REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 31 OF 2014 (OS)

MNNN..APPLICANT

VERSUS

ENK ....RESPONDENT

CONSOLIDATED WITH

DIVORCE CAUSE NO. 5 OF 2015

PROF. ENK ....PETITIONER

VERSUS

MNNN ....RESPONDENT

JUDGMENT

1. There are two suits for determination. One is for dissolution of marriage between the parties hereto, and the other is in respect of distribution of their matrimonial property. Matrimonial property can only be distributed after dissolution of marriage thus court will proceed to determine the divorce cause before the matrimonial property cause. See *CK vs. AGM* [2018] eKLR. In view of that, I shall first address the matter of the dissolution of the marriage, before I can consider whether or not to divide the matrimonial property.

2. Directions were given that the consolidated matters be disposed of by way of oral evidence.

3. Prof EN, hereinafter referred to as the petitioner, vide petition dated 20th January 2014 filed a divorce cause seeking dissolution of his marriage to MNNN, hereinafter referred to as the respondent, on the grounds of cruelty. In the petition, he outlined the following grounds of cruelty -

(a) That the respondent was uncourteous and disrespectful towards him and treated him with rudeness, defiance and disrespect causing him great mental anguish, torment and social embarrassment;

(b) That the respondent was treating the petitioner with misplaced mistrust to the extent that she hired private investigators to put the petitioner on surveillance and snoop into his cell phone call and text records;

(c) That the respondent since the year 2011 developed a persistent accusatory attitude towards him, and in particular accused him wrongfully, baselessly and without any justification of having affairs with his colleagues at work and a taxi service company employee;

(d) That the respondent was a domineering person with an ungovernable temper;

(e) That she taunted and cajoled him that he was old, while she was young with many potential suitors and admirers thus causing the petitioner great mental distress and a feeling of inferiority;

(f) That the respondent had denied him companionship and displayed uncaring attitude towards him, and that since September 2013 the respondent had denied him his conjugal rights;

(g) That the respondent orally encouraged him to have illicit sex with strangers for his conjugal needs or to have extra marital affairs thus causing the petitioner great mental anguish;

(i) That the respondent lacked in probity and candidness in matters relating to the financial affairs of the family and had failed, neglected or declined to contribute financially towards advancement of the family;

(j) That the respondent was making false complaints and accusations against the petitioner to close friends and relatives thus causing him great social embarrassment and lowering his dignity and social standing; and

(k) That the respondent was denying him marital consortium and causing him to leave the matrimonial home due to repeated mistreatment and hostility by manner of speech.

4. The respondent on her part responded to the petition by way of an amended answer to petition and cross-petition dated 12th July 2019. In the cross-petition, she prayed for dissolution of the marriage on the grounds of cruelty and of adultery. She outlined several particulars of the same, to wit: -

(a) That the petitioner physically and verbally abused her causing her mental anguish, stress and psychological torture;

(b) That the petitioner had subjected her to inhuman treatment, threatened her with death and constantly neglected her physical and emotional needs;

(c) That the petitioner had also been cruel and subjected her to mental torture by sleeping out of the matrimonial home without reasonable cause and that he had ungoverned temper and had on several occasions broken or destroyed her clothes and other items; and

(d) That the petitioner had since the year 2013 committed adultery with one IW, whom she enjoined as a co-respondent, and whom he was living with as at the date of the filing.

5. In their pleadings, both parties pleaded that the marriage had irretrievably broken down and they prayed that the same be dissolved.

6. The petitioner, a professor of environmental studies and a resident of Lavington, Vanga Road, Nairobi, testified first. He stated that he first met the respondent in 2004 in Lesotho, and that they got married on 21st December 2017 via a traditional and a Christian wedding. He testified that at the time of the said marriage he was a widower with three children, while she had a son from a previous marriage. He stated that after their marriage, they resided at their home at Jabari Road, where he previously resided with his deceased wife. He testified that in 2012 and 2013, the respondent started mistrusting him, even to the extent of employing private investigators to follow him. He stated that the respondent kept on accusing him of adultery. He stated that in a recorder telephone conversation between the respondent and his sister-in-law, he heard the respondent describing him as old and foolish, which description he termed as derogatory and highly defamatory. The respondent had also stated how she was with him only for economic gain. The petitioner further stated that that respondent was rude in terms of her language and demeanor in the house. she had also denied him conjugal rights on account of alleged grounds that she suspected him of adultery. He stated that the marriage between them became so intangible that he was forced to leave the home. He denied the allegations by the respondent in her cross-petition, stating that he had never cheated on her, neither had he ever threatened her life. He stated that IW was just a friend whom he met after he left his matrimonial house. He prayed for a dissolution of the marriage.

7. In cross-examination, he stated that he had known the respondent three years before he married her. He said that they started having issues in 2013, and that she denied him conjugal rights, and advised him to source it outside their marriage. He stated that he moved out of their matrimonial home when he found out that the respondent was planning to kill him. He said that he had had a child with IW in 2014 right after he moved out of their matrimonial home. He confirmed that that he met I in November 2013 and in December the same year he was being referred to as her fiancée in her father's obituary. He stated that he did not introduce her to the respondent, despite having known her during the subsistence of their marriage. He stated that the respondent was planning to kill him, information which he was told in September 2013, and which he did not report to the police, neither did he tell any of his relatives.

8. MN, a wife of the petitioner's brother, testified next. She stated that she had been a friend of the respondent, and that she would call her, and tell her how she was relating to the petitioner. She stated she recorded a conversation in which the respondent stated that the petitioner was sleeping around with even house girls, and that she was with him only for his money, and would finally leave him. She testified that the respondent also informed her that she had hired a private investigator to follow the petitioner around. She also stated that the respondent confided in her that she would kill the petitioner. In cross-examination, she stated that she did not inform the police nor her husband of the death threats, rather she kept it to herself. She also could not remember the exact dates when the threats to kill were made but only told the petitioner of the same once she felt that his life was in danger.

9. Her evidence was corroborated by her husband, who testified as the petitioner's third witness.

10. The respondent on her part testified that she met the petitioner in 2004. she stated that they got married in 2007. She said that in 2013 she discovered that the petitioner was having extra-marital affairs during the subsistence of their marriage, including one with IW. She stated that she was shocked when she read the obituary of the co- respondent's father listing the petitioner as her fiancée. She stated that the said women would call her in the presence of the petitioner, and abuse her, and that she once contracted a sexually transmitted disease from the petitioner due to his adultery. She denied the allegations of cruelty on her part, and stated that it was the petitioner who was cruel to her. She stated that the petitioner moved out of their home, and did not inform her where he was going, causing her mental anguish and stress. She stated that she loved the petitioner but his ways caused her to suffer as she could no longer enjoy their marriage. She blamed him for emotional and physical abuse. She also stated that the petitioner had a bad temper and that he was always angry at her. She prayed for dissolution of the marriage.

11. The main issue for determination is whether there are valid legal grounds to dissolve the marriage between the petitioner and the respondent.

12. The grounds for dissolution of a civil marriage are as per section 66(2) of the Marriage Act, which provides that: -

‘A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds—

(a) adultery by the other spouse;

(b) cruelty by the other spouse;

(c) exceptional depravity by the other spouse;

(d) desertion by the other spouse for at least three years; or

(e) the irretrievable breakdown of the marriage.’

13. Both parties herein alluded to the fact that either party was cruel to the other, and both sought dissolution of the marriage based on that ground. It is trite law that he who alleges must prove. The Court of Appeal in *Alexander Kamweru vs. Anne Wanjiru Kamweru* [2000] eKLR, stated: -

‘Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.’

14. The definition of cruelty was settled in *Meme vs. Meme* [1976] KLR, where it was said that -

‘For cruelty to be established two tests must be satisfied. These are: First whether the conduct complained of is sufficiently grave and weighty to warrant the description of being cruel: and, secondly, whether the conduct has caused injury to health or reasonable apprehension of such injury.’

15. In summary, it was stated in *Meme vs. Meme*, above, that to establish cruelty, the petitioner must show to the satisfaction of the court:

(a) That there was misconduct of a grave and weighty nature;

(b) That there was real injury to the complainant’s health or reasonable apprehension of such injury;

(c) That the injury was caused by misconduct on the part of the respondent; and

(d) That on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.

16. The same was reiterated in *DM vs. TM* [2008] 1 KLR 5 where it was stated that: -

‘To establish cruelty the complainant must show to the satisfaction of the court:

(a) misconduct of a grave and weighty nature

(b) real injury to the complainant’s health and reasonable apprehension of such injury

(c) that the injury was caused by misconduct on the part of the Respondent, and

(d) that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.’

17. In *KAS vs. MMK* [2016] eKLR, the court was of the view that -

‘Cruelty is defined by the Black's Law Dictionary 8th ed as “the intentional and malicious infliction of mental and physical suffering on a living creature.” The dictionary points out that physical cruelty involves “actual violence.”

It further defines “mental cruelty” the following terms: -

“As a ground for divorce, one spouse’s course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse.”

Justice GBM Kariuki SC (as he then was) in WMM vs. BML [2012] eKLR was of the view that:

"Courts have avoided formulation of an exhaustive definition of cruelty. Acts of cruelty, like acts of negligence in the law of torts, are said to be infinitely variable."

Justice GBM Kariuki went on to state that "Conduct that may undoubtedly be cruel in one case may clearly not be cruel in another on account of differing circumstances." The learned judge stood guided by the finding by Sir Charles Newbold in Colarossi v Colagrossi [1965] E.A 129 where it was held that:

"no comprehensive definition of cruelty has ever been accepted as satisfactory – much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree."

Judge Kariuki referred to the House of Lords findings in Gollins V Gollins [1963] 2 All E.R.966 H.L. [1964] AC 644 and Williams v Williams [1963] 2 All ER 944 HC [1964] AC 694 which established that the balance in claims of cruelty as a ground for dissolution of the marriage was in favour of giving relief to a complainant in a situation which has become intolerable. Such that if the spouse causes injure to the complainant's health or is likely to do so, "it will amount to cruelty if it is grave and weighty and is such that the Petitioner cannot reasonably be expected to put up with it or to tolerate it."

It was further held that "A reasonable apprehension that injury will result if the conduct persists will suffice for the simple reason that the court will not wait for a spouse to be actually injured before affording such spouse relief."

…In my opinion both parties have proved mental cruelty as defined by the Black's Law Dictionary. They have further proved that they carry strong views against each other that can lead to mental anguish. The Petitioner claim that the Respondent threatened to kill her in more than one occasion. The view held by the Respondent that the Petitioner was out to milk him off his hard earned money and not out to capture the essence of marriage which to him is eternal bliss, affection and companionship. These views can lead to mental anguish. There is also the feeling held by each party that the other was cheating on her/him. It appears that the five years of the marriage were characterized by suspicion, threats, anger and anguish.'

18. In *CH vs. KRGH* [2018] eKLR the court held that

'Although there is no internationally accepted standard definition on what constitutes cruelty in divorce proceedings, various courts have advanced and adopted some common ground by holding that:

"…cruelty is willful and unjustifiable conduct of such character as to cause danger to life, limb, or health, bodily or mental so as to give reasonable apprehension of such a danger."'

19. From the above it is clear that what amounts to cruelty in divorce matters has never been definitively stated. The Court of Appeal in *JSM vs. ENB* [2015] eKLR stated as much thus: -

'The last point, which has been made time and again by various courts, and which is worthy reiterating here, is that there is no comprehensive definition of cruelty. Each petition founded on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves. Therefore, it is not very helpful to rely on fact of previously decided case as precedent.'

20. It was the petitioner's case that the respondent was cruel to him. He described her as being rude and that she constantly abused him. He stated that she even threatened to kill him, allegations that were not proved. Other than stating that there was cruelty, the petitioner did not provide any other evidence to prove that there was cruelty other than the fact that the respondent was rude and denied him conjugal rights. The respondent also alleged the same. She stated that the petitioner had a bad temper. although she alleged that he had physically abused her, she had no evidence to prove the same. From the evidence, the parties herein did not adduce sufficient evidence to prove that there was cruelty on the part of either party, and thus it is my opinion that the ground of cruelty has not been proven by both the petitioner and the respondent.

21. In LMM *vs. PMM* [2017] eKLR, the court held that -

'From both particulars, it is evident that the actions as alleged by each party as against the other are capable of qualifying as cruelty (mental or otherwise) as defined by the Black Laws Dictionary. Being physically assaulted is likely to inflict bodily harm thus endangering someone's health. Having to endure constant insults, disrespect and ungovernable temper in a marriage is likely to cause one distress and great torment.

14. Cruelty has no standard definition in law but it can be proved by a preponderance of probability as it varies with the circumstances of each case. In the instant case, this court has not been convinced that cruelty had been meted out against each other and equally do find that the ground has not been proved.

15. It is not enough for one to allege that he or she has been tortured, assaulted or abused without proof. What is before court is a word of mouth by the petitioner against that of the respondent. This court has not been persuaded sufficiently to arrive at a conclusion that either party assaulted, abused or humiliated the other thus exerting physical, mental or psychological injury. The

ground of cruelty alleged against each other cannot stand in the circumstances and the same is dismissed.'

22. The respondent also alleged that there was adultery on the part of the petitioner. She enjoined one IW in her cross-petition, and stated that the petitioner was having an affair with her, and even had a child with her, a fact that the petitioner did not deny.

23. The standard of proof on adultery as a ground of divorce was well discussed by the Court of Appeal in *Wangari Mary Josephine Maathai vs. Andrew Stephen Mwangi Maathai* (1980) eKLR as follows: -

> '*…The charge of adultery is a serious matrimonial offence. Circumstantial evidence in proof thereof ought to be carefully and cautiously considered, the court being required to move with great care. The standard of proof required is very high. The charge must be proved clearly, beyond establishing a mere balance of probabilities or preponderance of probability or a mere suspicion and opportunity to commit adultery. It must be proved to the satisfaction of the court, which means that the court must be satisfied beyond reasonable doubt or satisfied so as to feel sure…'*

24. The petitioner clearly had an extra-marital affair, evidence of which was a child that he sired with the co-respondent, during the subsistence of the marriage, a fact that he does not deny. To that extent it is my opinion that the respondent has sufficiently proved the ground of adultery.

25. Both parties herein were of the view that the marriage had irretrievably broken down. The court in *N vs. N & Another* [2008] 1 KLR (G&F) 16, eloquently painted the classic picture of a marriage that has irretrievable broken down, ironically in 1977, long before the concept of irretrievable breakdown of the marriage was recognized as a ground for divorce in Kenya. It was stated as follows:

> '*This husband and wife have gotten themselves into a real grand-sized matrimonial tangle. In the words of the poet there are winds of sorrow where their voice was, silence where their love was. Their eyes loudly tell the story of their unhappiness. Their hearts are dried up and they do not stir for each other anymore. They must have forgotten their reading from St Paul's letter to the Corinthians that love is patient and kind; love does not keep a record of wrongs. Love never gives up; its faith, hope and patience never fail. This husband and wife look like being soaked in misery with their hearts dead for each other…Their own road of love has petered out; they are in a cul-de-sac of their own making of their marriage which has after some years turned out to be an intolerable any longer.'*

26. In the instant cause, both the petitioner and the respondent have maintained that their marriage had irretrievably broken down and each one of them wanted the marriage dissolved. The petitioner stated that he moved out of the matrimonial home in 2013 and have not been living with the respondent since then. He describes his relationship with the respondent as one filled with doubt mistrust and contempt for each other.

27. In *Alexander Kamweru vs. Anne Wanjiru Kamweru* [2000] eKLR, the Court of appeal held that -

> '*As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by section 66(2) (e) of the Marriage Act, 2014 and was not recognized in the repealed Matrimonial Causes Act. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties...It is worth noting that although adultery, cruelty and desertion are distinct and separate grounds for divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage…What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again; among others. These considerations would be, in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down*.'

28. The same was reiterated by the Court of Appeal in *JSM vs. ENB* [2015] eKLR in the following words -

> '*As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by section 66(2) (e) of the Marriage Act, 2014 and was not recognized in the repealed Matrimonial Causes Act. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties.*
>
> *Under section 66 (6) of the Act, irretrievable breakdown of the marriage can be proved by evidence of one or more of the following facts:*
>
> > *(a) commission of adultery;*
> >
> > *(b) cruelty to the other spouse or any child of the marriage;*
> >
> > *(c) willful neglect of one spouse by the other for at least two years immediately preceding the presentation of the petition;*
> >
> > *(d) separation of the spouses, voluntarily or by decree of the court, for at least two years;*

(e) desertion for at least three years immediately preceding the presentation of the petition;

(f) the sentencing of a spouse for a term of life imprisonment or a term of seven years or more;

(g) certification by two doctors, one of whom is a psychiatrist, that a spouse suffers from incurable insanity; and

(h) any other ground as the court may deem fit.

It is worth noting that although adultery, cruelty and desertion are distinct and separate grounds for divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage. Of relevance to this appeal is section 66(6) (e) which the learned judge relied upon. Under that provision, a marriage is deemed to have irretrievably broken down if "a spouses has deserted the other spouse for at least three years immediately preceding the date of presentation of the petition."

The uncontroverted evidence on record is that the respondent left the matrimonial home in Ganjoni, Mombasa in December 2012 and went to live in Mazeras. By the time the petition was presented on 14th October 2013, the parties had been separated for less than one year, rather than at least three years immediately preceding the presentation of the petition, as required by the Act. Clearly the learned judge erred by finding that the marriage had irretrievably broken down in terms of section 66(6)(e) of the Marriage Act.

The error on the part of the learned judge notwithstanding, could the marriage, on the basis of the evidence that was adduced, have been dissolved as having irretrievably broken down on account of "any other ground as the court may deem fit", within the meaning of section 66(6)(h) of the Marriage Act? What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again; among others. These considerations would be, in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down.

Madan J. (as he then was), eloquently painted the classic picture of a marriage that has irretrievable broken down in N vs. N & Another, [2008] 1 KLR (G&F) 16, ironically in 1977, long before irretrievable breakdown of the marriage was recognized as a ground for divorce in Kenya. The venerable judge stated:

"This husband and wife have gotten themselves into a real grand-sized matrimonial tangle. In the words of the poet there are winds of sorrow where their voice was, silence where their love was. Their eyes loudly tell the story of their unhappiness. Their hearts are dried up and they do not stir for each other anymore. They must have forgotten their reading from St Paul's letter to the Corinthians that love is patient and kind; love does not keep a record of wrongs. Love never gives up; its faith, hope and patience never fail. This husband and wife look like being soaked in misery with their hearts dead for each other…Their own road of love has petered out; they are in a cul-de-sac of their own making of their marriage which has after some years turned out to be an intolerable any longer."

In this case, both the respondent and the appellant had, in their pleadings and evidence maintained that their marriage had irretrievably broken down and each wanted out of it. Although the appellant did not file a cross petition for divorce, in her answer to petition she prayed the court to dissolve the marriage. In his evidence the respondent told the court that there was no possibility of reconciliation with the appellant and that the only solution was a decree of divorce. In his own words, the relationship between the two had reached a point of no return.

On her part, the appellant testified that her marriage to the respondent was not working; that she was living alone; that as of the date she testified in February 2014 she had lived apart from the respondent for more than one year; that one party lived in Mazeras while the other lived in Ganjoni; that the parties had not enjoyed any conjugal relationships for more than one year; that the marriage could not work; that the problems between her and the respondent could not be resolved and that she also wanted divorce.

The record does not indicate and none of the parties has suggested that there was collusion in the presentation of the petition. On our part we are satisfied that there was no collusion. In light of the evidence on record, the trial court was entitled, on the facts of this case, to find that the marriage had irretrievably broken down within the meaning of section 66(6) (h) of the Marriage Act, 2014.'

29. From the evidence given by the parties herein, it is clear that their marriage has irretrievably broken down. They have not been staying together for close to five years and do not relate as though they can stay together. Each of the parties herein complains of how rude and bad tempered the other party is, which in turn is causing distress between them. their relationship is filled with distrust and contempt for each other. It is thus my opinion that they have sufficiently proved that the marriage has irretrievably broken down and thus ought to be dissolved as prayed by both of them.

30. With regard to division of matrimonial property, the respondent seeks for orders that -

(a) That it be declared and decreed that 50% or such other or higher proportion of the following properties with all and developments thereon which property was acquired by the joint funds and efforts of both the petitioner and the respondent during the marriage and registered in the joint names of both parties as in more specifically shown in the annexed affidavit, belong to the respondent, that is to say - town house No 4 on LR XXX/XXXX, Ngecha/Kabuku/TXXX and Ngecha/Kabuku/TXXX;

(b) That the respondent be at liberty to purchase the petitioner's share of the said properties upon valuation thereof on in the alternative, the said properties be old and the net proceeds of the sale be shared between the petitioner and the respondent equally;

(c) That the petitioner by himself, his agent and or servant be restrained form alienating, encumbering or in any other manner disposing of the said properties until the determination of the suit; and

(d) That it be declared and decreed that the motor vehicle registration number [particulars withheld] M was given to the respondent by the petitioner as a gift and thus belongs to the respondent.

31. In her oral testimony, the respondent stated that the above properties were bought during the subsistence of their marriage. She stated that the parcels of land were bought jointly and that the car was given to her by the petitioner as a gift when he relocated from the United States of America (USA). She thus demanded 50% of the land as she regards herself a joint owner and that the car be given to her as the gift that it was.

32. The petitioner, on his part, denied the claims stating that he was the sole purchaser of all of the above properties and that the only entitlement she had on the said property was 1%. In his testimony, the petitioner testified that he bought LR No XXX/XXXX which was their matrimonial property in 2009. He stated that the property was purchased at a consideration of Kshs. 20,000,000.00. He produced a sale agreement dated 10th August 2009 to prove the same. He also stated that the sale agreement indicated that both he and the respondent were the purchasers. He stated that he singlehandedly paid the purchase price and that the respondent was to pay the stamp duty which she had not to date. He stated that the respondent did not contribute a single cent for the purchase of the said property. He further testified that he singlehandedly furnished the property and developed it. He testified that in 2013 they purchased Ngecha/Kabuko/TXXX and TXXX. He stated that they were the buyers of the property vide a sale agreement dated 4th May 2013. He confirmed that the properties were jointly registered in their names. He stated that the property was bought for a consideration of Kshs. 3,700,000.00, which he paid in full without the help of the respondent. He also testified that in September 2009, he bought motor vehicle registration Number [particulars withheld] M. he stated that it was for the respondent's use. He stated that he later discovered that the said motor vehicle had been transferred to her name yet he had not authorized the transfer. He stated that he reported the matter to the police and that she was charged with the offence of forgery. He testified that the respondent made no contribution to the purchase of the said property and he demanded them back.

33. From the pleadings and the evidence, it is clear that the claim is based on the division of the following properties -

(a) townhouse No. 4 on LR No. XXX/XXXX;

(b) Ngecha/Kabuku/TXXX and Ngecha/Kabuku/TXXX; and

(c) motor vehicle registration mark and number [particulars witheld] M.

34. The issues that emerge from the pleadings for determination are: whether the above properties were matrimonial property and what entitlement does each party have in the properties.

35. It was the respondent's evidence that the townhouse No 4 on LR No. XXX/XXXX, Ngecha/Kabuku/TXXX and Ngecha/Kabuku/TXXX were purchased during the subsistence of the marriage and that they were all registered in their names. The respondent confirmed the same and stated that the parcels of land were bought by both of them and registered in their names with the townhouse being their matrimonial home.

36. Matrimonial property is defined under section 6 of the Matrimonial Property Act to mean the matrimonial home or homes, household goods and effects in the matrimonial home or homes, or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. The matrimonial home is defined under section 2 of the Act 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. It is thus clear that the said parcels of land are indeed matrimonial property.

37. In their written submissions, both parties agree that the parcels of land meet the definition of matrimonial property. The contention is with the motor vehicle. It is the respondent's position that the said motor vehicle was given to her by the petitioner as a gift. She stated that the petitioner bought her the car and was to transfer the same to her name. She admitted having faced forgery charges over the transfer of the motor vehicle into her names and stated that the petitioner had always promised that he would have it transferred to her name but never did. The petitioner on his part contended that the said motor vehicle was his and that he did not give it as a gift to the respondent. He stated that he bought the vehicle as for personal used and convenience of the respondent. He stated that he had the intention to have it transferred in her name and he had even handed her the logbook only for her to forge documents and have the same transferred to her without his knowledge. He stated that due to her conduct he wanted the car back. It should be noted that the criminal case was still pending determination before the trial court even as the matrimonial dispute raged.

38. The starting legal provision is section 15 of the Matrimonial Property Act; which states as follows: -

'*Gifts between spouses*

"*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 absolute to the recipient.*"'

39. It is crucial to note from the above provision that there is a "rebuttable" presumption. The *Black's Law Dictionary* defines rebuttable presumption as follows: -

'*An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary*

evidence.'

40. The *Black's Law Dictionary* defines a gift as the voluntary transfer of property to another without compensation. It should be noted in this case that the car in question was indeed bought by the petitioner for the respondent's use. He had, however, not transferred it to her as a gift only for her to do so by herself. As stated above, a gift has to be voluntarily transferred to the recipient. in this case it is my view that the transfer that was made was not occasioned by the petitioner and that the same cannot be regarded as a gift. It is thus my finding is that the purchase of the said motor vehicle was done by the petitioner and that the same petitioner has since challenged the transfer thereof to the respondent the existence of the criminal case confirms as much. It is thus my finding that the said motor vehicle was not a gift to the respondent and it also does not form matrimonial property as the same was not jointly acquired by the parties herein.

41. It is the respondent's case that the parcels of land were all registered in their joint names and thus the same ought to be distributed on a 50-50 basis. She stated that in as much as she did not make direct monetary contribution to the purchase of the properties, she made non-monetary contributions which included companionship, domestic work and taking care of the petitioner's children. The petitioner on his part could not hear any of it. He stated that he singlehandedly financed the purchase of the said property and mentioned that all that was despite the fact that the respondent was a self-employed PhD holder. He stated that the respondent did not make any non-contribution as she was a career woman with full time engagement and with no time to perform domestic chores and management of their home. He stated that the respondent was only entitled to 1% of the properties and he was willing to buy her out after valuation of the same. The respondent relied on the provisions of Article 45 of the Constitution and stated that she had an equal entitlement to the property.

42. In *TMW vs. FMC* [2018] eKLR, the court held that Article 45 of the constitution of Kenya 2010 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," and then went on to analyze the said provision in the following terms -

> *'As quoted in the case of PNN vs. ZWN (2017) eKLR, "One of the earliest opportunities to interpret the provisions of Article 45 (3) came one year after the promulgation in the case of Agnes Nanjala William -vs- Jacob Petrus Nicolas Vander Goes, (Civil Appeal No. 127 of 2011), where this Court stated as follows: -*
>
> *"Article 45 (3) of the Constitution 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. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day."*
>
> *In the case of PWK vs. JKG 2015 eKLR the Court said;*
>
> *"Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in Gissing vs Gissing [1970] 2All ER 780 Page 788."*
>
> *After analyzing English authorities, this Court in Peter Mburu Echaria vs. Priscilla Njeri Echaria, (2007) eKLR stated in part as follows:*
>
> *"It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in Pettit are those of English law of trusts. The House of Lords specifically decided so in Gissing vs. Gissing. According to the English law of trusts it is only through the wife's financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property."*
>
> *The Court also examined local decisions and came to the following conclusion:*
>
> *"In all the cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this Court, the court has invariably given the wife an equal share (see Essa vs. Essa (supra); Nderitu vs. Nderitu, Civil Appeal No. 203 of 1997 (unreported), Kamore vs. Kamore (supra); Muthembwa vs. Muthembwa, Civil Appeal No. 74 of 2001 and Mereka vs. Mereka, Civil Appeal No. 236 of 2001 (unreported). However, a study of each of those cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case, the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband."*
>
> *In Francis Njoroge vs. Virginia Wanjiku Njoroge, Nairobi Civil Appeal No. 179 of 2009; Kiage JA. stated that:*
>
> *"… 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 – a precise mathematical exercise'."

In PNN vs. ZWN (2017) eKLR, Justice Kiage; expressed himself as follows:

"I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words "50 per cent."

The nub of the above cited judicial precedence is that the Trial Court is mandated to scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties so as to inform the division of matrimonial properties after dissolution of the marriage. It's not in dispute as of now the court of appeal decision embodies that when applying the principle of equal ownership share the courts shall take into account a range of factors with no single consideration bearing a greater weight than the other in a case requiring the halving step formulae."

43. In the case of *WMM vs. BML* [2012] eKLR interpreted Article 45(3) of the Constitution in the following terms: -

'The rights enshrined in this Article connote equality of parties in a marriage and are intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedom. The equality in this Article does not create nor is it intended to create equal spousal ownership of property regardless of which spouse has acquired and paid for it or regardless of how it has been acquired and paid for. Rather, and contrary to the assumption that it makes property acquired during marriage the property of both spouses in equal shares, it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices.'

44. It should, however, be noted that the property herein was jointly registered in the names of both the parties herein.

45. In the case of *OKN vs. MPN* [2017] eKLR, the Court of Appeal was of the view that -

'Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See Kivuitu vs. Kivuitu, [1991] KLR 248. The presumption is however, rebuttable by either party showing that their contributions were not equal. Section 22(4) of the Registration of Titles Act recognizes tenancy in common. It is generally accepted that in a common tenancy, if property is registered in joint names, then no tenant is entitled to any separate share in the property and, any disposition of such property may be made only by all the joint tenants; on the death of a joint tenant, that tenant's interest would vest in the surviving tenant or tenants jointly; or each joint tenant may transfer their interest inter vivo to all the other tenants but to no other person. Tenancy in common, in the circumstances of this dispute, means that the appellant and the respondent each holds a 50% undivided share in both properties.'

46. In *INN vs. MSC* [2018] eKLR the court held that -

'Where property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition See Kivuitu vs. Kivuitu, [1991] KLR 248. For that reason, we also agree with the following sentiments of the learned Judge: -

"However, on the basis that the registration of this property into joint names was not shown to have been done under any irregular manner or coercion and given that it was acquired during the subsistence of their relationship, I will take the position that the defendant is entitled to some shares by virtue of his name having been included. Further the plaintiff having acquired a property earlier even without a PIN must have known the process involved in acquisition of title deeds. In any event, obtaining a P.I.N document in Kenya does not require a long time. Therefore, it is my finding that they are both entitled to the suit property in Mwembe-Legeza in equal shares."

47. This court in *MWK vs. CWN* [2014] eKLR stated that -

'Having carefully, considered the application, affidavits on record and the rival submissions by counsel for respective parties, I form the view that the main issue for consideration is whether the Plaintiff is entitled to a 50% share of the said property acquired during marriage and registered in the joint names of the parties. For the most part the facts are not significantly in dispute. The said property LR. No. Nairobi/Block 146/21 – House No. M17 – Hazina Estate South "B" Nairobi was registered in the couples' joint names and it must be pointed out that this state of affairs creates a presumed equal ownership which is an undivided equal share.

In the case of Kivuitu vs. Kivuitu (1991) 2 KAR 241 it was observed that:

"The fact that the property is registered in the joint names means that each party owns an undivided equal share thereon… Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the intention of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the entire

ownership."

This was also the case in Kamore vs. Kamore (2000) 1 EA 81, where the Court held that:

"where property is acquired during the course of coverture and is registered in the joint names of both spouse, the court in normal circumstances must take it that such property, being a family asset is acquired in equal shares."

Further, in Gathiya Essa vs. Mohamed Alibhai Essa (CA No 141 of 1998), the court, observed that

"where the property is acquired during the subsistence of a marriage is registered in the joint names of the spouses, the law assumes that such property is held by the parties in equal shares."

I am satisfied that in the circumstances of this case the Plaintiff is entitled to equal share of the said property. I say so particularly with reference to the Assignment Agreement dated 15th June, 2006, the Sale Agreement dated 13th April, 2007 all refer to both the Plaintiff and the Defendant as jointly called 'the purchasers" and further, a perusal of the Transfer of Lease dated 13th April, 2007 reveals that they hold the leasehold interest as equal joint proprietors.'

48. It was the petitioner's evidence that the properties were bought in the presence of the respondent, who, according to the sale agreements, was listed as a purchaser. In his submissions, the petitioner stated that the only reason that he registered the respondent as a joint owner was because he had the desire to be transparent with her and to make her feel comfortable, loved and cared for as a wife. It is my view that the properties were jointly owned by the parties herein and thus each party is entitled to 50% share of the property.

49. In the end, I shall dispose of the two causes, as consolidated, in the following terms -

(a) That the marriage, celebrated between the petitioner and the respondent herein on 21st December 2007, is hereby dissolved on the grounds of adultery and irretrievable breakdown;

(b) That the following properties shall be shared on a 50:50 basis between the parties hereto, that is to say-

(i) townhouse No. 4 on LR No. XXX/XXXX;

(ii) Ngecha/Kabuku/TXXX; and

(iii) Ngecha/Kabuku/TXXX;

(c) That I declare that motor vehicle registration mark and number [particulars withheld] M is not matrimonial property and I shall not make any orders on its division;

(d) That each party shall bear their own costs; and

(e) That any party aggrieved by the orders that I have made hereinabove has right of appeal to the Court of Appeal within twenty-eight (28) days.

DATED AND SIGNED AT KAKAMEGA THIS 24th DAY OF April, 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 10th DAY OF May 2019

A ONGERI

JUDGE