



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**DIVORCE CAUSE NO 31 OF 2015**

**EMP.....APPLICANT**

**VERSUS**

**FNM .....RESPONDENT**

**JUDGMENT**

1. EMP, the Petitioner, filed the Divorce Petition herein dated 20.5.15 (the Petition) against FNM, the Respondent seeking the following orders:

*a) A Permanent injunction restraining the Respondent either by himself, his servants and/or agents or third parties or anyone under his authority from selling, disposing, transferring, mortgaging, charging, registering the property or interfering with the matrimonial properties jointly acquired with the Petitioner during the subsistence of the marriage or doing anything detrimental to such properties and to the Petitioner herself.*

*b) The marriage between the Petitioner and the Respondent be dissolved.*

*c) A declaration that the Petitioner has equal rights to the properties acquired during the marriage the Respondent (sic) and registered nn (sic) the name of the Respondent separately are owned jointly with the Petitioner and an Order do issue for the sale, division and/or apportionment of all the herein below listed properties between the parties equally the properties being:*

*i. The matrimonial home at Serena-Shanzu*

*ii. [Particulars withheld] Bar and Lounge.*

*iii. Plot No. [...] Mainland North (sub division from CR no. [...]).*

*iv. Construction company - [Particulars withheld].*

*v. Company – [Particulars withheld].*

*vi. Motor Vehicle Registration Number KBV [...]Y*

*vii. Bank accounts in the name of the Respondent*

*viii. Any other property in the name of the Respondent and in the event that the title or ownership of the suit properties has already been transferred to any third party the Respondent do account for and the same be divided between the Respondent and the Petitioner equally.*

*d) The Respondent be condemned to pay the costs of the cause.*

*e) This Honourable court be pleased to make any further orders as it may deem just and fit to grant.*

2. The Petitioner alleges that in 1997, she, a divorcee and the Respondent then a bachelor commenced cohabitation in 1997 at Serena, Shanzu in Mombasa. They were blessed with 1 child, AAM. The child was born on 15.4.98. The Petitioner further claims that the Respondent acquired parental responsibility over her son from a previous relationship, KAG, who in 2015 was 21 years old. During the

marriage, the parties acquired several properties most of which were registered in the sole name of the Respondent. The Petitioner sought dissolution of the marriage on grounds of cruelty and adultery, the particulars whereof are set out in the Petition.

3. In his Reply dated 10.7.15, the Respondent denied all the allegations by the Petitioner. In particular the Respondent states that the Petitioner was married to one LWR from 1996 to 23.10.03 when the marriage was dissolved. As such, the Petitioner had no legal capacity to enter into any marriage at the time she claims the marriage took place. He denied solemnizing marriage with the Petitioner under Taita Customary law. As such, the issue of divorce cannot arise. To the Respondent, the Petition is thus a nullity and ought to be struck out. According to him, the Petitioner has been his girlfriend since 1997 and together they have a child. He accuses the Petitioner of adultery with various men including himself, while still married to the said L. He denies ever introducing the Petitioner as his wife but always as a girlfriend. He acknowledged that he has supported the Petitioner and her son who is now an adult, up to university level. Although they live under the same roof, their relationship broke down 6 years before the filing of the Petition. They live separate lives and both date different people.

4. As regards the properties, the Respondent states that he and his late wife acquired Plot No. MN/I/[...] on 14.4.92 and moved into the house they built thereon in December 1994; that he worked as a mechanical engineer at [Particulars withheld] from 1988 to 30.10.05 and was well remunerated; that he purchased Plot No. [...] in Mtwapa upon which he built 6 bedsitters and a house on Plot No. [...] in Kiembeni and registered the same in the Petitioner's name to hold in trust for him; that from these properties, the Petitioner collects monthly rent of Kshs. 53,000/= and 8,000/= respectively; that on 10.3.06, he and Thomas Wunderer (Thomas) acquired Plot No. [...] MN without contribution from the Petitioner; that in 2009, he purchased equipment and set up for the Petitioner, [Particulars withheld] on Plot No. MN [...] at the cost of Kshs. 750,000/=; that he continues to pay Kshs. 10,000/= every month for utilities while she pockets the profits.

5. As regards the companies, the Respondent states that [Particulars withheld] Construction which he and Julius Kagia own has been dormant since registration; that he and Thomas Wunderer hold 50% shares each in [Particulars withheld] Bar and Lounge Limited; that the company had employed the Petitioner for a salary on Kshs. 15,000/= until 30.5.15 when her services were not required anymore; that he holds 999 shares in [Particulars withheld] Limited while the Petitioner holds 1 share; that the company is only used for rent collection;

6. On the vehicles, the Respondent averred that he purchased and fully maintains vehicle KBL [...]N which the Petitioner uses and holds in trust for him; that KBM [...], which he uses was a gift to him by his mother while KBV [...]Y is registered to a third party.

7. In his Cross Petition, the Respondent reiterated the averments in his Reply to the Petition. The Respondent claims that the Petitioner has in her Petition omitted the properties she holds in trust for him. The Respondent prayed that the Petition be dismissed and that his Cross Petition be allowed and prayed for the following orders:

**a) A declaration that the following properties registered or in possession of the Petitioner belong to the Respondent and that the Petitioner holds the same in trust and for his benefit. him:**

**i) Plot No. [...], Kiembeni.**

**ii) Plot No. [...], Mtwapa.**

**iii) [Particulars withheld] Salon and all equipment therein.**

**iv) Motor vehicle KBL [...]N.**

**v) 1 share in [Particulars withheld] Limited**

**b) That the Petitioner be ordered to give full account for the above properties and the rent collected to date.**

**c) That the Petitioner, her servants, agents and or employees be enjoined from disposing of, selling or alienating the said properties**

**d) That any transfer of any of the properties made by the Petitioner be declared null and void and be set aside.**

**e) That the Petitioner be ordered to sign transfer forms in favour of the Respondent of the said properties and in default the Deputy Registrar to sign the same in her place.**

8. At the hearing, the Petitioner reiterated her averments in her Petition and affidavits. She stated that she met the Respondent in 1997 at Ratna Square. They have lived together in Shanzu, Serena since then and have a daughter. Her son K from another relationship has also lived with them. The Respondent took her to his parents' home in Switzerland severally and introduced her as his wife. She has also taken him to her family home in Ratna Square. Her family and friends know the Respondent as her husband. They did a customary marriage in 1997. She stated that her marriage to LWR who she married on 29.3.96 was dissolved on 23.10.03. At the time she met the Respondent, she and L were not together as he had assaulted her and fled the country. Initially, their relationship was good until the Respondent began disrespecting her. He became cruel and adulterous with several women.

9. The Petitioner further stated that they acquired and developed properties together including their matrimonial home in Serena. In 1997, their home was a single room on a ½ acre compound. They finished construction of the second bedroom and kitchen in 1997. The rooms upstairs were built in 1998. Between 1998 and 1999, they built the first guest house. The second one was built between 2000 and 2005 while the pool was constructed in 2000. In 2011, they built another guest house. In 2012 however, a fire razed all the houses to the ground but they rebuilt them from savings in [Particulars withheld] Mechanical. Currently, they have 4 guest houses together with their matrimonial home,

the first floor of which they rent out.

10. The Petitioner further averred that they started the [particulars withheld] together and she manages the business to date. The Mtwapa property No. CR [...] which has 6 bedsitters was registered in her name in 2001. The funds were provided by the Respondent's parents. The property was given to her as a present for giving them a grandchild. She sold half the plot to get money for construction. The house in Kiembeni is in her name but she did not list it in her petition. It was purchased after she met the Respondent for Kshs. 500,000/=. Her mother lives in that house. Plot CR. No. [...] (Saga Apartments) is in the name of the Respondent and Thomas and was acquired on 11.8.06. She does not know how much the Respondent contributed towards its purchase. She contributed by purchasing water and building materials and also did the fence.

11. The Petitioner testified that they started [Particulars withheld] Mechanical and Engineering Works Limited together. The Respondent has 999 shares and he gave her 1 share. She and the Respondent formed [Particulars withheld] Lounge in 2013. However the Respondent recently removed her and put Thomas in the business in her place. [Particulars withheld] Construction is not operational. Motor vehicle KBM [...] N is registered in the Respondent's name. KBL [...]N, which she uses and KBV [...]Y which he bought for her as a surprise are registered in the names of 3<sup>rd</sup> parties.

12. As regards her income, the Petitioner stated that in 1997, she was working at [Particulars withheld] Baptist School, earning Kshs. 2,250/= per month. She stopped working in September 1997 to concentrate on her salon which she has had since 2008. After expenses, very little is left from the earnings of the salon. Since 2016, she has been receiving Kshs. 48,000/= monthly rent from the Mtwapa bedsitters. She stated that she started filing tax returns when they started receiving rent. In her returns, she described herself as single and doing real estate business. As regards the salary vouchers from [Particulars withheld] Engineering, she exhibited, she stated that she did not actually get money. She only signed the vouchers.

13. In his testimony, the Respondent gave vent to his averments in his Answer to Petition and affidavits. He stated that he met the Petitioner in 1997 and after dating for a few weeks they began to cohabit in the Shanzu house which he built. At the time he was a widower. His wife EA had died in January 1997. He earlier had another girlfriend BM with whom he purchased Plot [...]I/MN, Shanzu. He later paid Betty Kshs. 300,000/= for her share which she transferred to him. He began construction on the plot in 1993 and occupied the house in December 1994. Between 1988 and 2005, he worked at [Particulars withheld] Club initially as workshop Manager, then Operations Manager and ultimately as General Manager. By the time he met the Petitioner, the house was already completed. The ground floor was rented and they occupied the 1<sup>st</sup> floor.

14. The Respondent denied ever marrying the Petitioner under Taita customs. When they met she was married to L. She was his girlfriend and mother of his child. Their relationship ended around 2008. They have continued to stay in the same house but in separate rooms and have no relationship. On 5.4.17, the Respondent made an application for their daughter to be a citizen of Switzerland. In the Application, the Petitioner's status was indicated as single having divorced on 23.10.03 while the Respondent's status was indicated as widower.

15. On the properties, the Respondent denied that the Petitioner contributed towards the acquisition of his 2 properties. On Plot No. [...] in Shanzu owned by him and Thomas, he built 12 bedsitters with swimming pool and salon. The funds to do this were from his savings from his employment with [Particulars withheld] Club and from his parents. Thomas also lent him some money.

16. At the conclusion of the hearing, parties filed their written submissions which I have carefully considered. The issues for determination are:

- a) Whether a marriage can be presumed between the parties.
- b) Whether there was material non-disclosure on the part of the Petitioner.
- c) If a marriage is presumed, whether the same should be dissolved.
- d) Whether the Court has jurisdiction to grant the orders sought with regards to the properties.
- e) Whether the suit properties are matrimonial property.
- f) Whether the suit properties should be divided equally between the parties.
- g) Whether the Defendant has parental responsibility over the child of the Petitioner.

Whether a marriage can be presumed between the parties

17. The Petitioner has urged the Court to presume a marriage between her and the Respondent while the Respondent vehemently opposes this. The undisputed facts are that the parties began an intimate relationship in 1997. The parties are not married under any system of law, but have lived together since 1997 and continue to do so to date. They have a child who was born on 15.4.98. At the time the relationship began, the Petitioner was married to one LWR. This marriage was dissolved and decree absolute issued on 23.10.03.

18. The Court notes from the exhibited marriage certificate, that the marriage between the Petitioner and L was conducted under the repealed Marriage Act, Cap 150. Section 50 of the said Act provided:

***Whoever, having contracted marriage under this Act, during the continuance of such marriage contracts a marriage in***

*accordance with native law or custom shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.*

19. The period between 1997 to 23.10.03 while the marriage subsisted, the Petitioner had no legal capacity to contract any other marriage with any other person. It is noted that the Petitioner made no submissions on the alleged Taita customary marriage she had alluded to in her pleadings and testimony. This is perhaps informed by her awareness of her incapacity to contract such marriage and that the contention of the alleged marriage has no legal basis

20. I now turn to the issue of presumption of marriage. The statutory basis of the doctrine of presumption of marriage is contained in section 119 of the Evidence Act which provides:

***“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”***

21. The *locus classicus* on the doctrine of presumption of marriage is the celebrated Court of Appeal case of Hortensia Wanjiku Yawe vs. The Public Trustee Nairobi CACA No. 13 of 1976 where Mustafa JA held:

***“...long cohabitation as man and wife gives rise to a presumption of marriage...only cogent evidence to the contrary can rebut such a presumption”***

For his part, Wambuzi P observed:

***“The presumption is nothing more than an assumption rising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted.”***

22. Long cohabitation and general repute are the key ingredients for presumption of marriage. Where parties in no formal marriage have cohabited for a long time and there exist other circumstances indicative of an intention of the parties to live and act together as husband and wife, our Courts have presumed the existence of a marriage between such parties.

23. In the case of N L S v B R P [2016] eKLR, the Court stated:

***The Court of Appeal in Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held as follows: -***

***“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed” (own emphasis)***

24. In the instant case, the parties have lived together since 1997 when they met. Although the Respondent opposes the idea of presumption of marriage, he did in his testimony, state that he and the Petitioner began to cohabit a few weeks after meeting in 1997 and continue to live together to date, albeit in different rooms. Further, the Respondent stated in his testimony that he catered for the needs of both their daughter and the Petitioner’s son. He took them to the same school and paid for their maintenance right up to college. He also stated that he wanted the children to grow up as a family. Additionally, in the exhibited insurance policy no. 392-1183 on the Respondent’s life dated 14.3.12, he describes the Petitioner as his wife and named her as beneficiary of 100% share of the policy. It is indisputable that the parties, their daughter and the Petitioner’s son lived together until the children matured and left the country in their different pursuits. The period of 23 years during which the parties have lived together is by all standards is quite a long cohabitation.

25. All these factors taken together are indicative of a relationship between the parties that is more than mere friendship. For the Court to presume a marriage however, it is necessary that the parties have capacity. This was the holding in Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR, where the Court of Appeal stated:

***As Madan, J.A (as he then was) said in Njoki v. Muthuru [1985] KLR at page 882***

***“The concept of presumption of marriage is not new in Kenya. It was recognized by the former Court of Appeal in Hortensiah Wanjiku Yawe v. Public Trustee in Civil Appeal No. 13 of 1976 and by this Court in Mbithi Mulu & Another v. Mitwa Mutunga in Civil Application No. Nai 17 of 1983.”***

***This presumption arises from long cohabitation and repute between the man and the woman who have capacity to marry and have consented to do so – see Yawe (supra). We consider that the deceased and 1<sup>st</sup> respondent in this appeal had capacity to marry while the deceased was married to the deceased 2<sup>nd</sup> appellant under Kikuyu customary law but this was not a bar to him marrying any other woman since customary law of marriages under Kikuyu customs are potentially polygamous. (emphasis mine).***

26. From the evidence, my finding is that the long cohabitation between the parties has crystallized into a marriage and it is safe to presume the existence of a marriage between the Petitioner and the Respondent. Duly guided by the Court of Appeal in the foregoing decision, it is noted that marriage may only be presumed where parties have the legal capacity to marry. Given that the Petitioner was still married to L when she commenced cohabitation with the Respondent in 1997, the marriage is presumed between the parties, not from 1997 but from

23.10.03, when the previous marriage between the Petitioner and L was dissolved.

Whether there was material non-disclosure on the part of the Petitioner

27. It was submitted for the Respondent that the Petitioner claimed to be married to the Respondent under Taita customary law and failed to disclose that she was married to L when she commenced cohabitation with the Respondent until 23.10.03. The Petitioner further failed to disclose that she had a source of income and led the Court to direct the Respondent to pay her maintenance of Kshs. 4,000/= per week. Relying on the case of Signature Tours & Travel Limited v National Bank of Kenya Limited [2017] eKLR, the Respondent urged the Court to find that the Petitioner is not entitled to the prayers sought and the maintenance order issued on 16.6.16. As such, the Petitioner should refund the sum paid to date.

28. I have considered the authority cited. It relates to ex parte applications where a party is required to make full and frank disclosure to the Court of all material facts. The Court in the case of **Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997**

29. The record shows that on 16.6.16, when the order was made in the course of the hearing, it was alleged by the Petitioner's counsel that the Respondent had chased away the Petitioner from the bar and stopped from going there. Counsel then stated that the Respondent **"has resorted to giving her only 4,000/= per month for maintenance which is not enough"**. In response, the Respondent's counsel informed the Court that **"The Respondent ghas shown me mpesa statements that he sends 4,000/= to the Applicant every week."** The Court then directed the Respondent to continue sending Kshs. 4,000/= to the Petitioner per week. The amount was not set by the Court by the Court but by the Respondent. As such, the Petitioner cannot be said to have misled the Court as alleged by the Respondent. The Court is therefore not persuaded to grant the prayer for refund of the sums paid to the Petitioner.

If a marriage is presumed, whether the same should be dissolved

30. The Court has presumed a marriage between the parties herein. Both parties accuse each other of adultery. Although they live together, the evidence on record shows they live in separate rooms and their relationship ended around 2006 to 2008. Indeed the Respondent stated that they were both in relationships with other people. Irretrievable breakdown of marriage is a ground of dissolution of marriage. Since around 2008, the parties have been living in separate rooms in the same house. There is evidence of a marriage that is irretrievably broken down. In *N v. N [2008] 1 KLR [G & F] 16*, Madan, J. (as he then was) observed:

***"...if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences."***

31. From the evidence, it is apparent that over 10 years ago, the parties herein reached that point of not being able to live together reasonably happily. Neither has any interest in the relationship which beyond salvage. Accordingly, the parties are entitled to be released from their matrimonial union.

Whether the Court has jurisdiction to grant the orders sought with regards to the properties

32. The Respondent contends that there having been no marriage between the parties, the Court has no jurisdiction to deal with the properties herein. Given the finding of the Court that there was a marriage between the parties, this Court is clothed with jurisdiction to deal with the properties and make a determination as to whether the same are matrimonial property and the entitlement to the parties thereto. The cited case of NLS v BRP [2016] eKLR is distinguished as in that case unlike the present case, no marriage was presumed.

Whether the properties are matrimonial property

33. It is the Petitioner's submission that the properties listed in her petition are matrimonial property.

34. Section 6 of the Matrimonial Property Act defines matrimonial property as:

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

**(a) the matrimonial home or homes;**

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

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

35. For a property to be declared matrimonial property, it must constitute the matrimonial home or household goods and effects in the matrimonial home of the parties. Other property jointly owned **and** acquired during the subsistence of the marriage also constitutes matrimonial property. It should be noted that acquisition of a property during the subsistence of a marriage does not necessarily make it matrimonial property and likewise, a property acquired before marriage is not necessarily excluded from constituting matrimonial property.

36. The evidence shows that the parties have their home on Plot No. [...] / I/MN, Serena. The exhibited certificate of title shows that the property was acquired by the Respondent and Betty Makasi on 14.4.92. The Respondent later paid Betty off and she transferred her share to

him. He stated that he built a house thereon and in December 1994, moved in. This is the house the Petitioner moved into in 1997 when the parties began to cohabit and continue to live in to date. The property was clearly acquired and developed before the parties met. This notwithstanding, with effect from 23.10.04, the date of commencement of their presumed marriage, this property became the matrimonial home of the parties and therefore matrimonial property.

37. As regards the other properties, none is the matrimonial home of the parties nor household goods and effects in the matrimonial home or homes. Further, although the properties were acquired during the marriage of the parties, none is jointly owned by the parties. As such, none of these properties falls within the statutory definition of matrimonial property.

Whether the suit properties should be divided equally between the parties

38. The Petitioner submitted that the suit properties in contest should be divided equally between her and her Respondent. For his part, the Respondent opposes this and seeks a declaration that the properties registered or in possession of the Petitioner belong to him and that the Petitioner holds the same in trust and for his benefit.

39. Section 7 of the Act makes provision relating to ownership of matrimonial property as follows:

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

40. Besides the matrimonial home, there are guest houses on Plot No. [...]I/MN, Serena. It is the Petitioner's case that in 1997, their home was a single room. Construction of the rest of the rooms was completed in 1998. The Respondent however stated that when he met the Petitioner, they lived on the first floor while they rented the ground floor. The Petitioner then stated that they built the first guest house between 1998 and 1999. The second one was built between 2000 and 2005 while the pool was constructed in 2000. In 2011, they built another guest house. In 2012 however, a fire razed all the houses to the ground but they rebuilt them from savings in [Particulars withheld] Mechanical and Engineering Works Limited. Currently, they have 4 guest houses together with their matrimonial home, the first floor of which they rent out. The Respondent did not in his testimony state how the reconstruction of the guesthouses was financed. The Petitioner's testimony in this regard is therefore uncontroverted. The Petitioner's testimony is that the 1 share she holds in [Particulars withheld] Mechanical and Engineering Works Limited, the Respondent gave to her. Based on her testimony therefore my finding is that the Petitioner made no contribution towards the construction of the 4 guesthouses on the property, which includes their matrimonial home.

41. The law recognizes that there will be property acquired by one spouse that does not constitute matrimonial property and makes provision as to how the other spouse may acquire an interest in such property. Acquisition of interest in such property may only be by contribution. This is the tenure of Section 9 of the Act which provides:

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

42. In light of the foregoing provision, I will proceed to consider the remaining properties.

Plot No. [...] Mainland North (sub division from CR no. [...]), Shanzu

43. This Plot, according to the exhibited certificate of title, was acquired on 11.8.06 by the Respondent and Thomas Wunderer. The Respondent stated that he built 12 bedsitters with swimming pool and salon, on this property.

Bank accounts in the name of the Respondent

44. No evidence was adduced relating to the alleged bank accounts. As such, there was nothing for the Court to consider.

The [Particulars withheld] Bar and Lounge Limited

45. The Petitioner stated that she and the Respondent started the business together and she manages the business. The Respondent on the other hand stated that he and Thomas hold 50% shares each. The exhibited certificate of incorporation shows that the company was incorporated on 19.8.13. There is however no document showing the shareholding. As such, the Court is unable to make any finding as to the entitlement of the parties thereto.

[Particulars withheld] Constructions

46. [Particulars withheld] Constructions was registered on 2.11.07. The certificate of registration shows that the business is owned by the Respondent and one Julius Kagia Ziro. Both parties stated that the business is not operational. In the premises, no more need be said about this business.

Motor Vehicles Registration Numbers KBV [...]Y

47. The Petitioner exhibited the log book of this motor vehicle which indicates that the same is registered to one Diether Rolf Koehler. The vehicle not being owned by either of the parties cannot be dealt with in these proceedings. To make any orders in respect of the said vehicle in the absence of the registered owner would offend all notions of justice. I am guided in this regard by the decision in the case of Mbaki &

Others v. Macharia & Another [2005] 2 EA 206, at page 210, where the Court of Appeal stated:

***“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”***

[Particulars withheld] Mechanical and Engineering Works Limited

48. From the exhibited documents, this is limited liability company was incorporated on 2.9.04. The shareholders are the Respondent with 999 shares and the Petitioner with 1 share. The Petitioner stated that she and the Respondent started this company together and the Respondent gave her 1 share. For the Respondent however, it was submitted that the Petitioner was made a shareholder to meet the legal requirement of a minimum of 2 directors. The Respondent urged the Court to order the transfer to him of the 1 share which is held by the Petitioner in trust for him. If indeed the intention of the Respondent was that the Petitioner holds the 1 share in trust for him, nothing was placed before the Court to demonstrate that this.

Plot No. [...], Kiembeni

49. The certificate of title to this property indicates that the same was acquired on 3.7.06. It is registered to the Petitioner. The Petitioner stated that the property is a 1 bed roomed house and was purchased for Kshs. 500,000/=. Her mother lives in the property. The Respondent stated that he used to give to the Petitioner Kshs. 8,000/= per month. He purchased the house for her so that he did not have to continue giving the said amount. There is no indication that this property was intended for the benefit of the Respondent or to be held in trust for him. This position is further affirmed by the fact that the Petitioner’s mother resides on the property. To my mind, this was a gift from the Respondent to the Petitioner.

Plot No. [...], Mtwapa

50. This property was acquired on 30.11.01. The title is in the name of the Petitioner. The property has 6 bedsitters which are rented for Kshs. 48,000/= per month. The Petitioner stated that the Respondent gave the property to her as a present after giving birth to their daughter and giving his parents a grandchild. The Petitioner stated that the funds for the purchase were from the Respondent’s parents and were paid directly to the seller. She however had nothing to prove the same. The Respondent’s testimony is that the purchase price came from him. He purchased the property for their daughter’s upkeep. It is noted that at the time the property was acquired, the presumed marriage had not commenced. The Respondent purchased the property and had it registered in the Petitioner’s name who at the time was his girlfriend. The conclusion that this Court draws is that the property was also a gift by the Respondent to the Petitioner.

Motor Vehicle KBL [... ]N

51. The Petitioner stated that is one of the vehicles they have. She drives the vehicle but it remains in the name of the previous owner. The Respondent stated that he purchased the vehicle and the Petitioner uses it. There is not much evidence to show the circumstances under which this vehicle was purchased and the terms upon which the same was given to the Petitioner by the Respondent. It would appear however that the same was a gift to the Petitioner by the Respondent. Given that the ownership documents were not availed to the Court, I am unable to make any orders in respect thereof.

[Particulars withheld] Salon and all equipment therein

52. The Petitioner stated that she has been running this salon since 2008 but it has not been doing well. According to her, after expenditure, very little is left. The Respondent testified that he built the salon on the property owned by himself and Thomas. He also equipped the same and paid for her training as a hairdresser. She runs the salon to date and earns income.

53. The Act contemplates a scenario where one spouse gifts a property to the other spouse. Section 15 provides:

***Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient.***

54. The evidence herein shows that the Respondent purchased Plot No. [...], Kiembeni and Plot No. [...], Mtwapa and had them registered in the name of the Petitioner. He further gave her 1 share in the company, motor vehicle KBL [... ]N and established and equipped [Particulars withheld] Salon for her. All this points to a pattern. It would appear to me that the Respondent actually intended to gift the Petitioner with these properties. For this Court to find that the Petitioner, held these properties in trust for the Respondent, a clear intention must be evident. In the case of Peter Ndungu Njenga v Sophia Watiri Ndungu [2000]eKLR the Court of Appeal stated:

***The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied. See Ayoub vs. Standard Bank of S.A [1963] E.A. 619 at pp 622, 623.***

55. Had the Respondent intended that the Petitioner holds the properties in trust for him, he would have made her execute a declaration of trust in his favour, more so because he claims that they were never married. Further, he would not have allowed the Petitioner to collect rent from the Mtwapa property, nor allowed her mother to occupy the Kiembeni property. He would also not have given her the freedom to use the proceeds of [Particulars withheld] Salon for her sole benefit.

56. In the premises, I have no difficulty in drawing the conclusion that these properties belong to the Petitioner absolutely as the recipient of the Respondent’s generosity towards her. The Respondent has failed to rebut the presumption contemplated in Section 15 of the Act.

Whether the Respondent has parental responsibility over the child of the Petitioner

57. There is no prayer in the Petition relating to the child of the Petitioner. The issue as to whether the Respondent acquired parental responsibility over the Petitioner's child is a new issue that was raised in submissions. It is trite law that parties are bound by their pleadings. Similarly, the Court is bound by the pleadings of the parties and cannot embark on an enquiry into the case before it other than to adjudicate upon the specific matters in dispute *to wit* the marriage and the properties, which the parties raised in their pleadings. In stating so, I am guided by the Court of Appeal in the case of Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR, which cited with approval the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu [1998] MWSC 3

***“The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation.”***

58. It is also trite law that submissions are not pleadings and that new issues cannot be raised in submissions. In Republic vs. Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting and Training Limited & another [2014] Korir, J. stated:

***“The Applicant, the respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”***

59. The issue as to whether the Respondent has parental responsibility over the Petitioner's son who was 21 years old when the Petition was filed, having been raised in submissions, is best ignored and the Court will not expend any time considering the same. In any event, the Petitioner's son is no longer a child.

60. In the result and having carefully considered the matter herein, I find that the Petition partially succeeds. The Cross Petition however fails. I now make the following declarations and orders:

- a) The Petitioner and the Respondent are hereby presumed married from 23.10.03.
- b) The marriage between the Petitioner and the Respondent be and is hereby dissolved.
- c) The Petitioner is not entitled to any share in the properties listed in her Petition namely:
  - i) Plot No. [...]I/MN
  - ii) [Particulars withheld] Apero Bar and Lounge.
  - iii) Plot No. [...] Mainland North (sub division from CR no. [...]).
  - iv) [Particulars withheld] Constructions.
  - v) The Respondent's shares in [Particulars withheld] Mechanical and Engineering Works Limited.
  - vi) Motor Vehicle Registration Number KBV [...]Y.
- d) For the avoidance of doubt, the Respondent is not entitled to any share in the properties in the name of the Petitioner, listed in his Cross Petition, namely:
  - i) Plot No. [...], Mtwapa.
  - ii) Plot No. [...], Kiembeni.
  - iii) [Particulars withheld] Salon
  - iv) 1 share in [Particulars withheld] Mechanical and Engineering Works Limited
- e) The circumstances of this case do not call for an award of costs. I therefore direct that each party bears own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 5<sup>th</sup> day of May 2020**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Petitioner**

..... **for the Respondent**

..... **Court Assistant**