



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
FAMILY DIVISION
MATRIMONIAL CAUSE NO. 1 OF 2018
IN THE MATTER OF SECTIONS 7, 10, 12 & 17 OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

AND
IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

MLL..... APPLICANT

VERSUS

RKL.....RESPONDENT

JUDGMENT

Background

1. The parties were married on the 26th October, 2009 at ACK Church Ngong pursuant to provision of the African Christian Marriage and Divorce Act, Cap 151 and they were divorced on the 5th of December, 2017 in Divorce Cause No. 593 of 2016 at Milimani Commercial Courts in Nairobi. Prior to the marriage the parties cohabited, however, there are differing views as to when the cohabitation commenced. According to the Respondent they commenced cohabitation in September, 2006. The parties were blessed with a single issue during the subsistence of their marriage.

2. The Applicant filed Notice of Motion Application dated 3rd of April, 2018, brought under **order 40 Rules 1 and 2** of the Civil Procedure Rules, 2010; **Section 3A** of the Civil Procedure Act; **Section 7, 10, 12, 17 & 19** of the Matrimonial Property Act and any other enabling laws.

3. He sought the following orders from the court: - the Applicant claims against the Respondent, joint ownership of several properties situated in different towns which are all registered in the Respondent's name.

a) An interim order of injunction to restrain the Respondent from conducting any kind of dealings land being Ngong/ Ngong/[...]; Ngong/Ngong/[...]; Kajiado/Kaputiei-North/[...]; West Pokot/Siyoi "A"/[...]; Plot Number KLS/[...] Laini Saba; and Plot Number [...] Mnakei (hereinafter "the suit properties".

b) That the above-mentioned properties be shared equally between the parties and the costs of the application be in the cause.

Grounds of Application

4. The Notice of Motion is premised upon five grounds couched on the face of it which are as follows: that the Applicant is married to the Respondent herein and both the Applicant and the Respondent herein have been jointly acquiring the suit properties herein and causing development upon the same.

5. However, due to the fact that the Applicant was always out of Kenya for international marathons, the Respondent would register the suit properties so jointly acquired during the subsistence of their marriage, in her sole names; that the marriage between the Applicant and the Respondent has since irrevocably broken down and the Respondent has since evicted the Applicant from their matrimonial home and it is in the best interest of the deceased's estate and justice that the orders sought be granted expeditiously.

The Applicant's Case

6. The application is supported by a Supporting Affidavit of MLL. It was deponed that on 26th of October, 2009 he entered into a monogamous marriage with the Respondent and solemnized at the ACK Church Ngong pursuant to the provision of the provision of the African Christian Marriage and Divorce Act Cap. 151 of the Laws of Kenya. *(Annexed herein and marked as MLL-2a & b are copies of the certificate of Marriage and the Registrar's Certificate).*

7. The Applicant averred that he has been cohabitating with the Respondent as husband and wife and they are blessed with one issue; that he is a trained [Particulars Withheld] with the Tegla Lorupe Peace Foundation and he has participated in international marathons between the years 2004 and 2013. Further that they jointly purchased several parcels of land through their joint proceeds acquired after his international marathons in various countries. *(annexed herein and marked as MLL-5 are copies of the sale agreements and proof of developments).*

8. It was also deponed that the said acquired properties were either solely acquired by the Respondent's funds then subsequently developed by the Applicant or alternatively acquired and developed by the Applicant. *(annexed hereto and marked as MLL-5 are copies of the sale agreements and proof of developments).*

9. The particulars of the properties in question are as follows: -

a) Title No. Ngong/Ngong/26093, where the matrimonial home is situated. The applicant conceded that it was purchased by the Respondent in the year 2002 for Kshs. 150, 000 through a loan. (annex marked as MLL6 is the copy of the Title Deed). The applicant claims to have sent to the Respondent Kshs. 380,000/- to put up three (3) temporary rooms which they occupied in 2003. He averred that between the year 2007 to 2008, he attended several road races in Canada and earned Kshs. 1, 800, 000/- and he sent the Respondent a million shillings from the earnings for purposes of putting up a maisonette which is their matrimonial home. (annexture marked as MLL-7 is a copy of the building plan). He stated that he put the remaining balance of Kshs. 800, 000 in a fixed deposit account. Further that on the 4th of April, 2011 they were jointly granted a loan of Kshs. 600,000/- for purposes of completing the construction of the maisonette. The said loan was paid from the rental proceeds from Kajiado/Kiputiei- North/[...], Plot No.KLS/[...] Laini Saba Village Kibera, West Pokot/Siyoi "A"/[...] and not from the Respondent salary. (annexture marked as MLL-8 are copies of letter of offer from HFCK and loan statement).

b) Title No.Ngong/Ngong/[...] which is adjacent to Title No.Ngong/Ngong/[...] and purchased the same in 2004 for Kshs. 320,000/- from the proceeds of London Marathon he participated in 2004. He stated that he sent the Respondent Kshs. 750,000 from the proceeds of the London Marathon out of which the Respondent paid the owner Kshs. 300,000 and cleared the balance of Kshs. 20, 000/- upon his return to Kenya. The Plot is registered in the name of the respondent and the same has not been developed yet. (annexture marked as MLL-9 is the copy of the Title Deed).

c) Title Number Kajiado/Kaputiei- North/[...]which plot was purchased by the Respondent. He stated that he used Kshs. 800,000/- he had kept in his fixed account and constructed 20 rooms which were rented out for Kshs. 3,000/= per each room. Further that, subsequent to the savings from the rental income, he constructed additional eight rooms making the total rooms on the plot to be twenty rooms which are all occupied.

d) Plot No.KLS/[...] Laini Saba Village Kibera is an unregistered plot located in informal settlement in Kibera and was identified by the Respondent. It was claimed that the Applicant and the Respondent jointly acquired the plot in October 2007 for Kshs. 605,000/- out of which he contributed Kshs. 520, 000 and the Respondent Kshs. 85, 000. (Annexture marked as MLL 10 is a copy of the Agreement for purchase of the Plot). The Applicant claimed to have used the proceeds from marathon race he attended in Canada in the year 2007 to contribute towards the purchase of the plot. It was further deposed that the Plot is comprised of eighteen rooms and the total current rental income is Kshs. 50,000 per month.

It was also deposed that in 2009, the Applicant arranged for electricity connection to the rooms at a cost of Kshs. 30, 000/- from the rental income of October. (annexture marked as MLL- 11 is a copy of KPLC Supply Contract). It was stated that the rental income is paid to their joint account, but however the on 1st March 2018 the Respondent directed the tenants to deposit rent in her personal account.

e) Title No. West Pokot/Siyoi "A"/[...] which is located in Kapengurai and according to the applicant it was acquired jointly by the Respondent and him sometime in 2007. He claimed to have contributed Kshs. 250, 000/- and his wife contributed Kshs. 150,000 towards its purchase. It had old houses and the Applicant claims that he renovated them at a cost of Kshs. 80,000/= from his own sources. Further that the rental income from the houses is Kshs. 8,000/- per month and the same was to be registered in their names jointly. (annexture marked MLL 13 are copies of Land Control Board Consent and Transfer in favor of our joint names).

The Applicant stated that he has learnt that the property has been registered in the Respondent's sole name despite the fact that he has been holding on the original transfer and consent from the Land Control Board.

f) Plot No.[...] Mnakei which is located in Kapenguria and purchased sometime in 2007 for the sum of Kshs. 300,000/- with the Respondent contributing no funds. The applicant stated that he disposed a motor vehicle registration number KBY [...]JK for Kshs. 1, 800, 000/- and used Kshs. 500, 000/- to build a house on the above plot and the remaining amount to purchase motor vehicle Toyota Fielder KCA 241W.

10. It was deposed therefore that the properties herein were solely registered in the names of the Respondent for reasons that during the purchase of the same, the Applicant was away from Kenya participating in International marathons and in that regard the Respondent has been in possession of all original title deeds.

11. The applicant deponed that in 2014 the parties' marriage broke down upon discovering that the Respondent herein began to cohabit with another man in their matrimonial home when he was away on one of his International marathons. Further that the Respondent subsequently forced and or caused his eviction from the matrimonial home and that she continues to verbally abuse him through telephone calls.

12. That the Respondent herein continues to solely collect and consume rental proceeds from the jointly acquired properties that have been commercially developed by him. He also stated that his eviction from the matrimonial home constitutes an infringement of his rights to access their matrimonial home. That he is entitled to all the properties jointly acquired by the Respondent and him during the pendency of their Marriage.

The Respondent's Case

13. On the other hand, the Respondent opposed the Application by way of a Replying affidavit sworn on the 12th June 2018. The Respondent denied having married to the Applicant in October and stated that they met around September, 2006. Contrary to a myriad of alleged trips that the Applicant mentioned in its supporting affidavits, the Respondent stated that the Applicant only travelled twice in the year 2006 and 2009 out of the country and she facilitated his travel by purchasing his air tickets. She produced a document marked as MLL-3 a copy of invitation letter which do not prove attendance of the same and does not prove that the Applicant is an [Particulars Withheld] with the Tegla Lorupe Peace Foundation.

14. She denied having jointly acquired the properties contained in the schedule of properties listed in the Applicant's affidavit with the Applicant. She further denied having received some monies to purchase any property by the Applicant. It was stated that it is untrue that they acquired the said properties jointly during their marriage and that the applicant was all along unemployed and with no income generating occupation which she works as [Particulars Withheld] at Kenyatta National Hospital and also a member of Mangereza Society Limited Sacco where she claims to have obtained several loans to purchase most of the properties in question.

15. She also explained how she acquired the properties in question without any contribution from the Applicant. As regards property Title No. Ngong/Ngong/[...], which the respondent said to be her home. It was stated that the same was solely acquired by the Respondent in the year 2002 for Kshs. 150,000/- whereby she paid Kshs. 100,000/= as a deposit and acquired the title in her name on the 19th day of September 2002 and the remaining balance was paid in installments until completion. **(annexture marked as RK2 are copies of the title deed and receipts of payment).**

16. She further deponed that the same was acquired way before she met the Applicant through her own salary and that she solely commenced development of the property around 2006 but however the same had to be stopped due to a boundary dispute lodged by her neighbor to the District Office. **(She produced a copy of a letter dated 1st February 2006 and her pay slip).** It was stated that she solely obtained a loan from Maregereza Sacco Society Limited of Kshs. 1, 000, 000/- on the 8th of January 2010 to build a maisonette on Ngong/Ngong/[...] where they lived and therefore the Applicant did not contribute in the development of the property as he alleges. **(she produced a copy of her statement from her Sacco herein marked as RKL 4).**

17. She further stated that out of the loan of Kshs. 1,000,000/=, she spent Kshs. 300, 000/- on building the maisonette and the balance of Kshs. 700,000/- she placed it in her fixed account at Co-operative Bank Limited.

18. In respect of Title No. Ngong/Ngong/[...], the applicant deponed that she solely entered into a Sale Agreement for the purchase of the same for the sum of Kshs. 250, 000/- on 1st October, 2005 which one Donald Ajega Luyai and she claims to have paid a deposit of Kshs. 210, 000/- on 31st March, 2006 and the remainder of Kshs. 40, 000/- which she later paid in instalments. **(Annexure marked RKL 5a-c is a copy of the sale agreement, memorandum of understanding and title deed in my name).**

19. She also deposed that the title in Ngong/Ngong/[...] got lost on or about October, 2005 and she reported it vide OB no.20/22/10/2005 at Ngong Police station and the same was advertised in the Kenya Gazette and she later got a Provisional Title Deed. **(Annexure marked as RKL-6a-c is a copy of the Police abstract, Kenya gazette and affidavit of lost title).**

20. As regards Title No. Kajiado/Kaputiei- North/[...], the Respondent deponed that she solely purchased the said property through a sale agreement dated 4th June, 2005 with Josekinyaga Enterprises and she claimed to have paid through a Cheque being Cheque No. 865042 to the Vendor and she produced a receipt and a title deed which are in her name.

21. She also averred that she withdrew the Kshs. 700,000/- which she claimed to have placed in a fixed Account at Co-operative Bank and construed single rooms for rental on the above-mentioned property. Owing to the fact that the money she had was not enough, she charged the title to Housing Finance to secure a loan of Kshs. 600, 000/- to enable her to finish the constructions of the rental houses. She also stated that she solely repaid the loan to Housing Finance and that she is in the process of discharging the title deed.

22. On Plot No.KLS/[...] situated Laini Saba Village at Kibera, she deponed that she entered into an agreement for sale with one Ann Wairigu Mwita who was selling her property as she was leaving the country for abroad. She further stated that a sale agreement dated 1st October, 2007 for the purchase of the said property at a purchase price of Kshs. 605, 000/- and that she repaid the entire purchase price to the seller through a banker's cheque on 1st October, 2007 from my a/c at Barclays Bank of Kenya limited at Haile Selassie Avenue. **(Annexure marked RKL 8a-e are copies of the Sale Agreement, Bankers Cheque, Bank Statement and copies of the Identity Cards of the witnesses).**

23. She further stated that when she purchased the above-mentioned property, the same had been developed with 19 single rooms as stated in the sale agreement. She therefore, denied averments by the applicant that he arranged for electricity connection to the rooms is false as she claims to have given the Applicant the sum of Kshs.30, 000/= to pay for the same which he misused and that she had to repay a further sum of Kshs. 30,000/= for the connection to be done.

24. On Title No. West Pokot/Siyoi "A"/[...], the Respondent deponed that she jointly purchased the property with one Julius Kamatakei Domokwang in the year before she met the Applicant. She stated that the said Julius began selling the property without her knowledge. When she learnt of the same, she reported the matter to the chief's office of Kapenguria where the issue was solved by way of subdividing the property and that is when she acquired her title in her own her name. (**Annexure marked RKL 9a-n are copies of the Title Deed, Report from the Chief, Mutation Form, Consent to transfer, Registration Receipt, Stamp Duty, Pay Slip and Bank Receipts**).

25. As regards West Pokot/Kisaunet/[...], the Respondent stated that she solely purchased the property from her savings and she denied having knowledge of Plot No.[...] Mnakei, and she stated that the Applicant should provide prove of the same.

26. Having stated the above, the Respondent is of the view that the Applicant is not entitled to any share of her properties as he did not contribute in any way. She further stated that the Applicant lied that all the properties were purchased when he was away from Kenya participating in International marathons.

27. She also stated that the Applicant left her in Nairobi and she later learnt that he remarried and this prompted her to Petition the Court for Divorce decree which was granted a decree absolute dissolving the marriage with the Applicant on 5th December, 2017. (**a copy of the Decree Absolute marked as RKL 11**). Contrary to the Applicant's assertion, she asserted that it is the applicant who moved out and left her with their daughter to raise single handedly, and that he used to physically and verbally abuse and to this effect she produced P3 forms that she took against him. (**annexure marked as RKL 12 is a copy of the P3 form**).

28. Further that she was rightfully collecting rent from my properties that she solely acquired. She also stated that she gave the applicant money to buy for her a motor vehicle TOYOTA Harrier registration No. KBY [...] and he brought the car and registered it in his name. Further that he later sold the car without her consent and the same is the subject matter in Civil Suit No.15 of 2015 in Principal Magistrate's Court at Kapenguria. (**annexure marked RKL-13 is a copy of the court pleadings**).

Issues for Determination

29. Having taken into consideration the Notice of Motion Application, the affidavits both in support and in opposition of the application and the annexures thereto, the submission tendered by the parties herein, I have come to the conclusion that the main issue for determination is whether the suit properties constitute matrimonial properties and if so, whether the parties should get equal shares.

The Law

30. It is now an undisputed fact that the Constitution of Kenya, 2010 as well as the Matrimonial Property Act of 2013, provides protection to family property and envisages the principles of non-discrimination and fairness between spouses. The rights of parties during the subsistence of marriage and upon dissolution of the same are encapsulated in terms of **Article 45(1)(3)** of the Constitution. It provides for equal rights principle as follows:

"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."

31. In several cases, our courts have endeavored to interpret the foregoing provisions of law. 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."

32. Pursuant to the powers conferred to the Parliament, it in its wisdom rose to the occasion two years after that decision and enacted **The Matrimonial Property Act, 2013** in the year 2013. **Section 7** provides:

"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."

33. The above provision of law entails that ownership of matrimonial property vests with the husband and wife/wives according to what each party contributed towards the acquisition of the same. This section introduces yet another aspect as far as ownership of property by spouses is concerned, that is the aspect of contribution of each party towards the acquisition of such property. In my view, what this provision of law entails is that it is possible for spouses to own certain properties but not in equal shares. Thus, in case of divorce, the court may look at what each party brought to the table for the purposes of the distribution of such properties if any dispute concerning distribution of matrimonial property arise.

34. Contribution is defined by **Section 2** to mean monetary and non-monetary contribution. Non-monetary contribution includes:

i. Domestic work and management of the matrimonial home;

ii. Child care;

iii. Companionship;

iv. Management of family business or property; and

v. Farm work

35. **Section 6 (1)** of the Act provides for that which constitutes Matrimonial Property. It stipulates as follows: -

i. The matrimonial home or homes;

ii. Household goods and effects in the matrimonial home or homes; or

iii. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

36. The properties which are subject to the dispute herein are all registered in the names of one spouse. In that regard, I'm alive to the provisions of **section 14** of the Act which stipulates as follows:

“Where matrimonial property is acquired during marriage-

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

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

37. The foregoing provision presents a rebuttable presumption that the property acquired in the name of one spouse is being held in trust for the other spouse. In the case of **NJOROGE -V- NGARI [1985] KLR, 480**, the court held that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property.

Findings, Analysis and Determination

38. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and annexures tendered by both parties. I take the following view of the matter. The main issue for determination is whether the Applicant contributed towards the acquisition and the development of the suit property and if so, the question to answer is who gets what?

39. This is a hotly contested matter where the applicant has not brought to the fore evidence to prove his contribution in the acquisition and development of all the suit properties. On the other hand, the Respondent has also endeavored to tender evidence which controverts the Applicant's claim that he made contribution to the acquisition and development of the said properties. At this juncture it is important to determine which properties fall under the category of matrimonial property.

The Matrimonial Home

40. Turning the provisions of the Matrimonial Property Act, Section 6 of the Matrimonial Property Act, 2013, matrimonial property is defined to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Basically, for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.

41. However, by dint of **section 9** of the Matrimonial property Act, Laws of Kenya, where one spouse acquires property before or during the marriage and the property acquired during the marriage which 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. The parties herein are in agreement that Property Title No.Ngong/ Ngong/(particulars withheld) (the matrimonial home) was solely acquired by the Respondent in the year 2002 for Kshs.150, 000/-. I have seen the title deed for the said property issued to the Respondent on the 9th day of September, 2002. In respect of this property, the Applicant's contention is that he acquired a beneficial interest through his contribution in the development of the matrimonial home. I refer to page 7 of his supporting affidavit dated 3rd day of April 2018 where it is indicated that he used to participate in international marathons between the years 2004 to 2013. He annexed copies of letters of invitation airline tickets in relation to the international races he alleged to have participated in. The same is marked as MLL-3.

43. It is further indicated by the Applicant that he contributed in the purchase of several parcels of land which they jointly acquired during the subsistence of their marriage. The applicant averred that he would occasionally send money to the Respondent from the proceeds he

acquired in the international marathons. He also averred that he sent Kshs. 380, 000/= to put up three temporary rooms and further transfers were made to the Respondent in the years 2007-2009 towards improvement of the matrimonial home. He claims to have put up the maisonette which is now their matrimonial home.

44. However, the applicant referred this court to copies of his bank statement which he said they show transfer of funds to the respondent on several occasions. No such annexure was provided by the Applicant. A perusal of applicant's supplementary affidavit dated 12th June 2018 shows that he did not tender any documentary proof as to the money gram transactions. I reject the applicant's excuse that the same is non-retainable as this court has dealt with myriads of cases where such evidence has been tendered. Such evidence can be easily retrieved.

45. On the other hand, the Respondent in her replying affidavit dated 30th April, 2018 opposed the Applicant's claim. She states that she solely acquired and developed the matrimonial home. She provided the court with documentary evidence showing that she took a loan from Magereza Sacco Society Limited of one million Kenya shillings issued on the 8th January 2010 which she claims to have used to by a maisonette where they lived.

46. In view of the foregoing evidence, it is abundantly clear that the Applicant failed to prove financial contribution towards the acquisition of this particular property.

I now consider whether the Applicant made any non-monetary contribution in the acquisition and development of this matrimonial home. In terms of **section 2** of Matrimonial Property Act, non-monetary contribution includes domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and, farm work. I note that child care and farm work is non-responsive since no evidence has not been tendered in this regard.

47. In light of the above parameters, the parties are not in dispute that domestic work and management of the matrimonial home; management of the family property and companionship is responsive in this matter. The inclusion of the Applicant's name in the building for the matrimonial home shows that some kind of non-monetary contribution on the part of the Applicant. He claims that he bought the building plans but however, there is no documentary proof of the same. In this regard, the equal share rule is not applicable in the distribution of the matrimonial home.

Distribution of the Matrimonial Home.

48. The value of the property be ascertained by way of valuation. In distribution, the Respondent is to get 100% of the current value of the land. This is because the same was acquired before the subsistence of her marriage with the Applicant. Further, the current value of the building erected on that particular piece of land be ascertained and the Respondent is to get 80% and the Applicant is to get 20%. This is because the Respondent has been able to prove both financial and non-financial contribution. No monetary contribution was proved by the Applicant. I have only noted his involvement in obtaining the house plans which I have taken into consideration. I take cognizance of the fact that the Respondent is living with their child and to uphold the interest of child a child principle, the Respondent is to remain with matrimonial home to avoid destabilizing the child. The said 20% which is to be given to the Applicant will be taken from other properties liable for distribution herein.

Distribution of Other Matrimonial Properties.

49. As regards distribution of property title No. Ngong/ Ngong/ ****5, the applicant indicated that it was purchased in 2004 for Kshs. 320, 000/- from proceeds of London marathon which he participated in that year. He claimed to have sent the Respondent Kshs. 750, 000/ out of which the Respondent paid the owner Kshs. 300,000/- and cleared the balance of Kshs. 20, 000/= upon his return to Kenya. These figures are not supported by any documentary evidence. This property is registered in the names of the Respondent and remains undeveloped. On the other hand, the Respondent contended that she solely purchased the abovementioned property for an amount of Kshs. 250, 000/- on the 1st of October 2005. She averred that she paid a deposit of Kshs. 210, 000/= on 31st March, 2006 and the remainder of Kshs. 40, 000/= was paid in installments. In support of her claim, she annexed a copy of the sale agreement, a memorandum of understanding and the title documents registered in her name.

50. In view of the evidence of the Respondent is in tandem with the land sale agreement, the memorandum of understanding and the title annexed to her replying affidavit dated 30th April, 2018. I note that there are differing views as to when the cohabitation commenced. Taking into consideration the totality of the evidence tendered by both parties herein, the evidence of the Respondent is more credible and it is well supported by documentary evidence. In this respect, I'm convinced to go by the evidence of the Respondent that the parties commenced cohabitation sometime in September 2006. Consequently, it is my considered view that the aforementioned property was acquired before the subsistence of the marriage. Further, I did not find any piece of evidence tendered by the Applicant which proves contribution. In the premises, I find that this particular property is not subject to matrimonial property distribution as it solely belongs to the Respondent.

Title Number Kajiado/Kiputiei-North/1*8**

51. The parties herein are in consonance that the above-mentioned was purchased by the Respondent through a sale agreement dated 4th June 2005. The Applicant furnished the court with documentary evidence in form of copies of the title deed, payment receipt and sale agreement which affirms that indeed the Respondent was the sole purchaser of the plot. The Applicant then claims to have acquired a beneficial interest through his contribution to the improvement and development of the property. In doing so, the applicant averred that he used Kshs. 800,000/= which he had kept in fixed deposit account and constructed 12 rooms which they have been renting out for Kshs. 3,000/- per room. Further that he constructed 8 more rooms which they have also rented out. Once again, no documentary evidence was produced to support his claim.

52. On the other hand, the Respondent also indicated that she put in Kshs. 700,000/= which she used to construct single rooms for rental. The

parties having found out that the money they had was not enough, they were prompted to charge the title to the Housing Finance to secure a loan of Kshs. 600,000/- to enable them finish the construction of the rental rooms. The Respondent in her replying affidavit stated that she solely repaid the loan to the Housing Finance. However, Counsel for the Respondent upon submissions conceded that the loan was serviced by both parties and the said original title deed was surrendered to the Respondent. This shows that the Applicant did contribute to the development of this property.

53. It is my considered view that the property be valued and the current value of the land to the exclusion of the value of the building be ascertained and then be given to the Respondent since the land was bought by her alone. Further that the value of the building should also be ascertained and the same be shared equally between the parties.

Plot No. (withheld) Laini Saba Village, Kibera

54. The Counsel for Respondent contended that the aforementioned property is not liable for distribution herein since it was solely acquired by the Respondent. It is indicated that the Respondent bought the said land for Kshs. 605, 000/= which was paid by a Banker's check on 1st October, 2007 from the Respondent's Barclays Bank Account. It is further indicated that the property was acquired by the Respondent with 19 single rooms already constructed on that plot. It is Counsel's contention that the Applicant did not contribute anything to the development of the rooms and that the Supply of Electricity Contract was an application for change of name of the meter from the previous owner to the Respondent. Counsel rejected the Respondent's claim that he paid the electricity bill owing to the fact no proof of payment was tendered before court to prove payment of any bill since the tenants catered for their individual bills.

55. The respondent reiterated that the plot was acquired in October 2007 for Kshs. 605, 000/- out of which he claims to have contributed Kshs. 520, 000/= and the Respondent contributed Kshs. 85,000/=. According to him, he used the proceeds from the marathon race he participated in Canada in the years 2007. It is also brought to the attention of the court that on the 1st of March, 2018, the Respondent made directions to the tenants to deposit rent in her personal account.

56. The Respondent has been able to furnish this court with proof of transfer of purchase money in form of a bank cheque. Her bank statement marked as annexure RKL-8l affirms this position. On monetary contribution, the Applicant has only tendered evidence of Electricity Supply Agreement for the abovementioned property which bears his names. That's in my view shows that the Applicant was in some way involved in the matters concerning the said property. The said contract bears a deposit fee of Kshs. 2500.00/=. Furthermore, on non-monetary contribution, I have noted that the parties opened a joint account which their tenants were depositing rent.

57. In my view, this is an act which shows an intention by the parties of wanting to do things together and for purposes of meeting their joint obligations. I therefore find that the Applicant made some kind of contribution though very minimal. On distribution, the property is to be valued to ascertain the current value of the land and the buildings erected on it. The value of the land goes to the Respondent since she has proved in a balance of probabilities that she solely purchased the land. Concerning the value of the building and developments which have been done on the land, the same be distributed in equal shares.

Distribution of Title Number West Pokot/Siyoi "A"/(withheld)

58. In view of the documentary evidence in respect of this particular property, the parties' initial intention was to register this particular property jointly. In an attempt to register the same, parties applied for the Land Control Consent in the year 2008 having purchased the property in 2007 according to the Applicant. The Application for the Land Control Board and the land transfer document bears names of both the Respondent and the Applicant as the purchasers of the property.

59. Further, it seems that the parties did not finish the registration process they had commenced. A search conducted by the Applicant on the 6th of March 2018 for the purposes of this matter shows that the property was since registered in the names of the Respondent and the title deed issued to her on the 27th April, 2016. The Applicant contended that the property was acquired jointly by the parties herein sometime in 2007. That is after the parties had already commenced cohabitation. He indicated that he contributed Kshs. 250,000/= and the Respondent contributed Kshs.150, 000/= towards its acquisition. Further, that he used his resources to the tune of Kshs.80, 000/= to renovate the old houses that were already built on the said land parcel.

60. The Respondent merely denied that the property was jointly acquired and offered evidence that she acquired the property with Julius Kamatakinet Domokwang in the year 2004 before she met the applicant. In my view the move by the Respondent to proceed to register this property in her sole names without involving the Applicant was not only selfish but also dishonest. She gave no plausible explanation as to why they intended to register the property jointly. In the premises, this particular property shall be distributed between the parties in equal shares.

Plot No. (withheld) Mnakei

61. The Applicant alleges that the said Plot is located in Kapenguria and purchased the same sometime in 2007 for the sum of Kshs. 300,000 without the Respondent's contribution. He indicated that in the year 2014 he disposed a motor vehicle for Kshs. 1,800,000/= and Kshs. 500,000/= to build a house on the said plot. On the other hand, the Respondent deposed that she is not aware of such property. It is trite law that he who alleges must prove. The Respondent has not provided the court with the title documents for the above-mentioned property. Neither did he furnish the court with bank statements showing transfer of the monies he claims to have paid for the above-mentioned property. Clearly, the court has nothing to distribute on this limb.

West Pokot/Kisaunet/(withheld)

62. The Respondent claims to have solely purchased this particular property vide a sale agreement of 23rd September, 2013 using her savings

held at Equity Bank Limited. This property remains undeveloped. These facts remain undisputed as the Applicant has not labored to prove both monetary and non-monetary contribution towards its development and/or improvement. In the premises this parcel of land is not subject to matrimonial distribution herein.

63. The upshot of this matter is that the Notice of Motion Application dated 3rd of April, 2018 partially succeeds. The orders are as expounded above.

64. Costs be borne by both parties.

Dated, and signed at Malindi this 25th day of June 2019.

Hon. R. Nyakundi

Judge of the High Court

Dated, Delivered and Signed in open Court at Kajiado this 8th day of July 2019

Hon. Chacha Mwita

Judge of the High Court