REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 32 OF 2005 (OS)

LNM.....PLAINTIFF

VERSUS

GSCM.....1ST DEFENDANT

JM.....2ND DEFENDANT

JUDGMENT

1. The plaintiff herein, LNM, in a suit by way of Originating Summons, dated 6th January 1998 and filed on 3rd February 1998, sought various declaratory orders. She stated that there were moveable and immovable properties that were acquired by the joint efforts of the plaintiff and 1st defendant during the subsistence of their marriage, and were registered in the name of and were in the possession of the 1st defendant, while others were in the joint names of the plaintiff and 1st defendant. She stated that the same ought to be shared equally between herself and the 1st defendant or in such manner as the court might deem fit. The plaintiff's suit was supported by various affidavits that were sworn on diverse dates. The defendants filed their replies by way of defence, counter claim and various affidavits that were similarly sworn on diverse dates.

2. The matter was set down for hearing and the parties testified and were subjected to cross-examination on the contents of their affidavits they called witnesses in the process. Parties further filed their written submissions on the various issues.

3. Going by the pleadings on record, as well as the recorded oral testimonies, the issues that arise for determination are:

a) whether Dagoretti/Riruta/[.....], [.....] and [.....] and LR Nos. 1/[.....] and 1/[.....] constitute matrimonial property;

b) whether the plaintiff contributed towards the acquisition of Dagoretti/Riruta/[.....], [.....] and [.....]and LR Nos. 1/[.....] and 1/[.....]; and

c) how should the properties established as 'matrimonial property' be distributed between the plaintiff and the 1st defendant?

4. On the first issue it was the plaintiff's submission that Dagoretti/Riruta/[.....], [.....] and [.....] were acquired during the subsistence of the marriage between her and the 1st defendant, but that the same were registered in the name of the 1st defendant. The plaintiff further submitted that the said properties were acquired sometime in 1989 by the 1st defendant while the plaintiff was servicing a mortgage as on other properties jointly acquired and thus the 1st defendant was holding the said properties in trust for her. The plaintiff submitted that the three properties were acquired through the joint funds of both the plaintiff and the 1st defendant. In her undated affidavit in support of the summons originating, the plaintiff stated that the 1st defendant sold Dagoretti/Riruta/[.....] in August 1996 and Dagoretti/Riruta/[.....] in April 1997 for Kshs. 2,200,000.00 and Kshs. 2,700,000.00, respectively, but that the he did not account for the proceeds to her. The plaintiff testified that she used to do all the paper work and carry out supervision when the properties were being developed. She denied that the 1st defendant's brother, the 2nd defendant herein, had been involved in buying Dagoretti/Riruta/[.....] and [.....], and that she never heard of the 2nd defendant's involvement in the said properties. The plaintiff referred to the properties green cards which she stated did not indicate or register any interests of the 2nd defendant. She further referred to the property green card for Dagoretti/Riruta/[.....]which indicated that it was registered in the name of Kimani Murungaru and that the original owner was Karuri Agencies. The plaintiff testified that Dagoretti/Riruta/[.....]was never transferred to her nor to the 1st defendant, but that the 1st defendant was in control of the said parcel and that the rent from the property was being received jointly by her and the 1st defendant. The plaintiff added that after the 1st defendant sold that property, he sent Kshs. 600,000.00 to their daughter, Doreen. The plaintiff added that she did not know the Nelson Ngari Ndwiga mentioned by the 1st defendant as the beneficial owner of the property. She further denied that a Charles Njeru was given Kshs. 200,000.00 by the 2nd defendant to give to the 1st defendant for the purchase of Dagoretti/Riruta/[.....]. She reiterated that Dagoretti/Riruta/[.....] was owned by the 1st defendant.

5. In her testimony, the plaintiff stated that she insured Dagoretti/Riruta/[.....], as evidenced by the policy document marked "LNM 4" in her affidavit sworn on 25th March 1998. The plaintiff testified that there were 20 maisonettes on the Dagoretti properties which were owned by Dr. Julius Kiano, who instructed the 1st defendant to sell the same on his behalf through a power of attorney that Dr. Kiano granted to the 1st defendant. The plaintiff added that the Dagoretti properties were sold through a firm known as Gestem Enterprises, which she stated was run by both her and the 1st defendant. The plaintiff added that they were able to sell 17 of the 20 maisonettes and that they retained Dagoretti/Riruta/[.....], [.....] and [.....]. However, the plaintiff admitted on cross-examination that no money came from her and the 1st defendant for the acquisition of Dagoretti/Riruta/[.....] and [.....], and, more so, the plaintiff did not monetarily contribute any money for the acquisition of Dagoretti/Riruta/[.....], [.....] and [.....]as the plaintiff stated that her contribution was supervision and paperwork. She further admitted during cross-examination that they never signed any sale agreement in respect of the Dagoretti properties, and, furthermore, she was never introduced in any of the lawyers' correspondence in respect of the Dagoretti properties. The plaintiff further stated that she met some of the 17 buyers of the Dagoretti properties and that the rent collected was deposited in the Gestem company account operated by both her and the 1st defendant. The plaintiff testified that the 1st defendant was an agent of Dr. Kiano and that once he received payment of rent, he would pay off the loan Dr. Kiano had at KCFC Bank. The plaintiff further testified that she was not aware that the 2nd defendant was one of the people interested in buying some of the Dagoretti properties or that the 1st defendant was collecting rent on his behalf. The plaintiff reiterated that there was no money paid directly to Dr. Kiano by the 1st defendant for those properties, but that the 1st defendant made profits selling off the 17 maisonettes and thus paid for Dagoretti/Riruta/[.....], [.....] and [.....]. I find the testimony of the plaintiff contradictory because, on one hand, she says that both she and the 1st defendant never paid any money for Dagoretti/Riruta/[.....], [.....] and [.....] and that there was no direct payment to Dr. Kiano, who was the initial owner of the property, and, on the other hand, she says that the 1st defendant sold 17 maisonettes and used the profits to buy Dagoretti/Riruta/[.....], [.....]and [.....].

6. It was the 1st defendant's submission that his brother, the 2nd defendant, bought Dagoretti/Riruta/[...]in 1989 and the same was registered in the name of the 1st defendant in trust for the 2nd defendant. The 1st defendant submitted that the said Dagoretti properties were initially owned by Dr. Kiano as one parcel known as Dagoretti/[.....], that was sub-divided, maisonettes constructed on each of the resultant subdivisions, and that the 2nd defendant bought one such maisonette. In his replying affidavit, sworn on 2nd March 1998, the 1st defendant deposed that he was not under any obligation to account to the applicant the proceeds of the sales of Dagoretti/Riruta/[.....] and [.....]. The 1st defendant admitted that he sold Dagoretti/Riruta/[.....] for Kshs. 2,700,000.00, but said that he was holding the said property in trust for the 2nd defendant. He further averred that Dagoretti/Riruta/2754 was always his, although it initially belonged to Karuri Agencies, who sold it to Nelson Ngari Ndwiga, who, in 1996, sold it to Kimani Murungaru. He stated that after the said Nelson Ngari Ndwiga bought Dagoretti/Riruta/2754 from Karuri Agencies, he did not transfer the same to his name but instead asked the 1st defendant to manage it for him. The 1st defendant stated that he did so by renting it out to the University of Nairobi along with Dagoretti/Riruta/[.....] and [.....]. In summary, it was the 1st defendant's contention that Dagoretti/Riruta/[.....] and [.....] belonged to the 2nd defendant and that property [.....] belonged to one Nelson Ngari Ndwiga and formerly by Karuri Agencies.

7. Nelson Ngari Ndwiga swore an affidavit on 31st January 2000, deposing, that in May 1989, the 2nd defendant sent him to deliver to the 1st defendant a sum of US$24,000.00, which the 2nd defendant informed him was for a house which the 2nd defendant was purchasing at Dagoretti Corner. Mr. Ndwiga added that the 1st defendant showed him Dagoretti/Riruta/[.....] which he liked, and he expressed an interest in purchasing the same. Mr. Ndwiga stated that he paid the sum of Kshs. 400,000.00 for the property and he agreed with the 1st defendant that the 1st defendant would lease out and collect rent from the property. The 1st defendant testified and confirmed that the property cost Kshs. 400,000.00. Mr. Ndwiga deposed that Dagoretti/Riruta/2754 was never transferred to his name although the 1st defendant continued to collect rent for him, and that in 1996 he instructed the 1st defendant to sell the house, which was done for the sum of Kshs. 2,200,000.00. The 1st defendant similarly testified as such stating, that at the time the property was being sold, it had not been transferred to Mr. Ndwiga.

8. In his testimony, the 1st defendant stated that Dagoretti/Riruta/2752 and 2753 were purchased at Kshs. 350,000.00 each by the 2nd defendant and that proceeds of that sale were forwarded by the 1st defendant to the advocates for Karuri Agencies, Hamilton Harrison & Matthews, who in turn transmitted it to KCFC, the financiers of the Dagoretti project. The 1st defendant added that Dagoretti/Riruta/[.....] was registered in his name but he held it in trust for the 2nd defendant. The 1st defendant testified that money for the purchase of Dagoretti/Riruta/2752 was brought by Charles Njeru and that of Dagoretti/Riruta/[.....] was brought by Mr. Ndwiga, both of whom were sent by the 2nd defendant. The 1st defendant added that Mr. Njeru brought the money in US dollar currency and the 1st defendant converted the same into Kenya Shillings and banked it in the bank account for Karuri Agencies on 16th March 1989. However, he later contradicted his earlier testimony by saying that the money for the purchase of Dagoretti/Riruta/[.....] was first sent to him through one Peter Mugaka in December 1988, a sum of Kshs. 150,000.00, and a second payment through Mr. Njeru on February 1989 of Kshs. 200,000.00. The remittance of Kshs. 350,000.00 for Dagoretti/Riruta/2752 to Hamilton Harrison & Matthews was apparently done in March 1989 and that in respect of Dagoretti/Riruta/[.....] on 18th August 1989 by a way of a banker's cheque from Gestem Enterprises. Similarly, for Dagoretti/Riruta/[.....], the 1st defendant stated that he received two banker's orders of Kshs. 350,000.00 and Kshs. 50,000.00, respectively, from Mr. Ndwiga, and that the 1st defendant paid the two cheques to Hamilton Harrison & Matthews, who in turn released the respective titles to the 1st defendant, both of them being in his name as the 2nd defendant was apparently not in the country. The 1st defendant reiterated that Dagoretti/Riruta/[.....] was never transferred from Karuri Agencies even after Mr. Ndwiga bought the same, and that the money collected as rent from the said properties was banked in the joint account that was being held by himself and the plaintiff. The 1st defendant further reiterated in his testimony that Dagoretti/Riruta/[.....], [.....] and [.....] were all never bought by him and the plaintiff, and thus the same were never matrimonial property. He denied the plaintiff's testimony that he bought Dagoretti/Riruta/[.....], [.....] and [.....] from the sale of the 17 maisonettes. He reiterated that he was collecting rent on behalf of the owners of the said properties, but banking the same in the joint account held by him and the plaintiff. He further testified that he and the plaintiff used the title for Dagoretti/Riruta/[.....]as security in 1990 being that it was registered in his name, and that the 2nd defendant also allowed him to use the other property as security. The 1st defendant admitted that Dagoretti/Riruta/[.....], which was in his name as well, but held on behalf of the 2nd defendant, was sold to one Mary Okello for the sum of Kshs. 2,700,000.00 on the instructions of the 2nd defendant.

9. Charles Njeru filed an affidavit on 15th January 2009 and affirmed its contents during the hearing of the suit. He testified that around

February 1989, the 2nd defendant gave him Kshs. 200,000.00 to be given to the 1st defendant for the purchase of property. It was worth noting that the 1st defendant had testified that Mr. Njeru had brought him the money from the 2nd defendant in form of US dollars and that the 1st defendant had to convert the said currency into Kenyan Shillings before banking it in Karuri Agencies' account. Mr. Njeru stated that the plaintiff knew him, and that it would be untrue for the plaintiff to claim that she did not know him. Mr. Njeru denied that he was out to defraud the plaintiff of her entitlement, and denied being involved in any dealings or acquisitions of the property by the plaintiff and the 1st defendant.

10. Regarding LR Nos. 1/[.....] and 1/[.....], it was the case of the plaintiff that they were acquired during the subsistence of her marriage to the 1st defendant and that the same are registered in the joint names of the plaintiff and the 1st defendant. The plaintiff submitted that they bought the two properties from Dr. Kiano at a consideration of Kshs. 205,000.00 each and that the plaintiff and 1st defendant took out a mortgage of Kshs. 600,000.00 from Housing Finance Company of Kenya (HFCK) and gave the two properties as security. The plaintiff further submitted that her employer, Kenya National Assurance Company (KNAC), took over the loan from HFCK and consequently, the title document for LR No. 1/[.....] was released to the 1st defendant and LR No. 1/[.....]was retained by KNAC as security. The 1st defendant on the other hand submitted that the two properties originated from the head title LR No. 1/[.....], which was owned by Dr. Kiano, who had problems servicing his mortgage and thus he requested the 1st defendant to sell LR. No. 1/[.....]on his behalf and facilitated that by giving the 1st defendant a power of attorney over the property. The 1st defendant further submitted that he unsuccessfully tried to sell the property, and that even he and the plaintiff tried buying it, but the sale price was too high and that in the end, no one was able to buy LR. No. 1/191 as whole. The 1st defendant denied that it was him and the plaintiff who subdivided LR No. 1/[.....], arguing that the said property was never bought by anyone else after Dr. Kiano bought it, and that it was the said Dr. Kiano who sub-divided the property into three portions, being "A", "B" and "C", in October 1986 through the 1st defendant who had the power of attorney. The 1st defendant submitted that he acquired one of the portions, portion "B", and that he approached the 2nd defendant who also expressed interest and paid up for the subdivision which the 1st defendant submitted formed part of the purchase price of portion "C". The 1st defendant further submitted that Portion "A" was sold to one Mr. Zahid Hussein Ibrahim Attari by Dr. Kiano but through him as he held the power of attorney. The 1st defendant submitted that portion "C" is what is referred to as 1/[.....] and is owned by the 2nd defendant and that the 2nd defendant allowed the 1st defendant and the plaintiff to register the said property in their names for purposes collateral for a loan of Kshs. 600,000.00 from HFCK for the acquisition of portion "B" which is what is 1/[.....]. The 1st defendant denied that the two properties were bought for Kshs. 205,000.00 as was submitted by the plaintiff, instead stating that those were values given by the government valuer for purposes of stamp duty.

11. During the hearing, the plaintiff was in agreement with the 1st defendant's submission that LR. No. 1/[.....] was subdivided into three, with portion "A" being sold to Mr. Attari. She added that the entire LR. No. 1/191 was worth Kshs. 750,000.00, and that the money used to purchase the said property came from the loan she took from her employer, KNAC, being Kshs. 600,120.00, which her employer took over from HFCK. The plaintiff testified that LR No. 1/[.....]was where their matrimonial home was located. She stated that the balance of Kshs. 150,000.00 was paid by the plaintiff taking up a loan from their cooperative. The plaintiff further testified that the loan repayment of Kshs. 600,000.00 with HFCK was initially repaid from the rental income of the house and that after her employer, KNAC, took over the loan, it was being repaid from her salary until when her company went into receivership around 1996. The plaintiff stated that the initial property LR. No. 1/[.....] was subdivided into three portions, that is say LR Nos.1/1005, 1006 and 1007 and that 1005 was sold for Kshs. 340,000.00 before the loan was obtained. The plaintiff further stated that the 1st defendant applied for a loan of Kshs. 400,000.00 from Standard Chartered Bank using LR No. 1/[.....]as collateral, and that the mortgage deed indicated that she and the 1st defendant as the joint mortgagors. The plaintiff stated that she did not know what the 1st defendant did with the Kshs. 400,000.00 which was repaid through their joint account. The plaintiff stated that she paid the outstanding balance once her employer went into receivership, and she denied that she was holding LR No. 1/[.....]in trust for the 2nd defendant. The plaintiff further declined the 1st defendant's proposal that she be given 20% of LR No. 1/[.....], where their matrimonial home, stating that she paid nearly 80% for LR No. 1/[.....], whose price was Kshs. 750,000.00, and not Kshs. 2,327,756.00 as was claimed by the 1st defendant. On cross-examination, the plaintiff stated that LR No 1/191 could have cost more than Kshs. 750,000.00 because of incidental charges like legal and sub-division fees. The plaintiff was in agreement with the 1st defendant that after sub-division, portion A was sold to Mr. Attari but denied that she and the 1st defendant only purchased portion B. The plaintiff further denied that portion C was purchased in trust for the 2nd defendant. The plaintiff further stated that the Kshs. 600,120.00 she borrowed from her employer was for the purchase of LR No. 1/[.....], and not LR No. 1/1006. However, on further cross-examination, the plaintiff conceded that the mortgage document of Kshs. 600,120.00 indicated that it was in reference to LR No. 1/[.....] only and not LR No. 1/[.....], which she admitted was inserted by hand in the mortgage document. The plaintiff admitted that LR No. 1/[.....] was mortgaged to Standard Chartered Bank in 1990 and she did not know when the said title document was released. The plaintiff further stated that she stopped paying the mortgage installments for about four months after she separated from the 1st defendant and that the 1st defendant may have paid for those months she stopped paying. On further cross-examination, the plaintiff admitted that there was a supplementary agreement dated 25th June 1986 which increased the purchase price to Kshs. 925,995.05, and that she and 1st defendant met the charges of subdivision. However, in her initial testimony, the plaintiff had stated that it was expensive for them to meet the costs of subdivision of property LR No. 1/[.....].

12. The 1st defendant testified that LR. No 1/[.....] belonged to Dr. Kiano, who had asked him through a power of attorney dated 5th September 1984 to sell the property so that he could offset a loan he had with Savings & Loans Credit Bank. The 1st defendant stated that he then informed Dr. Kiano that it was not possible to sell the property as a whole, and that was why he applied for subdivision and paid for the conditions of the subdivision. The 1st defendant stated that he applied for mortgage through HFCK and gave LR No. 1/[.....] as security and that the 1st defendant was the one repaying the mortgage from when it was granted in 1985 up until October 1987 where he talked to the manager of the plaintiff's employer, KNAC, who informed him that they had better interest rates. After the takeover of the loan by KNAC, the 1st defendant testified that the title to LR No. 1/[.....] was released to him by HFCK and that the 1st defendant requested the 2nd defendant, who was the owner of the property, to borrow some money using the said title as collateral for his poultry business. That was the Kshs. 400,000.00 he got from Standard Chartered Bank in 1990. The 1st defendant admitted that the plaintiff was paying the loan against LR No. 1/1006 through her salary between February 1989 and 1997. The 1st defendant further testified that he received money for the purchase of LR No. 1/[.....]from the 2nd defendant through one John Muhoro in April 1985 who gave the 1st defendant Kshs. 150,000.00 and Dr. Kimani who gave the 1st defendant Kshs. 250,000.00 in July 1985. The 1st defendant denied the claim by the plaintiff that apart from repaying the loan of Kshs. 600,000.00, she paid Kshs. 150,000.00 to make up the Kshs. 750,000.00. The 1st defendant stated that he paid the Kshs.

150,000.00. The 1st defendant further admitted that he only paid Kshs. 64,480.00 from the loan that the plaintiff was repaying but that he was taking care of other domestic responsibilities. The 1st defendant further testified that the plaintiff only paid Kshs. 315,660.00 for LR No. 1/[.....], which he said was security when the loan was taken over by KNAC, but added that when the facility was with HFCK, the loan was secured by both properties 1/1006 and 1/1007, with the 1st defendant having sought the consent of the 2nd defendant for LR No. 1/[.....] . The 1st defendant stated that the value of LR No. 1/[.....] was not Kshs. 600,000.00 but over Kshs. 2,000,000.00 then. The 1st defendant further added that the loan at KNAC was yet to be fully paid as the plaintiff apparently paid for only Kshs. 315,660.00. The 1st defendant disputed the plaintiff's affidavit sworn on 22nd July 2008 which indicated that the outstanding amount of Kshs. 395,562.50 appeared to have been paid. The 1st defendant alleged that those documents were forgeries but then admitted that KNAC had not demanded for the balance or sought to repossess the property or to realize the security.

13. Before determining the issues herein, the 1st defendant had submitted that the applicable law in this suit is the now repealed Married Women Property Act, 1882 and not the Matrimonial Property Act, 2013, due to the fact that the instant suit arose in the 1998 and involves properties acquired in the 1980's and 1990's.

14. Section 19 of the Matrimonial Property Act, 2013 provides that:

> *"19. Cessation of application of Married Women Property Act*
>
> *The Married Women Property Act shall cease to extend to or apply in Kenya."*

15. This means that, at the date of commencement of the Matrimonial Property Act, 2013 on 16th January 2014, the Married Women Property Act, 1882 ceased to apply. When the suit was being heard, the Matrimonial Property Act, 2013 was in force as from 16th January 2014 and so was the Constitution of Kenya, 2010.

16. The Court of Appeal, in *PBW vs. JWC* [2017] eKLR, held that:

> *"The summons leading to this appeal was filed on 21st October 2011 under the Married Women's Property Act, 1882, which was a statute of general application in Kenya (See I vs. I [1971] EA 278 and Karanja vs. Karanja [1976-80] 1 KLR 389). During the pendency of the summons, Parliament enacted the Matrimonial Property Act, 2013 which came into effect on 16th January 2014. By section 19 of that Act, the Married Women's Property Act ceased to apply in Kenya.*
>
> *When the summons was heard and determined on 9th July 2015 therefore, the Matrimonial Property Act was in force."*

17. Similarly, in this suit, the originating summons was filed in 1998 under the Married Women's Property Act, 1882, and during the pendency of the summons, the Matrimonial married Act, 2013 was enacted and effectively the Matrimonial Women's Property Act, 1882 ceased to apply. I, therefore, find that the Matrimonial Property Act, 2013 is the applicable law to this suit.

18. The Matrimonial Property Act, 2013 defines matrimonial property in section 6, which states that:

> *"6. Meaning of matrimonial property*
>
> *(1) For the purposes of this Act, matrimonial property means—*
>
> *(a) the matrimonial home or homes;*
>
> *(b) household goods and effects in the matrimonial home or homes; or*
>
> *(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.*
>
> *(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.*
>
> *(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.*
>
> *(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust."*

19. In the instant case, the evidence on record indicates that Dagoretti/Riruta/[.....] , [.....] and [.....] were never acquired by the plaintiff and the 1st defendant jointly or severally. By the plaintiff's own admission, there was no evidence that the 1st defendant ever acquired Dagoretti/Riruta/[.....] , [.....] , and [.....] and I hereby dismiss her claim that the 1st defendant sold 17 maisonettes of Dr. Kiano's properties and used the profits to buy Dagoretti/Riruta/ [.....] , [.....] and [.....] . The said claim has no evidentiary basis and does not hold water. The weight of evidence on record tilts in favour of the 1st and 2nd defendants, who have demonstrated, on a balance of probability, that Dagoretti/Riruta/[.....] and [.....] were bought by the 2nd defendant, while Dagoretti/Riruta/2754 was bought by Nelson Ndwiga Ngare. The evidence on record also indicates that the three properties were at all material times the property of Dr. Kiano, and that at no time did the 1st

defendant own them. As a consequence, I find that Dagoretti/Riruta/[.....] , [.....] and [.....] do not constitute matrimonial property as between the plaintiff and the 1st defendant.

20. I find that LR No. 1/[.....] was the matrimonial home of the plaintiff and 1st defendant, based on the fact that the same was admitted by both parties, and that the same falls within the definition of matrimonial property as per section 6(1) of the Matrimonial Property Act, 2013.

21. Similarly, I find that the weight of evidence is in favour of the plaintiff when it comes to ownership of LR No. 1/[.....] . The 1st defendant's claim that he was holding the property in trust for the 2nd defendant was not supported by cogent evidence. The 1st defendant claimed that he received cash payments from two persons on behalf of the 2nd defendant but the said persons were never called to the witness stand to verify his assertion. The 1st defendant admitted that there was no evidence which indicated that LR No. 1/[.....] , which was registered in the joint names of the plaintiff and himself, was being held in trust for the 2nd defendant. Interestingly, the 1st defendant never communicated the same to his financier, HFCK, the first time he took out a loan using LR No. 1/[.....] as security. It would appear that the introduction of the 2nd defendant as the owner of this property was an afterthought, and I am in agreement with the plaintiff that the said inclusion was meant to conveniently and mischievously knock the plaintiff out of her entitlement to the said property.

22. The second issue to determine is whether the plaintiff contributed towards the acquisition of properties Dagoretti/Riruta/ [.....] , [.....] and [.....] , and LR Nos. 1/1006 and 1/[.....] . Having found that Dagoretti/Riruta/[.....] , Dagoretti/Riruta/2753 and 2754 do not constitute matrimonial property, the court is only left to determine the contribution of the plaintiff towards LR Nos. 1/1006 and 1/[.....] .

23. "Contribution" and "Family Business" is defined under Section 2 of the Matrimonial Property Act, 2013 as follows:

> *"contribution" means monetary and non-monetary contribution and includes—*
>
> *(a)domestic work and management of the matrimonial home;*
>
> *(b)child care;*
>
> *(c)companionship;*
>
> *(d)management of family business or property; and*
>
> *(e)farm work;*
>
> *"family business" means any business which—*
>
> *(a)is run for the benefit of the family by both spouses or either spouse; and*
>
> *(b)generates income or other resources wholly or part of which are for the benefit of the family …"*

24. Section 7 of the Matrimonial Property Act, 2013 provides as follows:

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

25. Section 14 of the Matrimonial Property Act provides as follows:

> *"14. Presumptions as to property acquired during marriage 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."*

26. The Court of Appeal, in *OKN vs. MPN* [2017] eKLR, on the matter of presumption of property acquired during marriage stated:

> *"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."*

27. The court in *Njoroge vs. 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. Thus, it is important to mention that the Act takes into account non-monetary contribution and provides that a party may acquire beneficial*

interest in property by contribution towards the improvement of the property equal to the contribution."

28. In *NWM vs. KNM* (2014) eKLR, it was stated that:

> "*... the court must give effect to both monetary and non-monetary contributions, that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property."*

29. On non-monetary contributions, this court in *TMW vs. FMC* [2018] eKLR, stated that:

> "*As regards non-financial contribution I wish to rely on The House of Lords decision in White vs White (200}UKHL 54 in which the Court cited the greater awareness of the value of non-financial contributions to the welfare of the family, and the increased recognition that, by being home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills, a position that was reiterated in subsequent decisions of the House of Lords in Miller vs Miller & McFarlane {2006}UKHL 24 with courts endorsing the jurisprudence of equality. She argued that any law that advocates for the division of matrimonial property on the basis of proved contributions alone, runs counter to the spirit embodied in the Maputo Protocol and that the division of matrimonial property must be effected having due regard to the principle of equality."*

30. In *JAO vs. NA* [2013] eKLR, it was held as follows:

> "*When it comes to distribution of matrimonial property, there are a number of decisions which have laid down principles which are used to determine contribution of a spouse towards matrimonial property. It has been held that a spouse's contribution need not only be financial. It can even be in form of giving the other peaceful time as he acquires the property e.g. by taking care of the children of the marriage, taking care of the home or even improvement of the property.*
>
> *In Kenya, under the Constitution of Kenya 2010 Article 2 (5) provides that the general rules of international law shall form part of the Law of Kenya. Article 2 (b) further provides that any treaty or convention ratified by Kenya shall form part of the Law of Kenya.*
>
> *Article 6(1) (h) of the International Convention on the Elimination of All Forms of Discrimination against Women enjoins state parties:*
>
> "*To ensure on the basis of equality the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration".*
>
> *Article 16(1) of the Universal Declaration of Human Rights provides as follows:*
>
> "*Married women of full age without limitation due to race, nationality or religion have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution".*
>
> *Article 7(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa provides as follows: -*
>
> "*In cases of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the property deriving from the marriage".*

31. The evidence on record indicates that the plaintiff made monetary contribution for the acquisition of LR No. 1/[.....] by taking up a loan facility of Kshs. 600,120.00 with her employer, and repaying the full amount with interest and that there was a further mortgage of Kshs. 50,000.00, which the plaintiff had taken up as well. The allegation by the 1st defendant that the said additional mortgage was a forgery was not proven. The evidence on record further indicates that HFCK released the title to LR No. 1/[.....] after it was discharged by the loan facility taken up by the plaintiff with her employer, KNAC. To this end, I find that the monetary contribution of the plaintiff towards the acquisition of LR No. 1/1006 was Kshs. 650,120.00, together with interest of 3% p.a. until payment was made in full between 1988 and September 1997. By the plaintiff's own admission, the said loan of Kshs. 600,120.00 was obtained and secured by LR No. 1/[.....] and not LR No. 1/[.....] . There is no evidence that the plaintiff monetarily contributed to the acquisition of LR No. 1/[.....] in as much as the same was in the joint names of herself and the 1st defendant.

32. How should the properties established as 'matrimonial property' be divided between the plaintiff and the 1st defendant?

33. Article 45(3) of the Constitution of Kenya 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."*

34. The Court of Appeal, in *PNN vs. ZWN* [2017] eKLR, observed as following in respect of Article 45(3) of the Constitution of Kenya:

"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.'"

35. The court further stated:

*"First, while I take cognizance of the marital equality ethos captured in Article 45 (3**)** of the Constitution, I am unpersuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage … To my mind, all that the Constitution declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words all forms of gender superiority-whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage cowered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest-all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law.*

Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in Francis Njoroge vs. Virginia Wanjiku Njoroge, Nairobi Civil Appeal No. 179 of 2009;

> *"… a division of the property must be decided after weighing the peculiar circumstances of each case". As was stated by the Court of Appeal of Singapore in Lock Yeng Fun vs. 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'."*

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."

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

36. The same court in *VWN vs. FN* [2014] eKLR held that:

"The provisions of Sections 2, 6 and 7 of the Matrimonial Property Act, 2013 breathe life into the rights provided in Article 45 (3). The Matrimonial Property Act recognizes that both monetary and non- monetary contribution should be taken into account in determining contribution. In light of Article 45 (3) and Section 2 of the Matrimonial Property Act which define contribution to mean monetary and non-monetary contribution, Echaria [supra] is no longer good law."

37. And in *PWK vs. JKG* [2015] eKLR, it said as follows:

"We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five-judge bench of this Court in Echaria vs. Echaria (Supra) "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 or equity" while heading the caution of Lord Pearson in Gissing vs. Gissing [1970] 2 All ER 780] at page 788 paragraph c that:

> *"No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions otherwise than by way of advancement, by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one quarter, I do not think it is helpful or right for the court to feel obliged to award either one half-or nothing?"*

We are of the respectful view that the principles restated by Echaria vs. Echaria are good law and contribution as the basis for distribution of matrimonial property remains valid."

38. The Court of Appeal had said, in *Priscilla Njeri Echaria vs. Peter Mburu Echaria* [2007] eKLR, that:

> *"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."*

39. That argument was accepted by the same court in *PNN vs. ZWN* [2017] eKLR, where it was stated that:

> *"Holding as I do that contribution must be proved and assessed, I do not find that the central thrust of Echaria is violative of the marital equality principle of Article 45(3). I would therefore eschew any bold pronouncement that it is no longer good law and should be interred … In the end it does work out justly and fairly enough in that assessment may turn out 50:50 or as in the case of Njoroge vs. Njoroge (supra) 70:30 in favour of the man. There is no reason why the math may not be in favour of the wife if that is what the evidence turns up. In many cases in fact, percentages never feature as the Court only ascertains who between the spouses owns which property. It is always a process of determination, not redistribution of property. And each case must ultimately depend on its own peculiar circumstances, arriving at appropriate percentages."*

40. In *FS vs. EZ* [2016] eKLR, it was said that:

> *"The task of distributing matrimonial property is based on judicial discretion and what the trial court would consider to be just in each particular case. Unlike disputes involving award of damages where there are precedents to guide the court, disputes relating to distribution of matrimonial properties are unique in the sense that at times it is difficult to determine the level of contribution of each party. Spouses would usually not keep records of individual contribution wherever acquiring properties during their happy lives … My interpretation of Article 45 of the Constitution is that it does not call for 50:50 sharing of matrimonial properties after a marriage is dissolved. If that were to be the case, then marriages would be converted to economic traps whereby an individual would lure a rich man or woman, get married to them and soon thereafter seek divorce. Such a person can repeat the same process with another spouse and enrich himself or herself without making any monetary contribution … It is important to note that there are certain past decisions which are of the view that matrimonial properties should be shared equally. Most of those decisions were made before the coming into force of the Matrimonial Property Act, 2013. In the case of MK V SK [2008] 1 KLR 204 where the Court of Appeal held that where a property is registered in the joint names of husband and wife, it means that each party owns an individual equal share in the property: Such decisions may not represent the current Kenyan status under Section 14 of the Matrimonial Property Act, there is a rebuttable presumption that there is an equal beneficial interest. This means that evidence can be adduced to rebut and defeat the presumption that the interest on the property is equal. It is not a fixed presumption. One spouse can buy a property and have it registered in the names of the other spouse. Whenever an issue of distribution arises, what would count will be the level of contribution by each party, whether monetary or non-monetary contribution."*

41. It was said, in *PAWM vs. CMAWM* [2018] eKLR, that:

> *"… a woman's direct and indirect contribution was taken into consideration and every case was determined in its own merit while bearing in mind the principles of fairness and human dignity. See the case of; - Muthembwa Vs. Muthembwa (supra)*
>
> *'In assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.*
>
> *The jurisdiction of the court is to determine a question or questions between husband and wife principally as to title to or possession of property.*
>
> *In the instant case, where matrimonial property is intertwined with company property the court cannot decline jurisdiction under Section 17 to deal with the whole property as this would be unjust. In application under section 17 the court has wide and unfettered discretion to make such order or orders as justice may demand including sale and distribution of property subject of the*

application … 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 plant and none should reap more than they planted'. That is a basic tenet of equity which follows the law.'"

42. Having gone through the pleadings and evidence on record, together with the various Articles of the Constitution, national and international legislation and case law aforementioned, it is my finding that LR Nos. 1/[.....] and 1/[.....] form part of matrimonial property as they were acquired during the subsistence of the marriage between the plaintiff and the 1st defendant.

43. I find that the plaintiff made monetary contributions for the acquisition of their matrimonial home, LR No. 1/[.....] by taking up a loan of Kshs. 600,120.00 and a further loan of Kshs, 50,000.00, which she repaid in full, together with interest. However, I fail to find evidence that the plaintiff monetarily contributed to the acquisition of LR No. 1/[.....] in as much as the same was registered in the joint names of herself and 1st defendant. The plaintiff hinged her case on monetary rather than non-monetary contribution, thus she is entitled to the monetary contribution she put in for the acquisition of LR No. 1/[.....] .

44. In the end these are the final orders that I make in the matter:

(a) That I declare that LR Nos. 1/[.....] and 1[.....] are matrimonial property;

(b) That the plaintiff and the 1st defendant shall share the same at the ratio of 50:50:

(c) That any party aggrieved by the determinations in (a) and (b) above, is at liberty to move the Court of Appeal appropriately within the next twenty-eight (28) days of this decision; and

(d) That each party shall bear their own costs.

DATED AND SIGNED AT KAKAMEGA THIS 15th DAY OF October 2019

W. MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 22nd DAY OF October2019

A.O. MUCHELULE

JUDGE