is not and by its very nature cannot be a precise mathematical exercise.

40. According to the Applicant, the Respondent has only produced a receipt of Kshs.80, 000/- towards purchase of the steel gate which was unnecessary since the area was a gated community where there are sufficient existing gate and structures. Further the invoices/quotations were issued in 2019 and 2020 when the Applicant had ceased staying in the said house.

41. It was submitted that the Respondent has been in employment throughout hence untenable that she has made non-monetary contribution. It is submitted that both parties took care of the minors and maintained the home and reliance was placed on the case of **JMM vs. MM [2019] eKLR** where court distributed property at a ratio of 60% to 40% where a wife had contributed only Kshs.80, 000/-while the husband had paid the rest of the mortgage.

42. On the third issue, it is submitted that the Applicant is the party poised to pay the loan as he is the one in a contractual relationship with Kenya Commercial Bank hence he will be highly prejudiced if the suit property is sold. Reliance was placed on the case of **NNN vs. SNM [2017] eKLR** where the court considered the fact that the matrimonial property was charged and declined the invite to have it sold. It was submitted that the parties are not at liberty to sell the charged property until the mortgage is fully paid and the Applicant asserted that he should be granted the option of buying off the Respondent's contribution and that while the Respondent can retain all the household items in the suit property, the Applicant should be left to make payments for the suit property and clear the Respondent's share in the property, then the suit property can be registered in his name.

43. The Court was therefore urged to grant the prayers as prayed.

44. On behalf of the Respondent's, two issues were proposed for determination:-

a. Whether the Respondent made monetary and non-monetary contribution

b. Whether the Respondent is entitled to half beneficial share in the suit property.

45. On the first issue, it was submitted that it is not in contention that the suit property was acquired during the subsistence of the marriage hence a matrimonial property and that the Applicant confirmed that the Respondent made contribution of Kshs.580, 000/- towards the acquisition of the suit property. The Respondent also admitted that when she was unemployed, the Applicant repaid her share of the mortgage and did not dispute the receipts showing the payment except for the sum of Kshs. 161,000/- alleged to have been paid by the Applicant. According to the Respondent, she settled her balance of the mortgage from July 2019 when the Applicant stopped making payments.

46. It was submitted that no evidence was tendered in court by the Applicant towards payment of Kshs.228, 626/- to the Respondent's liquidation account which included the mortgage account. On the other hand, the Respondent tendered her bank statements in court as proof of payment of her part of the loan. According to the Respondent, she developed the suit property through landscaping, general repairs and fixing of a new gate at a cost of Kshs.501, 550/- as per the invoices and receipts tendered in court.

47. Apart from that, the Respondent asserted to have made monetary contribution and in this regard it was submitted that the Respondent was involved domestic work and managed the matrimonial home by taking care of the children and companionship to the Applicant. She also utilized her salary towards the household expenses like food and other needs. In this regard, reliance was placed on the cases of **TMW vs. FMC [2018] eKLR**, **JMM vs.MM (2019) eKLR** and **NNN vs. SNM (2017) eKLR**.

48. As regards the second issue, it was submitted that pursuant to Article 45 of the Constitution, all parties in a marriage have equal rights during and at the dissolution of the marriage. Further, Section 14 of the ***Matrimonial Property Act*** enacts rebuttable presumptions that (a) the property is held in trust for the other spouse and (b) their beneficial interest in the matrimonial property are equal and the Respondent cited in support the case of **GNJ vs. JMM [2019] eKLR**. According to the Respondent, the Applicant failed to provide sufficient evidence to rebut the presumption under Section 14(b) of the Act to render the vacation of Article 45. Placing reliance on the case, it was submitted that the purpose of purchasing the suit property is a consideration and this case the suit property was to serve as the matrimonial home and as the Respondent is still residing with the children in the suit property, the distribution should be in equal shares. She cited the case of **NNN vs. SNM (2017) eKLR** as supporting this position.

49. The Respondent therefore urged the court to consider her proposal of half share beneficial interest in the suit property for having contributed both monetary and non-monetary and prayed that the suit property be divided equally between the parties.

Determination

50. I have given due consideration to the pleadings and the evidence on record. The case revolves around the application of Article 45(3) of the Constitution as read with section 7 of the ***Matrimonial Property Act, 2013***. The former provides 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.

51. What this Article provides, in my view, is that parties to a marriage do not lose their rights merely because they have entered into a matrimonial union but they continue to enjoy equal rights at the time of the marriage, during the marriage and at the termination of the marriage. What I understand by the said Article is that spouses may be in a union, each one with his or her rights which are not necessarily pegged on the said relationship. With respect to the present case, it is possible for the husband and wife to enter into a relationship with each one of them owning his or her separate property in his or her own rights without necessarily ceding the right merely because of the fact of their marriage.

52. What then is matrimonial property? Section 6 of the *Matrimonial Property Act* defines ‘matrimonial property’ as:

- (a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes; or
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

53. Under Section 2 of the Act, ‘*Matrimonial home*’ has been defined as:-

any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

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

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

55. In the Ugandan High Court, Mwangusya J. in Paul Kagwa vs. Jackline Muteteri (Matrimonial Cause-2005/23) [2006] UGHC 17 (18 May 2006) while citing Bossa, J in John Tom Kintu Mwangwa vs. Myllious Gafafusa Kintu (Divorce Appeal No. 135 of 1997) (unreported) expressed himself as hereunder:-

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

56. In this case the parties agree that the property herein was acquired during the coverture and that it was meant to be the matrimonial home of the Applicant and the Respondent and their children. The fact that the property was acquired under a mortgage does not derogate from that fact since a mortgagee only acquires a financial interest in the mortgaged property and not a proprietary one.

57. In this case, the Applicant and Respondent solemnized their marriage on 11th November, 2016 and thereafter divorced on 2nd September, 2020. What is before the Court is the issue of the distribution of the suit property. I agree with Kemei, J in ENN vs. SNK [2021] eKLR 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.

58. A similar view was adopted in P.O.M vs. M.N.K (2017) eKLR the where the court appreciated that:

“This is a suit for division of matrimonial property. The legal regime governing such endeavor is the Matrimonial Property Act, Act No. 49 of 2013. The relevant provisions are to be found in Part III thereof. According to those provisions, in particular section 7, such property is to be divided upon divorce or dissolution of the marriage. The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made. A party, who moves the court for orders relating to division of matrimonial property, or declarations thereon, must strive to bring his case within the prerequisites stated above.”

59. It was agreed by the parties that the suit property was acquired and developed during the marriage of the Applicant and the Respondent. Section 14(b) of the *Matrimonial Property Act* provides that:-

Where matrimonial property is acquired during marriage—

- (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

60. However, Section 7 of that *Matrimonial Property Act*, provides as follows:

Ownership of the matrimonial property vests in the spouses according to the contribution of other spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

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

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

62. It is however clear that contribution need not necessarily be in financial terms since according to section 2 of **Matrimonial Property Act, 2013** (hereinafter referred to as the said Act):

“contribution” means monetary and non-monetary contribution and includes—

- (a) domestic work and management of the matrimonial home;**
- (b) child care;**
- (c) companionship;**
- (d) management of family business or property; and**
- (e) farm work.**

63. It will be noted that monetary contribution has not been defined under the Act. The **Black's Law Dictionary Free Online 2nd Edition**, defined monetary as that which relates to money.

64. It therefore follows that the mere fact that one spouse is not engaged in any income generating venture does not necessarily mean that the said spouse is not contributing to the acquisition of the matrimonial property and ought to leave the union barehanded. One however has to show some contribution made towards the acquisition and preservation of the acquired property. In the old days it was presumed that it was the husband who would be going to work while the wife stays at home. In a majority of the old cases, non-monetary contribution was geared towards ensuring that the non-working wife's contribution was appropriately taken into account when the marriage was dissolved. However, these days, it is not uncommon to find cases where the roles have reversed. Maybe out of sheer laziness or due to circumstances beyond the control of the husband, such as redundancy, it is the wife who is in income generating activity while it is the husband who is left to look after the home. In a case where the husband is at home out of sheer laziness, it would be unfair to the wife to hold that in the event that the marriage is dissolved, the property acquired during the marriage be shared equally. In that event, I have no doubt at all in my mind that the husband must accept his position and move on without making any claim to the properties he never contributed in their acquisition. As was appreciated by **Kiage, JA in P.N.N vs. Z.W.N [2017] eKLR**:

“In such circumstances, an assessment of the inauspicious party's non-monetary contribution may well turn out to be in the negative, the account in debit. No fifty-fifty philosophy would grant such a party any right to property acquired without their contribution notwithstanding their negation or diminution of the efforts towards its acquisition.

In the end it does work out justly and fairly enough in that assessment may turn out 50:50 or as in the case of NJOROGE vs. NJOROGE (supra) 70:30 in favour of the man. There is no reason why the math may not be in favour of the wife if that is what the evidence turns up. In many cases in fact, percentages never feature as the Court only ascertains who between the spouses owns which property.”

65. On the other hand, the husband may not be in an income generating engagement but may be involved in other non-monetary activities such as management of the home by making sure that it is clean, supervision of the farm or business activities etc. It is not uncommon to find such a husband dropping and picking the children to and from school. Such contribution must be taken into account when the marriage is dissolved and ought to be quantified somehow.

66. The reverse is also true when it comes to the wife. However, one must take into account the fact that the wife also bears the burden of childbearing, a task which husbands do not perform. However, it is possible to find that the contribution of a particular wife to the acquisition of the properties is minimal due to sheer laziness. On the other hand, it is not unheard of to find circumstances where a working wife decides to leave her job in order direct her attention fully to the care of the family. That is a fact that must also be considered in determining the apportionment of contribution. It follows that there is no rule of thumb that in the event of a divorce the property must be shared in the ratio of 50:50. That each case must be decided on its own facts was appreciated in by the Court of Appeal in **TKM vs. SMW [2020] eKLR** where it stated as follows:

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

67. Where from the evidence presented, it is clear that one spouse has not made any contribution at all towards either the acquisition or development of the matrimonial property, the court must gather the courage to state so. Accordingly, as was held by Nyakundi J. in MNH vs. FHM [2018] eKLR:-

“The logical conclusion flowing from the judicial precedence quoted above is that in determining the distribution of matrimonial property at the dissolution of a marriage, the Trial Court ought to dispassionately scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties.”

68. This was appreciated by in EGM vs. BMM [2020] eKLR where the Court of Appeal and opined as hereunder:

“We think it was erroneous for the learned judge to assume and hold that the Constitution gives spouses an automatic 50% share of the matrimonial property simply by being married...The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed.”

69. The Court in that matter was of the view that:-

“The Learned Judge missed the mark on his interpretation of spousal equality as enshrined in that sub-Article. This Court espoused the meaning of that equality in M E K vs. G L M [2018] eKLR as follows;

“Equality in marriage is not a principle to be applied blindly nor is it intended to encourage dependency by one spouse. It is a situation where each party makes a contribution. In other words it is not shifting the burden, but the sharing of responsibilities and benefits taking into account the gender limitations.

We think it was erroneous for the learned judge to assume and hold that the Constitution gives spouses an automatic 50% share of the matrimonial property simply by being married. The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly a party by giving such party more than he or she contributed.

It is the duty of the courts to fairly and accurately determine such distribution and the learned judge but abducted that duty. His blanket of a 50:50 formula ostensibly on the basis of Article 45(3) of the Constitution effectively made the distributive scheme of the statute completely of no effect and orchestrated a failure of justice.”

70. However, as held by Kiage, JA. said in PNN vs. ZWN [2017] eKLR:-

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

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

71. The Learned Judge further added:

“Thus it is that the Constitution, thankfully, does not say equal rights ‘including half of the property.’ And it is no accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.”

72. It was therefore held in Federation of Women Lawyers Kenya (FIDA) vs. Attorney General & Another [2018] eKLR 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.”

73. Similarly, in UMM vs. IMM [2014] eKLR the court was of the view that:

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

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

75. I appreciate that whereas a person’s source of income may be evidence of his or her capability to contribute towards the purchase and development of a property, it does not necessarily follow that the person did actually make the said contribution. It is therefore necessary that the spouses prove their respective proportions of the financial contribution either directly or indirectly towards the acquisition of the property rather than merely waving the source of income. It is not unheard of for certain parties to spend all their income a marriage in their own personal gratification while the other spouse invests. Accordingly, financial muscle alone is not necessarily proof of contribution.

76. Again the mere fact that a party has access to financial facilities does not necessarily mean that the said facilities were spent towards the development of the properties in question though it would be evidence of his or her capability to do so. I agree with the position in the case of T M W vs. F M C [2018] eKLR, where the court held that:

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

77. In this case, it is not in dispute that the Applicant took a mortgage facility of Kshs.8, 700,000/- from Kenya Commercial Bank and the Respondent took an additional loan of Kshs.580, 000/- as a top up to the mortgage at the same bank towards the purchase of the suit property. As a result, the property was registered in both their names for the purposes of securing both facilities. It is not disputed by the Respondent that the Applicant paid Kshs. 55,159/- which was deducted from the salary to repay the mortgage. The Applicant did attach his pay slip to show a monthly amount was being deducted. According to the Respondent, she also developed the suit property through landscaping, general repairs, and fixing of the new gate at a cost of Kshs.501, 550/- which amount is disputed by the Applicant except an amount of Kshs.80, 000/- used to purchase a steel gate. A receipt from Stajeri Enterprises has been exhibited. I agree with the Applicant that the quotations cannot be used to prove the expenditure by the Respondent. The Respondent has not tendered any document to show actual expended towards development of the house including landscaping, general repairs. As regards direct contribution, I agree with Ndung’u J. in the case of A W N vs. F M N [2018] eKLR that:

“..the Court cannot infer what is not tendered in evidence. As a general rule, a Court of Law will not rely on conjecture or assumptions. Neither can it be left to the Court to speculate on what contribution the Plaintiff could have made. Direct evidence must be tendered in support of such contribution. It is the duty of a claimant to lay cogent evidence before Court.”

78. It must however be appreciated that 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 realised 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.

79. 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.

80. The Applicant asserted that he personally paid the firm of Kipkenda & Co. Advocates legal fees of Kshs. 796,095.75 towards the acquisition of the mortgage. The Applicant placed reliance on the annexure marked as EK 5b which is a letter from the firm informing the Respondent about the estimated costs in the transaction. I note that the letter bears the name of the Respondent as the recipient and not the

Applicant. However, the Applicant has exhibited a receipt of Kshs. 715,057/- issued by the firm as proof of payment.

81. In her submissions, the Respondent submitted that she does not dispute that at one point she was unemployed hence the Applicant repaid her share of the mortgage but she disputed the receipt of Kshs.161, 000/- towards payment of the mortgage. According to the Respondent, she settled her part of the mortgage when the Applicant stopped making payments as evidenced in her statement marked as. 'ECC-1'. It is clear that the Applicant participated in repaying Kshs.580, 000/- advanced to the Respondent despite not providing court with sufficient evidence that he paid Kshs. 228,626/-into the Respondent's liquidation account.

82. As regards non-monetary contribution, it is not in dispute that both the Applicant and Respondent were in gainful employment. The Applicant submitted that the Respondent was in employment throughout hence the Respondent could not say that she took care of the children alone before their separation. The Applicant asserted that they both took care of the children and managed the home. I agree with the Respondent that the fact that she was in employment, she did not lose her non-monetary contribution. It is not disputed that the Respondent was terminated from employment and therefore at that time, it is clear that she took care of the children while the Applicant was working. In my view she made non-monetary contribution as well as monetary.

83. I have considered the evidence before me and seen the Applicant and the Respondent testify. It is admitted that the prime mover of the facility was the Applicant. He sought to take a facility to enable the family purchase the said house in the sum of Kshs.9, 280,000/-. However, the Applicant qualified only for Kshs. 8.7 million mortgage. He then asked the Respondent to take a facility for the balance and the Respondent did so and obtained a further facility Kshs. 580,000/-. Due to some problems at the Respondent's place of work, the Respondent was unable to regularly meet the required installments and at some point the Applicant had to step in. The Respondent also undertook some developments in the premises though the Applicant denied that he was consulted. While the Respondent claimed that she spent Kshs. 501,000/= in developing the property, the only receipt she exhibited was for the gate of Kshs 80,000.00

84. I have considered the evidence on record and I find that both parties made both monetary and non- monetary contributions towards the purchase and development of the suit property. It was admitted that the Applicant's monetary contribution was more than the Respondent's and that it was the Applicant who was the prime mover in securing the mortgage facility and the Respondent only came to his rescue to top up the said 6%. It is also clear that as things stand, it is the Applicant who stands to lose more financially if the property is sold and the proceeds do not offset the outstanding balance since the facility is attached to his employment. However, one must always appreciate that there are a lot of things to go into a marriage and a lot of sacrifices are made by the couple which are never documented. It is only upon realization that the marriage is finally over that it suddenly hits the couple that something is lost. No matter how devilish the other partner was, at least he/she was a devil that you knew. Accordingly, it would be unjust to assess the Respondent's contribution to the acquisition and development of the matrimonial house at 10%. On the other hand, the 50% suggested by the Respondent does not reflect a true value of her contribution. One must appreciate that in a marriage, both partners give each consortium and it cannot be said that one of the couples offered more consortium than the other. Taking the cue from **VMW vs. FN - Nairobi Court of Appeal Civil Appeal No. 3 of 2014**, I find, based on the evidence before me that the Applicant's contribution towards the suit property was 70% while the 1st Respondent contributed 30%.

85. The issues regarding the parental responsibility of the parties are better of being determined before the Children's Court.

86. I therefore make the following orders:

a. A declaration that the property known as House No. 6 Type B on LR No. xxxxx Lap Fund Gardens with all buildings and developments thereon acquired during the subsistence of the marriage between the Applicant and the Respondent, and registered in their joint names, is a matrimonial property.

b. The House No. 6 Type B on LR No. xxxxx Lap Fund Gardens be distributed to the Applicant and the Respondent as a ratio of 70 and 30 percent respectively being their respective contribution to the purchase and development of the said property.

c. That the Applicant be at liberty to purchase the Respondent's share of contribution on the House No. 6 Type B on LR No. [Particulars withheld] Lap Fund Gardens and the property be registered in the Applicant's name.

d. That in the event that the Applicant is unable to purchase the Respondent's share, the Applicant and the Respondent be allowed to get into private equity negotiations with the chargee of the matrimonial property in order to pay off the outstanding facility and the proceeds be divided between the Applicant and the Respondent into the ratio of 70:30 respectively.

e. That all the household items be retained by the Respondent.

87. Each party will bear own costs of these proceedings.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 2ND DECEMBER, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Naibei for Mrs Rotich for the Applicant

Miss Nyarango for Miss Jemator for the Respondent

CA Susan