



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CIVIL CASE NO. 16 OF 2017
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
AND
IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT (2013)

BETWEEN

DR. GNJ.....APPLICANT

VERSUS

JMM.....RESPONDENT

CORAM:

Hon. Justice R. Nyakundi

Betty Rashid Advocates for the Applicant

David Mutunga Advocates for the Respondent

JUDGEMENT

This is a matrimonial claim brought in terms of Section 17 of the Matrimonial Property Act (2013) and all other enabling provisions of the law by Dr. GNJ (the Applicant) against his former wife, JMM (the Respondent regarding the division of matrimonial properties they acquired during the pendency of marriage. The Applicant sought for a declaration that the property situated at **L.R. NUMBER KAJIADO/ KAPUTIEI-NORTH/ [xxxx]** was developed or build by joint funds and efforts of the parties during the pendency of their marriage hence it should be shared equally. It is not in contestation that the suit land was acquired by the Respondent before marriage of the parties.

The Applicant contends that the ownership of the suit property be severed and the same to be held by parties as tenants in common. He requested that the suit property be valued, sold and the proceeds be shared equally between parties. Alternatively, to order 3, that the Court be pleased to order that the said property be partitioned in equal proportions and be shared equally.

The Applicant is a medical doctor by profession and the Respondent was at the time of the acquisition of the property in question, working for [particulars withheld]. The parties solemnized their marriage on 8th December, 2018 through a Civil wedding at Siakago District Commissioner's office.

The Respondent by way of her Replying Affidavit filed on 17th of October, 2017 contends that she purchased and constructed the Suit Property single handedly. Thus, she has denied that the Applicant is entitled to 50% of the Suit Property. She deponed that she did not acquire any assistance whatsoever from the Applicant as he claims. She also refuted claims by the Applicant that the Suit Land had not been developed at the time of their marriage. She therefore avers that she had already commenced development with her own funds prior to the marriage. Both parties filed affidavits and annexed several documents to support their cases and I shall consider the same in my analysis and determination.

The evidence by the parties

Both parties relied on affidavits and submissions filed on their behalf in the matter and evidence tendered before me during the hearing. It is claimed that between 2011 and 2014 the applicant had invested up to Kshs. 6, 293, 000/= in the Suit Property. Paragraph 9 of the Respondent's supporting affidavit indicates that in January, 2011 a loan of Kshs. One Million, Eight Hundred Thousand, Three Hundred and Eighty was acquired by the Applicant from Standard Chartered Bank which was granted with an interest rate of 22.5% on reducing balance.

The Applicant claims that he channeled the said loan amount to finance the construction project. It is indicated that some amounts were withdrawn from the loan amount and gave it to the Respondent in cash and other payments were done electronically from his Bank Account to the Respondent's Account. He produced an account statement showing that he indeed received the loan and other documents capturing the said cash withdrawals and electronic funds transfer t from the Applicant's account to the Respondent's Account. The same is marked as **GNJ 5 & 6** respectively.

Paragraph 10 of the same affidavit shows that in January 2011, the Applicant made a standing order of Kshs. 40, 000/- for a period of five months to the Respondent's account which was exclusively used for construction of the Suit Property. He produced a copy of the standing order dated 8th July 2011 marked as annexure **GNJ7**. The Applicant also claims that in May 2011 he resigned from [particulars withheld] and his final benefits of Kshs. 177, 035 and Kshs. 378, 563/= were utilized towards construction of the suit property.

It is the applicant's averment that in 2013 the parties in a bid to complete the construction of the suit property agreed to obtain KCB Mortgage loan on the project. It was the Respondent who applied for the loan of Kshs. 8 Million which was approved and the Applicant signed for it as the spouse. He claims to have used terminal benefits from Nairobi Women's where he had gotten a job in April 2014 to fund the construction of the suit property.

It is also averred that following demand letters from KCB, parties agreed to apply for a top up mortgage over the Applicant's Nairobi West property which was to be granted by Equity Bank at staff loan rate of 8% so that they would pay off KCB. According to the Applicant, he agreed with the Respondent that the loan was going to be used as follows: 4 million was to be channeled to pay off the Standard Chartered Mortgage and Personal loan balances and 9 million shillings to pay off Kenya Commercial Bank Loan, its arrears and other charges. The same was disbursed to the parties even though it took longer than they expected. He produced a copy of the demand letters dated 27th May 2014 herein attached and marked as "**GNJ 11**", a copy of the loan application attached and marked as "**GNJ 13**", and a copy of the said loan approval letter herein attached and marked as "**GNJ 14**".

The Applicant stated that since 2014 when the Respondent abandoned their marriage, he has not contributed any monies towards the construction of the suit property and further that no further construction has taken place while the building was in the custody of the Respondent.

The Respondent sought to prove that she constructed the Suit Property single handedly. She denied ever having help whatsoever from the Applicant. The Respondent also controverted the evidence that the suit property was not developed prior to the commencement of the marriage. She claims that contrary to the Applicant's averments in paragraph 5 of his supporting affidavit, it was the Applicant who persuaded her to quit her job to take care of a child that was a few months old since her work involved a lot of travelling

out of the country. Further that, the Applicant promised that he would cater for the household expenses by a standing order to her account of Kshs. 40, 000/= per month for shopping. The Respondent attached the shopping transactions that she did within the period she claims to have had no job marked as “**JMM5**”.

The Respondent asserts that on 17th February 2011, she was paid a total of Kshs. 885, 478 as part of her IPP and on 4th March 2017 paid 851, 781 as terminal dues from her former employer, [particulars withheld] which she directed towards finalization of the project at the Suit Property. She denied having had an agreement with the Applicant insofar as the construction is concerned. To support this fact, she attached copies of her electronic bank statements showing incoming transactions of the said payments marked as “**JMM5a**”

The Respondent further asserted that since 2006, she was actively involved in the stock market. In 2011, she claims to have disposed a reasonable proportion of her portfolio as follows:

- i. Sale of NIC Uganda shares at Kshs. 1,791, 732 on 7th April 2011.***
- ii. Sale of Counters held at the NSE on 9th May, 13th June, 20th July, 3rd August, 25th August and 14th September all amounting to Kshs. 2, 520, 081.***
- iii. On 18th April 2011, she received Kshs. 25, 698 as dividends from Kenya Bankers Sacco (KBSACCO) with whom she had been a member since 2003.***
- iv. On 16th December 2018, I got a loan of Kshs. 1, 200, 000 from KBSACCO.***
- v. In 2011, she received NSE shares dividends amounting to Kshs. 31,096.***
- vi. Between December 2010 and December 2011 when she was jobless, she claims to have received a total of Kshs. 7, 815, 102 as a result of the above listed transactions.***

The above according to the Respondent excluded the amounts that were deposited by the Applicant into her bank account. She further claims that she directed part of the to meeting the family bills and the rest to the construction of the project at the Suit Property. The Respondent attached copies of electronic bank statements showing the incoming transactions of the said payment marked as” **JMM41**”, statement from cfc stanbic and stanbic Uganda showing trade history since January 2006 marked as “**JMM4B**” and a statement of account as at December 2010 from CDSC marked as “**JMM6**”.

She claims that after quitting her job, she discovered that the Applicant was earning approximately Kshs. 200, 000 per month, was a sole breadwinner of his extended family back at Siakago and was paying fees of his siblings, four in secondary schools. Further that in 2014, two of his siblings joined university in addition to serving his own mortgage. She also averred that starting in 2010, the Applicant was engaged in a farming project back at his rural home in his 10 acres of land. As such, the Respondent asserts that the plaintiff was a heavily burdened man and could not have diverted any other coin towards any other form of development. She further claims that she made enormous contributions to the said farming project though she did not benefit from its proceeds.

The Respondent denied that the loan of Kshs. 1, 800, 000/= applied by the Applicant was for construction of the Suit Property. She brought to the attention of the court that the loan was not a fresh one but rather a top up for a personal loan that the Applicant had been servicing. The Respondent further avers that the purpose of the Kshs. 1.8 million was partly for clearing the old personal loan as it was a top up and for payment of his own school fees as he was doing distant masters programme majoring in public health with the University of London which he had started in 2007. She attached transactions showing how plaintiff was servicing the old personal loan Marked “**JMM9 a and b**”

As regards the 1 million shillings that was transferred by the Applicant to the Respondent’s account by the Applicant, the Respondent averred that the same was transferred to her account which had not debts to

avoid deductions by his bank. She claims that the Applicant had taken a loan with Standard Chartered Bank, his credit card was overdrawn and if the money had been disbursed as loan remained in his account the bank would have recovered its monies. According to the Respondent, the money was meant for payment of his master's and farming project at his rural home whereupon he purchased some land and expensive farm machinery.

The Respondent reiterates, that she never received any money from the Applicant in any other form and as can be shown by our financial dealings, as everyone had their own finances hence the only way money could have been given to her was through bank transfers. She also avers that she even engaged in the payment of the Applicant's mortgage, take his siblings to school, give him money for day to day use, pay his credit card and pay for his hospital insurance among other things. The Respondent attached copies of receipts and bank transfers for medical cover in 2012 and 2013 marked **JMM12(a) and (a)**.

In response to paragraph 13, the Respondent avers that the Applicant got a job which a volunteer work with HIV Village Clinic which was not paying him and she had to take of his bills including repayment of his mortgage on top of construction of her house. She attached the copies of bank deposit slips for payment of the plaintiff's mortgage in May, June and August 2012 marked **JMM13**. The Respondent admitted having taken a loan from KCB to continue with the project at the suit property which had stalled completely.

In response to paragraph 14, the Respondent stated that she was getting paid over half a million shillings per month and was servicing the project monthly resource requirements comfortably without any input from the Applicant. in that respect, she attached some payments received on the months of March, April, May, June, July, August, September and October 2013 marked as **JMM14**. She also averred that when her consultancy with JAM came to an end in December 2013, she had paid her loan with KCB substantially. Owing to that, she was unable to pay the instalments since she was not working and loan payments went into arrears as there was nobody to pay it up and that also explains why the bank wrote a number of letters threatening to sale the house.

The Respondent alleged that when she pleaded with the Applicant to help her pay for the said loan since had also paid for his mortgage when he was not working, the Applicant demanded that she transfers the property to him so that he could pay off the arrears. She then declined as she had found that to be suspicious motives. She claims that the Applicant took up agriculture and started farming passion fruits in his rural village and since he could not supervise farming passion fruits in his rural village. He then instructed her to supervise the project where he would give her money for purchase of farming equipment and payment of workers. She attached details of Mpesa transactions and plaintiff's instructions marked as **JMM15**. The Respondent alleges that she never benefited in the project.

In Response to paragraph 19 of the Applicant's supporting Affidavit, the Respondent alleges that the Applicant applied for a loan of Kshs. 13 million when they had already parted ways. The Respondent claims that she did not sign the spousal consent for disposition in the title of what was a matrimonial home.

The relevant law

To begin with, this court is seized with jurisdiction to hear and determine an action for declaration of rights to property in terms of **PART V** of the Matrimonial Property Act (2013) which provides for the **JURISDICTION AND PROCEDURE** an applicant should pursue. The said procedure is provided as follows:

“17. (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

Article 45 of the Constitution of Kenya introduces what is commonly known as the “equal share rule” which is a presumption that each spouse is entitled to half share of the properties acquired during the pendency of their marriage. The said article 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. Equal share rule is also known as 50%:50% rule. It is derived from the view that marriage is a partnership of equals. (*See R vs R[1992] 1 A.C. 599, 617 per Lord Keith of Kinkel*).

Thus, it is has been said that marriage is partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets unless there is a good reason to the contrary; fairness requires no less. (*see Lord Nicholls of Birkenhead in Miller v Miller; McFarlane v McFarlane [2006] 2 A.C. 618, 633*).

By saying parties to a marriage are entitled to equal rights upon dissolution of marriage, the aforesaid Article 45 carries the object of attaining fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation. Of course, equal rights include property rights. (*see this Court’s decision in Mariano Dinacci vs Stefania Livi, Matrimonial Cause No.1 of 2019, eKLR (2019)*).

It is the view of this Court that the said article provides for a rebuttable presumption that parties have equal rights to property upon dissolution of their marriage. Which rebuttable presumption may be displaced by way of evidence which seeks to show that it would be unreasonable or unjust if the equal share rule was to be applied. There must be good reasons canvassed by parties to the matter as to why the court ought to vacate the application of 50%/50% share rule.

When the Court is satisfied that the reasons advanced by the parties to a matrimonial dispute are sufficient to set aside the equal share rule, it will then look into the contribution that each party made towards the acquisition of the property in question pursuant to Section 7 of the Matrimonial Property Act. The fact that the equal share rule is enshrined in the Constitution shows its superiority to the Contribution principle. It also supports the equality and non-discrimination principle under Article 27 of the Constitution of Kenya, 2010.

Analysis of the Evidence and The Law

In essence and in light of the above demystification, the question to be determined in relation to the Suit Property herein is whether the Applicant should share equally or should the equal share rule be departed from on the grounds that to apply it would be unreasonable or in the circumstances would lead to an unjust outcome. In doing so I shall deal with the following issues for determination:

a. Whether the Suit Property forms part of matrimonial property within the context of the Matrimonial Act of 2013.

b. Whether the Applicant contributed to the development of the Suit Property within the context of Section 9 and 7 of the Matrimonial Property Act.

As to whether the Suit Property forms part of matrimonial property within the context of the Matrimonial Act of 2013, I refer to Section 6 defines matrimonial property 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.

Essentially for property to qualify as matrimonial property, it ought to have been acquired during the

subsistence of the marriage unless otherwise was agreed upon by the parties. For instance, parties may agree that certain property would not form part of matrimonial property even though the same has been acquired during the pendency of their marriage.

In the instant case, it is not in dispute that the Suit Land was acquired before the pendency of the marriage. What is in dispute is whether the Applicant contributed to the development or construction of the Suit Property. In terms of Section 9 of the Matrimonial Property Act (2013) provides that property acquired before or during the marriage does not form matrimonial property, but where the other spouse makes contribution towards the improvement of the property, the spouse who makes such contribution acquires a beneficial interest in that property equal to the contribution made.

The Respondent purchased L.R NUMBER KAJIADO/KAPUTIEI-NORTH/[xxxx] (the Suit Land) on the 30th June 2005. That was before the pendency of the marriage. In that respect, it cannot be said that the land per se in the instant case does not form part of matrimonial property. However, does the Suit Property (the Construction on the suit land) form part of Matrimonial Property. According to the aforementioned Section 9, a spouse who makes contribution towards the improvement of property whose acquisition occurred before the subsistence of the marriage acquires beneficial right in such property.

Further, Section 6 of the Act underpins that ownership of matrimonial property vests with both spouses according to what each party contributed towards the acquisition of the same. It is possible for parties to jointly own a certain property but not in equal shares. This provision invites the Courts to look at what each party brought to the table for purposes of the distribution of matrimonial property arise.

Before I do embark on the foregoing, it is important at this juncture to define that which constitutes contribution. I therefore turn to Section 2 of the Act, which defines contribution to include the following aspects:

- 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*

From the above, it is important to note that contribution may be both financial and non-financial in form. However, there are no clear parameters on the weight that ought to be given to either of the two forms of contribution aforementioned. Furthermore, Courts seem to give more weight to financial contribution as compared to non-financial contribution. Therefore, there is need for a national conversation in a bid to ascertain the value or score that ought to be attached on each aspect of contribution both financial and non-financial in form.

In light of the foregoing provisions of law, it is important that this court interrogates whether the Applicant indeed contributed and to certain the extent at which he contributed to the improvement/development of the Suit Property. The analysis of the evidence on record is as follows:

When did the Construction commence?

To ascertain at what time the construction of the Suit Property was commenced, I have relied upon the designs used on the construction of the building that sits on LR. NO. KAJIADO/KIPUTIEI-NORTH/[xxxx] approved by Architect Lawrence Maina Mwangi Boraq of registration no. A637 and further by VEX Engineers under the consultancy of KENOTECH BUILDING SOLUTIONS. I have noted that the same designs were the ones approved by the County Council of Olkejuado (as it then was) for the construction of the suit property. The construction approval dates by the

County Council of Olkejuado are: 08/02/2011, 08/03/2011, 09/03/2011 and 10/03/2011.

I therefore go by the assertion made by the Applicant in paragraph 6 of his supporting affidavit where he stated that construction commenced in January 2011. He produced copies of the list of documents as **GNJ38** which include Architectural, Mechanical and Structural designs which I have carefully perused.

The Respondent has claimed that when she met the Plaintiff, the construction of the building on the Suit Property had already commenced and it was at an advanced stage. In paragraph 6 of her Replying affidavit, she states that the construction started in immediately after purchasing the plot in 2005. In paragraph 13 of her affidavit, the Respondent refers to copies Architect drawings purportedly marked as **JMM4**.

I have carefully perused the Respondent bundle of documents to confirm attachment of such documents and I can confirm that no such attachment was made to support the Respondent's position. I therefore discount the truthfulness of the Respondent's testimony in so far as the issue of whether or not the construction on the Suit Property commenced prior to the marriage. The Respondent could not have started construction of the Suit Property without approval from the County Council of Olkejuado.

Evidence of Contribution

Having established that the development of the Suit Property commenced in 2011, there is high possibility that the Suit Property was constructed with the input of both parties. It is not in dispute that around the time within which the construction started, the Respondent was unemployed as she lost her [particulars withheld] job. That is the same time that the Applicant was advanced with a bank loan facility from Standard Chartered Bank to the tune of Kshs.1,850,380.00 which was approved on the 20th June, 2011.

I have seen copies of Standard Chartered Bank Account Statement attached and marked as **GNJ-6**. The shows that a total of Kshs.300,000.00 and Kshs.120,000.00 was withdrawn respectively followed by an electronic transfer of a million of shillings from the Applicant's account to the Respondent's account. According to the Applicant, the loan was obtained for the sole purpose of constructing the suit property. Conversely, the in paragraph 22 of the Respondent's replying affidavit, she asserted that the loan in question was partly for clearing his old personal loan as it was a top up facility and for payment of his own school fees since he was doing long distant masters programme with the University of London which he started in 2007.

Further the Respondent further alleged that the one million shillings deposited into her account by the Applicant was partly obtained to fund a farming project at his rural home in Siakogo where upon he purchased some land and heavy and expensive farming machineries.

Firstly, it is not in dispute that the loan in question was acquired in 2011 during the subsistence of the marriage and around the time when construction of the Suit Property had just begun. The allegation by the Respondent that the one million shillings wired into her account was partly for purposes of paying the Applicant's School fees at the University of London is not supported by any documentary evidence assuming that the said monies were in her account. In my view, the Respondent ought to have brought before this court documentary evidence showing that indeed such monies were channeled towards the alleged purpose of paying fees.

Secondly, along the same line, the allegation by the Respondent that the loan was also partly used to purchase land and to fund a farming project through the purchase of heavy expensive machinery was not supported by any plausible proof. Further, at the time the construction of the suit property started the Respondent was unemployed. Thus, the time when the loan was obtained corresponds with the time the project was commenced hence there was need for the Applicant to obtain a loan to so as to facilitate the development of the suit property.

Additionally, the Respondent gave no other credible proof as regards the use of loan in question, which

leaves this court with no other option but to go by the position of the Applicant whose evidence was very consistent in so far as the use of the loan in question is concerned. The only logical explanation as regards the use of the loan would be that it was exclusively obtained to develop the Suit Property. I therefore once again discount the evidence of the Respondent on this limb and consider the same to be an attempt to mislead this Court to rule in her favor. In my view the Applicant in her testimony was very economic with the truth.

As regards the standing order, it is not in dispute that a standing order of Kshs. 40,000/= monthly was effected on the 1st February 2011. The same was to run for a period of five months. It is the testimony of the Applicant that the Standing Order was meant to continue the purchase of building materials like sand and stones. He further claims that he was the only bread winner during that time since his wife had lost her job with [particulars withheld].

On the other hand, the Respondent contends in paragraph of her Replying affidavit to quit my job to take care of the children since her work involved a lot of travelling out of the country. Thus, the standing order was a promise by the Applicant to cater for household expenses. In support of her assertion, she produced what she claims to be a shopping transaction which she claimed to have done within that period she had no job herein marked as **JMM5**.

The Applicant rebutted the Respondent's testimony by contending that he was giving the Respondent money in cash for shopping, and most of the times they would go shopping together. His explanation was that the standing order was meant for construction only and that is why it was stopped immediately after he procured and transferred the loan to the Respondent's Bank account. According to the documents produced by both parties, none of the parties has been able to conclusively deal with the purpose of the said standing order. However, what the court can decipher from that is that parties had activities undertaken within the common bond.

There is yet another mortgage loan to the tune of Kshs.8 million which was obtained from Kenya Commercial Bank in the name of the Respondent. The Applicant claimed that he agreed with Respondent to obtain the loan for purposes of continuing with construction of the Suit Property. He further averred that during that time the Respondent continued to supervise the project. The Respondent denied that the Applicant was party to the loan facility. She claimed that when she asked for the Applicant's help to repay the said loan, he demanded that she transfers the property to him first, a move she claimed to have declined.

However, the foregoing allegations made by the Respondent are not able to be proved by way of documentary evidence. What can be depicted from the documentary evidence provided by the Applicant in his supplementary affidavit dated 15th January 2018 is that the applicant signed the KCB mortgage spousal consent form on the 10th January 2013. This goes to vindicate the Applicant that the parties were in agreement as regards procuring the KCB mortgage loan in question. The documents could have been easily obtained and brought before Court if she wanted to. That in my view shows that the parties were working together towards achieving common goals. Nevertheless, the documentary evidence that is available, though limited, was able to support the applicant's contention that he indeed contributed to the development of the Suit Property.

In the premises, I'm of the considered view that an adverse inference ought to be drawn against the Respondent for the continuing non-disclosure of certain documents such as the Architectural plans which had an effect on determining the actual period when the construction of the Suit Property started.

As regards the contribution of the Respondent, there sufficient material including the applicant's admission that she also actively participated in both financial and non-financial contribution in development of the property. In that regard, what then constitutes 'matrimonial assets'? Under paragraph 1064 of **Lord Hailsham's Halsbury's Laws of England 4th Edition at p.491**, it is pronounced that:

“The phrase ‘family assets’ has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties, with

the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of a capital nature, such as the matrimonial home and the furniture in it (2) those which are of a revenue-producing nature such as earning power of husband and wife.”

In considering applications such as the instant one, it is imperative to establish wherever conceivable what the parties' intention was when a particular piece of property was acquired or developed. The mere fact of marriage alone may not form an inference of joint ownership of property. It cannot be gainsaid that, in circumstances such as the one at hand, it may be problematic to establish what the parties' intentions were after the marriage has broken up since then the competing claims are tainted with enormous bias.

However, going by the classic case of **Gissing v Gissing [1970] UKHL 3**, in determining whether there was a common intention, regard can of course be had to the conduct of the parties. If, for example, a wife or former wife provided part of the purchase price of a house either initially or subsequently by paying or sharing in the mortgage payments, a presumption, which is rebuttable, may well arise that it was a common intention that she should have an interest in the house.

In light of the foregoing evidential analysis on contribution, this is a case where the land was acquired prior to the pendency of the marriage hence there was need for the Appellant to bring forward evidence which seeks to show that he did contribute towards with improvement or development of Property and that the property was indeed improved. I have considered that the proper finding of facts to be that the Appellant made sufficient financial contributions to the development of the Suit Property. Therefore, even though the property was acquired before the marriage, it has been established that the property was substantially improved during the marriage by both parties.

In the same vein, this court shall not ignore the fact that property acquired before the pendency of marriage does not form part of matrimonial property. What this entails in the instant case is that if fairness is to be achieved, the value of the land where the Suit Property is situated should be excluded from the value of the Suit structure or construction which is subject to matrimonial distribution herein. On that basis, it seems therefore that parties intended to have an equal beneficial interest in the suit structure at the time of its construction of the Suit Property.

What about non-financial contribution? In the hunt for achieving a fair upshot, the law shuns discrimination between husband and wife and their respective roles. **Butler-Sloss LJ** propounded in **Dart v Dart (1996) 2 FLR 286, 303**, that a husband and wife share the activities of earning money, running their home and caring for their children. This is the same principle envisioned in Section 2 of the Act which defines matrimonial property to include domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work. All these non-exhaustive aspects of contribution constitute non-financial contribution.

The Learned Judge in the **Dart Case (supra)** further expressed himself as follows:

“Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party ... If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.”

In the instant case, bearing in mind the fact that parties had been married for more than six years. There were two children which parties were actively involved in raising as well as meeting the responsibilities

of husband and wife. Thus, during the pendency of the marriage parties jointly made the most of that help and apparently, they intended to benefit both of them. With the evidence adduced by parties herein, there is no doubt whatsoever that parties herein were working towards achieving common goals.

Based on all the above, it seems therefore that there is no basis to depart from the original intention of the parties, which had been to hold the beneficial interest in the Suit Structure or Building in equal shares. Notably, during the pendency of the marriage and the period within which the construction was put in place, none of the parties herein made an express intention to the effect that the same was not be owned in equal shares. Suffice it to say that this supports the presumption that marriage is partnership of equals who work together towards achieving common goals. Thus, when two people decide to marry, they do not do that in contemplation that the marriage will turn sour, they invest in each other for the common good and for their everlasting future life.

In conclusion, the court makes the following orders:

- a. That the Block of Flats situated on L.R NO. KAJIADO/KAPUTEI NORTH/ [xxxx] constitutes matrimonial property and its current value will form the basis of equal share.**
- b. The value of land upon which the Block of Flats aforementioned is situated does not form part of matrimonial property since it was acquired before the pendency of the marriage. The same is to be valued and its entire value shall be allocated to the Respondent.**
- c. The aforesaid property in order(a) be valued by a professional valuer within 30 days.**
- d. The respondent in the alternative has an option to buy off the plaintiff's equal share of the property.**
- e. The order on costs is for each party to shoulder the burden of this litigation.**

Judgment, written, signed by me on this 8th day of November 2019

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R. NYAKUNDI

JUDGE

DELIVERED BY IN OPEN COURT AT KAJIADO THIS 11TH DAY OF DECEMBER 2019.

.....

CHACHA MWITA

JUDGE