



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCC. NO. 2 OF 2015

AKM.....PLAINTIFF

VERSUS

NNN.....DEFENDANT

J U D G E M E N T

1. **AKM**, the Plaintiff/Applicant herein was married to **NNN**, the Defendant/Respondent herein but they are now divorced. She has brought this matrimonial cause under Matrimonial Property Act No. 49 of 2013 through Originating Summons seeking determinations of the following questions:-

- i. Whether the Applicant and the Respondent contracted statutory marriage on 3rd December, 1988.**
- ii. Whether they were five issues of marriage between the Applicant and the Respondent.**
- iii. Whether the marriage was dissolved and a decree nisi issued vide Chuka Principal Magistrate's Court Divorce Cause No. 4 of 2012.**
- iv. Whether the Applicant was and still is a teacher from the time of marriage and whether the Respondent was an employee of Marshalls East Africa and later operated an auto spares shop known as Far East Technical Services.**
- v. Whether the applicant and the Respondent during the substance of their marriage used and applied their income unsparingly towards acquisition and development of their acquired matrimonial properties.**
- vi. Whether the Applicant and the Respondents were given a parcel No. L.R Karingani/Ndagani/[particulars withheld] as a gift by Stanley Mutegi Muthara and whether the same gift was sold and proceeds used to purchase parcel No.Kagaari/Kigaa/[particulars withheld] .**
- vii. Whether the Respondent secretly cause subdivisions of parcel No.Kagaari/Kigaa/[particulars withheld] into parcel Numbers [particulars withheld] before disposing parcels Numbers [particulars withheld].**
- viii. Whether the parties during the subsistence of the marriage acquired the following properties namely:-**
 - a. Runyenjes Municipality Plot D [particulars withheld]
 - b. Kagaari/Weru/[particulars withheld]
 - c. Kagaari/Kigaa/[particulars withheld]
 - d. Kagaari/Kigaa/[particulars withheld]
 - e. Motor Vehicle Registration No. [particulars withheld] Peugeot & [particulars withheld] Peugeot 404.
 - f. Frisian cow and assorted personal and household goods.

ix. **Whether the applicant contributed to the acquisition of the above mentioned properties and if so to what extent.**

x. **Whether the Applicant is entitled to be given half of all the matrimonial properties acquired jointly despite the Respondent being registered as owner of the same.**

xi. **Whether the court should order that all matrimonial properties acquired during subsistence of the marriage be distributed equally now that the marriage is dissolved.**

xii. **Whether Kagaari/Kigaa/[particulars withheld] sold by the Respondent should form part of the Respondent's share during distribution of matrimonial property.**

xiii. **Who should pay costs.**

2. The Plaintiff's Case:

The Plaintiff/Applicant in her pleadings and evidence in court stated that she was married to the Respondent on 3rd December, 1988 under the African Christian Customary Marriage and Divorce Act Cap 151 Laws of Kenya. This is not contested. It is also uncontested that there are five issues of marriage and that the said marriage has since been dissolved vide **Chuka Principal Magistrate's Court Divorce Cause No. 4 of 2012.**

3. The Plaintiff claims that she was an untrained primary school teacher when she got married and that she later went for training and graduated as a trained P1 teacher from Kilimambogo Teachers College and that she contributed financially towards acquisition and development of the matrimonial properties.

4. She has claimed that parcel No. Karingani/Ndagani//[particulars withheld] was a wedding gift from her father to both the Plaintiff and Defendant and that the gift was later sold by consent to purchase parcel No. Kagaari/Kigaa/[particulars withheld]. She claims that the Respondent later secretly subdivided Kagaari/Kigaa/[particulars withheld] into parcel Kagaari/Kigaa/[particulars withheld] before disposing parcel Numbers Kaagari/Kigaa/[particulars withheld] She is asking this court to take into consideration of that disposal.

5. The Plaintiff further claims that they both acquired plot No.D [particulars withheld] at Runyenjes Municipality through a joint effort asserting that she took a loan from Winners Sacco while the Defendant got a loan from Marshalls East Africa Ltd.

6. The Plaintiff further claimed that she used her earnings to pay school fees for their children and took loans to help the Respondent add stock to his business in Nairobi. She also claimed that she was forced to borrow from relatives to pay school fees when the Respondent abandoned them.

7. It is the Plaintiff's case that they jointly purchased parcel No. Kagaari/Kigaa/[particulars withheld] with the Respondent asserting that they agreed to dispose parcel No. Karingani/Ndagani/[particulars withheld] to pay part of the consideration.

8. The Plaintiff further claims that they also jointly paid for the acquisition of parcel No. Kagaari/Kigaa/[particulars withheld] through proceeds from farming. She also claimed that though parcel No. Kagaari /Kigaa/[particulars withheld] was Respondent's ancestral land she had to build her mother in law a house single handedly in consideration. In the same view she is also claiming for a share in Kagaari/Weru/[particulars withheld] and Kagaari/Weru/[particulars withheld]. Besides that she states that she left her matrimonial house and motor vehicle Registration No. [particulars withheld] Saloon and [particulars withheld] Pickup 404 Peugeot.

9. The Plaintiff also claims that they were given furniture and other household items during their wedding. She further claims that she contributed more towards acquisition of properties in the name of the defendant as she paid fees for their children and took various loans to help in purchasing some of the properties. She however concedes that Kagaari/Weru/[particulars withheld] are ancestral lands belonging to the Respondent and cannot therefore be part of matrimonial property.

10. The Plaintiff has urged this court to take into consideration the fact that the Plaintiff contributed significantly towards acquisition of matrimonial properties and developments and improvements of the same. She has on that basis asked this court to divide the listed properties equally between her and the Respondent contending that she is still taking care of the children of the marriage and that the Respondent has neglected his parental duties.

11. The Defendant/Respondent's Case

The Defendant/Respondent has acknowledged the fact that the Plaintiff is his former wife having married her on 3rd December, 1988. He states that at the time of marriage he was employed at [particulars Withheld] as a Senior Supervisor having been employed in 1980.

12. The Defendant claims that the Plaintiff at the time was working as an untrained teacher with a monthly salary of approximately 800 shillings. He claims that he assisted her indirectly by helping in paying fees for her brother named HM and that he later took her to [particulars withheld] Teachers College and paid for her upkeep and fees required at the said college.

13. The Respondent has stated that parcel No. Kaagari/Kigaa/[particulars withheld] is a subdivision of Kagaari/Kigaa/[particulars withheld] which is not a matrimonial property as he claims that he inherited it from his father. He has tendered a copy of the Green Card to back up that contention.

14. The Respondent also claims that he acquired parcel No Kagaari/Kigaa/[**particulars withheld**] using his own resources in a public auction in 1995 while the Plaintiff was still in College. He concedes that he subdivided parcel No. [**particulars withheld**] into several portions and sold some portions but insists they did agree with the applicant to sell the portion to raise funds for developments of plot No. [**particulars withheld**] at Runyenjes township with a view to getting income and resources to pay school fees for their children.

15. The Defendant further claims in his defence that land parcel No. Karingani/Ndagani/[**particulars withheld**] obtained from Applicant's father- one Stanley Mutege in 1994 was a form of compensation to him in consideration of some Kshs.30,000/- which he had lent to the Applicant's father. He has exhibited a petty cash voucher dated 21st July, 1993 to prove he lent Kshs.30,000/- to the Applicant's father.

16. The Defendant claims that he single handedly paid school fees for their children and has exhibited a bundle of receipts in his Replying Affidavit sworn on 13th January, 2015 as proof that he paid fees for his children.

17. The Defendant has claimed that the Plaintiff/Applicant has no right to claim any property as in his view she did not contribute anything towards the acquisition of the same. He further claims that the applicant took away household items like TVs, fridge, furniture's, a bull and over 200 chicken and sold them. He also claims that the applicant took away 3000 clay bricks from their matrimonial home for her own benefit.

18. The Respondent further claims that he had put up a structure in plot No. D[**particulars withheld**] within Runyenjes Municipality but that someone later turned up and claimed it which made the development to stall pending owing to the ownership dispute. He says the dispute is so far unresolved.

19. The Respondent has conceded that one of the Applicant's sister named Pamela Mutege assisted him in one time to pay fees for his children but added that he refunded the amount with additional Kshs.20,000 and produced banking slips as D. Exhibit 6 (a) and 6 (b) to back up the claims.

20. The Defendant/Respondent claims that upon retrenchment at Marshalls East Africa, he established an auto spares shop known as Far East Spares and has tendered a Registration Certificate as D Exhibit 7 a and a Business Permit as D Exhibit 7 b.

21. The Defendant has contested the Plaintiff's claim that she should be given half or equal share of the matrimonial properties insisting that she did not contribute any money to acquire the said properties or to develop the same. He insists that he paid school fees for his children alone when his wife, the Applicant was in college.

21. In his written submissions through learned counsel Victor L. Andande, the Defendant has submitted that **Section 6(3)** of the **Matrimonial Property Act** provides that ownership of Matrimonial property rests in the spouses according to the contribution of either spouse towards its acquisition. He submits that the Plaintiff has no tendered evidence to prove that she made any contribution in accordance with requirements under **Section 7** of the cited Act.

22. It is submitted that there is no law preventing women from owning property and that the aim of the Plaintiff is to benefit from the Defendant's sweat when she did nothing to contribute towards purchase of the said properties.

23. The Defendant has pointed out that parcel No. Kagaari/Kigaa/[**particulars withheld**] was purchased via a public auction in 1995 when the Plaintiff was in college and therefore in his contention that property should not be treated as matrimonial property.

24. He has further submitted that parcel No.3078 was given to him as compensation by his father in law and that the same was sold in 1999 to pay school fees and cater for the family needs.

25. The Defendant submits that parcel No. Kagaari/Kigaa/[**particulars withheld**] resulted from subdivision of Kagaari/Kigaa/[**particulars withheld**] which was inherited from his father and has argued that **Section 5** of **Matrimonial Property Act** excludes such properties acquired or inherited before marriage as they do not form part of the matrimonial property. In the same breadth, the Defendant contends that Kagaari/Weru/[**particulars withheld**] should not form part of the matrimonial property. He also submits that Plot D16 was acquired in 2002 and that the Plaintiff never made any contribution and that the property presently is not even in defendant's name as it has unresolved disputes. He has also denied ownership of motor vehicle Registration No. [**particulars withheld**].

26. The defendant has contended that the bricks taken by the Plaintiff from their matrimonial home should be considered as adequate part of her entitlement in the division of matrimonial property arguing that even the Television Set and the refrigerator should also be factored in.

27. The Defendant has relied on the decision of Court of Appeal in the case of **PNN -VS- ZWN [2017] eKLR** to buttress his submissions. In that case the court observed that the **Land Act** and **Land Registration Act Sections 162** and **106 (3)** respectively provide that any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under the cited statutes. The court found that where a law is repealed, its applicability prior to the repealing of the Act is not affected.

28. Analysis and Determination.

This court has considered both the Applicant/Respondent's case. In my considered view the following issues for determination have cropped up in this cause namely:-

- (i) Whether this matter is subjudice owing to another matter filed vide Embu ELC 154 of 2015.

(ii) Which properties are considered matrimonial property?

(iii) What contribution if any did the Plaintiff /Applicant make in the acquisition of the matrimonial properties and how should it be shared?

29. Whether this suit is sub judice in regard to another suit filed in Embu ELC No. 154 of 2015.

The Respondent has pleaded in his response that this present suit has been filed in bad faith because the Plaintiff has filed another case vide Embu ELC No. 154 of 2015. The Respondent has exhibited the plaint which shows that the subject matter of that suit as the same subject matter here. The listed properties in the ELC case are the same properties listed here as comprising what the Plaintiff pleads are matrimonial properties. The Plaintiff in the ELC case is seeking declaratory reliefs to have her and her children declared to have rights to use and occupy the said properties and a declaration that the Defendant who also Defendant/Respondent herein holds the properties in trust and for the benefit of himself, the Plaintiff and their children.

30. The Plaintiff/Applicant has conceded to the existence of the suit in the ELC Court in Embu but says that the claim is different in that she claims that the suit at ELC is based on her interest under **Section 92(3)** of the Land Registration Act No. 3 of 2012 and that she is seeking to be put into possession and use of the stated parcels by virtue of having put money and energy in developing the same while in the present suit she is seeking to have equal share of all the listed properties claiming that she made equal or not more in acquisition and development of the listed properties. The plaintiff applicant is clearly trying to secure her interests by whichever means and the filing of the similar suits is perhaps a demonstration of enthusiasm by the Plaintiff to obtain/secure her interests.

31. The parcels of land in issue in this suit are mentioned as follows:

- i. Karingani/Ndagani/[particulars withheld] which the plaintiff claims was sold and proceeds used to purchase Kagaari/Kigaa/[particulars withheld] which were subdivided into parcels ; Kagaari/Kigaa/[particulars withheld].
- ii. Kagaari/Kigaa/[particulars withheld]
- iii. Kagaari/Kigaa/[particulars withheld]
- iv. Kagaari/Weru/[particulars withheld]
- v. Plot D.[particulars withheld] at Runyenjes Township
- vi. Motor vehicles Registration Numbers [particulars withheld] Peugeot and Peugeot 404 [particulars withheld].
- vii. Friesian cow and assorted household goods.

The above listed properties save for those listed under (iv) and (vii) above, are also listed in the ELC case and therefore are the subject matter in that suit.

32. The Black's Law Dictionary 10th Edition define sub judice as a matter before a Judge or court where there has no adjudication or out of court settlement. The provision of **Section 6** of the **Civil Procedure Act** provide for sub judice rule and bars a court from proceeding over a matter that is pending before another court. The law states:-

" No court shall proceed with trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed". (Emphasis added)

33. The big question posed is whether the claims made by the Plaintiff falls under the jurisdiction of ELC pursuant to **Article 162(2) of Constitution** and **Section 13(2)** of ELC Act No.19 of 2011 or this court pursuant to **Article 165(3) (a)** as well as **The Marriage Act No. 4 of 2014** and **The Matrimonial Property Act No. 49 of 2013**.

34. The jurisdiction is critical in any action brought before any court of law. As observed above jurisdiction is either covered by statute or the Constitution and a court either has jurisdiction to entertain a matter or it does not. There are no 2 ways about it.

35. The issue before this court is division of matrimonial property or put it another way sharing of property acquired by two individuals during subsistence of their marriage. The marriage between the Plaintiff and the defendant was dissolved vide **Chuka Principal Magistrate's Court Divorce Cause No. 4 of 2012** on 25th February, 2015. Upon dissolution of the said marriage, the Plaintiff brought this action to get a share of the properties she believes she made contributions towards their acquisition and developments thereon. Matrimonial proceedings for dissolution or other reliefs like maintenance are within the ambit of magistrate's court as provided under **Section 2** of the **Marriage Act**. The Matrimonial Property Act No.49 of 2013 does not specifically define "court" but it is trite that issues of matrimonial properties are determined by the High Court under its inherent jurisdiction as provided under **Section 3A** of the **Civil Procedure Act** and **Article 165(3)(a)** of the **Constitution of Kenya 2010**.

36. On the other hand, the jurisdiction of the ELC Court is limited by **Article 162(2) and (3)** of the Constitution of Kenya and **Section 13(2)** of the ELC Act No. 19 of 2011. **Article 162(2)(b)** states that ELC Court has the mandate to hear and determine disputes relating to use and

occupation and title to land. The provisions of **Section 13(2)** of the **ELC Act** clearly gives power to ELC to hear and determine disputes relating to *inter alia*, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues. The division of matrimonial property upon dissolution of marriage in my view is outside the purview or the scope of ELC and the relief cannot be granted in that court and it is only to that extent that I find that this cause though it touches on similar properties like the ones mentioned in the cited ELC Court in Embu, is not sub judice. What this court is being called upon to do can only be done in this court. Although the issue of ownership is claimed at the ELC, the claim arises from the contribution made by virtue of marriage and it is not a challenge to the title of listed properties. As I have observed above the relationship between the parties herein was dissolved in 2015 and therefore the provisions of Matrimonial Properties Act No.49 of 2013 and Marriage Act No.4 of 2014 apply. Having said that, this court is unable to see or discern the wisdom in the decision by the Applicant/Plaintiff to mount two separate suits and particularly the action taken before the ELC Court but what I can state here without any doubt is that this cause certainly is not sub judice to the suit filed in ELC Court.

37. **Properties considered to be matrimonial properties:**

The Matrimonial Property Act under **Section 6** provide that Matrimonial Property include.

"(a) **The matrimonial home or homes**

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

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

38. The parties in this cause have disputed what comprises matrimonial properties. On one hand the Plaintiff has listed the following properties as comprising matrimonial properties namely:-

- i. Kagaari/Kigaa/[particulars withheld]
- ii. Kagaari/Kigaa/[particulars withheld]
- iii. Kagaari/Kigaa/xxx now subdivided into Kagaari/Kigaa/[particulars withheld] .
- iv. Kagaari/Weru/[particulars withheld]
- v. Kagaari/Kigaa/[particulars withheld]
- vi. Friesian cow
- vii. Plot No. [particulars withheld] Runyenjes Township
- viii. Motor vehicle Registration No. [particulars withheld] Peugeot 504 and [particulars withheld] Peugeot 404.
- ix. Assorted household goods.

39. On the other hand the Defendant has denied that any of the above properties comprise matrimonial properties insisting that either he single handedly contributed towards their acquisition or that he inherited some from his father and that some are not his.

40. The above divergent position notwithstanding it is trite law that whoever alleges must prove. The onus of prove obviously rested on the Plaintiff to prove both monetary contribution made and non monetary contribution in acquisition and developments of the listed properties. The onus of proof however is subject to a presumption of law under **Section 14** of **Matrimonial Properties Act** as we shall shortly see hereunder.

41. There is no dispute as the Plaintiff herself conceded during examination that the following properties were ancestral or are held under customary law namely:-

- i. Kagaari/Kigaa/[particulars withheld]
- ii. Kagaari/Weru/[particulars withheld] and some extent
- iii. Kagaari/Kigaa/[particulars withheld]

The provision of **Section 8(2)** of the **Matrimonial Property Act**, specifically precludes such properties from being considered as matrimonial property.

In regard to Kagaari/Kigaa/[particulars withheld] the Plaintiff alleged that the property though it was inherited from Defendant's father, was conditional because according to her, her mother in law insisted that a house be built for her which condition she claims to have met single handedly. However the claims is not backed by any tangible evidence to enable this court consider the said property (Kagaari/Kigaa/[particulars withheld]) as part of Matrimonial Property.

42. Besides the above, this court is unable to make a finding on whether the motor vehicle Registration No. [particulars withheld] and [particulars withheld] belongs to the Defendant because no single document to establish ownership was tendered besides the fact that motor vehicle Registration No.[particulars withheld] obviously lacks one letter so it is difficult to tell whether such vehicle exist in the first place. In the same breath this court is unable to make a finding on the existence of a Friesian cow and who it belongs. So too are the assorted household items. The particulars were not given and this court noted from the evidence and submissions tendered that the Plaintiff was perhaps not so keen to pursue the said household items.

43. There is a presumption of law (Section 14 of Matrimonial Property Act) that where matrimonial property is acquired during marriage

"(a) In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse and

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

The listed immovable properties in this cause are all registered in the name of the Defendant/Respondent. The Defendant/Respondent went to great lengths to show that he acquired the properties solely. In regard to parcel No. Kagaari/Kigaa/[particulars withheld], the Respondent tendered a newspaper advert dated 19th April, 1995 (D. Exhibit 3a) which indicates that the land had been put up for sale in a public auction. The defendant stated that he bought the property in a public auction and tendered documents (exhibits 3b and 3c) that shows how he acquired the ownership in 1995. He also stated that he subdivided the properties into parcels Numbers [particulars withheld] and tendered a copy of green card (D Exhibit 4 a) as proof and that he later sold parcels numbers [particulars withheld] in 2011. In 1995, it is not in dispute that the Plaintiff was still in a Teachers College. The documents she tendered in evidence shows she was employed as a teacher but the bank statements she provided (PExhibit 6) shows accounts of 2011 indicating various transactions but none shows a transaction in favour of the Respondent.

44. I have of course noted from the evidence tendered that the Plaintiff and her sister paid fees for the children though the Defendant disputes this saying he equally paid for the fees and that he refunded her sister in law and tendered banking slips (D Exhibit 6(a) and 6 (b)) dated 8th February, 2007 and 9th February, 2007 respectively totalling Kshs.50,000/- to show that he refunded the amount to Pamela M. Mutege. The Plaintiff tendered a slip dated 22nd June 2007 from Embu Teachersn Savings and Credit Cooperative Society Ltd (P.Exhibit 5B) and another cash deposit of Kshs.20,000/- (twenty thousand) but unfortunately for the Plaintiff in terms of financial contribution for acquisition of any matrimonial property or the developments it uncertain as to what the total amount of Kshs.70,000/- given to the Respondent in 2007 was for as the listed properties appear to have been acquired between 1995 and 2002.

45. The Defendant in my view based on the evidence tendered rebutted the cited presumption of law under **Section 14** of the **Marriage Act** in regard to how he acquired all the listed properties save for that property known as Kagaari/Kigaa/[particulars withheld] and the matrimonial home. The Plaintiff did state that their matrimonial home is domiciled at Kagaari/Kigaa/[particulars withheld]. That Matrimonial house despite the fact that it is situated on ancestral land should be considered matrimonial property by virtue of **Section 6(1)(a)** of the **Matrimonial Property Act 2013**. In regard to Plot [particulars withheld] at Runyenjes the Defendant/Respondent has added a twist to it by stating that the parcel has a dispute relating to ownership which remains unresolved. It is therefore not save to consider the plot matrimonial property in the absence of a title because the only document tendered to prove ownership is a sale agreement.

46. Having considered the evidence tendered before me in its entirety the only properties that can safely be considered Matrimonial Property on the basis of a presumption of law is that property known as Kagaari/Kigaa/xxx and the Matrimonial home situate at Kagaari/Kigaa/[particulars withheld].

47. What contribution if any did the Plaintiff/Applicant make in the acquisition of the matrimonial property and how should it be shared.

The Constitution of Kenya 2010 under Article 45(3) states that;

" Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage."

The constitutional provision does not however equate equal rights to a 50/50 sharing of assets but rather to the rights to be treated equally and fairly. The statute (Matrimonial Property Act) provide under **Section 7** that;

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

The law therefore provide that in the event of divorce, the matrimonial property is divided between the spouses according to the contribution of each spouse. Section 2 of the same statute defines "**contribution**" as monetary and non-monetary 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

It is a bit difficult to ascertain exactly in monetary terms or in percentage terms the value of non-monetary contribution made by the plaintiff in this cause in regard to acquisition and development of Kagaari/Kigaa/[particulars withheld] and the matrimonial home in Kagaari/Kigaa/[particulars withheld]. Although she states that her father gifted the two of them as a couple parcel No. Karingani/Ndagani/[particulars withheld] which parcel she claims was sold and used to purchase parcel No. Kagaari/Kigaa/[particulars withheld], there was no evidence tendered to support the claim. I am however prepared to make a presumption under **Section 14 of the Matrimonial Property Act** that part of the proceeds of sale of parcel of that parcel of land known as Karingani/Ndagani/[particulars withheld] constituted part of her monetary contribution towards development of their matrimonial home in Runyenjes. So how should the properties be divided? In the case of *AW -VS- MVCMAWM [2018] eKLR* the Court of Appeal grappled with this issue and observed as follows:-

" **This now takes us to the crux of appeal; that is whether the appellant was entitled, to a larger share being 50/50 ownership of the suit premises or as cross-appealed by the Respondent the award of Kshs.2 million was excessive. This suit was filed on 30th May, 2015 after the Matrimonial Property Act was in operation.....what proportion or share should the appellant be awarded? It is common ground that the suit premises was inherited by the Respondent and just the learned trial Judge, we appreciate no case is like another and each must be considered on its own merit while bearing in mind the peculiarities, circumstances and the principles of fairness and human worth in each case. Just like the old saying goes, "no one should reap where they did not sow and none should reap more that they planted." That is the basic tenet of equity which follows the law."**

In another decision in *Civil Appeal No. 142 of 2018 in CWM-VS- JPM [2017] eKLR*, the Court of Appeal held as follows:

" **parties are of equal worth and human dignity, whatever their station in life. To the issue before us, it is obvious the appellant having been married for 18 years made some contribution to the family of Respondent at the time of such overture. In our view, that contribution, be it domestic work and management of the matrimonial home, child care or companionship falls within the definition of contribution under the Act"**.

48. Guided by the above authorities and given the fact that the Plaintiff was married to the Defendant for 27 years, I am certain that despite the absence of evidence of actual contribution, the Plaintiff must have made significant contribution towards acquisition of land parcel No. Kagaari/Kigaa/[particulars withheld] and construction of matrimonial house or home. The Defendant told this court that he was working in Nairobi as a supervisor with Marshalls East Africa Ltd and only left service on 22nd December, 2006 which means that the person who was mostly at home for more than 18 years of marriage was the Plaintiff. Her contribution is major in the circumstances and cannot be ignored particularly in the construction of the house which the Defendant stated was done between 1993 and 1995. I have already found that the land on which the matrimonial house stands is not part of the matrimonial property as it was inherited by the Defendant from his parents therefore by dint of **Section 6(2) Matrimonial Property** the same cannot be considered part of the matrimonial property subject to be shared. What can only be shared in my considered view is the value of the matrimonial home and the parties in this cause and particularly the Plaintiff made things difficult by not tendering evidence about the value. That notwithstanding I will exercise my discretion in the spirit of **Article 159(d) of the Constitution and Section 1A and 1B of Civil Procedure Act** by making/giving a monetary award of **Kshs.1.5 million** to the Plaintiff. In arriving at the sum I have taken into consideration the location of the house (Runyenjes Town) and the fact that at the time of the construction, the Plaintiff was still working as a untrained Teacher and was at home most of the time and supervised the construction of the house.

I therefore find that an award of **Kshs.1.5 million** is just and fair in the circumstances. This amount should fairly cover her monetary and nonmonetary contribution in the development of the matrimonial home in parcel No.xxx. I am also persuaded by the Defendant's contention that the number of bricks (3000 clay bricks) she carried away from the matrimonial home, a fact she did not deny, should be considered and in arriving at **Kshs.1.5 million** I have taken the fact into consideration as well.

49. In regard to parcel No. Kagaari/Kigaa. [particulars withheld], I find that in the absence evidence of actual contribution by each party and given the fact that each of the parties have given competing version on the acquisition of the same, I find that both the applicant and the Respondent are entitled to 50% share in the said plot and even if the defendant is the sole registered owner I find that **Section 14** of the Matrimonial Property Act applies. He holds 50% share of the plot in trust for the Plaintiff herein. I direct that either the plot be valued by a registered valuer to be agreed or default to be appointed by court and either of the parties can either buy out the share of the other or the property be divided equally into two and each party takes ownership of half the plot.

The long and shot of the above is that this suit succeeds only to the following extent:

i. The Plaintiff shall be paid **Kshs.1.5 million** being the consideration for her monetary and non monetary contribution towards construction and development of the matrimonial home situate on Kagaari/Kigaa/[particulars withheld].

ii. The Plaintiff is also entitled to 50% share of that property known as Kagaari/Kigaa/[particulars withheld].

iii. The other claims made by the Plaintiff on the other properties are disallowed as the Plaintiff has failed to proof to the required standard (balance of probabilities) that the properties are:

1. Part of the matrimonial properties and
2. That she made any monetary or non monetary contribution towards their acquisition.

Finally on the question of costs, I direct each party to bear own costs.

Dated, signed and delivered at Chuka this 16th day of May, 2019.

R.K. LIMO

JUDGE

16/5/2019

Judgment signed, dated and delivered in the open court in presence of Mugo for Plaintiff and in presence of AK and NN.

R.K. LIMO

JUDGE

16/5/2019